



## Intermodal Motor Carriers Conference

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Executive Director

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Deborah A. Garza, Chair  
Jonathan R. Yarowsky, Vice Chair  
Antitrust Modernization Commission  
Attn: Public Comments  
1120 G Street, NW., Suite 810  
Washington, DC 20005.  
[comments@amc.gov](mailto:comments@amc.gov)

**RE: May 19 Federal Register Notice Regarding the Antitrust Modernization Commission (AMC) Request for Public Comments on Antitrust Related Issues Being Considered for Commission Study**

Dear Ms. Garza and Mr. Yarowsky:

I am writing on behalf of the Intermodal Motor Carriers Conference (IMCC) regarding the above referenced May 19, 2005 notice requesting comments on issues being considered for Commission study. Specifically, IMCC comments will address Section V, Immunities & Exemptions, subsection A.2.h., *Shipping Act*. 46 U.S.C. app. 1701 et seq., from which the current antitrust exemptions for ocean carriers and marine terminal operators are derived.

The IMCC, under the sponsorship of the American Trucking Associations (ATA) was organized and established in October, 2004 and is open to all ATA member companies engaged in the truck segment of the intermodal transportation of property, companies engaged in businesses and services allied to the truck segment of the intermodal transportation of property, and state associations affiliated with ATA. ATA is the national trade association for the trucking industry and is a federation of affiliated state trucking associations, conferences and organizations that includes more than 37,000 motor carrier members representing every type and class of motor carrier in the country.

The IMCC is particularly interested in and supports the need to consider and address the adverse economic impacts resulting from the application of antitrust exemptions granted to foreign owned ocean carriers under the *Shipping Act of 1984*. We are therefore most encouraged that the AMC included the *Shipping Act* in Section V of the above reference notice as one the laws it may evaluate during the review process. Given the economic magnitude and rapidly evolving nature of global trade and intermodal logistics that have occurred since the enactment of this legislation, we believe the time is indeed overdue to reassess the rights, interests and legal protections that all major stakeholders have or should have in the maritime related transportation sector, including those of domestic intermodal motor carriers.

Good stuff.



In today's intermodal transportation trade sector, domestic truckers unfortunately confront a phalanx of much larger, often foreign owned participants whose size and economic dominance are further and unfairly magnified by the antiquated and unnecessary antitrust exemptions perpetuated and expanded under the *Shipping Act*. Moreover, the anticompetitive operational procedures fostered and protected by the existing antitrust laws serve to exacerbate port operational inefficiencies that directly and adversely impact domestic intermodal trucking, port productivity, and the general health and welfare of adjacent port communities.

Therefore, **the IMCC strongly supports the Commission's review of the *Shipping Act's* antitrust applications and impacts.** In addition, we urge the Commission to make recommendations to the Congress on changes needed in the legal-regulatory requirements and implementation of the *Act* that will provide a more equitable economic balance to the entire marine transportation logistics network. Most importantly, the Commission's recommendations must ensure that competition, not stakeholder edict, will in the future provide the prevalent force that shapes operational decisions and financial parameters that define intermodal marketplace activities.

## **Issue Overview**

### **Intermodal Trucking-Maritime Container Transportation**

Domestic-U.S. intermodal motor carriers generally handle the first and last segment of container transportation that utilizes a ship for the major portion of the container line haul, i.e. the segment between the port and the shipper or consignee. Our length of haul varies from a few miles to a few hundred miles. Intermodal truckers also generally do not arrange for the entire transportation movement from container pick-up to delivery; instead, a third party often arranges the transportation segments and chooses to use a trucker for a designated portion of the container move. The company that pays for our trucking-drayage service may be a third party logistics provider (3PL), the shipper or consignee, or a steamship line.

Because intermodal stakeholders are of unequal size and economic influence, the truckers' larger, foreign-owned ocean carrier "partners" very often dictate the business terms of our day to day activities pursuant to existing interchange agreements executed under the controlling Uniform Intermodal Interchange and Facilities Access Agreement (UIIA). The UIIA provides standard-uniform provisions for the non-commercial aspects of the marine and motor carrier interchange, leaving the commercial aspects (rates, per diem, free time, demurrage, equipment loss and repair, etc.) to individual addenda drafted by the marine carriers and issued to participating motor carriers following a cursory review by the Intermodal Interchange Executive Committee (IIEC-discussed below). As a consequence, it is unfortunately common for the ocean carriers to make decisions that are beneficial to their operations but otherwise often add significant and unexpected costs to an intermodal shipment and the trucker, as underscored by the recent, almost uniform increases in container related fees, per diem and reduction in storage-dwell times, etc. that have been instituted across the nation's intermodal network. These otherwise collusive operational edicts not only adversely impact motor carrier financial resources but also cause well documented scarce driver resources to be inefficiently deployed to meet arbitrary operational procedures

mandated by ocean carriers and marine terminal operators acting under the protection of antitrust exemptions.

