7A(c)(6) - Federal Maritime Commission

[redacted]

August 7, 1998

BY TELECOPIER (326-2624) AND BY HAND

Richard B. Smith, Esquire
Premerger Notification Office
Bureau of Competition
Federal Trade Commission
Sixth Street & Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Dear Dick:

I am writing to confirm the advice you gave me last Friday, July 31st, that the transaction I described to you then, and which I describe again below in greater detail, falls within the scope of Section 7A(c)(6) of the Clayton Act, 15 U.S.C. §18A(c)(6).

A Corporation (hereinafter "A") and B Corporation ("B") are both foreign persons. A and a wholly-owned subsidiary of B ("B'") have agreed to enter into a joint venture regarding certain of their respective liner shipping businesses. To this

end, they have executed a "Framework Agreement", pursuant to which A will form a new foreign corporation ("C"). A and B* will each contribute assets to C, and B* will receive 50% of the voting securities of C. A will keep the other 50% of the voting securities of C. A and B* are negotiating a "Shareholders' Agreement", which will regulate their relationship with each other vis-à-vis the joint venture. For purposes of this letter, we are assuming that the formation of this joint venture would be reportable under §7A of the Clayton Act unless it is exempt under §7A(c)(6).

Section 5 of the Shipping Act of 1984 (the "Act"), 46 U.S.C. App. §1704, requires that certain agreements among ocean common carriers be filed with the Federal Maritime Commission ("FMC"); and §6(b) of the Act, 46 U.S.C. App. §1705(b), directs the Commission to reject any agreement that does not meet the requirements of §5. The agreements that must be filed are described in §4 of the Act, 46 U.S.C. App. §1703.

Section 6(a) of the Act, 46 U.S.C. App. §1705(a), provides that within 7 days after an agreement is filed, the FMC must transmit a notice of the filing to the Federal Register for publication. Section 6(c), 46 U.S.C. App. §1705(c), provides that an agreement filed under §5 shall become effective on the 45th day after filing or on the 30th day after notice of the

filing is published in the Federal Register, whichever is later, unless the FMC either rejects the agreement or requests additional information or documentary material. If the FMC makes such a request, the agreement becomes effective unless the FMC rejects the agreement within 45 days after it receives all the additional information and documentary material.

Finally, §7 of the Act, 46 U.S.C. App. §1706, provides that the antitrust laws do not apply to any agreement that has been filed under §5 and has become effective under §6.

The staff of the FMC has advised us that an agreement between A and B* with respect to the joint venture must be filed with the FMC pursuant to §5 of the Act; and A and B* intend to do so. Thus, unless the agreement is rejected by the FMC, that agreement will be exempt from the antitrust laws pursuant to §7 of the Act.

As you know, §7A(c)(6) of the Clayton Act provides that a transaction is exempt from the requirements of §7A of the Clayton Act if it is "specifically exempted from the antitrust laws by Federal statute it approved by a Federal agency, if copies of all information and documentary material filed with such agency are contemporaneously filed with the Federal Trade Commission and the Assistant Attorney General." We submit, and you agreed, that (1) the process to be followed at the FMC

concerning the joint venture between A and B* constitutes approval of the transaction by a Federal agency (unless, of course, the FMC rejects the agreement); and (2) therefore, A, B and C do not have to file Hart-Scott-Rodino Notification and Report Forms, but rather need only file with the FTC and the Antitrust Division copies of the information and documentary materials that they file with the FMC.

While this was your final conclusion, and is the position that I am confirming, I also wish to address the concern expressed by Patrick Sharpe of your Office when I talked with him earlier last Friday. As he noted, a leading commentary on Hart-Scott-Rodino states:

> "Although FMC approval exempts from the antitrust laws agreements between carriers that create an ongoing arrangement in which the parties undertake continuing responsibilities (and thus require continuous FMC supervision), the Supreme Court has held that the FMC does not have the authority to exempt one-time acquisition agreements that result in one of the contracting parties ceasing to exist. Thus, even when an acquisition of assets or voting securities, or a merger is subject to the Shipping Act of 1916 and is approved by the FMC, it is not exempt pursuant to Section 7A(c)(6) and thus is subject to the notification and waiting period requirements of Section 7A, unless otherwise exempted by the Act.
>
> "The Shipping Act of 1984 provides immunity from the antitrust laws for certain agreements filed with the FMC relating to international shipping. The act does not apply to acquisitions of assets or voting securities and does not exempt acquisitions or mergers from Section 7A requirements."

