

THE ANTITRUST MODERNIZATION COMMISSION

**HEARING ON ANTITRUST IMMUNITY
PROVIDED UNDER THE SHIPPING ACT OF 1984**

COMMENTS

Submitted on Behalf Of

THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE

THE NATIONAL INDUSTRIAL
TRANSPORTATION LEAGUE
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The National Industrial Transportation League ("League") appreciates the opportunity to submit its Comments to the Antitrust Modernization Commission ("AMC" or "Commission") in response to the Notice of Public Hearing on the Shipping Act of 1984, published in the Federal Register on September 29, 2006. 71 Fed. Reg. 57462. The League understands that the Commission was established to evaluate whether modernization of the antitrust laws is needed. One of the topics that the Commission has identified for study is the antitrust immunity provided to ocean carriers and marine terminal operators under the Shipping Act. 70 Fed. Reg. 28905 (May 19, 2005).

**I.
EXECUTIVE SUMMARY**

The antitrust immunity provided under the Shipping Act has not been reviewed by Congress since the passage of the Ocean Shipping Reform Act of 1998 ("OSRA") more than 8 years ago. The business arrangements between ocean carriers and their customers have changed significantly since then.¹ Although OSRA has resulted in significant benefits, including more

¹ See The Impact of the Ocean Shipping Reform of 1998, FMC Sept. 2001 reporting on the significant changes brought about by the passage of OSRA within two years of the law's effective date. Since the publication of the FMC's Report on OSRA, the industry has continued to adjust to the flexibility

flexible and customized shipping arrangements, it is prudent to evaluate whether even greater public benefits could be achieved if rates for transportation services were established solely by competition among service providers.

The European Union ("EU") has decided to repeal its antitrust exemption, known as Regulation 4056/86. Just two weeks ago, the EU determined that "a thorough review of the industry carried out by the Commission has demonstrated that liner shipping is not unique as its cost structure does not differ substantially from that of other industries. There is therefore no evidence that the industry needs to be protected from competition." EC Regulation No. 1419/2006, Sept. 26, 2006.

The League believes that a review of antitrust immunity provided under the Shipping Act should be conducted. The review should involve government and industry stakeholders and include an examination of the costs, benefits, and anticompetitive effects that result from the immunity, and whether carriers need to be insulated from competition based on existing market conditions. The review should also consider the impact that the repeal of Regulation 4056/86 in Europe will have on U.S. trades, including whether it places U.S. businesses at a competitive disadvantage to their foreign competitors.

II. IDENTITY AND INTEREST OF THE LEAGUE

Established in 1907, the League is the nation's oldest and largest association in the United States representing shippers and receivers of goods transported in U.S. domestic and foreign commerce using all modes of carriage. The League has over 600 member companies that range from some of the largest users of the United States' and the world's transportation systems, to smaller companies engaged in the shipment and receipt of goods. Many of its members ship and/or receive goods via ocean vessels exiting and entering U.S. ports. In 2003, the League broadened its membership to permit carriers, logistics companies, and other persons engaged in

and freedoms granted by OSRA's reforms which is reflected in the more customized shipping arrangements between shippers and carriers.

the transportation of goods to join the League, however, the majority of its members include traditional shippers and receivers of goods. Thus, League members have a direct interest in any review or study of antitrust immunity provided under the Shipping Act.

The League is also a member of the Global Shippers' Forum ("GSF") (formerly known as the Tripartite Shippers' Group), an association of shippers' organizations worldwide. Members of the GSF include the European Shippers' Council, the Asian Shippers Council, the Japanese Shippers Council, and many others. Members of the GSF met in September of 2006 in Antwerp to discuss common problems and agree upon common public policy positions. One of the topics addressed was the repeal of the antitrust exemption provided to liner carriers in Europe. The members of GSF entered into a Joint Shippers' Declaration that states:

This repeal in Europe will become a force and model for change elsewhere. Competition policies for the liner shipping sector around the world can be expected to align themselves with those followed in most other industrial and service sectors. It is the GSF's objective that these policies embrace competition, free market principles and end collusion among suppliers.

See Joint Shippers' Declaration of Asian Shippers' Council, Canadian Industrial Transportation Association, European Shippers' Council, Japan Shippers' Council, and The National Industrial Transportation League, Sept. 27-29, 2006, Antwerp, Belgium, p. 1, attached here to as **Exh. A**.

III. THE LEAGUE'S INVOLVEMENT IN U.S. REGULATORY REFORM OF THE OCEAN LINER INDUSTRY

The League was instrumental in bringing about reform of the ocean liner industry in the United States through passage of OSRA. In the mid-1990s, the members of the League sought to change the regulatory landscape for liner shipping after ocean carrier conferences abused their dominant position in the marketplace by refusing to negotiate individual contracts with their customers, failing to respond to customer requests in a timely fashion, and by proposing to implement programs that would reduce capacity. The League worked directly with the stakeholders in the U.S. liner industry, including the U.S. liner carriers in existence at the time,

and with the Congress to develop reform proposals designed to make the U.S. liner shipping industry more competitive, efficient, and responsive to shippers' business requirements. This process led ultimately to the adoption of OSRA, which became effective in May 1999.

