

## ANTITRUST MODERNIZATION COMMISSION

## PUBLIC HEARING

Wednesday, October 18, 2006

Federal Trade Commission Conference Center  
601 New Jersey Avenue, N.W.  
Washington, D.C.

The hearing convened, pursuant to notice, at 1:09 p.m.

## PRESENT:

DEBORAH A. GARZA, Chairperson  
JONATHAN R. YAROWSKY, Vice Chair  
BOBBY R. BURCHFIELD, Commissioner  
W. STEPHEN CANNON, Commissioner  
MAKAN DELRAHIM, Commissioner  
JONATHAN M. JACOBSON, Commissioner  
DONALD G. KEMPF, JR., Commissioner  
SANFORD M. LITVACK, Commissioner  
JOHN H. SHENEFIELD, Commissioner  
DEBRA A. VALENTINE, Commissioner  
JOHN L. WARDEN, Commissioner

## ALSO PRESENT:

ANDREW J. HEIMERT, Executive Director and General  
Counsel

SUSAN S. DESANTI, Senior Counsel  
WILLIAM F. ADKINSON, JR., Counsel  
NADINE V. JONES, Counsel  
MARNI B. KARLIN, Counsel  
HIRAM R. ANDREWS, Law Clerk  
CHRISTOPHER N. BRYAN, Paralegal  
KRISTEN M. GORZELANY, Paralegal

## CONTENTS

**Statutory Immunities and Exemptions: The Shipping Act**

## Panelists:

- FABRIZIA BENINI, European Commission,  
Directorate General - Competition
- STEVEN R. BLUST, Federal Maritime Commission
- JEAN GODWIN, American Association of Port  
Authorities
- EDWARD GREENBERG, Galland, Kharasch,  
Greenberg, Fellman & Swirsky, P.C.  
(*On behalf of the National Customs  
Brokers and Forwarders Association of  
America*)
- PROF. CHRISTOPHER SAGERS, Cleveland State  
University, Cleveland-Marshall College  
of Law (*On behalf of the American Bar  
Association*)
- STANLEY SHER, Sher & Blackwell (*On behalf  
of the World Shipping Council*)
- GREG P. STEFFLRE, Rail Delivery Services,  
Inc. (*On behalf of the Intermodal  
Motor Carriers Conference*)

These proceedings were professionally transcribed by a court reporter. The transcript has been edited by AMC staff for punctuation, spelling, and clarity, and each witness has been given an opportunity to clarify or correct his/her testimony.

## PROCEEDINGS

CHAIRPERSON GARZA: All right, I would like to begin the hearing.

We have a very large panel to fit into a short amount of time. So we are going to jump right to it.

First of all, I want to thank you very much for being here, for submitting your written comments and for agreeing to come here and take our questions. I want to thank the members of the audience for showing interest in our hearing this afternoon.

I want to just explain to the panelists, very quickly, how we are going to proceed. First, we will give each of you an opportunity, which you can pass on if you like, but we will give each of you an opportunity to make a short statement, summarizing your testimony or views.

Because we have a short amount of time and a lot of you, I would ask that you please keep your opening statements to five minutes. To help you do that, there are some lights in front of me and in front of Mr. Greenberg - between Ms. Godwin and Mr. Greenberg - that will turn from green, to yellow, to red. Green means you're fine; yellow means you are coming to two minutes; and then red, of course, means that your time has expired.

So we ask that you try to keep an eye on that and help us to get you out on time by keeping to five minutes.

After that will be the questioning by the

Commissioners. The way we proceed is that we usually have one lead questioner for the Commission who'll take 20 minutes to pose questions. Today, that will be Commissioner Shenefield.

After Commissioner Shenefield is done, each of the other Commissioners who are here will get an opportunity to put questions to all or one of you. And each of the Commissioners will take five minutes.

So that is how we are going to proceed. We are not going to swear you in or anything. I am going to apologize in advance if I mispronounce anyone's name. I will do my best not to do that.

COMMISSIONER CANNON: Madam Chairman?

CHAIRPERSON GARZA: Yes?

COMMISSIONER CANNON: One thing for the record?

I just wanted to note that our law firm represents the Intermodal Motor Carriers Conference. I know that does not recuse me, but I just wanted to put that on the record.

CHAIRPERSON GARZA: Very good.

We will start with one of our two officials. So I am going to start with Ms. Benini, and then go to Mr. Blust, and then down the row.

Ms. Benini, if I can ask you to go ahead, if you care to, and give your statement.

MS. BENINI: Thank you very much, Madam Chairman. Thank you for inviting me here, today.

My name is Fabrizia Benini, and I work for the

European Commission's Directorate General for Competition.

Now, as you may know, on the 25th of November, 2006, the European Union unanimously voted to put an end to the possibility for shipping liners to meet in conferences, fix prices, and regulate capacities. This regulation had been in place in the European Union since 1986 on the presumption that price-fixing was necessary for the provision for reliable lines of services.

But price-fixing and capacity regulation are hardcore restrictions of competition. This means that they are likely to produce a negative effect without producing a countervailing value to consumers. As such, they are prohibited in the European Union.

On the other hand, in the European Union, agreements that restrict competition are allowed only to the extent that they fulfill four cumulative conditions. In other words, they generate efficiencies, such that consumers receive a fair share of the benefits so as to outweigh the anticompetitive effect they produce.

From 2003 to 2006, the European Commission has reviewed the liner conference block exemption, setting out to determine whether these four conditions were still being fulfilled by conferences in today's market conditions.

The first question we set out to determine was whether there was a direct link between price-fixing and capacity regulation on the one hand, and the provision of reliable liner service. What we found is that conferences do

not provide a service; their members do, individually or together with other carriers, members or outsiders to conferences. Conferences are not able today to enforce the conference tariff. They do not regulate capacities. These are individual decisions that are made at carrier level.

Moreover, the majority of cargo is carried under individual service contracts, which are negotiated confidentially between individual shippers and carriers. And, in the transatlantic trade, almost all cargo - I am talking in the vicinity of 90 percent - is carried under individual service contracts, rather than under the conference tariff.

The same picture is present, albeit in the lower percentages, in other trades from the European Union. Conferences, therefore, do not have a pivotal role in the provision of reliable liner services.

The second question we examined was to establish whether conferences achieved economic benefits, and whether these were being passed on to consumers. A study carried out by the liner industry itself showed that, in the Northern Europe/Asia trade, conference members were receiving higher ocean freight rates than independent carrier lines.

Most importantly, shippers in the European Union have always demanded the abolition of the conference system, which they believe generates higher prices. Although conferences are not able to enforce the tariff, as I said before, the tariff still acts as a benchmark in the

negotiation of individual service contracts. And this, according to shippers, means that the negotiation is not free. Most importantly, conferences still fix, and are able to enforce, charges and ancillary charges. This is a part of the price of transport, which accounts for an average of 30 percent of the total price of exporting goods. I am talking about in E.U. trades, of course. These charges are also followed by independent carriers who are not part of conferences. We consider that the repeal of the liner conference block exemption will, because of this, result in lower transport prices in European trades.

The third test we carried out was to ascertain whether there was an alternative that was less restrictive than price-fixing and capacity regulation, but that ensured the provision of reliable services. Today, we see that there are independent operators. We see that there are some trades where conferences do not exist. And, of course, consortia and alliances are examples of reliable liner services provided by the industry without carriers meeting to discuss prices or, indeed, capacities.

We looked into whether conferences eliminated competition. We found that they do not, but, to the extent that part of the price - that 30 percent that I was mentioning before - is fixed jointly and is enforced by carriers inside and outside conferences - indeed, for this part of the price - eliminate competition.

Finally, we believe that our decision to abolish

the liner conference block exemption in October 2008, is procompetitive, and it is compatible with the way industry works in providing Europe with a reliable liner service system. It is also the result of extensive consultation, both with carriers and shippers.

Shipping lines will still have the opportunity and the capacity to enter into extensive horizontal cooperation amongst each other, and this is protected in the European law system, and in the liner consortia block exemption regulation. The only thing we request here is that there is actually a benefit for consumers in the form of a joint service.

Moreover, to ease the way for a fully competitive regime, the European Commission will issue, before October 2008, guidelines explaining how competition law applies to the liner sector, as indeed was requested to us by industry.

Thank you very much for your attention, and I will be happy to answer any questions that you may have.

CHAIRPERSON GARZA: Thank you.

Mr. Blust?

MR. BLUST: Chairperson Garza, Vice Chair Yarowsky, Commissioner Shenefield, and other Commissioners, thank you for this opportunity to address and answer any questions that you may have today.

I am Steve Blust, the Chairman of the Federal Maritime Commission.

I have, joining me today, in the audience,

Commissioner Paul Anderson, who is in the back of the audience.

I am pleased to discuss with you today the Shipping Act and the FMC's oversight of agreements between and among ocean carriers and U.S. marine terminal operators. I believe that the Shipping Act and its recent modifications are working as they were intended by Congress.

To the extent that any future reforms may be warranted, Congress has provided the FMC with exemption authority that can be, and has been, used for that purpose. I hope that I can assist the AMC as it strives to fulfill its mandate by clarifying and elaborating on the FMC's controlling statutes and the state of international shipping, generally, during this testimony. I will leave it to the other members of this panel of experts to describe the impacts on their particular segments of the industry.

I came to the Commission in 2002, a little over four years ago, with over 30 years of experience in the industry as it regulates ocean carriers, in which I was an executive of public port authorities, and a marine terminal operator.

As a graduate of the U.S. Merchant Marine Academy, combined with my industry experience, and having the four years now at the Commission, I think I can speak with some authority, both from the government perspective, as well as the outside perspective, about the Commission and about the Shipping Act.

The international shipping industry is not just vessel-operating common carriers, but it is also marine terminal operators, marine transportation intermediaries that serve the U.S. foreign trades, and have been regulating - as an oversight - at the FMC since 1916, 90 years.

The limited antitrust immunity provided to the agreements under the Shipping Act has been one piece of an integrated regulatory system for ocean-borne transportation in U.S. foreign commerce.

Congress has recently reviewed this approach. The major changes made to the regime in 1998 were completely shifting the focus away from public tariff rates to confidential service contracts. We estimate that, presently, over 80 percent of the commerce moving in common carriage to and from the United States is carried under such confidential service contracts. We have also seen significant declines in liner rate conferences.

In addition, the drafters of the Ocean Reform Act encouraged the Commission to use its exemption under Section 16 of the Shipping Act and gave us a greater ability to deregulate where doing so would not cause reduction in competition or be detrimental to commerce. The Commission has used this deregulatory authority not only to lift the burdens on the industry where regulation was determined to be unnecessary, but also to enhance competition among different segments of the industry.

There are two ways that this has been accomplished.

