

(S E R V E D)
(July 1, 1992)
(FEDERAL MARITIME COMMISSION)

FEDERAL MARITIME COMMISSION

46 CFR PART 586

[PETITION NO. P2-92; DOCKET NO. 92 - 42]

ACTIONS TO ADJUST OR MEET CONDITIONS
UNFAVORABLE TO SHIPPING IN THE
UNITED STATES/KOREA TRADE

AGENCY: Federal Maritime Commission.

ACTION: Proposed Rule.

SUMMARY: The Federal Maritime Commission publishes this proposed rule, pursuant to section 19(1)(b) of the Merchant Marine Act, 1920, in response to a petition for relief from conditions allegedly unfavorable to shipping in the United States-Korea trade resulting from Republic of Korea laws. The proposed rule imposes sanctions on Korean, non-U.S. citizen, owned or controlled ocean freight forwarders and non-vessel-operating common carriers.

DATE: Comments due on or before [insert date 30 days from date of publication].

ADDRESS: Comments (original and 15 copies) are to be submitted to:

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SUPPLEMENTARY INFORMATION:

INTRODUCTION

Section 19 of the Merchant Marine Act, 1920, 46 U.S.C. app. 876, as amended by Pub. L. No. 101-595, 104 Stat. 2979 ("Section 19"), authorizes the Federal Maritime Commission ("Commission" or "FMC") to take regulatory action to correct unfavorable shipping conditions in U.S. foreign oceanborne commerce. Specifically, paragraph (1)(b) of Section 19 directs the Commission

[t]o make rules and regulations affecting shipping in the foreign trade not in conflict with law in order to adjust or meet general or special conditions unfavorable to shipping in the foreign trade, whether in any particular trade or upon any particular route or in commerce generally, including intermodal movements, terminal operations, cargo solicitation, forwarding and agency services, non-vessel-operating common carrier operations and other activities and services integral to transportation systems, and which arise out of or result from foreign laws, rules, or regulations or from competitive methods or practices employed by owners, operators, agents or masters of vessels of a foreign country.

46 U.S.C. app. 876(1)(b).

Section 19 further provides that the Commission may initiate such rule or regulation on its own motion or pursuant to a petition for Section 19 relief by an affected person. Paragraph (5) of Section 19 states in this regard:

Any person, including a common carrier, tramp operator, bulk operator, shipper, shippers' association, ocean freight forwarder, marine terminal operator, or any component of the Government of the United States, may file a petition for relief under paragraph (1)(b) of this section.

46 U.S.C. app. 876(5).

The Commission's regulations governing Section 19 proceedings are set forth at 46 CFR Part 585 - Regulations To Adjust or Meet Conditions Unfavorable to Shipping in the Foreign Commerce of the United States ("Section 19 Regulations"). The Section 19 Regulations describe who may file petitions, 46 CFR 585.4, how such petitions are filed, 46 CFR 585.5, the contents of petitions, 46 CFR 585.6, and how petitions may be amended or dismissed, 46 CFR 585.7.

The Section 19 Regulations also set forth the types of conditions which are generally presumed to be actionable under Section 19. These include those which impose discriminatory fees, charges, requirements or restrictions upon certain vessels in the foreign trade of the United States; preclude or tend to preclude some vessels from competing in the trade on the same basis as any other vessel; reserve substantial cargoes to the national-flag or other vessels and fail to provide, on reasonable terms, for effective and equal access to such cargo by vessels in U.S. foreign trades; are discriminatory or unfair as between carriers, shippers, exporters, importers, or ports or between exporters from the United States and their foreign competitors; and are otherwise unfavorable to shipping in the foreign trade of the United States. 46 CFR 585.3(a), (b), (c), (d).

BACKGROUND

Direct Container Line, Inc. ("Petitioner" or "DCL"), a California corporation operating as a non-vessel operating common carrier ("NVOCC") in the outbound Trade, has filed a petition for

relief ("Petition") under Section 19 from conditions allegedly unfavorable to shipping in the United States-Korea trade ("Trade"). The Petition alleges that DCL has been prevented by Korean law from establishing a branch office in Korea and from operating in the inbound Trade.

A Notice of Filing of the Petition was published in the Federal Register, 57 FR 3433 (Jan. 29, 1992), soliciting comments on the Petition generally and specifically on the question of what relief might be fashioned to deal with the unfavorable conditions alleged. Comments were received from nine parties.

THE PETITION

Petitioner alleges that it has been unable to establish a branch office in Korea and therefore has been precluded from operating in the inbound U.S. trade from Korea as a result of the Korean Maritime Transportation Business Act ("Korean Act"), a statute of the Republic of Korea ("ROK"). Petitioner describes the relevant provisions of the Korean Act as follows:

Chapter IV of the Act, entitled "Maritime Freight Forwarding Business; Maritime Transportation Brokering Business; Shipping Agency Business; Vessel Chartering Business; and Vessel Management Business," broadly covers the shoreside activities of Korea's waterborne foreign commerce, which it expressly classifies generically as "maritime freight forwarding business, etc."

. . . Article 34 of the Act requires as a prerequisite to engaging in any such business in Korea that the would-be operator "register with the Administrator of the Korean Maritime and Port Administration under the conditions as prescribed by the Ordinance of the Ministry of Transportation."

Article 35-2, [paragraph 1, requires that] . . . "a foreigner" wishing to engage in "a maritime freight forwarder business, etc." . . . [have] the "authorization

of the aforesaid Administrator, [and] paragraph 2 . . .
[provides]:

(2) If a foreigner desires to obtain the authorization of investment in a maritime freight forwarding business, etc. under Paragraph (1), the ratio of domestic persons' investment and that of composition of the juristic person's officers shall exceed 1/2, and the representative of such juristic person shall be a domestic person."

Petition, 2. The Korean Act thus imposes a strict nationality-based requirement for participation as a freight forwarder or NVOCC in the Trade from Korea, and further provides for penalties for violation, including imprisonment and substantial fines.

Petitioner also describes diplomatic attempts to resolve the problem, including ongoing efforts by the U.S. Trade Representative ("USTR") and discussions by the U.S. embassy in talks with representatives of the Government of Korea. These efforts are said to have yielded no visible progress.

