



Office of Commissioner Joseph E. Brennan
FEDERAL MARITIME COMMISSION

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BY:

Deborah A. Garza, Chair
Antitrust Modernization Commission
1120 G Street N.W., Suite 810
Washington, D.C. 20005

Dear Ms. Garza:

On September 20, 2006, the Antitrust Modernization Commission asked the Federal Maritime Commission to identify the benefits and costs of the antitrust immunity in the Shipping Act, to assess the overall commercial impact of that immunity, and to recommend whether the existing immunity should be retained, modified, or repealed. As a member of the Federal Maritime Commission, I disagree with the position taken by the majority of the Commission. I would like to answer the questions posed to the FMC and to explain my reasoning briefly.

In my view, Congress should repeal antitrust immunity with respect to rate-setting and rate discussions by ocean common carriers. Information exchange and space-sharing among ocean common carriers should be retained, however, to the extent that such agreements are aimed at enhancing efficiency. Congress should also retain the limited antitrust immunity given to marine terminal operators under the Shipping Act.

I agree with the legislative recommendations made by the administrations of both President George W. Bush and President William J. Clinton. Numerous antitrust authorities that have considered this issue, including the Department of Justice's Antitrust Division, the American Bar Association's Section of Antitrust Law, and the Organization for Economic Cooperation and Development (OECD), have concluded that ending price-fixing in ocean shipping is the best economic policy. In addition, the European Commission has repealed the exemption for carrier price-fixing and joint capacity regulation and has pledged to take appropriate steps to advance the removal of that immunity worldwide. The repeal in Europe will take effect in 2008.

I begin from the standpoint that an exemption from the normal standards of business competition requires continual proof of its necessity. Ocean common carriers have not met this burden. On the contrary, antitrust immunity has arguably kept shipping rates higher. I believe this occurs when discussion agreements set up rate structures (e.g, service-contract guidelines, general rate increases, and peak-season surcharges) and the carrier members use those structures as the starting point of service-contract negotiations with shippers. It stands to reason that artificially high shipping rates have been the result and that shippers have passed this extra cost on to the American consumer.

Also troubling is the fact that the current exemption allows foreign carriers to fix the prices charged to American shippers. Although designed to protect American businesses and

consumers, the Shipping Act's antitrust immunity has been enjoyed by foreign-owned ocean carriers almost exclusively, at least since the mergers of 1999 that nearly eliminated the U.S.-flag oceangoing fleet. I do not believe that Congress intended the antitrust immunity in the Shipping Act to be used as economic protection for foreign-owned carriers.

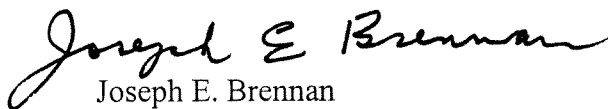
The ocean common carriers themselves maintain that the rates of today are overwhelmingly determined by supply and demand and not by the voluntary rate guidelines agreed upon by carriers. The predominance of individually-negotiated, confidential service contracts for the last six years has been a remarkable commercial success, they maintain. If true, rate-setting and rate discussions among ocean common carriers are indeed an anachronism that Congress should repeal as part of antitrust modernization.

The Shipping Act should retain, however, an antitrust exemption that allows space-sharing agreements and other operational agreements of carriers aimed at efficiency only. The antitrust exemption for marine terminal operators should also be maintained, on the basis that such agreements may alleviate port congestion, reduce air pollution, or enhance port security. One example is the off-peak-hours program created pursuant to a discussion agreement of marine terminal operators at the ports of Los Angeles and Long Beach.

In summary, it is my assessment that Congress should repeal antitrust immunity with respect to rate-setting and rate discussions by ocean common carriers. The exemption is unnecessary and in all likelihood harmful. Should such a change in the law prove not to benefit American shippers and consumers, Congress could always reinstitute the immunity at a later date.

Thank you for requesting testimony from the Commission on this issue. You may consider this letter a public comment on the "immunities and exemptions" issue that the Antitrust Modernization Commission has selected for study.

Sincerely,



Joseph E. Brennan
Commissioner

Federal Maritime Commission

cc: Andrew J. Heimert, Executive Director and General Counsel
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