The Shipping Act, as modified by OSRA, encourages one-on-one business arrangements between shippers and individual liner operators in the form of confidential service contracts. Since OSRA became effective, both shippers and carriers have embraced the flexibility and freedoms authorized under the new law and customized contractual arrangements have become overwhelmingly the preferred means of conducting business today in the U.S. trades. These contracts are modeled after proprietary relationships which exist in virtually all other U.S. industries, including the other modes of transportation.²

The U.S. regulatory system implemented under OSRA is working well and has resulted in significant benefits to the industry stakeholders based on the proliferation of individually negotiated contracts between shippers and carriers. The significant use of individual service contracts has allowed the U.S. maritime industry to become more reliant on competition than in the past and to operate more efficiently now that the bureaucracies of the old conference systems no longer exist or control the dealings between shipper and carriers.

However, now that the industry has fully adapted to the new practices spurred by OSRA, the League believes that it is appropriate to explore whether the U.S. regulatory system governing international shipping could be further improved. In the U.S. trades, the ocean carriers primarily use the antitrust immunity to participate in collective discussions of supply and demand and other market factors as part of "Discussion Agreements." Discussion Agreements are filed with the

² Unlike other contracts involving other U.S. transportation modes, service contracts between ocean carriers and shippers are required to include certain essential terms and the contracts are filed confidentially with the Federal Maritime Commission ("FMC"). 46 U.S.C. App. § 1707(c). Thousands of contracts and contract amendments are filed with the FMC every year. However, the FMC does not have the authority to review and "approve" service contracts. Rather, contracts are required to be filed with the FMC to facilitate the agency's enforcement of certain prohibitions in the Shipping Act and to monitor joint carrier activities, to the extent that multiple carriers participate in a service contract under the protection of the antitrust immunity afforded under the Act. 46 U.S.C. App. § 1709(b) and (c). The League understands that, in most cases, the FMC never reviews the contracts that are filed except when a complaint involving a particular contract is registered with the agency.

FMC and are subject to an expedited approval process under the statute. 46 U.S.C. App. § 1704(a). These agreements permit the carriers to discuss supply and demand information and to establish pricing guidelines on a "voluntary" basis. 46 U.S.C. App. § 1704(c). These guidelines are filed with the FMC and tend to propose implementation of General Rate Increases ("GRIs") and a variety of surcharges to be applied in the U.S. trades. Market conditions usually determine whether or not the voluntary pricing guidelines are actually charged to the carriers' customers. However, even though these pricing guidelines are negotiable, shippers with limited volumes and negotiating leverage are more likely to have to absorb the prices established by collective discussion among the service providers, rather than by competition.

In addition, the level of surcharges for both large and small shippers appears to be particularly influenced by the antitrust immunity still enjoyed by ocean carriers. Thus, the League believes that collective activities through the mechanism of Discussion Agreements by ocean carriers still have an influence on the prices (both base line freight and surcharges) charged to shippers in the U.S. trades, and that such influence, in many cases, is likely to result in prices that are higher than would otherwise be established in a purely competitive marketplace.

IV. THE LEAGUE'S INVOLVEMENT IN THE EXAMINATION OF COMPETITION RULES

In 2001, the League participated in a project commenced by the Organization for Economic Co-operation and Development ("OECD") concerning the matter of "Regulatory Reform in International Maritime Transport." Specifically, the OECD solicited information from the stakeholders involved in the maritime industry regarding the impact on shippers of collective pricing under antitrust exemptions. In response, the League surveyed its members to gather data on the shippers' experiences with the liner carriers and provided a submission to the OECD, which is attached as **Exh. B**. At that time, OSRA had been in effect for only two (2) years and the League believed that more time was needed to evaluate its impact on shipping in the U.S.

trades before additional regulatory reforms should be considered. However, the League also asserted that the OECD should evaluate whether antitrust exemptions were still necessary based on the workings of the more modern liner industry and whether the costs of collective pricing outweigh any claimed benefits.

Moreover, in February 2006, League staff and counsel met with several members of the European Commission Directorate – General for Competition to discuss the status of the agency's review of the Block Exemption for Liner Conferences contained in Regulation 4056/86, as well as the experience of U.S. shippers under OSRA. This useful and wide-ranging discussion covered a number of topics, and the League offered to provide the agency with information that it might need for its analysis of Regulation 4056/86. In July 2006, the League submitted written comments to the DG Comp regarding the EU's decision to repeal the Block Exemption applicable to liner conferences and evaluating a Revised Proposal of the European Liner Affairs Association ("ELAA") regarding industry Guidelines to be adopted by the EC. The League's Comments are attached as **Exh. C**.

V.