Additionally, Petitioner reports that its past attempts to do business in Korea in the prescribed manner, i.e. through a Korean agent, have resulted in a succession of business losses as "one after another, each of [the agents engaged by Petitioner] has gone out of business, in each case holding freight revenues collected on petitioner's shipments, none of which petitioner has been able to recover." Id., 4. Petitioner reports that it has also explored the possibility of entering into a minority ownership arrangement with a Korean national which would comply with the Korean Maritime Transportation Business Act, but found the arrangements and the outcome unsatisfactory.

Finally, Petitioner advises that it is unable to suggest a satisfactory form of sanction which might be imposed under Section 19 in this case and requests that the Commission fashion an appropriate remedy.

COMMENTS ON THE PETITION

A. Comments in Support

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Target Intermodal supports the Petition and suggests the suspension of the tariffs of U.S. resident, Korean owned NVOCCs. Trans-World Shipping Corporation, a customhouse broker and freight forwarder, suggests as a sanction that all licensed freight forwarders and NVOCCs be required to certify that the firm is less than fifty percent owned by Korean nationals.

The New York Foreign Freight Forwarders and Brokers Association ("New York Association"), on behalf of its 110 FMC-licensed ocean freight forwarder and NVOCC members, informs the Commission that the current trade practices of the ROK have created unfavorable shipping conditions in the Trade. The New York Association states that its members are disadvantaged by the Korean laws which prevent them from freely conducting business operations in Korea while their Korean competitors suffer no similar restrictions in their U.S. operations.

Absent action by the ROK to change its practices, the New York Association urges the Commission to enforce reciprocal measures against Korean forwarders and NVOCCs operating in the U.S. Noting the correspondence from the USTR and the U.S. Maritime Administrator, filed as attachments to the Petition, indicating

that legislative changes by the Korean Government are unlikely in the near term, the Association calls for the Commission to issue regulations to adjust or meet the conditions imposed by Korean law. It proposes that any freight forwarder or NVOCC that falls under the direct or indirect control of Korean nationals be subjected to sanctions. To this end, the New York Association suggests that:

- the FMC determine that an entity of which more than 51% is owned by Korean nationals is Korean owned and controlled;

- every NVOCC filing a tariff with the FMC certify that it is not owned or controlled by Korean nationals;

- all ocean freight forwarder applicants similarly certify non-Korean ownership;

- all existing NVOCC tariffs and ocean freight forwarder licenses be reviewed to ascertain that the business is not owned or controlled by Korean nationals (measured by whether Korean nationals comprise more than one-half of the officers and operators); the license of any freight forwarder found to be Korean owned or controlled be revoked after notice and hearing; and the tariff of any NVOCC found to be Korean owned or controlled be suspended; and

- each existing NVOCC and ocean freight forwarder be required to certify in its annual anti-rebate certification that it is not owned or controlled by Korean nationals.

The Pacific Coast Council of Customs Brokers and Freight Forwarders ("Pacific Coast Council") also supports the Petition. The Council, which represents over 7,000 customs brokers, freight

forwarders and NVOCCs, states that its members are most directly affected by discriminatory Korean law because their West coast location is the gateway to Korea and the Pacific rim. It complains that the ownership restrictions imposed by Article 35-2 of the Korean Act "force U.S. NVOCCs/freight forwarders to relinquish both managerial and ownership control over their own branch organizations." Pacific Coast Council Comments, 4. Pacific Coast Council disputes the claim that poor judgement in choosing an agent is to blame for DCL's problems, noting that this approach "begs the question" of the discriminatory impact of the requirement for a U.S. enterprise "to turn over its business to [a] . . . Korean agent." Id.

The Pacific Coast Council is among those commenters who discussed the planned consortium of Korean forwarders to operate a U.S.-based nationwide customhouse brokerage and forwarder, expressing the belief of many of its members

that the Korean government will secretly force or persuade most of the major trading companies and manufacturing companies to direct their U.S. bound or sourced transportation forwarding consolidation and Customs requirements to those Korean companies who are members of the consortium.

Id., 5. The planned consortium is said to indicate both the discrepancy between treatment of foreign forwarders and NVOCCs in the U.S. and Korea and the need for equal treatment.

The Pacific Coast Council notes that "the problem of discriminatory treatment of U.S. forwarders/NVOCCs in Korea has previously been addressed through intergovernmental negotiations," but that it has not been resolved. Id., 2-3. It refers to the

contacts with Korean authorities by the USTR and the U.S. embassy in Seoul, as reported by the Maritime Administrator, without satisfactory results.

The Pacific Coast Council suggests that the Commission impose sanctions on Korean-based freight forwarders and NVOCCs. It proposes that the FMC scrutinize the freight forwarder licenses and NVOCC bonds on file with the Commission to identify those companies based in Korea, and notify each that it is subject to license or bond revocation or suspension¹ unless Korean laws and practices are revised to eliminate their discriminatory impact. The Council emphasizes that its object in urging imposition of sanctions is not to prevent Korean-based companies from operating in the United States, but to gain equal treatment for U.S. companies operating in Korea.

The National Customs Brokers and Forwarders Association of America, Inc. ("NCBFAA") advises that its members are directly affected by the issues raised in DCL's Petition. NCBFAA identifies the detrimental effects of Korean law as follows:

First, the ban on control makes it difficult for non-Korean forwarders to establish efficient and viable relationships with inland Korean transportation companies, thus placing them at a substantial competitive disadvantage with Korean-owned firms. Second, the absence of a direct presence in Korea makes it substantially more difficult for U.S.-owned firms to solicit the business of Korean exporters.

NCBFAA Comments, 3.

¹ The Council believes that suspension of an NVOCC's bond will prevent it from operating because ocean common carriers are prohibited from accepting cargo from an NVOCC which lacks a bond.

NCBFAA also focusses on the planned consortium operation, indicating that reported ROK participation and direction raises extremely troublesome issues of antitrust, national security and fundamental commercial fairness. NCBFAA argues that the allegedly smaller size of Korean-based forwarders and brokers is not a basis for discrimination against U.S. companies, most of which are, in any event, relatively small in size.