S. Axinn, et al., Acquisitions Under the Hart-Scott-Rodino Antitrust Improvements Act §6.06[3][iii] at 6-47-6-48 (1995) (citations omitted). Because of this interpretation of the interplay between §7A of the Clayton Act and the Shipping Act of 1984, Patrick questioned whether the joint venture between A and B* would be exempt under §7A(c)(6).

I note first that perhaps Messrs. Axinn, Fogg, et al. did not intend to include the formation of joint ventures among the "acquisitions of assets or voting securities" to which, according to them, the Shipping Act of 1984 does not apply (and its predecessor, the Shipping Act of 1916, did not apply). If so, their discussion is simply inapplicable here. If, however, they intended to include all joint ventures in their exemption from the Shipping Act of 1984, they were simply mistaken.

The case upon which they rely, FMC v. Seatrain Lines, Inc., 411 U.S. 726 (1973), involved the acquisition by one ocean shipping company of all the assets of another, leaving the seller "as a shell corporation wholly without assets." Id. at 730. The question before the Court was "whether a contract which calls for the acquisition of all the assets of one carrier by another carrier and which creates no ongoing obligations is an 'agreement' within the meaning of this section [of the Shipping Act]", and thus subject to filing with the FMC and exempt from

the antitrust laws. Id. at 728. The Court ultimately concluded that such contracts are not agreements that must be filed, and thus are not exempt from the antitrust laws.

Pace Messrs. Axinn, Fogg, et al., the Court did not hold, or even suggest, that there are any agreements subject to filing under the Shipping Act that would not be exempt from the antitrust laws. It held that the agreement before it was not subject to the Shipping Act, and therefore was not exempt from the antitrust laws.

Furthermore, in reaching this conclusion with respect to the agreement before it, the Supreme Court repeatedly stressed the fact that one of the two parties to that agreement would have no ongoing responsibilities under the agreement. Indeed, the Court held that "Congress intended to invest the [Federal Maritime] Commission with jurisdiction over only those agreements, or those portions of agreements, which created ongoing rights and responsibilities and which, therefore, necessitated continuous Commission supervision." Id. at 729. The agreement between A and B*, by contrast, imposes continuing responsibilities upon each party, and provides for continuing participation by each party in the management of the joint venture. Moreover, A and B* will continue to exist as independent, operating entities after the formation of their

joint venture. Thus, Seatrain does not exempt the agreement between A and B* from the Shipping Act of 1984, or in any way even suggest that the agreement between A and B* will not be exempt from the antitrust laws if it is not rejected by the FMC.

Please call me, a[redacted] if you have any questions about what I have written, or about the transaction I have described. In accordance with the standard practice of the Premerger Notification Office, unless I hear otherwise from you within 3 business days after we deliver this letter to you (i.e., by the close of business on Wednesday, August 12th), we will proceed on the basis that the Premerger Notification Office agrees that the joint venture of A and B* falls within the scope of §7A(c)(6) of the Clayton Act; and therefore A, B and C will not file Hart-Scott-Rodino Notification and Report Forms, but rather will file with the FTC and the Antitrust Division only the information and documentary material that they file with the FMC.

I again thank you and Patrick for the time you spent discussing this matter with me last Friday.

Best regards.

Sincerely[redacted]

8/12/98 Advised writer that in the view of the PMN Office (after consultations with J. Sidorov at DOJ) [illegible] Sec. §1703(c) of Title 46 does not exempt from HSR filing any joint venture formation (such as the one described in this letter) since the [illegible] will be taking back voting stock. If the requirements of 801.40 are met, [illegible] filing (or filings) must [illegible] The writer [illegible] [illegible] FMC and make an HSR filing, [illegible] Sec. 1703 (c) [illegible]

of this Act to the Code, see Short Title note set out under section 1311 of Title 15 and Tables.