THE COMMISSION SHOULD RECOMMEND THAT THERE SHOULD BE A BROAD-BASED INDEPENDENT REVIEW OF THE ANTITRUST IMMUNITY PROVIDED UNDER THE SHIPPING ACT

It has long been the policy of the League to support transportation systems where competition among carriers and the forces of supply and demand determine the rates and charges assessed to the carriers' customers. To the maximum extent possible, the League believes that rates should be formulated based on an *individual* carrier's own costs and necessary return on investment, and the carrier's *individual* evaluation of market conditions. Shipping rates should not be influenced by collective carrier discussions.

Notwithstanding this long-standing policy of the League, when the debate over the OSRA reforms took place in the 1990s, the League supported the continuation of antitrust immunity for ocean carriers and terminal operators, as long as shippers were provided the right to

negotiate individual service contracts with the carriers, without interference from carrier conferences. The League believed that such a measured approach to reforming the Shipping Act was the appropriate course of action at that time.

1. Significant Changes Have Occurred Since Passage of OSRA in 1998

During the eight years since OSRA was passed, business practices in the liner shipping industry have changed significantly. As noted, both shippers and carriers have embraced contracting on an individual basis and service contracts are now the preferred business arrangement. The desire of both shippers and carriers to negotiate one-on-one relationships led quickly to the demise of many of the carrier conferences that once dominated the liner shipping industry and dictated the rates and service terms offered to shippers. Today, competitive forces play a much more significant role in the establishment of liner shipping rates and charges.

Despite these benefits that have resulted from OSRA, the carriers still engage in collective discussions of supply and demand in the U.S. trades primarily via Discussion Agreements. Although any action taken as a result of collective discussions must be "voluntary" and not mandatory, one cannot always distinguish between the two. In general, the GRIs and surcharges established by Discussion Agreements generally serve as benchmarks for service contract negotiations. However, some shippers may not have the leverage to negotiate discounts from the collectively established benchmarks. In addition, many shippers question why steamship lines are not required to establish prices based on their individual costs like almost all other industries operating in the United States, given the current structure and modern workings of the industry. They further question whether the carriers continue to need antitrust protection and whether even greater public benefits would result from removal of the immunity.

The carriers' collective activities are not limited to Discussion Agreements but rather extend to vessel sharing, slot-chartering, and other mechanisms to rationalize and promote the efficient utilization of the carriers' assets. The League strongly supports these kinds of efficiency-

enhancing activities that do not involve the collective establishment of shipping rates and charges. However, it should be examined whether these activities would be permitted under the existing antitrust laws or whether a special grant of immunity is required in order for carriers to engage in such activities.

Moreover, the continuation of antitrust immunity has resulted in a regulatory scheme that requires oversight and monitoring of collectively-based actions, at a significant cost. As noted, carrier agreements must be filed and monitored by the FMC. In addition, thousands of service contracts are filed electronically with the FMC, in part to ensure that no group of carriers engages in discriminatory conduct against certain specified maritime interests, such as ports, shippers' associations, and transportation intermediaries. 46 U.S.C. App. § 1709(c). These contracts are stored in an electronic database and examined only when a complaint is made at the agency. The contracts also may be randomly reviewed when the agency evaluates market trends. However, it is highly questionable whether the practice of service contract filing service continues to make sense from a cost/benefit viewpoint.

As the liner shipping industry continues to evolve under OSRA's reforms, the League believes that even greater benefits could be achieved if competition among service providers is the only factor that determines shipping rates and charges. Businesses engaged in the U.S. foreign trade should not be required to pay higher rates or charges that are derived from collectively established benchmarks, unless there is a compelling need to permit the anticompetitive conduct. Many shippers doubt that such a compelling need exists. Accordingly, the League believes that a review of the immunity provided under the Shipping Act should be conducted that examines whether any tangible benefits occur from the immunity and, if so, whether those benefits outweigh the costs and competitive detriments that also result from collective discussion by carriers of supply, demand, and prices.

2. Other Trading Nations With the U.S. Have Revoked or Are Reviewing Whether to Continue Antitrust Exemptions for Steamship Lines.

On September 25, 2006, the European Competitiveness Council adopted unanimously the proposal of the European Commission to repeal Regulation 4056/86, which affords ocean liners a block exemption from European antitrust laws. The repeal is scheduled to take effect on October 18, 2008 and will directly affect all trades to and from member states of the European Union, including the U.S. trans-atlantic trade. In addition, the League is aware that Japan and other Asian countries may begin the process to review their laws granting antitrust exemptions to the liner shipping industry based on the changes adopted in Europe. If those reviews ultimately lead to other revocations of antitrust exemptions, then those decisions would also directly impact the shipment of goods between the U.S. and those countries.