NCBFAA agrees with the New York Association that sanctions should be imposed on forwarders and NVOCCs owned or controlled by Korean nationals, and further suggests that the Commission seek participation of the U.S. Customs Service so as to include in the proceeding consideration of the continued fitness of licensed Korean-owned or controlled customs brokers. NCBFAA cautions, however, that care be taken to avoid affecting U.S. citizens of Korean descent "who are unconnected with the Korean government's initiatives." Id., 5.

Although not entirely supportive of Commission action at this time, the comments of the Korean Forwarders and Customs Brokers Association of Southern California ("KFCBA") generally support Petitioner's allegation that conditions unfavorable to shipping in the Trade exist as a result of laws, policies, and actions of the ROK. KFCBA argues that the issues which should be considered are not solely those raised by the Petition but should include activities of the ROK to direct the operations of a substantial proportion of the business in the Trade. KFCBA advocates discussion of these issues in bilateral talks in a manner which

addresses the alleged participation and direction of the Korean Customs Administration in a consortium of Korean business entities to establish a "transportation operation (customs brokerage, freight forwarding, NVOCC, trucking and warehousing) in the United States." KFCBA Comments, 2. KFCBA requests that the Commission recommend to U.S. negotiators that the issues raised by DCL be addressed at the same time as the issues raised by the consortium proposal, and that the FMC stay its consideration of the Petition while such talks take place.

KFCBA states that the issues raised by DCL are vastly different from those raised by the anticipated ROK-impelled consortium, which are its major concern. "The consortium is a move by the Korean government to invade and control private industry in the U.S." Id. KFCBA urges that bilateral negotiators not trade ROK action favorable to DCL for permission to proceed with the government-backed consortium. Should the Commission proceed to act on the DCL Petition, KFCBA urges thorough evaluation of the issues. With respect to sanctions, KFCBA objects to imposition of sanctions on Korean-owned, U.S.-resident freight forwarders or NVOCCs, stating that its members are U.S. companies owned and operated by U.S. citizens "(although of Korean extract.)" Id., 5. KFCBA makes no specific recommendation regarding possible remedial action but urges FMC caution in avoiding targeting U.S. operations whose owners are of Korean descent.

B. Comments in Opposition

The Korean International Freight Forwarders Association ("KIFFA"), representing 322 ocean freight forwarders in Korea, opposes the Petition. KIFFA, stating that its members are overwhelmingly small-sized companies with a very short history (less than ten years) of operations, argues that ROK's protection of such enterprises from large foreign NVOCCs from advanced countries such as the U.S. and the European Communities is not inappropriate or different from the policies of other countries to protect their own nationals. KIFFA believes that the suspension of Korean-owned, U.S.-resident NVOCC tariffs or ocean freight forwarder licenses would be an inappropriate application of Section 19. Petitioner's unsatisfactory experience with agents in Korea is attributed by KIFFA to a lack of caution by DCL in "choosing the capable agent with a good reputation in Seoul." KIFFA Comments, 3. KIFFA contends that it is inappropriate for DCL to seek relief under Section 19 at this juncture inasmuch as "the issue of market-opening for a foreign freight forwarding business was not raised in the previous bilateral shipping talks." Id., 5.

KIFFA states that the "Customs Brokerage Venture [presumably the projected Korean-government related venture discussed by others] to be established in U.S.A. has, at this moment, no plan to do the business of NVOCC's or ocean freight forwarders." Id., 3. Referring to past actions by the ROK to liberalize the access of foreign-flag carriers to shoreside activities, KIFFA states its understanding that "KMPA, taking into account the ongoing UR

[Uruguay Round] Multilateral negotiations, has a plan to open the freight forwarding market to the foreign companies on a gradual basis after revising the related shipping acts." Id., 5.

Hyundai Merchant Marine Co., Ltd. ("Hyundai") advocates resolution of this matter through discussions between the U.S. and the Korean Governments, without resort to formal FMC proceedings. Hyundai also believes that the unique nature of this inquiry, i.e. the status of Petitioner as a "transportation intermediary," provides additional reasons for the Commission to approach this matter with all deliberate speed, and to assure that all factors are fully considered and analyzed. It is particularly concerned that any Commission action not have harmful consequences on ocean common carriers or their cargo.

Hanjin Shipping Co., Ltd. ("Hanjin") recommends that the Commission decline to initiate a rulemaking proceeding in response to the Petition on the grounds that there is no basis for countervailing sanctions of any kind. Hanjin asserts that the problem alleged by DCL has never before been discussed by the U.S. and Korean Governments, and that such talks should precede any proposal of sanctions. Hanjin maintains that, in any event, it would be wrong to impose sanctions on Korean-flag carriers because they have not been beneficiaries of the laws about which DCL complains.

Hanjin contests Petitioner's characterization of Korean law as constituting an absolute ban on operations by foreign-owned forwarders and NVOCCs. DCL's problems in operating in Korea are

said to be no greater than those of other foreign firms which have established successful operations in Korea under the putatively restrictive laws, and attributes DCL's history to poor selection of agents. Hanjin states that recent liberalization of the shipping industry in Korea has occurred and has been in fulfillment of commitments made in bilateral talks. The talks scheduled to take place in June, 1992, which Hanjin understands will include for the first time the subject of NVOCC operations in Korea, are said to be the appropriate forum for action on these issues.

Should the Commission determine to impose sanctions in this matter, Hanjin is in agreement with the Petitioner that per voyage fees imposed on Korean-flag ocean common carriers would not be appropriate. Suggesting that the Korean carriers have done everything possible to ease restrictions affecting U.S.-flag carriers in Korea, Hanjin maintains that sanctions against the Korean carriers, would not be a countervailing sanction or one that meets or adjusts the alleged condition unfavorable to shipping, but would be arbitrary, discriminatory, fundamentally unfair, and therefore "subject to certain reversal by the courts . . ." Hanjin Comments, 5.

Kun Young Trading Co., Ltd. ("Kun Young") states that it is a member of the consortium informally formed by a number of Korean firms. It posits the group's belief that by entering into the customs brokerage business in the United States it can "facilitate the movement of our imports into the United States while at the

same time ensuring compliance with all United States Customs and trade laws." Kun Young Comments, 1.

