expedited investigation and submitted a confidential Report and Recommendations (''Report'') to the Commission on January 5, 1999.

A summary of Commissioner Won's Report was released to the public on March 12, 1999. Generally, as indicated by the summary, evidence cited in the Report corroborates allegations that carriers in the eastbound Transpacific trades, faced with shortages of space during the peak 1998 holiday shipping season, refused to carry low rated cargo at applicable rates, targeted the cargo of non-vessel-operating common carriers (''NVOCCs'') for rate and space discrimination, and imposed significant and sudden increases in rates and charges. Among other things, the Report indicates that space was allocated in many instances on the basis of profit to the carrier; and that bookings were often rejected unless the shipper agreed to significantly increased rates or charges. Large, reliable contract shippers were said generally to have received preferential space allocations.

The Commission has determined to pursue certain of the Report's findings through further investigation and enforcement action under sections 8, 10 and 11 of the Act, as appropriate. To facilitate such further investigation, the Commission is continuing this proceeding to assist in developing additional evidence concerning the activities of ocean common carriers listed in Appendix A hereto during the period July 1, 1998 to November 1, 1998 in the eastbound Transpacific trades, and related to the following issues:

1. Refusing to provide vessel space or equipment to shippers under existing service contract rates;
2. Demanding or charging rates higher than those set forth in applicable tariffs or service contracts;
3. Subjecting any particular non-vessel-operating common carrier (''NVOCC'') or NVOCC traffic generally, to any unreasonable refusal to deal, to any undue or unreasonable prejudice or disadvantage, or to unjustly discriminatory rates or charges; and
4. Transporting cargo for, or soliciting service contracts from, individual members of shippers' associations at rates higher than those found in existing contracts of the applicable associations.

In addition, the Commission is designating Vern W. Hill, Director, Bureau of Enforcement, as the Investigative Officer for the continued phase of this proceeding. Mr. Hill will have all of the powers formerly delegated to Commissioner Delmond Won to pursue the issues set forth above.

Interested persons are invited and encouraged to contact the Investigative Officer named herein, at (202) 523–5783 (Phone) or (202) 523–5785 (Fax), should they wish to provide testimony or evidence, or to contribute in any other manner to the development of a complete factual record in this proceeding.

Therefore, it is ordered, That pursuant to sections 8, 10, 11, 12 and 15 of the Shipping Act of 1984, 46 U.S.C. app. 1707, 1709, 1710, 1711 and 1714, and part 502, Subpart R of Title 46 of the Code of Federal Regulations, 46 CFR 502.281, *et seq.*, this nonadjudicatory investigation into practices of ocean common carriers in the Transpacific trades is continued in order to develop the issues set forth above and to provide a basis for any subsequent regulatory, adjudicatory or injunctive action by the Commission.

It is further ordered, That the Investigative Officer shall be Vern W. Hill, Esq., Director, Bureau of Enforcement, of the Commission. The Investigative Officer shall be assisted by staff members as may be assigned by the Commission's Managing Director and shall have full authority to hold public or non-public sessions, to resort to all compulsory process authorized by law (including the issuance of subpoenas *ad testificandum* and *duces tecum*), to administer oaths, to require reports, and to perform such other duties as may be necessary in accordance with the laws of the United States and the regulations of the Commission;

It is further ordered, That the Investigative Officer shall issue a report of findings and recommendations no later than 180 days after publication of this Order in the Federal Register, and interim reports if it appears that more immediate Commission action is necessary, such reports to remain confidential unless and until the Commission provides otherwise;

It is further ordered, That this proceeding shall be discontinued upon acceptance of the final report of findings and recommendations by the Commission, unless otherwise ordered by the Commission; and

It is further ordered, That notice of this Order be published in the **Federal Register.**

By the Commission.

Bryant L. VanBrakle,

Secretary.