First, through revision of our own regulations to streamline, modernize, focus information, how we receive it and how we review it, and also through exemption rules. I have discussed these two methods in my written testimony, and examples of each are provided, namely, the Commission's revisions to its agreement rules, which recently went into effect, and the Commission's NSA exemption rules.

Of course, one of our regulatory duties that I consider crucial is the review and monitoring of ocean carrier and marine terminal operator agreements. Once filed and reviewed by the Commission, these agreements are generally exempt from prosecution by the Department of Justice, by the Federal Trade Commission, and by private complaints under antitrust laws.

I believe that we do an extremely good job. Indeed, I believe the Commission's scrutiny is more intense and consistent than would be the case if there were not an expert agency to regulate this industry. The Commission's economists and trade analysts have a deep understanding and expertise in ocean transportation, and they do a superb job of monitoring and anticipating the effects of filed agreements.

The Shipping Act requires that all agreements be filed with the Commission, and the Commission publishes a notice of the agreement that includes a description of the agreement and parties to the agreement for public comment. Agreements are also available in their entirety to the

public.

Depending upon the authority contained in an agreement, it may be subject to an information form filing, contemporaneous with the filing of the agreement itself, which includes, among other things, data on service, capacity utilization, market shares, revenues, most important commodities, as well as a narrative statement regarding the agreement.

Once an agreement is effective, it may be subject to quarterly monitoring, reporting requirements, and the monitoring reports must contain, among other things, data on service, vessel capacity, utilization, market shares, revenues, and, again, major commodities. Agreements may also be required to file the minutes of their meetings.

Furthermore, speaking as someone with a long history in this business, I can personally tell you that, even though carriers can cooperate as they wish through their filed agreements without fear of reprisal under antitrust laws, competition today is very intense. And it seems to me that the antitrust authorities do not disagree with this on a practical level, although they may theoretically disagree. As stated, their mission is to repeal all immunity.

The merger review authorities have opposed none of the significant acquisitions that have been made over the course of the last decade, and there have been many.

The Shipping Act of 1984, as amended by the Ocean Shipping Reform Act of 1998 and implemented by the FMC, has

created a regulatory environment that has successfully achieved Congress's intent and contributed to today's relatively harmonious relationship between shippers and carriers.

To the extent that shippers and carriers need help from Congress, it is with the pressing problems of maintenance and expansion of freight infrastructure, the reduction of port-related congestion, and the environmental concerns related to international transportation. The antitrust immunity provided under the Shipping Act has been utilized currently to provide opportunity to discuss these issues and find solutions to achieve greater transportation efficiencies in the process.

Vessel operators and marine terminal operators use this authority in agreements filed under the Shipping Act to address infrastructure limitation and constraints, such as agreements to share chassis equipment and to make technological advances to provide better service to their customers, such as internet portals.

Carriers and MTOs also have agreements to address and coordinate their mutual efforts on the implementation of security measures, and to address port inland congestion issues and develop infrastructure capacity.

Thank you very much, and I apologize for running over the time.

CHAIRPERSON GARZA: That is all right.

Ms. Godwin.

MS. GODWIN: Thank you, Madam Chairwoman, and members of the Commission.

I am Jean Godwin; I am the Executive Vice President and General Counsel of the American Association of Port Authorities, or AAPA.

Founded in 1912, AAPA is an alliance of the leading public ports in the Western Hemisphere, and our testimony today represents the views of our 80+ U.S. port members.

Port authorities develop, manage, and promote the flow of water-borne commerce, and also act as catalysts for economic growth in their state, their counties, and their cities. Public ports own, develop, and maintain marine terminal facilities, some of which are leased to private terminal operators.

U.S. ports handle 99 percent of this nation's overseas cargo by volume. While the cargo tonnage and passenger count numbers that go through America's ports are already staggering, projections are even larger. The nation's cargo volumes are expected to double by 2020, and passenger counts on cruise lines will also more than double.

Terminal development is a key priority at America's seaports, as they plan for this unprecedented projected increase in overseas cargo trade. Without significant increases to port development investments, currently running at about \$2.1 billion a year nationwide, efficiency at America's ports will surely suffer, as will industries that rely on these goods, and, ultimately, U.S. consumers.

The next 15 years will be very challenging, since the U.S. marine terminal industry needs to find the resources to fund the infrastructure, technology, terminal access, and personnel improvements that will ensure America's ports are able to accommodate the huge influx of trade, while, at the same time, meeting security requirements, and addressing environmental needs.

AAPA believes that the 1998 amendments of the Shipping Act have worked well and that they do meet the needs of the U.S. public port community, as well as the needs of U.S. trade generally. My written testimony includes numerous examples of the ways ports and marine terminal operators utilize the antitrust immunity to work cooperatively in a number of ways. For example, to address port infrastructure and environmental programs, including measures to improve air quality by reducing emissions from port-related activities, discussing labor allocation issues, and promoting consistent labor practices - for example, along the West Coast, discussing security practices and setting security user fees, and addressing congestion through the use of chassis pools, by promoting the use of night gate hours and other industry practices.

The ability of ports to meet collectively to address these challenges with antitrust immunity under the Shipping Act is extremely important. Our nation's ports are valuable public resources, which play a major role in the health and vitality of regional, state, and national

economies.

The limited antitrust immunity that ports enjoy facilitates appropriate discussion before operational, pricing, or significant policy changes occur at one port, which may have detrimental, and perhaps unknown, effects on other ports. Antitrust immunity allows multiple ports to participate in infrastructure development projects or security programs, for example, which may benefit more than one port. In these cases, significant costs can be appropriately shared, and unnecessary expenses kept to a minimum.

The limited antitrust immunity granted to U.S. public ports continues to play an important role in facilitating discussions that have greatly improved the operational efficiency of our ports, that have promoted very significant environmental improvements to port operations, that have helped to manage potential labor issues, including worker shortages, that have led to more secure facilities, and that have assisted in the development of key infrastructure projects of regional and national significance, all the while maintaining healthy competition in the goods movement marketplace.

I do hope that you have a chance to look at the examples included in the testimony.

In conclusion, AAPA supports the Shipping Act and the related antitrust exemptions in the maritime industry, which permit ports and marine terminal operators to work

cooperatively to address a multitude of challenges.

Thank you and I will be happy to answer any questions.

CHAIRPERSON GARZA: Thank you.

Mr. Greenberg.

MR. GREENBERG: Thank you, Chairwoman Garza and Commissioners. I appreciate the opportunity to appear here and give our views.

My name is Ed Greenberg. I am a partner in the Washington, D.C., law firm of Galland, Kharasch, Greenberg, Fellman, & Swirsky. I also have the honor of being counsel to the National Customs Brokers Forwarders Association of America, which is a trade association that represents, as is relevant here, the ocean forwarders and NVOCCs, non-vessel operating common carriers, that are engaged in the U.S. export-import ocean trades.

Since it is possible that the term "non-vessel operating common carrier" of NVOCC, might be somewhat unfamiliar, I thought it might be helpful to provide you with a small example of what it is that they do. As an example I tend to use for people, I think of a piano manufacturer in Bloomington, Indiana, who sold his latest masterpiece to a buyer in Germany. If this person really wanted to do it himself, he could get on the internet and figure out a way to get all the necessary information to have the piano packed and crated, trucked to a rail depot in Chicago, moved, by rail, to New York, offloaded there and stuffed with other

goods into a container, prepare the necessary export documentation required by the various U.S. agencies with jurisdiction over the exports, book a slot on a vessel, have the container shipped to Antwerp, arrange for customs clearances at the port, have the container stripped at the port, and have the crate with his piano moved, by rail or truck, to Munich.

He could do that. Or he could place a single phone call to an ocean forwarder or an NVOCC who would do all of this itself. And they are able to do this and charge a lower price than he could possibly get himself because they are able to consolidate the goods into a single container, and they have the necessary logistical network that is required to get the goods moved to their ultimate destinations.

Now, NVOs have a very significant role in ocean transportation. And while it is not clear exactly what the market statistics really are here, anecdotally, what you typically hear is that NVOs typically control somewhere between 40 to 50 percent of the containerized cargo moving into or out of the United States. So they play a key role here. The question is, why are we here, or why are NVOs here, today?

The reason really is that there are two roles that NVOs play. As I explained in my paper, NVOs wear two hats. They are both a carrier, in their relationship to the shipper, and they are also a shipper in relationship to the carrier, because, after all, it requires them to be able to

tender cargo to the ocean carriers. It is in their role as shippers that NVOs are directly affected by the collective activity of steamship lines.

In our paper, I described a situation in which the ocean carriers, controlling virtually 100 percent of the capacity in the vitally important transpacific trades, had collectively determined to discriminate against NVOs by refusing to negotiate new service contracts with them until the lines had locked up their champion accounts, and also by imposing discriminatory rate surcharges on NVOs.

To its credit, the FMC took very prompt and significant action. They conducted an investigation that brought this action to a halt, imposed a substantial fine on the carriers, and imposed certain changes in the Transpacific Stabilization Agreement. But market-distorting behavior made possible only by collective activity of steamship lines need not be quite as obvious as the activities that were conducted there to have the same kind of pernicious effects on the trade.

Under their immunized agreements and the voluntary guidelines - the agreements publish recommended rates for the member steamship lines to follow in contract negotiations. This is followed up by periodic recommendations of general rate increases, peak season surcharges, bunker surcharges, and enough other types of additional charges that would make your head spin.

This is significant for a couple of reasons. The

first reason is, these additional charges are very significant. They are often much higher than the basic freight rate.

The second issue is that the service contracts typically offered to all but those few shippers that have very substantial economic leverage are essentially illusory from a rate standpoint.

These freight charges that are imposed on the shippers can be changed unilaterally almost at will, by adding new surcharges or increasing the costs of existing ones. So you have a contract that says, this is what the rate it is, but it also has a provision that says it all can be subject to any surcharges that are published in the tariff from time to time. Very few shippers, including NVOs, are able to negotiate their way out of those.

A second contemporary example of the problem that faces NVOs today was exemplified in the statement that was submitted by the Intermodal Motor Carriers Conference, and that relates to the collective imposition of rules relating to free time and detention. So these are costs that are passed on. If they are not absorbed by the truckers, they are absorbed by the NVOs or the shippers.

Now, despite its efforts, it is difficult for the FMC to control this situation. As indicated by Chairman Blust, the agency has 123 employees, but there are 219 approved agreements currently on file, 29 of them are rate discussion agreements. Very difficult to police.

In our view, antitrust immunity, as we have explained in our paper, is an anachronism, and does not appear to serve any legitimate purpose of which we are aware. But if it is to continue, the changes that are recommended in our paper should be adopted as a minimum, and the FMC staff budget and investigative tools need to be strengthened.

Thank you very much for your attention.

CHAIRPERSON GARZA: All right. Thank you.

Professor Sagers.

MR. SAGERS: Yes. Thank you.

I believe Commissioner Shenefield wanted to make a brief comment before I went; is that not correct?