Kun Young notes that foreign ownership of customs brokerage services in the U.S. is not a new concept. It advises that this undertaking will assure the compliance of Korean importers with U.S. laws and provide information concerning Korean laws and requirements to U.S. exporters, and further reports that the group has yet to focus on the viability of providing ancillary services such as freight forwarding, warehousing, NVOCC operations and trucking. Kun Young expresses its expectation that the ROK will give an objective view to any market improvement initiative proposed by the U.S. and hopes that the Commission, based on the precepts of a free market economy, "will not seek to unfairly penalize a venture such as ours." Id., 2

DISCUSSION

The provisions of the Korean Act upon which the Petition is based are, on their face, discriminatory. They clearly establish nationality-based requirements for non-Korean companies wishing to participate in the Trade. They flatly prohibit companies owned by U.S. citizens, as well as other non-Koreans, from participating in the U.S./Korea bilateral and Korean cross trades in the same manner, and with the same opportunities, as their Korean-based competitors.

Korean firms are, on the other hand, free to operate in the United States without such barriers. Many commenters linked this Petition to the expected ROK-impelled creation of a consortium of

shipping and other trade-involved firms to operate a U.S.-based firm. Some commenters indicate that they expect the consortium to undertake NVOCC, warehouse and freight forwarder operations in addition to providing customhouse brokerage. Without dealing with the merits of the issues with respect to the consortium raised by many of the commenters, we would observe that the creation and operation of any such enterprise in the United States highlights the discriminatory nature of the restrictive practices complained of by DCL. Such an undertaking would not be possible if provisions mirroring those of the Korean Act were applicable in this country.

Petitioner is not a vessel operating common carrier, and the discrimination about which it complains is not based on the registry of the vessels competing in the Trade, unlike the cases in which the Commission historically has been called upon to act under Section 19. The Commission has, nevertheless, addressed discriminations suffered by similar concerns. In proposing a rule to adjust conditions unfavorable to shipping in the U.S. trade with Ecuador, the Commission acted on behalf of Overseas Enterprise, Inc., a U.S. company engaged in arranging and coordinating shipping transactions between vessel owners and operators and U.S. exporters. In response to a jurisdictional challenge seeking a narrow reading of Section 19, the Commission ruled that it did

not view OEI's activities as making it any less engaged in the business of 'shipping in the foreign trade,' as that term is used in Section 19. It participates in such 'shipping' in much the same way as non-vessel-operating common carriers . . . and ocean freight forwarders do.

Inquiry Into Laws, Regulations and Policies of the Government of Ecuador Affecting Shipping in the United States/Ecuador Trade, Notice of Proposed Rulemaking, 54 FR 34,914 (August 18, 1989). We note, in addition, that any doubt as to the inclusion of NVOCCs, forwarders and similar enterprises among those maritime businesses to which the protections of Section 19 apply was removed by the 1990 amendment of that Section, which added specific reference to non-vessel-operating common carriers and freight forwarders. 104 Stat. 2979, Pub. L. 101-595 (November 16, 1990).

The Korean Act is on its face "discriminatory or unfair as between carriers, . . ." freight forwarders or others, within the meaning of the Section 19 Regulations at 46 CFR 585.3(d). In addition, the Korean Act precludes non-Korean-owned non-vessel-operating common carriers and freight forwarders from competing in the Trade on the same basis as Korean-owned non-vessel-operating common carriers and freight forwarders, and denies these non-Korean-owned maritime businesses effective and equal access to cargo moving in the Trade.² The Commission therefore finds that

² Paragraphs (a) and (b) of 46 CFR § 585.3, define conditions unfavorable to shipping which result from the discriminatory treatment of vessels based on national registry, by denying them effective and equal access to cargo or precluding them from competing in the trade on the same basis as others. While these paragraphs refer specifically to "vessels," their focus is the unfair and discriminatory impact of foreign laws, rules and regulations on maritime transportation businesses seeking to participate in trade. The conditions described in paragraphs (a) and (b) therefore also exist where a non-vessel-operating common carrier or freight forwarder is discriminatorily treated based on the nationality of the company or citizenship of its owners.

conditions unfavorable to shipping in the U.S. trade with Korea exist as a result of that Act.

All of the U.S.-based commenters, including organizations representing the firms most affected by the Korean laws in question, support both the finding of conditions unfavorable to shipping in the Trade and the need for Section 19 sanctions. Only the two Korean-flag ocean common carriers, a Korean member of the planned consortium and the Korean International Freight Forwarders Association oppose the Petition.

The latter group of commenters represents that the issue of discriminatory treatment of non-Korean NVOCCs and freight forwarders has never been raised in government-to-government shipping discussions and urges the Commission to delay action on this matter based on the bilateral talks originally scheduled to take place this month.³ It appears, however, that the matter has been raised in the past by both the USTR and the U.S. embassy, with no positive results. While these discussions may not rise to the formality of the government-to-government talks currently scheduled, they nevertheless represent attempts by U.S. representatives to pursue this matter with appropriate officials of the ROK Government and to bring about a resolution.

Although the upcoming talks are expected to include this issue, the Commission has pending before it a request for formal action on an issue which has not been amenable to informal

³ We understand that those talks are now scheduled to take place July 7 and 8, 1992.

resolution. The Commission finds little reason to delay or refuse action on DCL's Petition. The Commission therefore initiates this rulemaking proceeding.

The findings of conditions unfavorable to shipping made herein are based on current conditions brought to our attention by DCL and others. However, the Commission acts today on a proposed rule only; further proceedings, including the receipt and analysis of comments on the proposed rule, will be necessary prior to entry of any final rule. Of course, a resolution of these issues which might emerge from the July talks would be taken into consideration by the Commission in the course of this proceeding.

While all of the commenting parties do not agree that the matter is appropriate or ripe for Commission action, they concur that sanctions imposed on vessel operating common carriers in the Trade are inappropriate, specifically mentioning per voyage fees. The form of sanctions preferred by commenters appears to be the suspension of operating rights, i.e. freight forwarding licenses and NVOCC tariffs, for the Korean-based or Korean-owned-and-controlled firms which are the counterparts of the U.S. firms being disadvantaged by the laws and practices of the ROK.⁴

⁴ One commenter suggests, in the alternative, that the Commission suspend the bond of any Korean-based or Korean-owned NVOCC, to the same effect: to deny them authority to operate in the United States. Although the existence and filing of such a contract is required as a prerequisite to lawful operation, the bond is a contract between private parties. Suspension of tariffs, on the other hand, more directly achieves the desired result and is, as well, a statutorily recognized form of sanction.