Appendix A

Ocean Common Carriers

APL Co. PTE, Ltd. (''APL'')
American President Lines, Ltd. (''APL'')
A.P. Moller-Maersk Line (''Maersk'')
COSCO Container Lines, Ltd. (''COSCO'')
Evergreen Marine Corp. (Taiwan) Ltd. (''Evergreen'')
Hanjin Shipping Co., Ltd. (''Hanjin'')
Hapag-Lloyd Container Linie GmbH (''Hapag-Lloyd'')
Hyundai Merchant Marine Co., Ltd. (''Hyundai'')
Kawasaki Kisen Kaisha, Ltd. (''K-Line'')
Mitsui O.S.K. Lines, Ltd. (''MOL'')
Nippon Yusen Kaisha (''NYK'')
Orient Overseas Container Line, Inc. (''OOCL'')
P&O Nedlloyd B.V. (''P&O Nedlloyd'')
P&O Nedlloyd Ltd. (''P&O Nedlloyd'')
Sea-Land Service, Inc. (''Sea-Land'')
Yangming Marine Line (''Yangming'')

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FEDERAL MARITIME COMMISSION

[Docket No. 99–05]

Anera and Its Members-Opting Out of Service Contracts; Order To Show Cause

On September 21, 1998, the Commission instituted Fact Finding Investigation No. 23—*Ocean Common Carrier Practices in the Trans-Pacific Trades,* for the purpose of conducting an inquiry into allegations that ocean common carriers in the eastbound Transpacific trades have engaged in activities in violation of the Shipping Act of 1984 (''1984 Act''), 46 U.S.C. app. 1701, *et seq.* 28 S.R.R. 445 (1998). The alleged violations included various forms of refusals to provide space for cargo during the 1998 peak holiday shipping season unless the shipper agreed to significantly increased rates or charges, and the widespread practice of allocating space on the basis of revenue or profit to be achieved by the carrier. The Commission's Order of Investigation (''Order'') delegated authority to the Investigative Officer to hold hearings, and to issue subpoenas for the attendance of witnesses and the production of documents.

As directed in the Order, the Investigative Officer issued a report and recommendations to the Commission on January 5, 1999. Included in that report were information and evidence concerning a practice engaged in by the Asia North America Eastbound Rate Agreement (''ANERA'') and its members referred to as ''opting out'' of conference service contracts. This term is used to describe a method of participation in ANERA contracts whereby a participating carrier may charge a rate other than that agreed to by the shipper in the contract. Thus, the ''opting out'' carrier agrees to carry cargo under the contract, but ''opts out'' of the contract rates. As discussed below, the rates

charged by the ''opting out'' carrier may be the tariff rates found in ANERA's tariff applicable to that particular carrier (i.e., the rate may be a common tariff rate or an independent action rate). However, the cargo carried under those higher tariff rates would count toward the minimum quantity set forth in the contract and, conversely, the conference's exposure to liquidated damages for failure to make sufficient space available under the contract could be diminished by offers from the ''opting out'' carrier to carry cargo at tariff rates.

This device is new to ANERA contracts in 1998–1999, and has been used primarily by Sea-Land Service, Inc. (''Sea-Land''), according to evidence developed in the fact finding investigation. Commission records reflect that Sea-Land ''opted out'' of at least 183 ANERA service contracts which were still in effect as of March 29, 1999.[1] As space became tight during the 1998 peak shipping season, Sea-Land appears to have utilized this device extensively to obtain greater revenue from contract shippers which could not find space on other carriers. A review of active ANERA service contracts in the Commission's files as of March 29, 1999, also indicates that the following additional carriers ''opted out'' of ANERA service contracts: A.P. Moller-Maersk Line (13 contracts); American President Lines, Ltd. (3 contracts); Hapag-Lloyd Container Line GmbH (8 contracts); Kawaski Kisen Kaisha, Ltd. (12 contracts); Mitsui O.S.K. Lines, Ltd. (1 contract); and P&O Nedlloyd Ltd./B.V. (1 contract). Appendix A hereto is a list of 198 active ANERA service contracts as of March 29, 1999, from which one or more of the above-named carriers ''opted out.''