COMMISSIONER SHENEFIELD: After the hearing I want to address a footnote in your article.

MR. SAGERS: Okay.

Thank you, Madam Chair. I am Chris Sagers. I teach administrative law and antitrust law at Cleveland State University.

I am here in a representative capacity on behalf of the Section on Antitrust Law of the American Bar Association. I should be clear; the comments that were submitted were submitted on behalf of the Antitrust Section, and not the ABA proper.

I came to this project by having worked on a monograph book project for the Section of Antitrust Law concerning all of the antitrust immunities, a chapter of which deals with the Shipping Act. And, following that, I

was asked to draft the comments that were submitted on behalf of the Antitrust Section.

I am going to try to be very brief. In particular, I will not repeat comments that were already made, but I think a few points could be added that are important here.

First of all, I think a fair summary of the position of the Antitrust Section might be something like the following: if it really is true, as the Section believes, that there is not a meaningful economic distinction between the shipping industry, that is, the industry of ocean common carriers and a number of other industries that operate in a healthy manner under full exposure to antitrust laws - if that is true, but if it is also true that we should preserve the immunity that continues under the Ocean Shipping Reform Act, then there is no reason that a similar immunity should not apply broadly throughout the U.S. economy. And I do not want to overstate it, but a person might say, if that situation should continue, we should repeal the Sherman Act, or at least large sections of it.

CHAIRPERSON GARZA: Be careful what you say with this Commission.

[Laughter.]

MR. SAGERS: I understand.

COMMISSIONER JACOBSON: That was not serious.

CHAIRPERSON GARZA: The record will reflect laughter.

MR. SAGERS: Yes, indeed.

As a starting point, I think that anybody who believes in competition has to believe that the Ocean Shipping Reform Act of 1998 was a good thing. It accomplished something good. And the regime that exists under that statute is preferable to the one that preceded it.

But the real question, and I gather the question that is before the Commission, is whether the antitrust exemption that still exists under OSRA is a good thing. To answer that question, I think we have to be clear about just what the immunity is, that is, what exactly is permitted under this statute.

It is true, as a number of the comments have said, that the immunity is limited, in some sense. That is, not all types of agreements that ocean common carriers could be involved in are subject to this immunity. And some conduct that they might engage in, as part of entering into some agreements, is not within the immunity.

But that said, to call this immunity a limited one is really quite misleading, because, in fact, as to all the agreements to which the immunity applies, which is a fairly broad range of agreements, virtually anything is permitted. Virtually anything is permitted, including naked horizontal restraints on price and output. Indeed, in working on the antitrust exemptions monograph on behalf of the Section, we looked at, if I am not mistaken, 23 or 24 different statutory exemptions. This particular exemption is substantially broader than that in almost any other statutory exemption

that exists.

It is a rare situation under current U.S. antitrust law that a given industry enjoys a blanket immunity for naked horizontal restraints on price and output. So it is a broad one. Just to be clear, within that broad immunity, which is essentially total protection - when an agreement falls within that immunity, the protection is virtually total - carriers can and do engage in price-fixing agreements, output restraints, and voluntary guidelines that are said to be non-binding, but it appears they have some very significant binding effect, and the agreements for setting terms in service contracts, as well as what appear to be very significant exchanges of information among carriers -

An obvious response will be that this is okay because market conditions in this particular industry make it unlikely that the industry will desire, or will be able to, engage in abuses of anyone that exercises that immunity. In particular, it said that abuses would be restrained by the freedom of individual carriers to enter into service contracts. But I think there are two critical responses to that.

First of all, again, there does not appear to be any meaningful difference, in an economic sense, between this industry and many other markets that are subject to unrestrained antitrust.

And second, there is, apparently, pretty significant evidence that this immunity has been abused, to

the detriment of shipping customers.

And, just to give a few examples - really, I will just give one example, because my other example has already been pointed out. (Ms. Benini and Mr. Greenberg have pointed out that voluntary discussion agreements concerning prices and service terms for services that are provided in addition to the base rate appear to have been used to fix a pretty substantial portion of rates charges in individual service contracts in at least some markets.) Another big example is that it was a tradition throughout the history of the industry to engage in the so-called "general rate increase," or GRI.

GRI's have continued since OSRA. If there were no fear of anticompetitive abuses through allegedly non-binding agreements, or nominally binding agreements, which are subject to disciplinary competition through independent service contracting, then presumably it would not be worth the effort of going through the negotiation and enforcement of a general rate increase; and yet, the industry has done them.

So, while it is true that something like 95 percent of ocean cargo now moves under independent service contracts, they appear to have been pretty severely constrained through the immunity that still exists.

And I see that I am about out of time, and I apologize; I do want to make one last comment, and I will be very brief.

It is true, as Chairman Blust says, that the FMC does have some rulemaking power and enforcement power that should address some of these concerns. With all very genuine respect, I believe that the rulemaking authority is not likely to be of much use in this case, because of the terms of that authority. And I will elaborate, if anyone would like me to.

Second, the enforcement power, while it is genuine and, no doubt the FMC has done a good job - I agree with Mr. Greenberg that the agency is constrained both by the statute and by resources.

Thank you.

COMMISSIONER GARZA. Thank you.

Mr. Sher.

MR. SHER: Good afternoon.

My name is Stanley Sher. I am a partner in the Washington, D.C. law firm of Sher and Blackwell. I am testifying here today on behalf of the World Shipping Council.

The Council is the trade association that represents liner shipping companies. We very much appreciate the opportunity to share our thoughts with the Commission.

In the brief time I have, I want to focus on one area, and that is the facts, the facts about liner shipping. Justice Brandeis, some 88 years ago, said it best in looking at how to analyze an antitrust issue. He said, "The true test is whether the restraint imposed merely regulates and,

perhaps, thereby promotes competition, or whether it may suppress or destroy competition. To determine that question, we must consider the peculiar facts."

He went on to list the number of facts, emphasizing the restraint - we must look at the restraint, its effect, actual or probable, and all relevant facts. Obviously, this is a judicial interpretation, but I quote it because I believe that it is a sound framework for analysis by Congress, by the courts, and by this Commission.

What the court was saying was that, in antitrust law and in antitrust policy, the facts matter. The facts matter, and the facts, in this industry - and I am talking the big facts, from 30,000 feet, are virtually undisputed.

First, U.S. foreign trade is growing rapidly. The carriers have also grown rapidly and have met the demand of that growth. Nearly 26 million cargo containers per year, half a million containers every week, transit U.S. ports. In 1998, when the Ocean Shipping Reform Act was first adopted, there were just 15 million containers. So we have had an increase of 73 percent in 7 years.

Second, the liner shipping industry's response to that massive growth in trade has been a corresponding parallel massive investment in ships, terminals, containers, and information technology. The services are frequent, reliable, and cheap, and I use the word advisedly, "cheap."

Third, at the end of the day, only two things matter to consumers: service and price. No one, as far as I

am aware, questions that U.S. shippers have frequent sailing, reliable service, and choices that are continuously expanding. And all of the indicators show that the rates are reasonable, whether measured by historical rate studies, carrier profitability, margins, or returns on equity.

And the fourth undisputed point, which is apart from economics, is that the present U.S. legal regime under which the carriers are regulated has been universally praised, even by those opposed to the exemption.

This was a difficult compromise reached in 1998. It was reached with carriers, shippers - and I emphasize shippers, the customers - ports, and labor. When Congress enacted the 1998 change, it effectively dismantled the conference system and put in place a far more competitive, flexible system. I was going to resist - maybe it is a pun, but Congress modernized the antitrust laws as they applied to ocean shipping.

All of this is on one side of the scale. Weighed against this very positive factual background is the economic theory, namely that competition is the guiding principle of our nation's economy, and correspondingly, exemptions from the antitrust laws should be viewed narrowly and skeptically.

I do not quarrel with those principles. We certainly do not quarrel with those general concepts. But, as Justice Brandeis pointed out, you cannot substitute the facts for the concept. We must look at the facts and apply them to the concept. And what the facts show is that the

system is working remarkably well. Service is good. Rates are low. The booming economy is being handled more than efficiently.

Now, I do not want to overstate the case. I cannot claim that the liners' shipping ability to deal with this problem so successfully is solely the result of the Shipping Act or solely the result of the antitrust exemption. There are a number of factors that go into it.

But at the same time, however, it would border on the irresponsible not to recognize that the existence of a fair, stable, predictable, and flexible legal regime is important and, perhaps, crucial, to the continued ability of the industry to meet the demands of the country for expanding international trade.

The liner shipping industry is the pipeline that delivers for many sectors of our economy. Today, that pipe is wide, straight, and clear. The conditions that made it that way should not be altered unless there is good reason. Assuming that Congress wants substantive recommendations from this Commission on the antitrust exemption and the Shipping Act, I do believe that Congress is not asking for recommendations from you based solely on abstract economic theory. If so, it would scarcely have created a Commission, let alone one made up primarily of practitioners.

I see my time is up. My final point is this: If the Commission decides to make any substantive recommendation about the Shipping Act, I

respectfully submit that it is incumbent on you to look at all of the facts that are relevant to that exemption. Once that factual analysis is done, and only then, would it be possible to properly address the question of whether any adjustment is necessary.

Thank you.

CHAIRPERSON GARZA: Thank you.

Mr. Stefflre.

MR. STEFFLRE: I am Greg Stefflre. I am here on behalf of the ATA and the Intermodal Motor Carrier Conference. I appreciate the opportunity to present our views.

I am a lawyer by training as well, but I am a transportation lawyer, so the entire concept of antitrust law is not one with which I am greatly familiar or greatly talented.

My remarks are going to address, as Mr. Sher suggested, some very practical things, some very realistic things. I have been in this business for 35 years now. Our company was founded in 1981, just before deregulation of the motor carrier industry became de rigueur. I have lived through the new regulation of motor carrying.

One thing that has been true for us is that it has been a good experience, a positive experience, and the absence of antitrust protections or collective rate-making have built a stronger, better, more viable product that we can deliver today across this country.

Now, indeed, steamship lines provide a tremendous advantage to international trade, but the one thing that we can never forget, for every single steamship landing that comes in this country, we have a series of truck moves, both domestic and international truck moves. Using 2005 numbers, there were approximately 8 million truck moves that related to a multi-modal container being transported across the country to its ultimate destination, or beginning here and leaving.

As a consequence, the relationship between motor carriers and steamship lines and their terminal operators is a fairly significant issue, and provides tremendous opportunity for there to be conflicts and difficulties. In the days of regulation, when the ICC governed through rates, and the fairness of through-rates issue - when a motor carrier had a through rate with a steamship line, there was at least the opportunity for negotiation and test of reasonableness. That, of course, has disappeared with the absence of the ICC. But, more importantly, now what happens is, it is a take-it-or-leave-it issue.