Based upon the decision to repeal the block exemption in Europe and the pending review in other countries of the antitrust exemption for liner carriers, the League believes that it would be appropriate for the United States government, in consultation with the maritime industry, to undertake a broad-based independent review of the antitrust immunity granted under the Shipping Act. This review must include an analysis of the impact that the changes adopted in Europe will have on the shipment of goods in the U.S. trades, including whether the inconsistency in the regulatory regimes will place U.S. businesses at a competitive disadvantage to the extent that their shipping rates and charges are not based exclusively on competition. The incompatibility in the U.S. and European legal regimes is also likely to add costs and inefficiencies to the global supply chains of many companies shipping products between those countries, since additional administrative processes will be necessary to ensure compliance with the different legal systems.

Specifically, the lack of antitrust immunity in Europe raises questions and doubts as to the carriers' ability to collectively establish and assess GRIs and surcharges on shipments moving between the U.S. and EU countries. Not only should the impact of the repeal of the block exemption be evaluated, but it would be appropriate to consider whether the analysis and

reasoning supporting the decision of the EC to repeal the block exemption should be applied in the United States.

VI. CONCLUSION

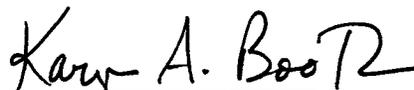
The League appreciates the opportunity to make its views known on the important topic of antitrust immunity granted under the Shipping Act. The U.S. regulatory regime should promote the establishment of rates and charges based on competition among liner carriers to the maximum extent possible. The liner industry has changed significantly since OSRA was adopted and we believe that the Shipping Act should be reviewed to ensure that it keeps pace with the evolving business arrangements and practices of shippers and carriers. Furthermore, the removal of the block exemption for liner carriers in Europe causes incompatibility in the regulatory systems of one of our nation's major trading partners. The impact of the changes adopted in Europe should be examined with an eye toward ensuring that U.S. businesses are able compete on a level playing field with their foreign competitors who will soon operate under less restrictive economic regulation that places a greater emphasis on competition among service providers.

These considerations, along with our Comments herein, necessitate a broad-based independent review of the antitrust immunity provided under the Shipping Act.

Respectfully submitted,

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By Its Attorneys

A handwritten signature in black ink that reads "Karyn A. Booth". The signature is written in a cursive style with a horizontal line underneath it.

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Dated: October 18, 2006

Joint Shippers' Declaration
of
Asian Shippers' Council
Canadian Industrial Transportation Association
European Shippers' Council
Japan Shippers' Council
The National Industrial Transportation League

THE 2006 GLOBAL SHIPPERS' FORUM MEETING

September 27-29, 2006
Antwerp, Belgium

The annual gathering of shippers from the three major trading regions of the world took place on September 27-29, 2006 in Antwerp, Belgium, a major historic European gateway and centre for trade and commerce that has helped shape the world we live in today. To more accurately reflect the membership – the group adopted the name “Global Shippers’ Forum (GSF).” GSF recognizes the need to reflect the interests of all freight shippers regardless of geographic origin or trade lanes. It conveys the Forum’s continuing objective to support policies which enhance changing transport needs around the world where efficiencies can be realized through competition and a marketplace environment. In addition, GSF adopted a “Statement of Principals” that formalizes the group’s vision and purpose. Likewise it serves as an invitation to other shipper groups to join and share the GSF’s principles.

Maritime Regulatory Reform

Global trade requires secure, efficient and effective freight transport. Increasing volumes of the world’s freight are moving by sea in containers in the liner trades. GSF seeks to ensure that shippers and receivers of freight have effective controls over their maritime container logistics services in order to optimize the management of their supply chains. This group has emphasized the need for co-operation, partnership, and transparency in the commercial and operational relations they have with their service providers.

This campaign is as vital this year as it has ever been. The European Union (EU) has removed anti-trust/anti-competitive exemptions for the liner shipping industry in trades to and from the EU. In this regard, the GSF applauds this week’s decision by EU’s Competitiveness Council. GSF believes this decision will usher in a new environment that will create new economic relationships amongst all transport stakeholders. This new environment will not only provide benefit to transport stakeholders, but more importantly to consumers everywhere.

This repeal in Europe will become a force and model for change elsewhere. Competition policies for the liner shipping sector around the world can be expected to align themselves with those followed in most other industrial and service sectors. It is the GSF’s objective that these policies embrace competition, free market principles and end collusion among suppliers.

GSF firmly believes that all industry sectors must recognize the new competitive environment that now presents itself. Shippers, carriers and other stakeholders should embrace the new challenges and opportunities or else risk being left behind.

GSF concluded at its 2006 meeting, that the revised proposals by the European Liner Affairs Association (ELAA) represent a real risk of collusive activity. GSF will prepare a detailed assessment of the pertinent issues contained in the European Commission's "Issues Paper" including the ELAA's revised proposals.

GSF believes, to the maximum extent possible, rates should be formulated based on an *individual* carrier's calculation of its *individual* costs and necessary return on investment and the carrier's *individual* evaluation of market conditions, and should not be influenced by collective carrier discussions. Likewise, customers must recognize that their practices must adapt to this new environment.