The rule proposed herein is based on this approach. It is an attempt to create for Korean firms, which are the beneficiaries of the Korean Act's protections from competition from U.S. and other non-Korean firms, conditions which mirror the detrimental effects of those provisions.

Firms owned by U.S. citizens are prohibited from doing business in Korea as freight forwarders on shipments from Korea to the U.S., thus depriving them of the opportunity to earn freight forwarder compensation and other revenue in connection with such shipments, and to compete in the Trade on the same basis as other firms offering to perform the same services. The proposed rule addresses this condition by prohibiting common carriers from paying freight forwarder compensation to Korean firms acting as freight forwarders, consolidators, freight brokers or other transportation intermediaries who provide services that facilitate arrangements between shipper and carrier incidental to the ocean transportation on bills of lading for shipments from Korea to the United States, whether directly or by transshipment.⁵ This prohibition does not apply to payments made by an ocean common carrier for which it is legally responsible as part of its obligation under its intermodal

⁵ We recognize that such a rule could adversely affect those few U.S.-owned forwarders and NVOCCs which have succeeded in establishing Korean operations through minority investment in a Korean-owned forwarder in compliance with the Korean Act. The rule, however, operates by prohibiting ocean carriers from paying freight forwarder compensation and necessarily applies across the board to all Korean-based freight forwarders. There appears to be no appropriate means to identify each such firm and to provide an exception for those few who succeeded in entering into such an arrangement prior to issuance of the proposed rule.

bills of lading. Thus, for example, payments to an inland carrier who provides the inland movement pursuant to a joint through bill of lading would not be prohibited.

Firms owned by U.S. citizens report that they are detrimentally affected by the Korean Act because they are unable to establish contacts with shippers in Korea which might produce business in the U.S. export trade. Korean freight forwarders, however, face no similar barriers to establishing operations in both countries. The proposed rule therefore provides that, upon notice to individual freight forwarders to be made upon publication of the final rule, the Commission proposes to suspend the ocean freight forwarder license presently held by, and to deny the pending or future application for an ocean freight forwarder license of, any firm which is majority-owned or controlled by citizens of the Republic of Korea.

The Commission will review its freight forwarder files, including information required to be filed pursuant to 46 CFR 510.12(e) and 510.19, and Part I and Schedule B of Form FMC-18, Application for License as an Ocean Freight Forwarder, to determine those licensees and applicants which appear to be Korean-owned or controlled. A licensee or applicant which is majority owned or controlled by non-U.S. citizen Korean nationals is deemed ineligible to perform the duties of an ocean freight forwarder, under section 586.4(c)(1) of this Rule, in the same manner that non-Korean nationals are deemed by the Korean Maritime Business Act

to be ineligible to own or operate as freight forwarders in the Republic of Korea.⁶

Each such licensee or applicant will be notified by publication in the Federal Register of Appendix B [Appendix B to be published in the final rule] and by certified mail of the Commission's intent to suspend its license or deny its application and may submit a written request for a hearing on the proposed suspension or denial within twenty (20) days after receipt of the notification. Each request for a hearing must be accompanied by a statement of the specific basis on which the Commission's determination of Korean ownership or control is challenged. Such suspension or denial proceedings will be limited to the issue of whether the licensee or applicant is majority Korean-owned or controlled. If no request for hearing is received, each licensee or applicant will be notified by Federal Register publication and registered mail, return receipt requested, that its license has been suspended or its application denied. In addition, effective 60 days after publication of the FMC notice identifying those firms which are Korean-owned or controlled ocean freight forwarders, discussed above, ocean carriers are prohibited in section 586.4(d) of the proposed rule, from paying freight forwarder compensation to

⁶ The Commission acknowledges the concern of KFCBA and others that we avoid the imposition of sanctions on freight forwarders or NVOCCs which are owned and operated by U.S. citizens of Korean extraction. We believe the proposed rule adequately addresses this concern.

such freight forwarders in connection with shipments from the United States to Korea.

Several commenters suggest that the Commission suspend or cancel the tariffs of Korean-owned or controlled NVOCCs. Nothing in the Commission's existing files provides information on the ownership of companies operating as NVOCCs sufficient to identify those which are more than 50% Korean-owned. However, a number of commenters suggested that NVOCCs, which are now required to file an annual certification of their policies and actions to prevent rebating, pursuant to 46 CFR §§ 510.25 and 582.3, respectively, also be required to certify that they are not Korean citizens or owned or controlled by citizens of Korea. This suggestion has merit. But, rather than tying such a requirement to an NVOCC's annual anti-rebating certification, the Commission will, in conjunction with any final rule issued in this proceeding, issue orders pursuant to section 19(6) of the Merchant Marine Act, 1920, 46 U.S.C. app. § 876(6), directing NVOCCs to provide information which would allow the Commission to identify those which are more than 50% owned by citizens of Korea or otherwise controlled by such citizens. NVOCCs so identified would then have their tariffs suspended.

In the interim and as an additional measure, the rule issued this date would suspend the tariffs of NVOCCs having a principal place of business in Korea. The Commission's rules at 46 CFR 580.5(c)(2)(i), presently require that common carrier tariffs contain "the full legal name of each participating carrier,

appropriately identified as a Non-Vessel-Operating Common Carrier or Vessel Operating Common Carrier and the address of its principal office." NVOCCs are also required to identify their principal place of business in their annual anti-rebate certifications filed pursuant to 46 CFR Part 582. Examination of NVOCC tariffs and anti-rebate certifications on file with the Commission has revealed 54 NVOCCs whose tariffs state that their principal offices are in Korea. Appendix A is a list of these NVOCCs. It is presumed that a firm whose principal place of business is in Korea is Korean-owned or controlled. The rule proposed today would therefore suspend the tariffs of each of the NVOCCs named in Appendix A. The suspension would remain in effect indefinitely, until terminated by the Commission.