But that is not the big reason that I am here to talk today. I am a practical kind of a guy. Back in 1991, we had an industry that was highly fragmented. We were beginning to grow a big intermodal pie. One of the things that happened was we created an organization called Intermodal Association of North America. There were three organizations that all came together to create a non-

fragmented organization to try to develop policy, best practices, and a mission that would help us move this freight forward.

One of the things that we did, and I got tasked for the assignment, which is one of the reasons that I am sitting here today, was take and redraft the Uniform Intermodal Interchange Agreement, which is a document that governs the rights, risks, and liabilities inherent in the hand-off of equipment and cargo between the carriers, rail carriers and truckers, and truckers and ocean carriers.

And so we drafted what was to become now an industry-standard agreement. Virtually everyone belongs to the agreement today. It is divided into two parts.

The first is the structural part, which handles the procedures by which we notify each other; we talk about things.

The second half is an addendum that is the carrier - the equipment provider's own document, which contains commercial terms, because we cannot be involved in commercial terms.

Up until OCEMA was founded by virtue of an MTO agreement, we had what effectively were two ocean carrier members, two truck members, and two rail members. We never had a block vote. We constantly worked to develop an agreement that was more fair, more equitable, distributed risks in a more rational fashion. We constantly discussed the commercial issues as between us. We constantly

negotiated and came to a fair understanding.

Sadly, with the growth of OCEMA, all ocean carriers now block vote. And, as a consequence, we reached the point with the UIA where it is almost impossible to move something through. So what I want to say is - we said it in our remarks - when the reason for a rule ceases to exist, the rule should cease to exist. There are no U.S. flag carriers anymore. All we are doing through antitrust immunity is protecting the interests of international, ever-growing ocean carriers.

And the people who are being hurt by that? The motor carriers. Not so much the shippers, because they have economic clout and negotiating strength; motor carriers have none. Let me give you a simple example on close.

The simple example is this: the biggest rate that gets charged to motor carriers, in the context of the Equipment Interchange Agreement, is per diem, the cost of holding onto a piece of equipment day by day. Every time someone decides to raise the equipment costs, which is now sitting at \$85 a day, even though this equipment costs \$6,000, everybody raises the cost. It all passes down to the motor carrier.

The antitrust immunity permits that. There is no reason for it. It hurts motor carriers. To the extent it hurts motor carriers, it hurts truck drivers. To the extent it hurts them, it hurts the overall fabric of the way that we do business.

Thank you very much.

CHAIRPERSON GARZA: Thank you.

Commissioner Shenefield.

COMMISSIONER SHENEFIELD: Thank you, Madam  
Chairman.

First of all, let me thank and congratulate the panel for its statements, both written and oral. I found them enormously helpful, very educational, and I appreciate it.

I particularly appreciate Chairman Blust, coming from the FMC, and Signora Benini, coming from the European Commission. Thank you very much for being with us.

I would like to start with our colleague from Europe, and ask this question. What do you expect will happen to the conference portion of the industry, those cargoes that are diminishing but still shipping under conference rates? What do you expect to happen now after October 2008?

MS. BENINI: Well, in E.U. trades, (i.e., in the traffic between Europe and any third country), from October 2008, any conference activity, (i.e., the fixing of prices, carriers meeting to regulate capacities, or, indeed, anything that is restrictive of competition), can no longer take place.

So, to speak simply, the cargo that is today transported under the conference tariff will simply be transported under the tariff of the carrier that operates the

service.

COMMISSIONER SHENEFIELD: Now, some of those tariffs, I take it, will be arrived at as the result of these other kinds of agreements, "consortia" is the word that you generally use.

MS. BENINI: Yes.

COMMISSIONER SHENEFIELD: What is the attitude of the European Commission with respect to consortia? Are they block-exempted in their totality? Are they examined, one by one? How do you approach that issue?

MS. BENINI: The consortia block exemption allows shipping lines to come together and organize themselves in consortia or alliances. Alliances are groups of several consortia that usually do the worldwide trade. The European Union block-exempts a whole series of restrictive practices, provided that they are necessary for the provision of a joint service.

Basically, all that we ask is that those shipping lines come together and actually offer a service. Our attitude is very positive. It is an exemption that has existed since 1995. It is reviewed every five years and adjusted accordingly to what the market asks. It does not allow price-fixing, but it does allow the carriers that are members of that consortia, but not the others, to meet together and to organize - share slots, share vessels, share costs, etc.

It is something that we consider brings

rationalization to the system and is necessary.

COMMISSIONER SHENEFIELD: Now, suppose, as is suggested for the United States, that there is a situation in which these discussion agreements verge on the issues of price? They do not agree on the price, but they discuss their pricing - each of the competitors discusses its pricing policies, discuss costs, discuss everything, and then they say, all right, we are now going to each, individually, set our own tariffs.

Would the European Commission be concerned by that kind of a situation?

MS. BENINI: Well, discussions on prices between competitors are considered a restrictive agreement.

COMMISSIONER SHENEFIELD: Whether there is an agreement or not to charge that price?

MS. BENINI: Whether you go out of the room where it was discussed and enforce it or not is your decision. But the fact that you take part in that discussion is considered to be restrictive.

In E.U. trades, we would consider that to be a practice contrary to our laws in 2008.

COMMISSIONER SHENEFIELD: And you individually will police them? If you find a violation, you will prosecute it.

MS. BENINI: It should also be said, in our system, exemptions, as I was telling you, are permitted. You can have a restrictive agreement if you fulfill a certain number of commissions.

It is your responsibility, as an undertaking, to patrol yourself, to police yourself. What it is you do in the market is your responsibility.

COMMISSIONER SHENEFIELD: That is very helpful. I would like to ask Mr. Sher and Chairman Blust, what would be the effect if either Congress or, if it is within its power to do so, the Federal Maritime Commission, abolished conferences outright? What would be the benefit? What would be the detriment? And, if there is no detriment, and some benefit, why doesn't it happen?

Chairman Blust, why don't you lead us in this discussion?

MR. BLUST: The conferences - there are several different - and if you are talking about the rate aspect -

COMMISSIONER SHENEFIELD: I am talking about the rate aspect.

MR. BLUST: There are only a handful of pure conferences left in the U.S. trades today, approximately eight. Some of them are very specific in their approach, particularly cargo segment, and then those that may be required by other laws, such as the European laws that require conferences as opposed to discussion agreements, which are voluntary.

Conference agreements publish a common tariff and apply common tariff rates across the members of the conference. In the discussion agreements, which are the majority of the agreements in the international trades today

with rate authority, any rate agreements are purely voluntary, and may or may not be published and included in the individual tariffs of the discussion agreement members.

COMMISSIONER SHENEFIELD: My question is, why doesn't the FMC or Congress abolish conferences in the rate sense outright?

MR. BLUST: Well, first of all, they are allowed by the law -

COMMISSIONER SHENEFIELD: I mean change the law to abolish them.

MR. BLUST: Well, we cannot change the laws -

COMMISSIONER SHENEFIELD: Why doesn't Congress abolish them?

MR. BLUST: You would have to ask Congress on that, sir.

COMMISSIONER SHENEFIELD: Is there a sensible reason why they should not be abolished?

MR. BLUST: I do not know that a conference specifically, itself, has been raised or identified as a specific issue of concern today. I do not recall any concerns being raised with us that a conference structure is a problem today. I do not believe Congress has been approached to change the law to abolish just the pure conference aspect of it.

COMMISSIONER SHENEFIELD: I know this is unfair, but if we recommend abolishing conferences, I hope that you will sign on to the recommendation.

Mr. Sher, what is your response?

MR. SHER: I would probably not sign on to the recommendation.

COMMISSIONER SHENEFIELD: I am not surprised, but why not?

MR. SHER: We are looking at it this way. First of all, I think it is important to understand the factual background, which I mentioned, and that is that we proceed under the premise that we have superb service and very low rates. So you have a very well functioning system.

I say that it is due to a number of things. One of the blocks in the system is the sharing of price information, particularly in this environment where you have a lack of transparency. The prices in this industry are so confidential now that people are having difficulty figuring out where the market is.

The carriers feel that this platform to share price information and to establish benchmarks is very helpful to them. And they also believe it is even helpful to their customers.

The point is, one can argue about that. Obviously, the European Union takes a different -

COMMISSIONER SHENEFIELD: The shippers appear to take a somewhat different view, as well.

MR. SHER: The shippers in the OSRA compromise; the major shippers all signed on to that compromise and supported the antitrust limited exemption.

COMMISSIONER SHENEFIELD: We are now eight years down the road.

MR. SHER: I understand, but you really do not have any real users at the table. Mr. Greenberg says 40 to 50 percent of the NVOs carry that cargo. I do not know if that is correct or not. They are significant. But Mr. Greenberg's group represents a very small fraction of that. He does not represent 50 percent of the industry. I do not think that he would profess that.

But let me come to your question.

COMMISSIONER SHENEFIELD: The question is, why shouldn't we abolish conferences outright?

MR. SHER: The reason why I don't think you should abolish them is this: You have a system that is working, and is working well. This is a very important, fundamental ingredient of that system. When you abolish conferences - and conferences, essentially, have been abolished - I assume you mean rate-fixing-type agreements.

COMMISSIONER SHENEFIELD: Well, I am just starting with the conference rate fixing. We can get to this discussion agreement rate fixing and whatever other kinds of rate fixing or discussions about it later. Let's just take the narrow question first.

MR. SHER: I would say, frankly, that is probably - I want to think about this for a moment, but I believe, in the present context, that has no practical import.

COMMISSIONER SHENEFIELD: So you wouldn't oppose

it?

MR. SHER: Well, frankly, you have raised an interesting question. It is a definitional question, but - I would have to think about it a little bit more, but I will say this: I do not think it has any impact, and if it does not have any impact, we would not have any problem.

COMMISSIONER SHENEFIELD: If the United States did exactly what the European Commission has done, would anybody here at this table object?

MR. SHER: I think it is unnecessary, but it has no practical implication right now.

There is only one conference left, as such, and that is functioning in the European trades because, incidentally, the antitrust exemption in Europe is based on the fact that you must be a conference. And, indeed, the European system - and this is where we have problems with it - the European system has been so emasculated over the last ten years of controversy, strife, and litigation, that you must, you must fix prices, and you must adhere to them, and they must be common and uniform; if you do not do that, you lose your exemption. It is an unworkable system.

COMMISSIONER SHENEFIELD: And it is coming to an end.

MR. SHER: It is coming to an end because it is, indeed, unworkable.

MR. BLUST: If I may just add to Mr. Sher's comment. I do not believe, and Ms. Benini can answer - I do

not believe the European Commission recognizes discussion agreements as we have them in the United States trades, with the exception of the European trades.

COMMISSIONER SHENEFIELD: I think she said that. If they discuss prices, notwithstanding the fact that they may all go out of the room and set their own individual prices, she said that would be a restriction. I believe that is correct.