Surcharges/Ancillaries Terminal Handling Charges

Surcharges and ancillary costs have long been a contentious issue for shippers. This past year has been no different in this regard to all modes

The volatility of the world oil prices has undoubtedly added significant costs for freight transport providers, as it has for many manufacturing companies. The pressure on all industries to manage these factors has been intense. The challenge for carriers in managing increased costs is to first do everything possible to mitigate these costs rather than automatically passing them along to their respective customers.

GSF strongly supports cost-based transparency for surcharges/ancillaries. It also believes that surcharges/ancillaries should be determined and announced by individual carriers and not guided by conference or discussion agreements or any other forum that seeks to facilitate a collective response to such charges.

Instead, all such decisions should reflect actual costs and the needs of customers. Surcharges should also be temporary in nature.

GSF supports those shippers' who desire to have all costs included in an "all-inclusive" freight cost. Many shippers, particularly Asian shippers, believe that the Terminal Handling Charge should be an integral part of the freight and hence shouldered by the party who pays the freight in accordance with normal commercial transport practices. GSF supports the desires of many shippers to have a simplified system with the ultimate objective of having "all-inclusive freight costs."

Equally, GSF supports those shippers who prefer to view line item costs that are calculated in the establishment of the final cost. Nevertheless, such an approach should not lead to the establishment of a "fixed base" for surcharges.

Freight Transportation Security

Anti-terrorist security measures, current and proposed, continue to be an issue of major importance to shippers around the world. GSF strongly supports initiatives and programs, that protect society, the economy, trade and transport from terrorist activity, without unduly impeding the efficient movement of goods.

Increasingly, the private sector is being required to invest in security systems, provide additional resources to implement security measures, and introduce new business practices in order to comply with new national and international security requirements.

GSF recognizes and accepts that industry has an integral role to play in preventing terrorists from exploiting trade and transport. It also firmly believes that industry will need to make investments in security measures and resulting systems. However, in instituting these new programs, it must be clear that the changes are proportional and effective in achieving their stated purposes and do not result in crippling the very systems they are designed to protect.

New and improved technologies must have proven capabilities that are effective in meeting both security as well as transport needs. This critical balance is imperative if we as an industry are to be successful in effectively combating terrorism.

Businesses, and especially small and medium sized enterprises, should be provided incentives, to help them make the investments necessary to comply with enhanced security requirements. Every effort should be made to prevent the proliferation of security regimes unilaterally imposed on the freight transport industry and its customers and encourage collaboration between governments.

Finally, GSF believes all security programs should be subject to regular reviews to insure that they are meeting their intended objectives. Industry assessed security charges and taxes should be used only for their intended purposes.

Ocean Cargo Liability

GSF has strongly supported completion of the deliberations of the UNCITRAL Working Group that is seeking to develop a new international instrument governing liability for the loss and damage of ocean cargoes. GSF still believes that adoption of an instrument which reflects modern shipping practices and up-to-date values for loss and damage to freight, would be beneficial to industry. However, there are notable areas of concern with respect to the present instrument as drafted.

GSF is not yet satisfied that the rights and interests of shippers are properly protected under the proposals, the freedom to contract using volume contracts that can provide derogation from the instrument is not contested when it is between equal parties. Additionally, there are outstanding issues which must be resolved with shippers, carriers and other parties which will bring about fair and equal treatment for all.

Enhancing Freight Transport Efficiency in the Supply Chain

Increasing volumes of freight, port congestion, capacity and gauge restrictions on the rail and road networks, limited infrastructure investment, increased security-based controls and growing unreliability of road freight services: these are all issues that are increasingly giving rise to concern among the members of GSF.

GSF supports initiatives from government or industry that seek to address these issues when they have, as their primary objective, the enhancement of efficient supply chains.

A multimodal, multi-party approach to finding solutions to inefficient supply chains is required. GSF will actively support, facilitate where possible, and promote initiatives that seek to develop and introduce best practices that involve all the parties active in a supply chain: carriers (all

modes), agents, air/port owners and operators, third and fourth party logistics providers and, significantly, shippers (consignors and consignees).

Equally, GSF welcomes dialogue with governmental organizations that seek to understand and enhance freight transport efficiency through facilitating intermodal logistics solutions where these are appropriate to the commercial needs of the users, and improving awareness of potential intermodal logistics solutions.

GSF also urges governmental organizations to invest in the strategic, open access/multi-user infrastructure, to support economic growth and development; in doing so, and not withstanding the social and environmental responsibilities of governments, it is important that governments do not dictate where economic developments should be located nor where the freight should move. Such matters are for business to determine according to the patterns and trends in trade and commerce and best commercial decisions, rather than political decisions.

Regulating Wood Packing Materials

GSF fully supports efforts to regulate solid wood packaging materials that are associated with the spread of undesirable pests and insects via international trade.