AMENDMENTS

1986—Par. (6)(B). Pub. L. 99-309, § 11(1), inserted provision that "common carrier" not include common carrier engaged in ocean transportation by ferry boat, ocean tramp, or chemical parcel-tanker, and defined "chemical parcel-tanker".

Par. (18). Pub. L. 99-307, § 11(2), struck out "; but the term does not include one engaged in ocean transportation by ferry boat or ocean tramp" after "common carrier".

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 1241g, 1707a, 1710a, 1907 of this Appendix; title 18 section 1641; title 49 section 5901.

§ 1703. Agreements within scope of chapter

(a) Ocean common carriers

This chapter applies to agreements by or among ocean common carriers to—

(1) discuss, fix, or regulate transportation rates, including through rates, cargo space accommodations, and other conditions of service;

(2) pool or apportion traffic, revenues, earnings, or losses;

(3) allot ports or restrict or otherwise regulate the number and character of sailings between ports;

(4) limit or regulate the volume or character of cargo or passenger traffic to be carried;

(5) engage in exclusive, preferential, or cooperative working arrangements among themselves or with one or more marine terminal operators or non-vessel-operating common carriers;

(6) control, regulate, or prevent competition in international ocean transportation; and

(7) regulate or prohibit their use of service contracts.

(b) Marine terminal operators

This chapter applies to agreements (to the extent the agreements involve ocean transportation in the foreign commerce of the United States) among marine terminal operators and among one or more marine terminal operators and one or more ocean common carriers to—

(1) discuss, fix, or regulate rates or other conditions of service; and

(2) engage in exclusive, preferential, or cooperative working arrangements.

(c) Acquisitions

This chapter does not apply to an acquisition by any person, directly or indirectly, of any voting security or assets of any other person.

(Pub. L. 98-237, § 4, Mar. 20, 1984, 98 Stat. 70.)

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 1704 of this Appendix.

§ 1704. Agreements

(a) Filing requirements

A true copy of every agreement entered into with respect to an activity described in section 1703(a) or (b) of this Appendix shall be filed with the Commission, except agreements related to transportation to be performed within or between foreign countries and agreements among common carriers to establish, operate, or maintain a marine terminal in the United States. In the case of an oral agreement, a complete memorandum specifying in detail the substance of the agreement shall be filed. 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.

(b) Conference agreements

Each conference agreement must—

(1) state its purpose;

(2) provide reasonable and equal terms and conditions for admission and readmission to conference membership for any ocean common carrier willing to serve the particular trade or route;

(3) permit any member to withdraw from conference membership upon reasonable notice without penalty;

(4) at the request of any member, require an independent neutral body to police fully the obligations of the conference and its members;

(5) prohibit the conference from engaging in conduct prohibited by section 1709(c)(1) or (3) of this Appendix;

(6) provide for a consultation process designed to promote—

(A) commercial resolution of disputes, and

(B) cooperation with shippers in preventing and eliminating malpractices;

(7) establish procedures for promptly and fairly considering shippers' requests and complaints; and

(8) provide that any member of the conference may take independent action on any rate or service item required to be filed in a tariff under section 1707(a) of this Appendix upon not more than 10 calendar days' notice to the conference and that the conference will include the new rate or service item in its tariff for use by that member, effective no later than 10 calendar days after receipt of the notice, and by any other member that notifies the conference that it elects to adopt the independent rate or service item on or after its effective date, in lieu of the existing conference tariff provision for that rate or service item.

(c) Interconference agreements

Each agreement between carriers not members of the same conference must provide the right of independent action for each carrier. Each agreement between conferences must provide the right of independent action for each conference.

(d) Assessment agreements

Assessment agreements shall be filed with the Commission and become effective on filing. The Commission shall thereafter, upon complaint filed within 2 years of the date of the agreement, disapprove, cancel, or modify any such agreement, or charge or assessment pursuant thereto, that it finds, after notice and hearing,