MS. BENINI: Yes. That is correct, as it is correct, what Mr. Sher was saying, that, in the E.U. system, conferences, under the block exemption, actually are required to fix common tariffs together.

The reason for that is very simple. Conferences were required, as they were considered an economic entity, outside of which there would be competition. That is why discussion agreements are not recognized. Discussion agreements would include everybody in the business, whereas conferences were, let's say, the forefathers of all our consortia today. It is just that they fixed prices.

COMMISSIONER SHENEFIELD: I am sorry, did you have something?

MR. SHER: No.

COMMISSIONER SHENEFIELD: Okay, let me go to the next layer of this sandwich.

Set aside pure conference-rate agreements, and go to all other discussion agreements, and all other kinds of consortia that involve the question of price, discussions of

price, allusions to price, winks and nods about price - why shouldn't those be abolished outright?

Or, to put it the other way around, what is the benefit to the American economy of allowing competitors to discuss price?

MR. SHER: I think there are certain benefits.

One of the benefits, and this has been documented in several economic studies, not studies that the carriers have supported or sponsored, but, impartial ones finding that this is a very, very volatile industry. The findings of several economic studies is that the setting benchmarks, or setting of guidelines, or setting of some kind of starting point for price negotiations tends to remove the volatility, or at least cut out the valleys and cut out the peaks.

This is a relatively important point in terms of a capital-intensive industry that is going forward and make these kinds of investments, that they do not have these tremendous ups and downs that make planning very, very difficult.

The other thing is, you cannot set, in my view at least, intelligent prices without some visibility, without some information. You need some transparency. This market has become the most secretive market imaginable. People sign contracts that they will never discuss, ever - what price they got. Now, that is perfectly permissible, and there are a number of people who feel strongly about it, and that is perfectly fine. But the result is that it has gotten to a

point where there is virtually no visibility in the industry. In every industry that I know of you must have some platform, perhaps the Internet, some way to get some idea of what the market is, and that is what they are doing.

But, Commissioner Shenefield, I think the most important point is a more practical point. It gets back to my point on the facts. And that is, if you accept my premise, which I believe is uncontested, that the system is working well, that service is good and rates are low, why would you take the risk of making a change? Quite frankly, we do not know - I wish I did know, but we do not know what the change would be if you eliminated this system.

I do not believe that the European Union knows what the change will be. I think we have an opportunity from a policy point of view. They will do away with it in two years. I think we will all be watching with great interest to see how it develops. We all have our views as to how it will develop, and I think we will all learn from that.

So I think, to some extent, at least they are answering one question that we have never been able to answer in this debate, and that is, what if?

COMMISSIONER SHENEFIELD: If we--

MR. SHER: I will finish, and then I will stop.

COMMISSIONER SHENEFIELD: I have a limited amount of time.

MR. SHER: All right. But I just wanted to say one of three things can happen here if we, as a general matter,

if we do away with the exemption, one, things get better; two, things stay the same; three, they get worse.

My premise is things are pretty much at the top in terms of service, in terms of cost. Why would you run that risk? The odds are so much greater that there is going to be disruption because the system is functioning so well. I would not run that risk.

COMMISSIONER SHENEFIELD: It would not surprise you to find out that I do not accept your premise. In fact, I am intrinsically opposed to the notion that we live in the best of all possible worlds, particularly when people are, in effect, discussing price, but my personal views are irrelevant.

I would like to hear what Mr. Greenberg and Mr. Sager and Mr. - I am sorry, Stefflre?

MR. STEFFLRE: Stefflre. Very good, thanks.

COMMISSIONER SHENEFIELD: What would you say about just, in effect, applying the antitrust laws without an exemption to price discussions among competitors? And I do not mean just on through rates, but I mean on all the adjunct and accessory rates - what were they called? Auxiliary charges, and surcharges, and peak season charges, and all the rest.

It is like the rest of the economy, they are either legal or illegal under the antitrust laws, and the Department of Justice gets to prosecute if they are illegal.

MR. GREENBERG: Well, speaking for my client, and

also in my experience, I have been doing this kind of work both in this industry, the rail industry, the trucking industry, for a long time. The world has not come to an end with the elimination of antitrust immunity. I do not think that it would come to an end here.

If the congressional decision was to make a change, I think it would be for the better. I think it would be for the positive. I think it is an anachronism. I do not see any justification for the carriers' ability to sit and discuss rates. And, contrary to Mr. Sher, I disagree with his notion that there is something inherently and intrinsically essential to be able to share that kind of information.

And I certainly see, from the examples that I have given, that there are market-distorting effects that result from it. And if you do not have - if you are dealing with a client that does not have the economic leverage to withstand the pressure, you take what they give you. I do not think that is appropriate.

COMMISSIONER SHENEFIELD: Mr. Sagers.

MR. SAGERS: I think my answer and my approach in drafting these comments, and the views of those who reviewed them on behalf of the Section were, in fact, practical. That is, I think Mr. Sher is right, that the way to look at this is to look at the facts, and, in particular, prior to OSRA, there were no good facts, because the industry had never really been exposed to very effective competition. So the

debate was mostly theoretical and not practical.

So the review we made was sort of an almost humble look at the facts, and the facts were that, since substantial deregulation in 1998, the industry had survived, despite about a century of predictions that they could not survive under competition.

COMMISSIONER SHENEFIELD: Well, they not only survived, but they prospered. I mean, we have heard that international trade is going through the roof, and we have got huge shipping orders for new ships. This is hardly a depression situation.

MR. GREENBERG: Well, with due deference, it has been a comparatively short time since OSRA, so who knows what is going to happen? But the strong inference, it seemed to me, on reviewing the evidence and reviewing everything I could read on economic theory and empirical evidence, was that they had done pretty well, and they likely will continue to do well.

Also, if the immunity is removed completely, the industry will have a very strong economic incentive to make it work if they can. I expect that they will do that, just as they have done under OSRA.

COMMISSIONER SHENEFIELD: Okay.

Mr. Stefflre.

MR. STEFFLRE: Trucking went through this. They have as big economic entities in trucking as they have in ocean carriage, with as many difficult issues. And the

concept that you have to be together to flag price, to establish what the market is, is counterintuitive. It just does not make any sense.

The other side of this is that there are real harms being done today by the retention of the immunity, because the whole thing - everything about multi-modal transportation is that all of the units of the transportation that delivers the box have to all seamlessly interrelate.

In all of the remarks that favor the retention, they cited the piers' activity and the neutral chassis pool activity as positive examples of the retention of this immunity. They could have done it without the immunity. There is no doubt. I have been in this business a long time. Those kinds of agreements have existed among truckers for a long time without violating antitrust rules and taking that risk.

There is such danger in - you look at the size of these international carriers today, the mergers amongst international carriers have been tremendous. All of the big carriers have merged today.

COMMISSIONER SHENEFIELD: And, as you pointed out, none of the carriers are American anymore, anyway.

MR. STEFFLRE: None are American.

COMMISSIONER SHENEFIELD: Can I conclude with a question - and I know I see a red light, but it will not take long, I don't think.

Chairman Blust, it is counterintuitive that there

is not price-fixing of an illegal kind going on in the industry, if you understand what I am saying, that some of these discussion agreements are, in fact, charades, and that, in fact, though everybody is supposedly going off and doing things by themselves, they are, in effect, co-conspirators in a price-fixing agreement. That would be my experience.

The question is, what, if anything, could the FMC do about it if they were ever to discover it? And second, when is the last time the FMC ever took an enforcement action against that kind of a situation?

COMMISSIONER VALENTINE: Other than the TSA that you described in your testimony.

MR. BLUST: Other than the TSA - I would have to go back and look at specific smaller areas of possible issues where it was a collective approach. If you like, I would be happy to share those with you. I do not have that information with me.

COMMISSIONER SHENEFIELD: It might be useful for the record.

COMMISSIONER VALENTINE: Yes. I would have asked the same question.

MR. BLUST: It does not appear to have been a significant issue, because it has not been raised by the shippers, the payers of those bills, to any great extent.

There have been concerns expressed about certain areas - you mentioned the surcharges. Part of that is part of the negotiation process, I would suspect. Part of that is

an understanding of how that works. It all has to go into the mix as to whether it is a burden for the shippers individually, or if it is something that they had not planned. Part of it is risk sharing. We all know what has happened with fuel prices. The surcharges, as an example, are quite often based upon the sharing of risk, or postponing the recognition of risk until something changes.

Any time those occur, there can be agony on one side or the other, depending upon what was anticipated or not. But it has not become an issue that has become a significant problem where it has been raised with us.

From that side, it appears to be working pretty well. And, as our staff looks at agreements and looks at how rates track to general rate increases or other aspects, it has not been raised that it is a significant issue in any of the trades.

COMMISSIONER SHENEFIELD: With respect, and I am now concluded.

I will bet you a milkshake that, under the very nose of the FMC, there is what we call, "common, garden-variety price-fixing" going on. And I like vanilla.

[Laughter.]

CHAIRPERSON GARZA: Thank you.

Vice Chair Yarowsky.

VICE CHAIR YAROWSKY: Good afternoon.

I am going to have to excuse myself in advance that I will have to leave after my questioning for just a bit,

because of an appointment that I have to keep.

But in these five minutes, I would just like to go over three issues.

One, a lot of our discussions about immunities and exemptions are connected, in the end, to what we are also studying, regulated industries. There is a connection to it.

This morning we looked at state regulation and the statutory immunity that was created by the McCarran-Ferguson exemption. So this afternoon we are looking at a federal regulatory situation and an antitrust exemption.

Mr. Stefflre, in his remarks, indicated some background about the old ICC. There used to be a principle in trying to describe the relationship between regulatory activity by the government and antitrust application that, if you were going to displace the antitrust laws, you would do it by a comprehensive regime of regulation. It was almost a separate world, and at that point the antitrust laws would be displaced, and the regulatory scheme created would work.

Increasingly over the last few decades, we have moved to some hybrid situations, and they cause some concern, at least from my standpoint, in terms of competition policy. And that is where you have a partial exemption that maybe even extends beyond the scope of where you thought it was applying, and some limits on the ability of the regulator to deal with those gaps.

So, my first question, at least, for Chairman Blust - and I would like to hear from others - Given the scope of

the exemption, as it currently exists, are you disturbed by some of the statements by Mr. Stefflre that the sector of the world in which he lives is being adversely and anticompetitively affected by the exemption that your agency administers, even though he is not really subject to your agency? He is getting the consequential outflow of what is happening, and yet, you do not have a comprehensive regulatory system to deal with his situation, to deal with hand-offs, or any other connections.

MR. BLUST: If it falls under our jurisdiction, and I am not certain that it does, because I do not know the full circumstances of the situation, but if it falls under our jurisdiction, they are certainly entitled to raise that with us. I do not know whether that particular, specific issue has been raised with us. I do not know that that has occurred.