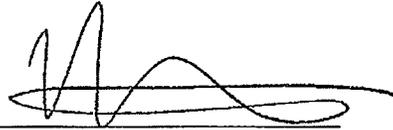
However, there are concerns with certain aspects of the implementation of the ISPM 15 Wood Packaging regulations for dunnage which is usually used to secure cargo inside containers. Wooden dunnage has to be custom-cut to size at the very last moment when a container is loaded. If the US interpretation of the requirement for marking every piece of wooden dunnage is adhered to by the authorities, and if the strict rule is applied to return the whole container (including cargo and packing materials) in the case of any violation of the rule, it is likely to result in insufficient dunnage in the container and may lead to a serious accident. The USA is still advocating such a course of action.

GSF calls for mitigating rules to be applied, in the interests of efficient and safe transport of goods. These include allowing IPPC Markings on container dunnage at places visible around the container doors. Alternatively a statement from the shipper could be made on the shipping documents saying that the dunnage materials have been treated in accordance with the rules.

The member delegations of GSF pledge to work in accomplishing the goals set forth within this Joint Declaration. While shippers throughout the world recognize that great value lies in accomplishing these policy initiatives, it will only be through coordination and communication that these goals will be realized, we know that much work lies ahead and GSF intends to take a leading role in helping to set the agenda.

The GLOBAL SHIPPERS' FORUM will develop measures and proposals that will give added impetus and new vigour to our efforts in securing a better environment in which our members – the world's shippers, can conduct their business.

Adopted in Antwerp, Belgium
September 29, 2006



European Shippers' Council



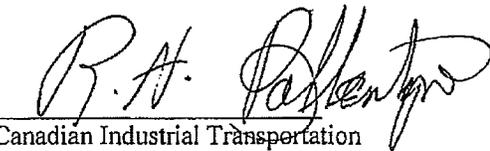
The National Industrial
Transportation League



Japan Shippers' Council



Asian Shippers' Council



Canadian Industrial Transportation
Association

SUBMISSION OF
THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE

TO THE
ORGANISATION FOR ECONOMIC
CO-OPERATION AND DEVELOPMENT

ON
REGULATORY REFORM IN
INTERNATIONAL MARITIME TRANSPORT

March 27, 2001

The National Industrial Transportation League ("League") appreciates the opportunity to participate in this important project of the Organisation for Economic Co-operation and Development ("OECD") concerning "Regulatory Reform in International Maritime Transport." This submission of the League is being provided in response to the OECD's request for information, dated December 19, 2000. The OECD has asked for information relating to the impact upon shippers of ocean carrier collective pricing under antitrust exemptions and to shippers' experiences with ocean carrier agreements. To assist in formulating its response to the OECD, the League surveyed the members of its Ocean Transportation Committee in order to gain insight into current experiences of U.S. shippers and possible trends relating to collective pricing and other activities of ocean carrier agreements. The responses to the survey are discussed below in Section III.

I. IDENTITY AND INTEREST OF THE LEAGUE

The League is the oldest and largest broad-based shippers' organization in the United States. League members include industrial and commercial concerns of all sizes. They ship products of all types in intrastate, interstate and international commerce using all modes of transportation. League members export and import substantial quantities of products to and from all points all over the world, and are, therefore, greatly affected by maritime policy. League members are the customers of the ocean transportation system. The League participated in the OECD workshop convened in May 2000 which sought to obtain feedback from the maritime industry stakeholders on the issue of collective carrier pricing undertaken pursuant to exemptions from antitrust laws. The League also joined with other shippers from around the world in support of the OECD's Examination of Regulatory Reform in Maritime Transport, pursuant to the November 2, 2000 communication to the OECD Secretary General. The League is pleased to provide this submission to the OECD as follow-up to the May workshop.

II. INTRODUCTION

Prior to setting forth the information collected by the League on the issue of carrier pricing, the League believes that it is important to provide some background on the regulatory reforms impacting the liner shipping industry adopted recently by the United States in the *Ocean Shipping Reform Act of 1998* ("OSRA"). Specifically discussed below is a review of the prior U.S. regulatory regime which led to OSRA's reforms and of the impact of OSRA thus far on shippers and carriers.

A. Changes to the U.S. Ocean Liner Industry Under The Ocean Shipping Reform Act

In 1995, League President Edward M. Emmett told a U.S. House of Representatives' subcommittee that the prior U.S. law governing international ocean transportation -- *The 1984 Shipping Act* -- needed to be changed because:

The current approach treats ocean liner carriage like a utility rather than a service. We urge you to recognize that ocean liner carriage is not a utility and should not be subject to utility style regulation. Instead, it should be economically deregulated and the competition marketplace should be allowed to work.

Before the enactment of OSRA, it had become evident to most U.S. shippers that the U.S. law was outdated. One of the central compromises that led to the passage of the 1984 Act was the continuation of antitrust immunity in the operation of ocean conferences. In return, the power of the conferences was to be limited by allowing individual carriers to exercise a mandatory right of independent action from the rates set by conferences. The compromise was intended to level the playing field for shippers and carriers.