One contract shipper which was charged tariff rates during peak season complained to ANERA that Sea-Land had charged an excessive rate and sought a refund of the difference between the rate charged and the contract rate. ANERA replied that Sea-land had charged the correct rate under the terms of the contract, explaining:

All ANERA carriers can carry cargo under your contract and all must charge the contract rates except for Sea-Land, which must charge the general tariff rate at the time of shipment. Sea-Land liftings shall be counted towards the MQC [Minimum Quantity of Cargo] in your contract, although the rate is different than other carriers.

ANERA document No. 106690. The contract to which this correspondence refers, SC No. 7490/98, lists all of the ANERA carriers as participants. Article 6 of that contract, and its essential terms publication sets forth the contract rates. Note 3 to Article 6, which appears to be ''boilerplate'' language in ANERA contracts containing an ''opt out'' clause, states:

The following participating carrier(s) has opted out of the following Contract rates pursuant to Rule 101.H of the ET tariff:

Line: Sea-Land Service Inc.
Commodity: All
Port Pair: All

Pursuant to Rule 101.H, certain shipments at the tariff rates applicable to the above carrier and port pair(s) may apply under this Contract. (Emphasis supplied)

Rule 101.H of ANERA's Essential Terms tariff is as follows:

H. Any participating carrier may opt out of any of the rates in this Contract. Notice of any such opt-out shall be given prior to the effective date of this Contract and shall be shown in Appendix A hereto. The participating carrier may revoke the opt-out at any time during the term of this Contract by written notice to ANERA and the Shipper, after which it would be fully a party to the Contract for the remainder of its term and may not opt out further. Cargo carried by such participating carrier during any opt out period shall count toward the Quantity Commitments of this Contract, provided that the rate shall be the governing tariff rate (either common or I/A) applicable to that participating carrier at time of shipment, and provided further that such cargo may count under the Contract only if the applicable tariff rate is higher than the corresponding rate set forth in Appendix A of this Contract. All rules, extra charges, and other terms and conditions of the Contract shall apply per the Contract.

Section 8(c) of the Shipping Act of 1984 (''1984 Act'') requires that an ocean common carrier file with the Commission and make available to the general public in tariff format, a concise statement of the essential terms of a service contract, including the line-haul rate. The Commission's rules at 46 CFR 514.17(c)(2) provide that essential terms may not ''(i) [b]e uncertain, vague or ambiguous; or (ii) [c]ontain any provision permitting modification by the parties other than in full compliance with this part.'' The essential terms quoted above appear to be uncertain, vague and ambiguous in that neither the shipper nor the Commission nor the public knows which rates will apply to any particular shipment. In addition, the rate can be modified by the conference, or by the individual carrier, at any time, without the shipper's consent. Thus, the ''opt out'' provisions found in the ANERA contracts listed in Appendix A to this order appear to be in violation of section 8(c) of the 1984 Act and the Commission's regulations.

Section 10(d)(1) of the 1984 Act states that, ''No common carrier * * * may fail to establish, observe and enforce just and reasonable regulations and practices relating to or connected with receiving * * * or delivering property.'' The practices of ANERA and its members in agreeing upon and implementing ''opt out'' provisions in 1998–1999 service contracts appear to be unjust and unreasonable in that ''opting out'' carriers refuse to accept bookings, and, thus, to receive, transport, or deliver cargo, under the rate for which a shipper has bargained in a service contract. Moreover, this refusal by ''opting out'' carriers may result in a shipper being penalized for failure to meet its minimum cargo requirements under the contract if it chooses not to ship at higher rates with an ''opting out'' carrier.[2] Therefore, these practices appear to violate section 10(d)(1) of the 1984 Act.

