Dated: May 5, 1997.

Joseph C. Polking,

Secretary.

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FEDERAL MARITIME COMMISSION

[Docket No. 97–08]

Possible Unfiled Agreements Among A.P. Moller-Maersk Line, P&O Nedlloyd Limited and Sea-Land Service, Inc.; Order of Investigation and Hearing

On February 22, 1996, the Federal Maritime Commission (''Commission'' or ''FMC'') served an order pursuant to section 15 of the Shipping Act of 1984 (''1984 Act''), 46 U.S.C. app. 1714, upon the Trans-Atlantic Conference Agreement (''TACA'') and its members to develop facts and evidence related to a possible agreement to restrict the members' rights to charter space to non-conference carriers.[1] Among documents received in response to that section 15 order were incomplete copies[2] of an unfiled Record of Discussions (''ROD'') among A.P. Moller-Maersk Line (''Maersk''), P&O Containers Limited (''P&O''), and Sea-Land Service, Inc. (''Sea-Land'') dated August 16, 1990. That ROD has a counterpart in FMC Agreement No. 203–011299 (''FMC agreement'') among the same three carriers, signed and filed with the Commission on August 27, 1990.[3] Both agreements provide for slot chartering in the U.S. Pacific Coast/North Europe trade.

While the form of the ROD and the FMC agreement are very similar, and both agreements are organized as required by the Commission's rules set forth at 46 CFR 572.403, there appear to be at least three substantive differences between the filed and unfiled agreements. First, there is a specific conference membership provision in the ROD which reads, in pertinent part:

> 5.2 Upon effectiveness of this Agreement, the Parties are to be members of the USA-North Europe Rate Agreement and the North Europe-USA Rate Agreement.[4]

At the time ROD was executed, Maersk was a member of the eastbound USA-North Europe Rate Agreement, but had been operating as a non-conference carrier in the westbound direction in these trades. P&O and Sea-Land were members of both the eastbound and westbound conferences. Maersk joined the westbound North Europe-USA Rate Agreement on October 1, 1990.

The FMC agreement, signed and filed eleven days after execution of the ROD, reads in pertinent part:

> 5.6 The Parties shall discuss and agree on a common position as to their conference/non-conference status in the Trade.

The FMC agreement became effective on October 11, 1990, ten days after Maersk joined the westbound North Europe-USA Rate Agreement.

Second, the ROD contains specific authority under which Maersk will charter to P&O and Sea-Land a defined minimum and maximum number of slots on Maersk vessels to and from California ports. The ROD contains no agreement under which any of the parties will charter space on P&O or Sea-Land vessels and, in fact, it appears that P&O and Sea-Land have operated no vessels in this service since this slot charter became effective. In addition, the ROD appears to contain no authority for any of the parties to influence the number and size of vessels, or number of sailings provided by other parties.

In contrast to this specific and limited agreement set forth in the ROD, the FMC agreement covers both California and U.S. Pacific Northwest ports and states, in pertinent part:

> 5.1 The Parties may charter, exchange or otherwise make space and slots available to each other in such amounts, for such charter hire, and upon such other terms as they may from time to time agree.
>
> 5.2 The Parties may consult and agree upon the deployment and utilization of their vessels in the Trade, including, without limitation, their sailing schedules, service frequency, ports to be serviced, port rotation, determining which vessels they will operate and adding or withdrawing vessels from the Trade.
>
> 5.3 The Parties may agree upon the number and type of vessels to be operated by each party in the Trade. The Parties may charter vessels to and from each other, or from other persons, for use in the Trade on such terms as they may from time to time agree. The maximum number of vessels to be operated hereunder, without further amendment, is 25, each vessel having a maximum size of 4,500 TEU's.

The third notable difference is related to the second, and is consistent with the conversion of the one-way slot charter agreed to in the ROD into a reciprocal space charter arrangement for filing purposes. The FMC agreement provides that the parties may discuss and agree upon the use of terminal facilities, may jointly negotiate and enter into leases of such facilities, and may jointly contract for stevedoring, terminal, or other related ocean and shoreside services and supplies, and may operate joint equipment maintenance and repair facilities and joint equipment pools. There appears to be no such authority in the ROD.

The 1984 Act and the Commission's regulations are explicit in requiring that a true and complete copy of every applicable agreement be filed with the Commission, and that the parties operate only pursuant to the terms of such agreements. Section 5(a) of the 1984 Act, 46 U.S.C. app. 1704(a), requires that:

> A true copy of every agreement entered into with respect to an activity described in section 4 (a) or (b) of this Act shall be filed with the Commission. * * * The Commission may by regulation prescribe the form and manner in which an agreement shall be filed and the additional information and documents necessary to evaluate the agreement.