However, in the years following the passage of the 1984 Act, the compromise proved inadequate because of the provisions in the Act which required service contract terms to be transparent. This permitted carrier conferences to police the contracts offered by individual carriers. In addition to enhancing the power of a conference over its members, such transparency, when combined with the "me too" provisions of the 1984 Act, created a strong disincentive for individual carriers to offer contracts.

The U.S. liner industry was also saddled with a system that required tariff filing and enforcement. With unrestricted entry into the liner business and modern communications available to shippers, tariff filing was a government "make work" project. Originally designed to protect shippers, it simply added costs, inefficiencies and hampered the ability of businesses to compete in world markets. Thus, the regulatory scheme under the 1984 Act was inflexible and inhibited innovation.

OSRA changed much of this environment. Specifically, it provided for the following key changes:

- The major provisions of service contracts, including rates and service commitments, were for the first time permitted to remain confidential.
- Ocean carrier agreements were prohibited from interfering with individual contract negotiations between shippers and carriers.
- The requirement that carriers match service contract terms for similarly situated shippers was eliminated.
- Tariff filing with a government agency was eliminated and replaced with a requirement that common carriers publish their prices in electronic tariffs.

When the League began its efforts to bring about the statutory reform that eventually became OSRA, it did so with the idea that change must incorporate the use of confidentiality provisions in service contracts, just as in other deregulated industries. Most shippers understood that the existence of confidential service contracts would tend to undermine the carriers'

collective rate setting authority. The League believed that if carriers could not view each others' rates, collective rate setting would become increasingly difficult. The League also believed that most carriers would come to realize that they could operate efficiently and effectively on their own and that they did not need the special protection of a rate setting conference. Rather, it was and still is the League's view that pricing in ocean transportation should be a function of supply and demand in a competitive market place and an individual carrier's costs, which presumably would include a reasonable return on investment.

OSRA, as finally enacted, was the result of shippers, carriers, ports, labor, and intermediaries coming together to produce a compromise intended to foster customized commitments, and a more competitive and efficient U.S. liner shipping industry.

B. OSRA Has Been Beneficial To Shippers And Carriers

As OSRA approaches its two year anniversary, most U.S. shippers believe that the statute appears to be operating as its architects intended, by promoting competitive and efficient ocean transportation. Perhaps the greatest impact of OSRA has been in the proliferation of ocean service contracts between individual carriers and their customers. According to the U.S. Federal Maritime Commission, the volume of service contracts entered into between May 1, 1999 and May 1, 2000 was up over 116 percent compared to the same period in the previous year.¹ Data from the FMC, as well as information obtained by the League from its members, clearly indicate that service contracts have become the preferred way to do business in the U.S. international liner trades. The preference for contractual transactions in ocean shipping mirrors the types of economic relationships that have come about in U.S. domestic transportation, which was largely deregulated to varying degrees some 20 years ago.

With the advent of one-on-one contracting, ocean carriers and their customers may freely negotiate and customize the terms of their business relationship. Arrangements as to price, service, and other terms may be incorporated into a contract which provides benefits to both parties.

Probably the most important aspect in the proliferation of contracts has been the development of confidentiality provisions. As has been the case in domestic transport, confidentiality allows only the parties to the contract to view the commercial arrangement and enjoy its benefits. In the past, "me too" requirements under U.S. law permitted "similarly-situated" shippers to review and request the same type of arrangements obtained by its competitor. This discouraged carriers from offering attractive terms for prices and services, since these terms may have to be given to other persons not a part of the original contract.

While the short-term assessment of OSRA among U.S. shippers has been extremely positive, it is important to note that this era of contracting is still relatively new to the U.S. trades. Experience has been limited to just a few contracting cycles for both U.S.-European and

¹ See Statement of the Honorable Harold J. Creel, Jr. Before the Committee on Transportation and Infrastructure, Subcommittee on Coast Guard and Maritime Transportation, United States House of Representatives, at 4.

U.S.-Asian movements. Obviously, additional time and operational experience is necessary before any long-term assessments may be drawn.

It should also be noted that some shippers have expressed concern over "voluntary guidelines" impacting service contracts, which are formulated by groups of carriers known as "discussion" or "stabilization" agreements. Under U.S. law, carriers may join together in agreements under which they may discuss prices and general market terms and conditions and may voluntarily agree upon pricing proposals. Some shippers question whether voluntary guidelines published by carrier agreements are truly "voluntary" and believe that their existence influences carrier pricing behavior. At present, the League remains optimistic that market forces will prevail and individual carriers will act accordingly.

Although the international ocean liner carrier community is in the best position to articulate how OSRA has impacted their operations, the League believes that they too are benefiting from the new contracting environment. Indeed, published reports seem to indicate that over the past year, many lines are reporting higher than ever profit levels.²

C. The League's View On U.S. Antitrust Immunity

OSRA retained immunity from U.S. antitrust laws (the equivalent of European competition rules) for carrier agreements. However, OSRA drastically changed the context within which this antitrust exemption operates. As noted, OSRA moved the liner industry to a regime in which contracting is prevalent, most prices are confidential, and carrier agreements have no authority over one-on-one contracting between shippers and carriers.