CONCLUSION

The Commission finds, pursuant to section 19 of the Merchant Marine Act, 1920, and section 585.3(a), (b), (c), and (d) of its Section 19 Regulations, that conditions unfavorable to shipping exist in the foreign oceanborne trades between the United States and Korea, as alleged in Direct Container Line's Petition. As a direct result of Korean laws, regulations, policies and practices, conditions exist which: (1) preclude or tend to preclude non-Korean non-vessel-operating common carriers and freight forwarders from competing in the Trade on the same basis as Korean non-vessel-operating common carriers and freight forwarders; (2) deny non-vessel-operating common carriers and freight forwarders owned and operated by non-Korean nationals equal and effective access to

cargo moving from Korea to the United States; (3) discriminate between non-vessel-operating common carriers and freight forwarders owned and operated by Korean nationals and non-vessel-operating common carriers and freight forwarders owned and operated by non-Korean nationals; and (4) are otherwise unfavorable to shipping in the foreign trade of the United States.

Therefore, pursuant to section 19 of the Merchant Marine Act, 1920, as amended, and the Commission's regulations at 46 CFR Part 585, the Commission hereby grants the Petition of Direct Container Line, Inc. and issues a proposed rule to address the existence of unfavorable shipping conditions in the foreign oceanborne trade between the United States and Korea and prescribes an appropriate remedy or remedies to adjust or meet those conditions. Interested parties are invited to comment on the rule proposed herein.

The Petition of Direct Container Line, Inc. as well as the comments on the Petition are hereby made a part of the record in this proceeding.

List of Subjects in 46 CFR Part 586

Cargo vessels; Exports; Foreign relations; Imports; Maritime carriers; Penalties; Rates and fares; Tariffs.

Therefore, pursuant to section 19(1)(b) of the Merchant Marine Act, 1920, 46 U.S.C. app. 876(1)(b), as amended, Reorganization Plan No. 7 of 1961, 75 Stat. 840, and 46 CFR Part 585, it is proposed to add a section 586.4 to Part 586 of Title 46 of the Code of Federal Regulations to read as follows:

Part 586 - Actions to Adjust or Meet Conditions Unfavorable to Shipping in the U.S. Foreign Trade

Sec.

586.4 Conditions unfavorable to shipping in the United States/Korea Trade ("Trade").

(a) Conditions Unfavorable to Shipping in the Trade.

(1) The Federal Maritime Commission has determined that the Government of Korea ("ROK") has created conditions unfavorable to shipping in the foreign trade of the United States by enacting, implementing and enforcing laws and regulations which unreasonably restrict non-Korean citizens and companies from competing as freight forwarders or non-vessel-operating common carriers to participate in the carriage of general import and export cargoes, in the trade between the United States and Korea on the same basis as Korean citizens and firms owned by Korean citizens.

(2) Korean law unilaterally prohibits the participation of non-Korean citizens and firms owned by non-Korean citizens from operating as freight forwarders, or non-vessel-operating common carriers or other shoreside maritime transportation businesses in the import and export of general cargoes between the United States and Korea. The enforcement of this system discriminates against U.S. maritime companies desirous of participating in the Trade through the operation of businesses in Korea and denies to these transportation firms effective and equal access to import and export general cargoes in the Trade. It also discriminates against shippers whose opportunities to employ these entities and to select a carrier of their choice are restricted and whose ability to compete in international markets is hampered.

(b) Korean non-vessel-operating common carriers--suspension of tariffs.

(1) Each non-vessel operating common carrier whose tariff or anti-rebate certification on file with the Federal Maritime Commission reflects as its principal place of business a place in Korea, named in Appendix A of this section, is hereby presumed to be a Korean-owned or controlled non-vessel-operating common carrier.

(2) The tariff of each non-vessel-operating common carrier named in Appendix A of this section is hereby suspended until further action of the Federal Maritime Commission to terminate the suspension.

(c) Korean freight forwarders--suspension or revocation of licenses.

(1) Pursuant to section 19(1)(b) of the Merchant Marine Act, 1920, 46 U.S.C. app. 876(1)(b), any holder of an ocean freight forwarder license issued by the Federal Maritime Commission pursuant to the Shipping Act of 1984, 46 U.S.C. 1718, and any applicant for such a license, in which a majority interest is held by non-U.S. citizen Korean nationals, is hereby deemed to be ineligible to render forwarding services in the same manner that non-Korean nationals are deemed by the Korean Maritime Business Act to be ineligible to own or operate as freight forwarders in the Republic of Korea.

(2) Any ocean freight forwarder holding a license pursuant to the Shipping Act of 1984, 46 U.S.C. app. 1718, and 46 CFR Part 510,

and any applicant for such a license, which appears to be owned or controlled by non-U.S. citizen Korean nationals, listed in Appendix B of this section [Appendix B to be published with the final rule], will be notified by certified mail, return receipt requested, that its license will be suspended until further notice, or, in the case of an applicant, that its application will be denied, unless it is able to show that it is not and was not on the date of publication of this Proposed Rule owned or controlled by non-U.S. citizen Korean-nationals.

(3) Each such notice shall be served on the individual licensee or applicant at its last known business address and shall include notification of the opportunity to request a hearing on the suspension or denial of a license within 20 days from the receipt of such notification pursuant to the Commission's Rules at 46 CFR 510.15 or 510.16 and the Rules of Practice and Procedure at 46 CFR Part 502. Failure to respond to such notice shall be deemed to constitute admission that the respondent licensee or applicant is owned or controlled by non-U.S. citizen Korean-nationals, and the licensee or applicant shall be notified by Federal Register publication and certified mail, return receipt requested that its license has been suspended, or its application denied.

(4) Each request for a hearing must be accompanied by a statement of the specific basis on which the Commission's determination of Korean ownership or control of the licensee or applicant is challenged.

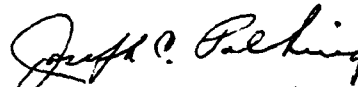
(d) Ocean common carriers--prohibition of payment of freight forwarder compensation or brokerage.

(1) Notwithstanding any provisions in its tariff or tariffs in which it participates to the contrary, each common carrier operating in the U.S. foreign trade with Korea is prohibited from making freight forwarder compensation, brokerage or other payments to freight forwarders, consolidators, cargo brokers or other transportation intermediaries who provide services that facilitate arrangements between shipper and carrier incidental to the ocean transportation on export shipments from Korea to the United States.