I do not know that any organization has the ability to look at every single piece of information under its jurisdiction. By itself, we usually encourage affected parties to come to us, also, if there is an issue. So we are open to hearing.

I do not know that that has occurred.

VICE CHAIR YAROWSKY: I see.

Now, Mr. Stefflre, in terms of what you have described, what is your recourse? What is your redress?

MR. STEFFLRE: We, honestly, have not been able - this probably is our best at the moment.

Let me say that, as a practical matter, when you partially deregulate a field that interacted totally, you establish an imbalance.

Remember that the 3-R Act came about and wiped out all trucking regulation. No one expected it to happen. It was not planned for, and it has not been corrected to this day.

So yes, there have been petitions filed with the FMC over certain types of acts, and I will not get into those; there is no time for that.

VICE CHAIR YAROWSKY: Right, right.

MR. STEFFLRE: They have all been unsuccessful because of a limitation of jurisdiction and, to some extent, a limitation of understanding of the nature of the problem.

But nothing will change the fact that these eight million road transactions that we do every year are being adversely affected by the retention of this. I could bring in 150 truckers from all over the country; they would all say the same thing.

VICE CHAIR YAROWSKY: So it is kind of a repeat of captive shipping of 100 years ago.

MR. STEFFLRE: It kind of is, yes.

MR. SHER: May I?

VICE CHAIR YAROWSKY: Please, sir.

MR. SHER: I think on this one we just have a completely different view of this.

The trucking industry is protected in the Shipping

Act in two specific provisions. Both of those provisions say that the antitrust laws apply completely to any negotiations with trucking companies, and it prohibits joint activity.

The ocean carriers do nothing jointly under the antitrust exemption with trucking. It is prohibited, and it is not done. There is a one-on-one negotiation. What they do with them, we do not know.

The agreement that Mr. Stefflre is complaining about, this Intermodal Interchange and Facilities Access Agreement, is a large, diverse group. First of all, it is not filed under the Shipping Act. It has no antitrust immunity. It is a group of railroads, trucking companies, steamship companies, and software providers. They put together a form agreement, having nothing to do with price. This does not have anything to do with the Shipping Act. It does not have anything to do with ocean carriers.

From what he has said, as I understand it, they "block vote;" I do not know what that means. It is a group. But I assume that, when a liability provision comes up that adversely affects ocean carriers, they all vote against it. I assume that, when a liability change comes up for railroads, they all vote against it. It has nothing to do with price, and there is no antitrust exemption. It has nothing to do with the Shipping Act.

VICE CHAIR YAROWSKY: Okay. So that is a direct difference.

I am going to go. Just one question I would like

answered at some point or put on the record.

I was going to direct this to you, Professor. Beyond price and capacity, what other types of joint conduct that are kind of covered by this exemption are there that are not already viewed as benign under the antitrust laws so that you would not really need the exemption to begin with?

MR. SAGERS: What sort of conduct would be okay?

There is a dispute in the comments in the committee on this. But my view, and I think the view of the Antitrust Section, is that there is a pretty broad range of conduct that would pass muster and is not at much risk of liability.

Nobody believes that conduct is a bad thing, to the extent that it excludes naked restraints on price output.

VICE CHAIR YAROWSKY: Thank you.

CHAIRPERSON GARZA: Commissioner Kempf.

COMMISSIONER KEMPF: Thank you. I made a statement this morning expressing my reservations about the necessity and the wisdom of today's hearings. I am not going to repeat that at this time, but I would like to incorporate it again by reference.

Commissioner Shenefield did a very nice job of posing the question of, why not abolish the rate fixing, and Commissioner Jacobson and others did this morning as well. I find the answers to that uniformly unpersuasive. And the reason I do has nothing to do with ocean shipping. It has nothing to do with insurance.

It has to do with what I think is the "unwisdom" of

having exemptions and immunities, any of them and all of them. And that is one reason, again, I was reminded of why I am uncomfortable singling these two particular industries out, and giving a pass to others, because I think, if those same questions were posed as to each and every exemption and immunity, the logic would be similarly unpersuasive.

In any event, this morning we noted that Congress is looking at the insurance exemption again. And I understand from the written submissions and some of the comments today that, less than a decade ago, they did that with respect to ocean shipping.

To me, those are examples of the process that I favor, which is periodic review of the continued existence of immunities and exemptions at work. I may disagree with the outcome, but, to me, that is Congress doing its job.

I have a couple questions, only.

One, Mr. Sher, you talked about - your watchword was "cheap," and you talked about the keys being service and price. And in the materials that the Commissioners were given by the staff, it echoes some of things you said, noting that, for example, rates in ocean shipping have fallen for a period of roughly 20 years. It then goes on to state that the fact that rates have fallen does not suggest much about monopoly power.

I was sort of curious about that, because I think of monopolists as people who want to raise prices, not lower them. And the falling rates for 20 years suggest one of two

things to me: either there is a lack of monopoly power, or they are a bunch of dumb monopolists, for the reasons I stated.

Would you care to comment on anything on the implications of the declining rates for the last 20 years?

MR. SHER: First of all, it is correct, and it is rather startling. I think what it suggests is, the rates are reasonable. I would say there are four or five other indicators. By itself, falling prices do not prove the point - there are other explanations for that, but I think all the indicators show rates are reasonable.

It is clear that the rate-fixing groups, whether they be conference or rate discussion agreements, do not control the rate structure. One, there are some legal barriers, but as a matter of economics, they have never been able - at certain periods of time, they influenced the price. As I said, they even out the hills and the valleys. They do something about the volatility. I think they have some impact when rates go down to a non-compensatory level in certain extremes. But they do not completely control rates. They do not have that kind of power.

No matter what their market share is, they just do not have that power.

COMMISSIONER KEMPF: Professor Sagers, I have two quick questions for you.

You referred to monograph -

MS. BENINI: If I may add something. We looked

into that, why rates were falling down the last 20 years. One of the things that we came up with, as a matter of evidence, was that it has been technical progress. The last 20 years we have seen fully cellular ships. It is cheaper today to ship goods simply because of economy of scale.

COMMISSIONER KEMPF: Professor Sagers, I had a couple of quick questions for you.

You referred to an ABA monograph. I assume that is the one listed, *The History of Politics and Economics of Exemptions from Antitrust*; am I correct?

MR. SAGERS: That is right.

COMMISSIONER KEMPF: And it says, "Forthcoming 2006." When is that forthcoming?

MR. SAGERS: I hate to admit this, but I finished it in the early hours of this morning, before I got here.

[Laughter.]

COMMISSIONER KEMPF: Can we get an early version of it? I, for one, would like to see it.

MR. SAGERS: I have a feeling they want to get it into your hands just as fast as they can.

COMMISSIONER JACOBSON: I will get you a copy.

COMMISSIONER KEMPF: Okay. Good.

Finally, this morning, there was a lot of discussion about what would come in the wake of abolishment of immunities and exemptions and the concept of unreasonable restraint and state courts in Illinois or federal courts in New York - I would add to the "parade of horrors," often a

jury in those jurisdictions are subject to review by the judge. But, as somebody noted this morning, every other industry always goes through those things. And, not only that, but over time, a body of law emerges that says, we do not need to argue over this one much anymore, because this has now been argued over enough, and it is now either a per se or a rule-of-reason defense, and we can short circuit the mass of inquiry involved.

The only other thing I had was, Chairman Blust, do you want to make any comment on the letter we received from Commissioner Brennan of your organization?

MR. BLUST: I guess the only comment I would make is that we are five Commissioners. We are five independent Commissioners. We all have our views. I respect his views, but - and I believe I can speak on behalf of the other three Commissioners - I feel that the existing laws and processes are working very well.

COMMISSIONER KEMPF: Thank you.

CHAIRPERSON GARZA: Okay.

I think, if Commissioner Carlton were here he might say, and he would say it more effectively than I can, that the fact that prices are declining is certainly no indication that there is not any monopoly power. It could simply be moving along the supply curve. But, as I said, other people can explain that better than I can.

I think for this panel - I think for this Commission, for some other Commissioners, you probably have a

pretty high burden to convince us that activity that is considered unlawful in any other context, indeed, prosecuted as a criminal offense, and punished by jail terms and huge fines, should somehow be deemed as perfectly benevolent in this industry. It is a bit of a hard sell.

Someone mentioned surcharges for fuel and security - I believe right now the airline industry is being investigated via grand jury, which usually indicates criminal penalties for supposed collusion, in respect to surcharges. So it is a dramatically different environment that other industries operate in, including in the transportation sector, than does the shipping industry. So I think that is part of the reason why you find some cynical people in front of you from the Commission.

The other thing I would say is that we would like to have shippers here, but they are a very hard group to get together and put on a panel, other than Mr. Greenberg. Certainly, we can dispute how many shippers he represents, but I think we have him here, in part - we regard him as at least expressing, in part, the view of the shippers. I think it is clear that he has a concern.

I would also note that the Department of Justice believes itself to be a bit of a proxy for the views of the consumers. I think the Department of Justice is on record as opposing the shipping exemption.

I do not want anyone to think that we do not have any shipper representatives by any design. I personally do

not think that it should slip by that somehow no one has ever expressed any concern about the exemption. I think that is why we are here. Whatever our conclusions are, people have expressed, I think, a concern about exemptions, generally, and, specifically, exemptions in the shipping industry.

Mr. Sher, one question I have for you - if I went back and looked at the archives, would I find that your organization resisted the reform that occurred in 1998 and predicted dire consequences for your industry?

MR. SHER: No.

I was involved in that personally in putting that compromise together. The carriers, I would say, were leaders in that compromise.

CHAIRPERSON GARZA: Okay.

MR. SHER: The reason for that is that the customers in the mid-1990s came to us and essentially said the system is too rigid. The system is too rigid. We were reluctant to change, of course. We did not want to give up certain rights - but we looked at it. We looked at the realities of the situation. We looked at what our customers wanted. It was a very important factor. We sat down, and we loosened up the system and we got both labor and the ports to put forward a coalition and go to Congress.

CHAIRPERSON GARZA: And the shippers, where were they in that?

MR. SHER: They were there.

CHAIRPERSON GARZA: In what form?

MR. SHER: Well, I think all the major shipper groups were there. The major one is the NITL; they are the big shipper spokesperson. They were there. As a matter of fact, they were one of the leaders.

As a matter of fact, if they heard me say I was a leader - I should say leaders. But they were there. The shippers were there.

CHAIRPERSON GARZA: Let me ask you another question. You exhorted us many times to consider the facts, which, indeed, we are trying to consider.

Now, some people have suggested that there are some relevant facts to consider here. For example, they have suggested that containerization has changed the environment. They have suggested that the growth of companies that provide end-to-end delivery services on a global basis has changed the way the industry looks.

There are other things that other people have suggested that may have changed - to the extent that there might possibly ever have been a reason for some form of exemption, there no longer exists such a reason.

Can you address any of those facts and explain why you think they are, or are not, relevant to us?