### **Existing Antitrust Protection Impacts**

Unfortunately, even a cursory review of the existing *Shipping Act*-maritime related antitrust regime supports a conclusion that competitive impact analysis and governmental concerns have historically focused exclusively on the ocean carrier-products shipping community and have totally ignored the key lynch-pin of the intermodal transportation network...the trucking company. Indeed, as sanctioned pursuant to the *Shipping Act of 1984* and expanded in the Ocean Shipping Reform Act of 1998 (OSRA), ocean carriers are permitted to discuss and collectively set rates that include the inland transportation (store door) rates they will charge their customers for container delivery. Thus, the inland transportation charge, i.e. the trucker's potential fee/income for moving the container from the port to the customer's facility, is already embedded in the through rate established by the antitrust exempted ocean carrier, without regard, understanding or input on what the economic costs and competitive and resource impacts these decisions have on the trucking transportation segment!

During the earlier carrier regulated era when the Interstate Commerce Commission (ICC) and the Federal Maritime Commission (FMC) co-existed, motor carriers were required to "join" in the ocean carriers' tariff, which at least theoretically gave the administrative agencies the ability to determine that the divisions of revenue between ocean and motor carriers were "reasonable". Today, obviously no such regulatory structure exists and the division is therefore effectively made solely at the discretion of the ocean carrier. Of course, again theoretically, the "free-market" *should* control the commercial fairness of the division but, in reality, the disparate level of bargaining power that exists between ocean and motor carriers heavily favors ocean carriers for a variety of obvious business realities including size and economic concentration. Greatly exacerbating these realities, however, is the anti-trust immunity founded in the *Shipping Act* and extended to permit ocean carriers to collectively set store door rates under OSRA. Significantly, this Section of OSRA was inserted just prior to passage of the act, with no debate, analysis and no committee report.

In addition, recent FMC actions citing *Shipping Act* authority have extended antitrust protection to Marine Terminal Operators (MTO), defined, in part, as "person[s] engaged in the United States in the business of furnishing wharfage, dock warehouse, or other terminal facilities in connection with a common carrier." 46 U.S.C. app. § 1702 (14). As a result, port operational activities and fees such as the about to be implemented PierPass at LA-Long Beach are being discussed and set by otherwise competitive port operators who now operate under antitrust protection, while the port truckers are forbidden to even jointly discuss and potentially react in a coordinated response to procedures and fees they consider unreasonable/excessive/unjust!

In addition, as referenced above, the vast majority of marine carriers subscribe to the UIIA. As referenced earlier, the UIIA interchange agreements are administered by the IIEC comprised of three representatives each from the motor, rail and marine carrier sectors. This committee is rightly prohibited from discussing or considering the commercial (economic) terms of the individual carrier addenda.

Since the inception of the recent West Coast MTO Agreement (FMC Agreement No. 201143), however, the marine carrier members of the UIIA executive committee have begun to vote in block on matters before the committee apparently based on decisions made outside of the committee but within the MTO agreement, thus cloaking their joint activities with antitrust immunity. One effect of this change has been to bring the otherwise important work of the UIIA to a complete stalemate in any situation where the MTO agreement members oppose the intermodal transportation issues that are before the committee for decision. A clear consequence is that marine carrier competitors can/are now setting rules and rates free from antitrust consequences, even though the effect of such activities restrains the free marketplace and negatively impacts the economic well-being of the domestic intermodal trucking industry.

### **Congressional Activity**

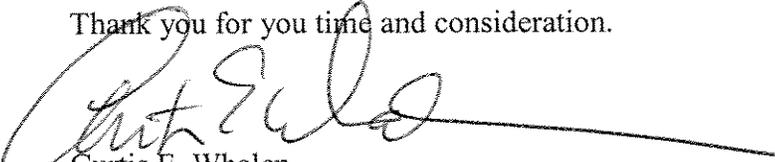
Congress has also initiated oversight of the *Shipping Act* and its impacts on the maritime shipping sector. Representative Henry Hyde, Chairman of the House Judiciary Committee, introduced legislation that would in fact strip ocean carriers of their antitrust immunity [*Free Market Antitrust Immunity Reform Act – (FAIR)*, H.R. 3138 (1999) & H.R. 1253 (2001)]. In his opening statement, Chairman Hyde stated that “The ocean shipping industry has evolved to the point that the immunity now almost exclusively benefits foreign-owned carriers at the expense of Americans: American shippers; Americans who consolidate small shipments into large shipments...and shippers' associations; and ultimately American consumers...”

Also on record as supporting the legislation were the Antitrust Division, U.S. Department of Justice and the Antitrust Section of the American Bar Association. John M. Nannes, Deputy Assistant Attorney General, specifically testified that “...the ocean shipping industry does not appear to be an exception to the general proposition that competition is the most effective way of providing consumers with the best products and services at the most affordable costs, and that the ocean shipping industry does not possess any unique characteristics that warrant departure from normal competition policy.” (Hearing record can be found at: [http://commdocs.house.gov/committees/judiciary/hju67304.000/hju67304\\_0.htm](http://commdocs.house.gov/committees/judiciary/hju67304.000/hju67304_0.htm) )

### **Conclusion**

Section II of the Commission’s approved Charter states in part that the objectives and duties of the Commission are “... to examine whether the need exists to modernize U.S. federal antitrust laws and to identify and study related issues.” The IMCC respectfully submits that given the importance that global trade and intermodal transportation have to this country’s present and future economic well being, the justification for and impacts of the antitrust exemptions granted to ocean carriers under the *Shipping Act of 1984* clearly warrant inclusion in the list of laws to be examined by the Commission.

Thank you for your time and consideration.



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IMCC Executive Director