(2) Notwithstanding any provisions in its tariff or tariffs in which it participates to the contrary, each common carrier operating in the U.S. foreign trade with Korea is prohibited from paying freight forwarder compensation to any ocean freight forwarder which has been notified by the Commission that its license is subject to suspension pursuant to this Rule and whose name appears in Appendix B of this section [the list to be published as Appendix B to the final rule].

(e) Effective Date. This section is effective on [insert date 30 days from publication of the final rule in the Federal Register], except that section 586.4(d)(2) is effective [insert date 60 days from publication of the final rule in the Federal Register].

By the Commission.


Joseph C. Polking
Secretary

APPENDIX A TO § 586.4
KOREAN NON-VESSEL OPERATING COMMON CARRIERS

1. AUTO-MULTIMODAL EXPRESS LINE INC.
DBA\AMEX LINE INC.
18TH FL., JEIL BLDG.
31-1 2-KA, MYUNG-DONG, CHUNG-KU
SEOUL, REPUBLIC OF KOREA
2. BOGO SHIPPING CO., LTD.
BOGO BLDG. 988-15
DAECHI-DONG, KANGNAM-KU
SEOUL, REPUBLIC OF KOREA
3. BONEX SHIPPING CORPORATION
DBA\BONEX LINE
RM. 1503, SAM KOO BLDG., 70 SOKONG-DONG
CHUNG-KU
SEOUL, REPUBLIC OF KOREA
4. BUM HAN SHIPPING CO., LTD.
24TH FLOOR INTERNATIONAL INSURANCE BLDG
120 5-KA NAMDAEMUNURO
CHUNG-KU, SEOUL, REPUBLIC OF KOREA
5. DAEIL SHIPPING CO., LTD.
SOON HWA BLDG., SUITE 1501
#5-2 SOON HWA-DONG, CHOONG-KU
SEOUL 110-030, REPUBLIC OF KOREA
6. DAERYOO SHIPPING CO., LTD.
RM. 504 MOCKSAN BLDG. #156
JOEKSEON-DONG, JONGRO-KU
SEOUL, REPUBLIC OF KOREA
7. DONG JOO INT'L SHIPPING CO., LTD.
RM. 1210, MARINE CENTER BLDG.
118, 2-KA, NAMDAEMOON-RO, CHUNG-KU
SEOUL, REPUBLIC OF KOREA
8. DONG SHIN SHIPPING CO., LTD.
INTERNATIONAL INSURANCE BLDG, #120
5-KA NAMDAEMUN-RO CHUNG-KU
SEOUL, REPUBLIC OF KOREA
9. DOO RAN SHIPPING CO., LTD.
RM. 905, SAM JUNG BLDG. 69-5, 2-GA
TAEPYUNG-RO, CHUNG-KU
SEOUL, REPUBLIC OF KOREA

10. EASTERN VAN EXPRESS CO., LTD.
16TH KYUNGKI BLDG.
115 SAMKAG-DONG, CHUNG-KU
SEOUL 100-200, REPUBLIC OF KOREA
11. EXPRESS CARGO SERVICE CO., LTD.
602 RM, KOREA YWCA 1-3 1-KA
MYUNG-DONG, CHUNG-KU
SEOUL, REPUBLIC OF KOREA
12. FIRST EXPRESS INTERNATIONAL
394-44, SEO-GYO-DONG, MAPO-KU
SEOUL, REPUBLIC OF KOREA
13. GLORY SHIPPING CO., LTD.
JANGKYO BLDG., #1703
1, JANGKYO-DONG, CHOONG-KU
SEOUL, REPUBLIC OF KOREA
14. GOLDMARINE CO., LTD.
3RD FL, TAE RIM BLDG., 85-13, 4-KA
CHUNGANG-DONG, CHUNG-KU
BUSAN, REPUBLIC OF KOREA
15. GYRO SHIPPING CO., LTD.
IL-JIN BLDG., ROOM 302
#85-11, 4-KA, CHUNGANG-DONG, CHUNG-KU
BUSAN, REPUBLIC OF KOREA
16. HAEWOO AIR & SHIPPING CO., LTD.
FL.7, TAEPYUNG BLDG. 69-20
TAEPYUNG-RO, 2-KA
CHOONG-KU, SEOUL, REPUBLIC OF KOREA
17. HANJOO SHIPPING INT'L CO., LTD.
DBA\HANEX LINE
18, 1-KA, NANDAEMOON-RO, CHUNG-KU
SEOUL, REPUBLIC OF KOREA
18. HERO SHIPPING CO., LTD.
RM 901, TAEPYUNG BLDG.
69-20, 2-KA
TAEPYUNG-RO, SEOUL, REPUBLIC OF KOREA
19. KANA SHIPPING CO. LTD.
RM#901, PAIK NAM BLDG. 188-3, 1-KA, EULJIRO
CHUNG KU SEOUL, REPUBLIC OF KOREA

20. KENNEY TRANSPORT (KOREA), LTD.
MAPO CHANGKANG BLDG., 18-1, DOHWA-DONG
MAPO-KU
SEOUL, REPUBLIC OF KOREA
21. KHEERYOONG COMMERCE & TRANSPORT CO., LTD.
25-5, 1-KA, CHUNGMU-RO, CHUNG-KU
SEOUL, REPUBLIC OF KOREA
22. KOREA EXPRESS CORP.
SUITE #301, HAN-KWANG BLDG. 82-1 4-KA
JUNGANG-DONG, JUNG-KU
BUSAN, REPUBLIC OF KOREA
23. KOREA INTERMODAL TRANSPORT CO., LTD.
15TH FL, MARINE CENTER BLDG., #118
2-KA NAMDAEMUN-RO, CHUNG-KU
SEOUL 100-770, REPUBLIC OF KOREA
24. KOREA LOGISTICS SYSTEMS INC.
12TH FL., JUNG SUCK BLDG.
89-14, 4-KA, CHUNGANG-DONG
CHUNG-KU, BUSAN, REPUBLIC OF KOREA
25. KOREA MARINE TRANSPORT CO., LTD.
15TH FL., MARINE CENTER BLDG. #118
2-KA, NAMDAEMUN-RO, CHUNG-KU
SEOUL, REPUBLIC OF KOREA
26. KUNYOUNG SHIPPING CO., LTD.
TAEYANG B/D 3F, 158-25 DONGKYO-DONG
MAPO-GU
SEOUL, REPUBLIC OF KOREA
27. MASTERS WORLD TRANS CO. LTD.
DBA\MASTERS CONTAINER LINE
RM 810, IL JIN BLDG
50-1 DOWHA-DONG
MAPO-KU, SEOUL, REPUBLIC OF KOREA
28. NAMA AIR CARGO & SHIPPING CO., LTD.
JINHAK BLDG, 201-1 CHUNGJIN DONG
JONGRO-KU
SEOUL 110-130, REPUBLIC OF KOREA
29. NEW WORLD SHIPPING CO., LTD.
17-7, 4-KA NAMDAEMOON-RO
CHOONG-KU, SEOUL, REPUBLIC OF KOREA