Sections 10(a)(2) and 10(a)(3) of the 1984 Act, 46 U.S.C. app. 1709(a)(2) and 1709(a)(3), state that no person may:

> (2) operate under an agreement required to be filed under section 5 of this Act that has not become effective under section 6, or that has been rejected, disapproved, or canceled; or
>
> (3) operate under an agreement required to be filed under section 5 of this Act except in accordance with the terms of the agreement or any modifications made by the Commission to the agreement.

The Commission's rules implementing these statutory provisions are set forth at 46 CFR part 572, and, as pertinent to the issues set forth herein, provide as follows:

46 CFR 572.103 Policies * * *

> (g) An agreement filed under the Act must be clear and definite in its terms, must embody the complete understanding of the parties, and must set forth the specific authorities and conditions under which the parties to the agreement will conduct their present operations and regulate the relationships among the agreement members.

46 CFR 572.407 Complete and definite agreements

> (a) Any agreement required to be filed by the Act and this part shall be the complete agreement among the parties and shall specify in detail the substance of the understanding of the parties.
>
> (b) Except as provided in paragraph (c) of this section, agreement clauses which contemplate a further agreement, the terms of which are not fully set in the enabling agreement, will be permitted only if the enabling agreement indicates that any such further agreement cannot go into effect unless filed and effective under the Act.

[1] This section 15 order was addressed to TACA and its seventeen member lines. Responses were submitted in May 1996, and required follow-up with the conference and its members which was complete in December 1996.

[2] These copies do not include certain appendices and an addendum which are mentioned in the text of the document.

[3] On December 31, 1996, the FMC agreement was amended to change the name of P&O Containers Limited to P&O Nedlloyd Limited (''P&O Nedlloyd''). No other amendments to this agreement have been filed with the Commission.

[4] These conference were predecessors to TACA in the U.S./North Europe trades.

(c) Further specific agreements or understandings which are established pursuant to express enabling authority in an agreement are considered interstitial implementation and are permitted without further filing under section 5 of the Act only if the further agreement concerns routine operational or administrative matters, including the establishment of tariff rates, rules, and regulations.

In view of the differences between the ROD and the FMC agreement among Maersk, P&O (now P&O Nedlloyd) and Sea-Land, which appear to extend beyond routine operational or administrative matters and concern activities which affect competition in the U.S. Pacific Coast/North Europe trade, the Commission questions whether the FMC agreement is the true and complete agreement or agreements among the parties. Neither the ROD nor subsequent operations by the parties indicate that the parties agreed to, or have engaged in, reciprocal space chartering in this trade. It appears, instead, that P&O and Sea-Land may have terminated direct vessel service to and from certain U.S. Pacific coast ports in connection with this charter of space on Maersk vessels.[5] Thus, the FMC agreement may not reveal the true competitive impact of the parties' arrangements. Moreover, there is nothing in the FMC agreement which would indicate that the parties had already entered into and implemented a specific agreement under which Maersk became a member of the North Europe-USA Rate Agreement.

Section 7(a) of the 1984 Act, 46 U.S.C. app. 1706(a), provides, as pertinent here, that the antitrust laws of the United States do not apply to—

(1) Any agreement that has been filed under section 5 of this Act and is effective under section 5(d) or section 6 * * *, [or]

(2) Any activity or agreement within the scope of this Act, whether permitted under or prohibited by this Act, undertaken or entered into with a reasonable basis to conclude that (A) it is pursuant to an agreement on file with the Commission and in effect when the activity took place.

This broad grant of antitrust immunity necessitates careful Commission oversight of the activities carried out pursuant to agreements. Effective oversight could be thwarted by failure to disclose essential elements of agreements, or by language filed with the Commission which may not permit an assessment of an agreement's true competitive impact.

[5] Prior to this agreement with Maersk, P&O and Sea-Land apparently provided service in this trade on vessels operated in conjunction with Hapag-Lloyd AG, Container Line AB, and Compagnie Generale Maritime.

In view of the above, the Commission is instituting this investigation to determine whether Maersk, P&O Nedlloyd and/or Sea-Land are violating or have violated pertinent provisions of the 1984 Act and Commission regulations by operating pursuant to an agreement or agreements not filed with the Commission, the terms of which may be substantively different from those contained in the parties' agreement which is on file with the Commission and effective pursuant to the 1984 Act. If so, this proceeding also shall determine whether civil penalties should be assessed and, if so, in what amount, and whether a cease and desist order should be issued.