Now, therefore, it is ordered That pursuant to section 11 of the Shipping Act of 1984, 46 U.S.C. app. 1710, ANERA and its members are directed to show cause why they should not be found to have violated section 8(c) of the Shipping Act of 1984 by failing to file with the Commission and make available to the general public in tariff format, a concise statement of the essential terms, including the line haul rate, of at least 198 service contracts in which one or more members have ''opted out.''

It is further ordered That ANERA and its members are directed to show cause why they should not be found in violation of Commission rules at 46 CFR 514.17(c)(2) for filing essential terms for at least 198 service contracts that are uncertain, vague and ambiguous and/or

[1] Sea-Land produced statistics in the fact finding investigation indicating a total of 215 service contracts from which that carrier had ''opted out'' as of October 31, 1998. Apparently, some of those contracts are no longer in effect.

[2] Rule 107(A) of ANERA's Essential Terms tariff appears to provide the shipper with the freedom to choose the participating carrier who will transport the shipper's cargo during the duration of the service contract. However, space on any specific vessel is not guaranteed to the shipper. Therefore, according to Rule 107(B), if the shipper ''is unable to secure space on any particular vessel of a participating carrier, [s[hipper agrees to contact all of the other participating carriers successively until appropriate substitute space has been found.'' Under these contractual conditions, if the only participating carrier that is able to provide space to the shipper is also one that has ''opted out'' of the service contract rates, then the shipper may be faced with the unattractive choice of either paying the higher tariff rates for the transportation of its cargo, or of breaching the contract by failing to meet its Minimum Quantity Commitment, thereby exposing itself to liability and penalties in the form of liquidated damages, as specified in Article 9 of the contract.

can be modified at any time without the shipper's consent.

It is further ordered That ANERA and its members are directed to show cause why they should not be found in violation of section 10(d)(1) of the 1984 Act for failure to establish, observe and enforce just and reasonable regulations and practices relating to or connected with receiving or delivering property under service contracts containing ''opt out'' clauses.

It is further ordered That this proceeding is limited to the submission of affidavits of fact and memoranda of law.

It is further ordered That any person having an interest and desiring to intervene in this proceeding shall file a petition for leave to intervene in accordance with Rule 72 of the Commission's Rules of Practice and Procedure, 46 CFR 502.72. Such petition shall be accompanied by the petitioner's memorandum of law and affidavits of fact, if any, and shall be filed no later than the day fixed below;

It is further ordered That ANERA and its members as set forth in Appendix B hereto are named as Respondents in this proceeding. Affidavits of fact and memoranda of law shall be filed by Respondents and any intervenors in support of Respondents no later than May 14, 1999.

It is further ordered That the Commission's Bureau of Enforcement is made a party to this proceeding;

It is further ordered That reply affidavits and memoranda of law shall be filed by the Bureau of Enforcement and any intervenors in opposition to Respondents no later than June 3, 1999.

It is further ordered That rebuttal affidavits and memoranda of law shall be filed by Respondents and intervenors in support no later than June 18, 1999.

It is further ordered That;

(a) Should any party believe that an evidentiary hearing is required, that party must submit a request for such hearing, together with a statement setting forth in detail the facts to be proved, the relevance of those facts to the issues in this proceeding, a description of the evidence which would be adduced, and why such evidence cannot be submitted by affidavit;

(b) Should any party believe that an oral argument is required, that party must submit a request specifying the reasons therefore and why argument by memorandum is inadequate to present the party's case; and

(c) Any request for evidentiary hearing or oral argument shall be filed no later than June 18, 1999.

It is further ordered That, if violations are found by the Commission, such violations be referred to an Administrative Law Judge for assessment of civil penalties as appropriate, under section 13 of the Shipping Act of 1984, 46 U.S.C. app. 1712.

It is further ordered That notice of this Order to Show Cause be published in the **Federal Register,** and that a copy thereof be served by express delivery upon Respondents;

It is further ordered That all documents submitted by any party of record in this proceeding shall be filed in accordance with Rule 118 of the Commission's Rules of Practice and Procedure, 46 CFR 502.118, as well as being mailed directly to all parties of record;

Finally, it is ordered That pursuant to the terms of Rule 61 of the Commission's Rules of Practice and Procedure, 46 CFR 502.61, the final decision of the Commission in this proceeding shall be issued by September 1, 1999.