MR. SHER: Well, certainly there have been significant changes in the industry. There is no question. But there have been no major changes since Congress looked at this in 1998 and reaffirmed part of the system and when they essentially dismantled the conference system.

And that is one of the reasons the changes occurred in 1998. Now, at that time, containerization, which is essentially what we are talking about here, had matured. Now, since that time, some of the ships have gotten larger. The cargo has increased, but the basic parameters of the business have stayed the same, although it has grown.

So I would say that there have been no significant changes since 1998, since Congress looked at this the last time. Before that, there clearly were changes.

CHAIRPERSON GARZA: Okay.

Mr. Blust, I am just sort of puzzled by the discussion agreement situation.

Obviously, there was a concern in 1998 that shipping conferences, as tight cartel organizations, were problematic, and there was a change. So there was sort of, what seems to me to be, a halfway change. And maybe it was viewed as being transitional. Now, we have discussion agreements, which are voluntary guidelines, right? But nonetheless, it is the ability for an industry to sit down, discuss, and agree to guidelines and, after having agreed to the guidelines, not having to comply with them, and filing the guidelines on a confidential basis; is that right?

So no consumer actually gets to see those guidelines; is that right?

MR. BLUST: They are filed confidentially with us, but any of the discussion agreements have the ability, and do quite often, either publish their guidelines on their website

or announce, publicly, what their guidelines are. So they are not secret.

CHAIRPERSON GARZA: So the guidelines are published?

MR. BLUST: In many cases they are - or noticed, I should say.

CHAIRPERSON GARZA: And, as I understand it, your Commission has gone and taken a look at the extent to which the industry has actually tended to comply with those guidelines; is that right?

MR. BLUST: Yes, we have, either on a spot basis or a sample basis. It appears that there is not a great deal of uniformity in applying those changes.

CHAIRPERSON GARZA: From your perspective, then, what purpose do the guidelines serve?

MR. BLUST: One, I guess it is a notice to the trade as to what the ideas of the discussion agreement members are for that particular trade.

CHAIRPERSON GARZA: What purpose does that serve?

MR. BLUST: Either planning purposes or negotiating purposes, starting points. Other industries will put out what they expect their increases will be.

You would have to talk to the carriers as to what they see as a value of that in the publishing of it.

CHAIRPERSON GARZA: As a regulator, though, what potential value do you see in that? Since that is the state of the world right now - a few conferences, and I think there

seems to be a disagreement as to whether there are eight or there is one.

But, to you, based on your knowledge of the industry, both as a regulator and as someone who was in the industry, what is the beneficial purpose of having the industry get together and develop guidelines for pricing, to guide their negotiations, et cetera?

MR. BLUST: From our perspective, it provides us the information to watch, because they are allowed to do that under the law, but -

CHAIRPERSON GARZA: I understand that, but I am trying to get - why should it? Why should the law allow them and encourage them to do it? That is the real question, from a policy perspective.

MR. BLUST: It is difficult for me, regulating that, to really address that point. You would really have to talk to Congress, I guess, who applied the law and created the law on it.

CHAIRPERSON GARZA: But I just want to be clear. The expert commission in this area - as head of that, you do not have a formed opinion about any benefits that are served by these voluntary guidelines?

MR. BLUST: The sharing of that information with us, filing with us, helps us to monitor and make sure that it is not being unreasonably - that it is adhered to on a voluntary basis, and that it is not heavy-handed in its approach.

CHAIRPERSON GARZA: But, just to be clear, now, you cannot identify for me a benefit of allowing them to develop the guidelines in the first instance.

MR. BLUST: Well, I guess the benefits of guidelines - one of the benefits would be that there would be a common approach for a trade area, or a common idea for a trade area, for rate increases, for rate adjustments, or rate reductions, which have occurred in some places periodically, to give the trade an idea of what the service suppliers are thinking for the upcoming period. It is a starting point for that next, either round of negotiations, or for the transportation for the next period.

And by the carriers being able to share the marketing information, and whatever costs they may legally be able to share, that allows a common approach to a trade and may not have to have a huge variance depending upon the equipment, types of ships, that carriers are providing.

CHAIRPERSON GARZA: Okay.

Commissioner Valentine.

COMMISSIONER VALENTINE: I will try to be brief.

First of all, thank you all very much, panelists, for your testimony this afternoon. I guess I have to say that I found, actually, the OECD paper on shipping policy to be one of the more thoughtful and enlightened things that we read, in addition to your testimony.

I totally applaud what the European Commission has done, and I, quite frankly, think, shame on us, the supposed

leader of the free world and free markets, that we are trailing behind in not opening up this industry to competition.

I also see no reason - in fact, all the evidence to me suggests - and I think some of this was in your paper, Mr. Sagers - that competition has, in fact, benefited this industry. And, since deregulation began in 1984, the industry has been doing better and better.

I also do not think that I have heard anything all afternoon that suggests that price-fixing is in any way good. I also, despite your patience, Chairwoman Garza, haven't heard any reason why discussion agreements, in which members of the same industry discuss prices, are good.

So, if we were to remove the exemption, I would have absolutely no problem with the price-fixing and the discussion agreements all being illegal.

What I do find interesting, and would like to pursue a little bit with some of you this afternoon, are the alliances, the joint ventures, the space charters, the slot swaps, and you may call some of these things "consortia," Ms. Benini.

From what I have seen, and this would include some of the port activities, I do not see that any of these things are in any way illegal under the antitrust act. I see you, Commissioner Blust, saying that you have - there is a notable rise in these creative, cooperative agreements, the address infrastructure limitations and constraints, such as

agreements to share chassis equipment, and make technological advances, such as creating Internet portal arrangements.

And you, Ms. Godwin, talk about centralized communication centers for harbor and local police - a central facility for customs and border patrol. None of this, none of this, in any way, implicates the antitrust laws.

So I guess I would like to know from Commissioner Blust and Ms. Godwin is, what, in fact, are you now seeing under these vessel-sharing arrangements or joint-port agreements that actually is illegal, that currently is illegal, under the antitrust laws that we would have to worry about?

Ms. Benini, does your block exemption essentially exempt things that, in fact, would pass muster under Article 81(3), that, ultimately, have more procompetitive efficiencies and benefits, or are there actually arrangements and consortia and alliances under that block exemption that would violate Article 81 but for the exemption?

Maybe it would be easiest to start with the Commission; is that okay?

MS. BENINI: Yes, that is fine.

Under our system, consortia carry out activities that are restrictive of competition, (i.e., they violate Article 81(1)), but they are considered to be beneficial, and hence fulfill the criteria under Article 81(3), the famous four criteria that I explained in my introduction. And the ones that are restrictive are, most importantly, revenue

sharing.

Basically, what is a consortia? It is a group of shipping companies. Each partner puts one ship or more to operate a service. What they do is exchange space, so that there will always be space for their clients. They will share costs - costs, in terms of equipments, in terms of expense in ports, but also in revenue pooling, and that is definitely restrictive of competition if you are doing that with your competitors.

What we find, also, in the application of that block exemption is that it has the benefit that, in most cases, each shipping line will present itself to the market as an independent actor. It will have its own pool of clients. So therefore, sometimes, there is internal competition within a consortia, as well as external competition to a consortia.

COMMISSIONER VALENTINE: Mr. Blust, are there any vessel-sharing agreements currently on file with you that you think violate the antitrust laws?

MR. BLUST: I am not aware of any agreements that would violate any antitrust laws that are not permitted with the antitrust immunity today.

COMMISSIONER VALENTINE: I am getting rid of - the immunity is gone. The question now is, sitting where you sit, you have listed "X" number 47 in your appendix - do any of those agreements violate the antitrust laws?

If you do not know the answer, you can write in to

us.

MR. BLUST: Yes. I would probably have to write in to you, because, as far as vessel sharing agreements, or vessel agreements, there are 219 that are on file with us. So, of those, going through the details, I am really not sure. We would have to do a thorough analysis of the exemption and the immunity that is granted versus what laws may -

COMMISSIONER VALENTINE: I am talking about the ones without pricing authority and not the discussion agreements. So just the remainders, okay?

MR. BLUST: Okay. We will have to check that and get back with you.

COMMISSIONER VALENTINE: Ms. Godwin, what agreements have you currently entered into that violate the antitrust laws?

MS. GODWIN: If I were the judge in the courtroom, I could make a decision on whether they violate the antitrust laws.

I think it is important for you all to consider whether the industry would undertake these activities if they felt like they were going to be exposed to the antitrust laws.

COMMISSIONER VALENTINE: All of these others are exposed to the antitrust laws.

MS. GODWIN: I agree with Mr. Sher, that the existence of a fair, flexible, and predictable legal regime

is very important. Those words stuck with me, and I wrote them down when he said them.

I will give you some examples from my testimony -  
COMMISSIONER VALENTINE: We have so little time and

-  
MS. GODWIN: The pier pass system is - private marine terminal operators coming together to jointly assess the same charge. The activities of the ports of L.A. and Long Beach where they agree with each other that they will make certain demands of all of the carriers calling at their two ports, with regard to slowing down as they enter the port - things that have environmental impacts.

I do not believe that they could get together and do that without potential exposure to the antitrust laws -

COMMISSIONER VALENTINE: Mr. Sagers, are you familiar with this pier-pass system at Long Beach and the port of Los Angeles?

MR. SAGERS: Only from the comments that were made to the Commission.

COMMISSIONER VALENTINE: Because I would be interested, if you have any reason to do independent research on that as to whether you think that agreement would violate the antitrust laws but for the exemption. It certainly seems to have many congestion, security, capacity - I think it increases throughput. It seems to have many procompetitive aspects to it.

Thank you. I am done.

CHAIRPERSON GARZA: We are going to go to Commissioner Warden.

COMMISSIONER WARDEN: Thank you, Chairwoman Garza. I associate myself with the comments of Commissioner Valentine.

Again, as with the insurance industry this morning, I see virtually nothing here that is for the good, and the things that were just described are for the good - slowing down when you come in to the harbor, and so on, that would conceivably violate the antitrust laws because they have been agreed to by public ports.

Having said that, I have a couple of questions, initially for Mr. Sher.

Mr. Sher, is shipping a more volatile business than copper, nickel, gold, and other precious metals?

MR. SHER: I am not familiar with that. I know that shipping is a very volatile market, but whether it is on the scale, I cannot say.

COMMISSIONER WARDEN: Are there capital-intensive industries that are volatile and fully subject to the antitrust laws?

MR. SHER: Certainly.

COMMISSIONER WARDEN: Mr. Sher, is it true, as Mr. Stefflre says, that there are no U.S. flag carriers?

MR. SHER: There are a number of U.S. flag ships. Most of the carriers are foreign. There are some U.S. carriers, but they are small.

COMMISSIONER WARDEN: Is that fact, or a mix of facts, I should say, in light of your answer, at all relevant, considering the antitrust exemption?