30. ORIENT EXPRESS CONTAINER (KOREA) LTD.
168-4 DONGKYO-DONG
MAPO-KU
SEOUL, REPUBLIC OF KOREA
31. ORIENT EXPRESS, LTD.
RM 1102, JEIL BLDG., 31-1 2-KA
MYUNG-DONG, CHUNG-KU
SEOUL, REPUBLIC OF KOREA
32. ORION EXPRESS LINE
3TH FL., SUJIN BLDG., 167-1 DANGJU-DONG
CHONGRO-KU
SEOUL 110-071, REPUBLIC OF KOREA
33. PAN ASIA MARITIME INC.
ROOM 301, NEW SEOUL BLDG., 62-7 2-KA
CHUNGMU-RO, CHUNG-KU
SEOUL, REPUBLIC OF KOREA
34. PAN TRANS INTERNATIONAL FREIGHT SERVICE CO.,L
RM #602 BOKCHANG BLDG.
80 SOKONG-DONG CHUNG-KU
SEOUL, REPUBLIC OF KOREA
35. PRIME CONSOLIDATION LIMITED
RM 905, SUN SHINE BLDG., 11-1 2-GA
CHOONGMU-RO CHUNG-KU
C.P.O. BOX 7125, SEOUL, REPUBLIC OF KOREA
36. PUM YANG SHIPPING CO., LTD.
4TH FLOOR, SOON HWA BLDG.
5-2 SOON HWA DONG, CHOONG-KU
SEOUL, REPUBLIC OF KOREA
37. PUSAN SHIPPING CO., LTD.
6TH FLOOR KCCI BUILDING
4-45 NAMDAEMUN-RO
JUNG-KU, SEOUL, REPUBLIC OF KOREA
38. REGENT EXPRESS KOREA INC.
RM 1405, SAM YOON B/D
63-2 2ND STREET
CHUNGMU-RU, CHUNG-KU, SEOUL, REPUBLIC OF KOREA
39. SEA-ROAD TRANS CORPORATION
DBA\SEA-ROAD INTERNATIONAL
7TH FLOOR, PAIK NAM BLDG. 188-3, 1-GA,
EULJIRO CHOONG-KU
SEOUL, REPUBLIC OF KOREA

40. SEIL SHIPPING CO., LTD.
51-1 NAMCHANG-DONG, CHUNG-KU
SEOUL 100-060, REPUBLIC OF KOREA
41. SELIM SHIPPING CO., LTD.
RM. 703, YOU DONG BLDG.
546, DOHWA-DONG, MAPO-KU
SEOUL, REPUBLIC OF KOREA
42. SHINWOO SHIPPING INC.
RM #401, SAM YANG BLDG.
85-8, 4-KA JUNGANG-DONG
JUNG-KU, BUSAN, REPUBLIC OF KOREA
43. SSANGYONG SHIPPING CO., LTD.
60-1, 3-GA, CHUNG MU-RO, JUNG-GU
SEOUL 100-175, REPUBLIC OF KOREA
44. SUN EXPRESS CORPORATION
780-1, 5-KA, NAMDAEMOON-RO
JUNG-KU, SEOUL, REPUBLIC OF KOREA
45. SUNGWOO SHIPPING CO., LTD.
2ND FL., SAMHEUNG BLDG
10-4 BUKCHANG-DONG CHUNG-KU
SEOUL 100-080, REPUBLIC OF KOREA
46. SUNJIN SHIPPING & AIR CARGO CO., LTD.
80 CHOKSON-DONG (HYUNDAI CHEIL BLDG.)
CHONGRO-KU
SEOUL, REPUBLIC OF KOREA
47. TAE JUNG EXPRESS CO., LTD.
ROOM NO. 521 BAEJAE BUILDING
55-4 SEOSOMOON-DONG CHUNG-KU
SEOUL, REPUBLIC OF KOREA
48. UNI-SEA & AIR FREIGHT CO., LTD.
RM # 405 EUI LIM BLDG., 16-48, 3-GA
HANGKANG-RO, YONGSAN-GU
SEOUL, REPUBLIC OF KOREA
49. UNION EXPRESS, LTD.
392-33, SOKYO-DONG
MAPO-KU
SEOUL, REPUBLIC OF KOREA
50. VANTRANS SERVICE INC.
2ND FL., HAE YANG BLDG.
87-5, 4 KA CHUNGANG-DONG
CHUNG-KU, SEOUL, REPUBLIC OF KOREA

51. WOO SHIN INTERNATIONAL TRANSPORT CO., LTD.
9TH FLOOR ROYAL BLDG 5.
DANGJU-DONG CHONGRO-GU
SEOUL, REPUBLIC OF KOREA
52. WORLD TRANS CORPORATION
RM 1803-5 SAMJUNG BLDG.
69-5, 2-KA TAEPYUNG-RO, CHUNG-KU
C.P.O. BOX 7197 SEOUL, REPUBLIC OF KOREA
53. WORLDSTAR SHIPPING & TRADING CO., LTD.
DBA\WORLDSTAR SHIPPING CO. LTD.
NAMDO BLDG. 1FL., KWANHOON-DONG
CHONGNO-KU
SEOUL, REPUBLIC OF KOREA
54. YKL EXPRESS LIMITED
18FL, BYUCKSAN 125 BLDG.,
12-5 DONGJA-DONG
YONGSAN-GU, SEOUL, REPUBLIC OF KOREA