By the Commission.

Bryant L. VanBrakle,

Secretary.

APPENDIX A.—ANERA SERVICE CONTRACTS IN WHICH ONE OR MORE MEMBERS HAVE ''OPTED OUT''

Name of carrier	Total number of ''OPT outs''	Service contracts with ''OPT outs''
Sea-Land Service, Inc.	183	7135, 7143, 7190, 7218, 7231, 7256, 7257, 7258, 7259, 7260, 7261, 7262, 7263, 7266, 7267, 7270, 7271, 7272, 7274, 7275, 7277, 7278, 7280, 7282, 7283, 7284, 7285, 7287, 7288, 7289, 7290, 7292, 7294, 7295, 7298, 7299, 7300, 7301, 7303, 7306, 7308, 7309, 7310, 7311, 7312, 7314, 7315, 7317, 7318, 7319, 7320, 7321, 7322, 7323, 7324, 7325, 7329, 7331, 7334, 7335, 7336, 7337, 7338, 7339, 7340, 7341, 7344, 7345, 7347, 7349, 7352, 7354, 7355, 7357, 7358, 7359, 7362, 7363, 7364, 7365, 7366, 7367, 7368, 7371, 7372, 7373, 7374, 7376, 7377, 7378, 7380, 7381, 7382, 7383, 7384, 7385, 7386, 7388, 7389, 7391, 7393, 7394, 7395, 7396, 7397, 7398, 7399, 7400, 7402, 7403, 7404, 7405, 7406, 7409, 7410, 7411, 7412, 7413, 7415, 7418, 7419, 7421, 7423, 7424, 7427, 7429, 7430, 7431, 7435, 7436, 7438, 7440, 7442, 7443, 7444, 7445, 7446, 7448, 7449, 7450, 7451, 7452, 7453, 7455, 7456, 7457, 7458, 7459, 7460, 7461, 7464, 7466, 7467, 7468, 7470, 7471, 7472, 7473, 7474, 7477, 7479, 7480, 7481, 7482, 7485, 7487, 7489, 7490, 7491, 7492, 7493, 7494, 7495, 7496, 7497, 7500, 7501, 7502, 7504, 7505, 7510, 7511, 7627.
A.P. Moller-Maersk Line	13	6918, 7191, 7229, 7230, 7256, 7274, 7298, 7321, 7340, 7341, 7368, 7416, 7627.
Kawasaki Kisen Kaisha, Ltd (''K'' Line)	12	7265, 7277, 7294, 7300, 7308, 7329, 7334, 7368, 7374, 7415, 7417, 7419.
Hapag-Lloyd Container Linie GmbH	8	7368, 7675, 7679, 7682, 7683, 7685, 7686, 7687.
American President Lines Ltd.	3	7406, 7478, 7679.
P&O Nedlloyd Ltd./B.V.	1	7334.
Mitsui O.S.K. Lines Ltd.	1	7368.

Source: ATFI Essential Terms Publication as of March 29, 1999.

Appendix B

Members of the Asia North America Eastbound Rate Agreement

APL Co. PTE Ltd. (''APL'')
American President Lines, Ltd. (''APL'')
A.P. Moller-Maersk Line (''Maersk'')
Hapag-Lloyd Container Linie GmbH (''Hapag-Lloyd'')
Kawasaki Kisen Kaisha, Ltd. (''K-Line'')
Mitsui O.S.K. Lines, Ltd. (''MOL'')
Nippon Yusen Kaisha Line (''NYK'')
Orient Overseas Container Line, Ltd. (''OOCL'')
P&O Nedlloyd B.V. (''P&O Nedlloyd'')
P&O Nedlloyd Ltd. (''P&O Nedlloyd'')
Sea-Land Service, Inc. (''Sea-Land'')

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