MR. SHER: No.

COMMISSIONER WARDEN: Mr. Greenberg, do you agree with Mr. Sher's 30,000-foot review of the facts?

MR. GREENBERG: I have known Stan a long time, and there are times when we have agreed.

[Laughter.]

30,000-foot view? It depends on the issue. I disagree with his concept that prices are falling because of efficiency - prices are falling, and that is a benefit of antitrust immunity. There has been discussion about that, and I agree with the comments that have been made.

I disagree with the issue of the compromise that was effected in 1998. My organization was not a participant in that compromise, and we opposed it. I guess the old saying, you don't want to see legislation or sausage being made, was very true there.

Our problem with it and my disagreement with it really is the issue of the voluntary guidelines. It is a huge problem. And, in our operation - the problem is that, as it is executed, it is under the radar. One cannot see it. It is difficult for the Commission to monitor and police. That is where my disagreement comes in.

COMMISSIONER WARDEN: Thank you.

Mr. Sher, did your organization oppose the change

in the European Union?

MR. SHER: No.

COMMISSIONER WARDEN: Thank you. I have no further questions.

CHAIRPERSON GARZA: Commissioner Litvack.

COMMISSIONER LITVACK: One of the things about going seventh out of eight is that there is not a heck of a lot to say.

I guess I want to admire Mr. Sher, as well as others. You are before the Antitrust Modernization Commission. You probably knew that when you came in. So this is not the friendliest -

MR. SHER: If I did not know when I came, I now know.

COMMISSIONER LITVACK: You sure do.

My colleague and friend Commissioner Shenefield obviously has a healthy skepticism about agreements to discuss price, but not to agree upon. Unfortunately, I guess I share that same thing since I have never been sure why you would be talking about something if nothing would result from it. And if, after a while, nothing does result from it, no one is going to talk about it anymore.

So I do have a question about that. I will give you a chance to answer that. I am just musing.

I guess I do have one observation, and it really flowed from something in your paper, because I was going to make the same point that Commissioner Valentine made, and I

guess Commissioner Warden, too, which is, it seemed to me that so much of what you talked about - not you, but Ms. Godwin and the Chairman - would be legal under the antitrust laws.

And in your paper, as I read it, you made an attempt to blunt that by saying, that is the wrong question; what we really need is certainty, and who knows what a court would hold. Ms. Godwin basically echoed that same theory or thought.

The problem I have with that is that everybody else lives by that. I do not know what a court is going to hold. I have practiced antitrust a long time, and I might tell you that it is rare that I am ever right in what the ultimate conclusion would be. But that does not mean that we are not subject to it, and that does not mean that it is not good. It does mean that is why we all practice law.

So I am not sure why you think that is somehow an answer to the question of, shouldn't the antitrust laws apply here, and particularly if so much of what you want to do, or seem to want to do, would probably be perfectly lawful. Okay? That is the question.

MR. SHER: Well, that is -

COMMISSIONER LITVACK: I learned that from Vice Chair Yarowsky. You end a statement by saying, so?

CHAIRPERSON GARZA: That was Commissioner Kempf: and so what?

[Laughter.]

MR. SHER: There is so much to talk about.

I think the first one is a misunderstanding of discussion agreements. The discussion agreements - maybe it is the name of them that misleads you - you can fix prices under those in the antitrust sense; that is what they are designed to do. They are not designed to just discuss.

When you issue a guideline, a guideline says, we are going to raise rates five percent, and everybody adopts that, but they do not have to follow it; that is the law.

COMMISSIONER LITVACK: Even if there is an illegal agreement, someone does not have to follow it.

MR. SHER: Of course, but in the antitrust sense, that is a price fix.

COMMISSIONER LITVACK: Oh, okay. I misunderstood. You are quite correct.

MR. SHER: They do not have to adhere to the fix, but they fix; that is the system.

They depart very, very frequently in a confidential contract.

The other question, which is complicated - maybe I will tell you a short story. These consortia agreements, these charter agreements, run the gamut from A to Z. Some of them are relatively simple and probably would not cause problems under the antitrust laws; a good number of them would, in my view. To not have those exempted would create, I would say, a restructuring of the industry. I really mean that.

COMMISSIONER LITVACK: Can you give us one quick example of what would violate the antitrust laws, yet you think is a positive?

MR. SHER: About four years ago, five years ago, we were retained by a carrier to do a simple slot-charter agreement. It turned out that carrier was in the domestic trades. This is the U.S. trade, so they have no antitrust exemption. The other side retained very eminent, well-known antitrust counsel. He sat down to negotiate the slot charter. I do not want to get into the specifics, because it is a little bit uncomfortable, but the conclusion was, after we were doing this negotiation for three or four days, that it could not be done without violating the antitrust laws. There was so much information on the table, so many possibilities.

The one thing that I am absolutely convinced of - I see your fellow Commissioner rolling her eyes - but the one thing that I am absolutely convinced of is that a number of these slot charters have serious problems, serious enough where the carriers will not be able to get a clean antitrust opinion. And if they are not given a block exemption, as they have been given in Europe - incidentally, Europe gives them the block exemption, which I think tells you quite a bit - if they are not, then I think that many of them will think seriously about disbanding them, because the risks would be too great. Needless to say, the carriers are exceedingly concerned about the application of the antitrust laws. But I

have had the experience. We could not do it. We could not do it.

The decisions that are made have competitive implications. If you take a ship out of the trade, you are reducing capacity, aren't you? You decide you are going to call at Philadelphia and not New York; are you boycotting a port?

We just have to be realistic about this, that there are a number of issues underlying these agreements. I think they are positive. I think they are beneficial. I think everybody supports them, but from a lawyer's perspective, without an antitrust exemption, the risks are too great.

COMMISSIONER LITVACK: Thank you.

CHAIRPERSON GARZA: Commissioner Jacobson.

COMMISSIONER JACOBSON: Mr. Sher, not to pick on you at all -

MR. SHER: I feel like the piñata at the birthday party, frankly.

[Laughter.]

CHAIRPERSON GARZA: Well, you could just look at it differently and feel loved.

[Laughter.]

COMMISSIONER JACOBSON: Am I right in remembering you from the *North Atlantic Conference* case back in the late 1970s on which I worked, and Sandy worked, and John was on the other side?

MR. SHER: I think you have a pretty good memory.

COMMISSIONER JACOBSON: Well, you did an excellent job in that case.

I want to thank everyone else here for excellent presentations, but in particular, Chairman Blust - it is not often that we get a chairman of a federal agency to come and testify before us; it is much appreciated.

And Ms. Benini, for coming such a long way - that is much appreciated, as well.

I am of a like mind with the other Commissioners. This will not shock -

MR. SHER: I haven't convinced you?

COMMISSIONER JACOBSON: - anyone. I would observe that most of the arguments that we hear in support of an exemption from the antitrust laws were, if you read the briefs, and the Supreme Court's opinion, and the *Trans-Missouri Freight Association* case from 1896, these are not new arguments; they have been advanced for decades. We cannot have volatility; there is a need for certainty.

These are old arguments, and basic economics and experience in other industries have demonstrated for over 100 years that you get lower prices, greater production, greater utilization, and more use of ports, in contexts where competition is the guiding principle rather than agreements that are designed to limit competition.

If competing carriers are going to decide not to call it Philadelphia, I cannot imagine why that is a positive for society that should be blessed by the antitrust laws. If

an individual carrier wants to make that determination, fine. The principle is that the market will decide whether that is a good decision or not.

Now, I am making these comments because we have a large audience here who probably thinks that we are a bunch of pointy-headed, insane folks, and perhaps we are. But from the discipline, from the antitrust laws, these are very fundamental principles that I think reflect the unanimity that you have heard from the Commissioners today.

I am usually pretty good about asking questions and not making speeches, but I will pass the baton at this point. Thank you all, again, for your time.

CHAIRPERSON GARZA: Commissioner Burchfield.

COMMISSIONER BURCHFIELD: Very briefly.

Thank you all for coming.

I know, or I suspect, that some of you appreciated that you would receive more questions than you have. I do not have another hard question to throw to you, but I do have a question out of curiosity for Chairman Blust.

How do you see the European Commission's action affecting the way that carriers subject to your jurisdiction are going to operate once the antitrust regime in Europe becomes applicable to them? Will they be able to operate under antitrust immunity here if they are subject to antitrust immunity in Europe?

MR. BLUST: If you are speaking of the antitrust immunity purely on the pricing side - depending upon how it

ends up in Europe - We are still waiting to see what Europe is coming up with at the end of their two-year period as it winds down.

It will probably be the driving approach on the U.S.-European trades.

COMMISSIONER BURCHFIELD: That would be my guess, and I would assume -

MR. BLUST: So the confidential service contracts that individual carriers have today will not change. The vessel-sharing arrangements that they have among the carriers, and other operational aspects, will not change. The pricing, because it is a conference by European mandate today - that conference tariff and concerted pricing activity will probably go away, if that is what the end of their agreement says.

As far as sharing information that I believe the carriers have asked for, and some other items, I am not sure how that will work out, but again, the most likely driver - at least in the North Atlantic and the Mediterranean trades, the E.U. countries will be the driver. And, as was mentioned earlier, it is probably a great place, as a laboratory, for the United States to look to see how it will develop. It would give us a better understanding as to what the potential changes may be in the United States as a result of the changes that are occurring out in Europe.

COMMISSIONER BURCHFIELD: It will put you in an odd situation, though, won't it, in that your Atlantic trade may

be subject to antitrust enforcement in Europe on pricing issues, but the Pacific trade would not be? Is that what is going to happen?

MR. BLUST: That is likely the case, but it is not that - we have a situation that is unique in Europe, now, where a conference is mandated by European law.

COMMISSIONER BURCHFIELD: But after their - it goes into effect in October of 2008.

MR. BLUST: Right, but in the transpacific we have a discussion agreement.

So it is not a new situation that some of the trades differ, I guess, is my only point.

COMMISSIONER BURCHFIELD: Okay. Thank you very much.

Madam Chairman?

MS. BENINI: If I might add something.

COMMISSIONER BURCHFIELD: Sure, please.

MS. BENINI: I would like to take this opportunity, actually, to thank the Federal Maritime Commission, because, throughout our review process, we explained, and we explored with them what the practical consequences would be in the market of our changing our law. We were very encouraged by the fact that there are very few rate-fixing agreements in the transatlantic trade.

Most of the goods are shipped under individual service contracts. We are confident that we will be able to manage the transition.

COMMISSIONER BURCHFIELD: Thank you.

CHAIRPERSON GARZA: All right.

Well, I would like to thank, again, each of the panelists for suffering through this afternoon with us. We really do appreciate your insights and your willingness to come here and respond to our questions, and the testimony that you have submitted.

MR. HEIMERT: The hearing is adjourned.

[Whereupon, at 3:10 p.m., the hearing was adjourned.]