Now therefore, it is ordered, That pursuant to sections 5(a), 10(a)(2), 10(a)(3), 11, and 13 of the Shipping Act of 1984 (''1984 Act''), 46 U.S.C. app. 1704(a), 1709(a)(2), 1709(a)(3), 1710, and 1712, and the Commission's regulations set forth at 46 CFR 572.103(g), and 46 CFR 572.407, an investigation is hereby instituted to determine, with respect to space/slot chartering in the U.S. Pacific Coast/North Europe trade:

1. Whether Maersk, P&O Nedlloyd and Sea-Land are violating or have violated section 5(a) of the 1984 Act by failing to file a true copy of any agreement entered into with respect to an activity described in section 4(a) or (b) of the 1984 Act, 46 U.S.C. app. 1703(a) or (b);

2. Whether Maersk, P&O Nedlloyd and Sea-Land are violating or have violated section 10(a)(2) of the 1984 Act by operating under any agreement required to be filed under section 5 of the 1984 Act that has not become effective under section 6 thereof;

3. Whether Maersk, P&O Nedlloyd and Sea-Land are violating or have violated section 10(a)(3) of the 1984 Act by operating in a manner not in accordance with the terms of an agreement required to be filed under section 5 of the 1984 Act;

4. Whether Maersk, P&O Nedllyod and Sea-Land are violating or have violated 46 CFR 572.103(g) by filing an agreement with the Commission that does not embody the complete understanding of the parties and/or does not set forth the specific authorities and conditions under which the parties will conduct their present operations and regulate the relationships among the agreement members; and

5. Whether Maersk, P&O Nedllyod and Sea-Land are violating or have violated 46 CFR 572.407 by filing an agreement with the Commission that is not the complete agreement among the parties and/or does not specify in detail the substance of the understanding of the parties.

It is further ordered, That Maersk, P&O Nedlloyd and Sea-Land are designated as Respondents in this proceeding.

It is further ordered, That, in the event violations of the 1984 Act or the Commission's regulations are found, this proceeding shall determine whether civil penalties should be assessed against any of the Respondents and, if so, in what amounts.

It is further ordered, That, in the event violations of the 1984 Act or the Commission's regulations are found, this proceeding shall determine whether a cease and desist order should be issued against any or all of the Respondents.

It is further ordered, That a public hearing be held in this proceeding and that these matters be assigned for hearing before an Administrative Law Judge (''ALJ'') of the Commission's Office of Administrative Law Judges at a date and place to be hereafter determined by the ALJ in compliance with Rule 61 of the Commission's Rules of Practice and Procedure, 46 CFR 502.61. The hearing shall include oral testimony and cross-examination in the discretion of the presiding ALJ only after consideration has been given by the parties and the presiding ALJ to the use of alternative forms of dispute resolution, and upon a proper showing that there are genuine issues of material fact that cannot be solved on the basis of sworn statements, affidavits, depositions, or other documents or that the nature of the matters in issue is such that an oral hearing and cross-examination are necessary for the development of an adequate record.

It is further ordered, That the Commission's Bureau of Enforcement is designated a party to this proceeding.

It is further ordered, That notice of this Order be published in the **Federal Register,** and a copy be served on each party of record.

It is further ordered, That other persons having an interest in participating in this proceeding may file petitions for leave to intervene in accordance with Rule 72 of the Commission's Rules of Practice and Procedure, 46 CFR 502.72.

It is further ordered, That all further notices, orders, and/or decisions issued by or on behalf of the Commission in this proceeding, including notice of the time and place of hearing or prehearing conference, shall be served on each party of record.

It is further ordered, That all documents submitted by any party of record in this proceeding shall be

directed to the Secretary, Federal Maritime Commission, Washington, DC 20573–0001, in accordance with Rule 118 of the Commission's Rules of Practice and Procedure, 46 CFR 502.118, and shall be served on each party of record.

Finally, it is ordered, That in accordance with Rule 61 of the Commission's Rules of Practice and Procedure, 46 CFR 502.61, the initial decision of the presiding ALJ shall be issued by May 5, 1998, and the final decision of the Commission shall be issued by September 2, 1998.

By the Commission.

Joseph C. Polking,

Secretary.

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FEDERAL MARITIME COMMISSION

[Docket No. 97–07]

Possible Unfiled Agreement Between Hyundai Merchant Marine Company, Ltd., and Mediterranean Shipping Co., S.A.; Order of Investigation and Hearing

On September 6, 1995, Hyundai Merchant Marine Company, Ltd. (''Hyundai'') and Mediterranean Shipping Co., S.A. (''MSC'') filed with the Federal Maritime Commission (''Commission'' or ''FMC'') FMC Agreement No. 217–011512 (''FMC agreement'' or ''filed agreement''), under which Hyundai is authorized to charter space on MSC's vessels in the trade between U.S. Atlantic and Gulf ports and ports in North Europe. At the time this FMC agreement was filed, MSC was a member of the Trans-Atlantic Conference Agreement (''TACA''). Hyundai became a member of TACA on September 11, 1995.

As a result of discussions with filing counsel concerning possible restrictions on the rights of TACA members to charter space to non-conference carriers, the staff questioned whether the FMC agreement reflected the entire agreement between the parties. There was no reference to TACA membership in the FMC agreement, as initially filed. In response to the staff's inquiry, on September 29, 1995, the parties filed an amendment to the FMC agreement, as follows:

5.7 In the event either or both of the Parties shall, at any time during the period this agreement may remain in effect, adhere to any other agreement in the Trade, including the Trans-Atlantic Conference Agreement (''TACA'') and/or Transatlantic Policing Agreement (''TPA'') and any successor to the TACA and/or TPA, they herein undertake to abide by the terms and conditions of any such other agreements and, in the particular case of the TACA, the provisions of Article 15 thereof.

The FMC agreement between Hyundai and MSC, as amended, became effective, pursuant to section 6 of the Shipping Act of 1984, 46 U.S.C. app. 1701, *et seq.* (''1984 Act'') on October 21, 1995.

Article 15 of the TACA agreement is entitled ''Adherence to Tariffs, Service Contracts and Authorized Practices; Conflicts of Interest.'' Article 15.3 thereof reads, in part:

All Parties shall strictly abide by and observe Agreement rules, regulations and authorized practices and no Party shall engage, directly or indirectly, through any holding, parent, subsidiary, associated or affiliated company or companies (''Related Companies'') or otherwise, in the transportation of cargo in the Trade at rates or on terms and conditions other than those agreed upon or otherwise authorized pursuant to the provisions of this Agreement * * *.

On the basis of concerns that this language may preclude TACA members from chartering space on their vessels to non-conference lines, the Commission issued an order pursuant to section 15 of the 1984 Act on February 22, 1996, requiring information and documents related to this issue.[1]

In response to that order, Hyundai and MSC produced a number of documents, including a slot charter agreement between Hyundai and MSC, dated August 4, 1995, and referred to by the parties as a memorandum of agreement (''MOA''). In addition, Hyundai and MSC produced copies of correspondence between negotiators for the two carriers, indicating that the terms of the MOA were the focus of extensive negotiations, while the first draft of the FMC agreement was agreed to without change or substantive discussion. Moreover, the negotiator for MSC informed his counterpart at Hyundai that, where there were discrepancies between the two documents, the terms of the MOA would supersede those of the filed agreement.

The MOA is a detailed document with four appendices,[2] while the FMC agreement is written in general terms and does not contain any appendices or certain other specifics set forth in the MOA.[3] In addition to this difference in the level of detail, there are at least three differences of a more substantive nature between the filed agreement and the MOA.

First, the MOA makes several references, on the title page and in the preamble, to the relationship between this slot charter and TACA. The title page of the MOA states that the slot charter agreement is ''Under the Trans Atlantic Conference Agreement.'' The preamble states:

This agreement is adopted pursuant to the Conference Agreement.[4] In furtherance of the Conference agreement, the parties have met and communicated among themselves for the purpose of effecting the purposes and provisions of the Conference Agreement. Their decisions are set forth in this agreement. This agreement is supplemental to the Conference Agreement and is subject to all of the rights, obligations, definitions, terms and conditions set forth in the Conference Agreement.

The filed agreement contains no counterpart to this preamble, nor any reference to TACA on the title page.

Second, as originally signed by the parties, the MOA contained an Article 15 which stated:

15. Conference Membership

Hyundai and MSC shall take a common position to membership in TACA for the period of this Agreement. No Party will resign from TACA without the agreement of the other Party.

Nothing similar to this commitment appears in the filed agreement. The MOA appears to have been amended by the parties on May 20, 1996, to delete this conference membership provision.[5] A copy of that amendment to the unfiled MOA was submitted to the Commission on June 28, 1996.

The third significant difference between the MOA and the filed agreement is found in the duration of the respective agreements. The MOA states that:

This agreement will have a firm validity of three years and shall commence on October 1st, 1995 or latest January 1st, 1996. It will remain in effect for a minimum of 36 months. [T]hereafter it will be subject to termination on six months notice given by any party in writing to the party [sic]. The earliest effective notice of termination date, however, will be March 30th, 1998.

Article 9 of the filed agreement states, in pertinent part, that:

[1] This section 15 order was addressed to TACA and its seventeen member lines. Responses were submitted in May 1996, and required informal follow-up with the conference and its members which was completed in December 1996.

[2] These appendices are: 1. Containerships/capacity/schedules; 2. Financial arrangements; 3. Slot Charter Party; and 4. Restrictions in respect of dangerous goods.

[3] E.g., compensation for unavailable slots; carriage of empty containers; intercoastal moves; utilization reports; costs of vessels out of service; etc.

[4] Conference Agreement is defined by the MOA to mean TACA.

[5] The MOA was first disclosed to the Commission on May 7, 1996, in response to the section 15 order.