Given the recent changes made by OSRA, the League believes that, whether or not antitrust immunity is retained in its present form as a matter of U.S. statute, carrier pricing that flows from collective activities will and should become less significant in the marketplace. In the U.S. domestic economy, for example, although some forms of antitrust immunity still exist for both domestic motor and rail carriers, the advent of confidential contracting has rendered such immunity virtually irrelevant to shipper-carrier relations. Prices in U.S. domestic transportation are set by individual contracts, not by the activities of carrier groups immune from the antitrust laws. We believe that the same will and should soon take place in international ocean liner transportation.

² "OOCL Parent Reports 67% Jump in Profit" March 16, 2001, *Journal of Commerce*; "P&O Nedlloyd Reports Record Earnings" March 15, 2001, *Journal of Commerce*; "GMA CGM Heads for Record 2000 Profit" March 13, 2001, *Journal of Commerce*; "Profit Jumps 38 Percent at Wilhelmsen Parent" February 22, 2001 *Journal of Commerce*; "ACL Earnings Surged in Third Quarter" October 26, 2000, *Journal of Commerce*; "Marine Transport Corp. Posts Jump in Profit" October 19, 2000 *Journal of Commerce*; "NOL Earnings Soar in First Half" September 22, 2000, *Journal of Commerce*; "P&O Profits Rise on Ports, Container Performance" September 26, 2000 *Journal of Commerce*; "Hapag-Lloyd Leads Earnings Surge in Preussag's Logistics Division" August 30, 2000 *Journal of Commerce*; "Maersk-Sealand Sparks Surge in Moller Earnings" August 24, 2000 *Journal of Commerce*; "OOCL's Parent Changes Back into the Black" August 21, 2000 *Journal of Commerce*; "P&O Nedlloyd Profit Surges" August 17, 2000 *Journal of Commerce*; and, "ACL Earnings Surge as Westbound Rates Rise" August 1, 2000 *Journal of Commerce*.

The League also believes that, under OSRA, carrier antitrust immunity will and should eventually be used primarily for efficiency-enhancing activities (such as vessel-sharing or other similar arrangements). However, if antitrust immunity leads to undue interference with one-on-one contractual relationships, via voluntary guidelines or otherwise, then the grant of immunity would need to be carefully reviewed. As a result, the League believes that OSRA should be given time to work before formal changes are contemplated to U.S. law providing antitrust immunity to ocean carriers.

III. U.S. SHIPPERS EXPERIENCES UNDER COLLECTIVE CARRIER PRICING AUTHORITY AND WITH CARRIER AGREEMENTS

As noted above, to assist in responding to the OECD's request for information, the League developed a survey which was intended to capture general pricing trends in the major U.S. trades and shippers' experiences with ocean carrier agreements. The survey was sent to the members of the League's Ocean Transportation Committee ("OTC"). The members of the League's OTC include representatives of U.S. companies that are responsible for managing the movement of their company's goods in U.S. international commerce. These individuals typically engage in rate and service negotiations with ocean carriers on behalf of their respective company.

A. Structure of the Survey

The League's survey was comprised of five (5) parts covering the following areas: General Information, Rate Volatility, Rate Experiences, Surcharges, and Other. A copy of a blank survey is attached hereto as Exhibit 1.

In Part I, General Information, the League sought to obtain information regarding the trades in which the respondent shipped cargo and the range of TEUs shipped in each trade. The League also sought to discern the approximate percentage of cargo moved under contracts versus common carrier tariffs. Thus, Part I was intended to provide the context within which to analyze the responses to the questions set forth in the other parts to the survey.

Part II of the survey was designed to capture general information regarding rate volatility by trade during the four year time period of 1996 through 2000. For each of the listed trades and years, the respondent was asked to indicate the percentage by which its rates had either increased or decreased. This section of the survey focused upon the major U.S. trades of the North Atlantic and Pacific and asked for responses based upon the shippers' experiences for both eastbound and westbound movements in these trades. The respondent was also asked to set forth their rate experiences in any other trade by completing the response under the category of "other." In this part, the League was attempting to evaluate whether the pricing activity of ocean carriers has been relatively stable or volatile in the major U.S. trades in recent years.

In Part III, the League requested information regarding the general pricing behavior of ocean carriers. In particular, the League sought to discern whether, in general, there has been small, moderate or substantial variance in the pricing practices between (1) members of the same

ocean carrier agreement, and (2) members of carrier agreements and independent carriers operating in the listed trades. This area of the survey also focused upon the major U.S. trades of the North Atlantic and Pacific and asked for responses based upon the shippers' experiences for both eastbound and westbound movements in each trade. A "small" variance was defined as 1-5%, "moderate" variance as 5-10%, and "substantial" variance as >10%.

In Part III, the League also asked shippers to compare their current rate levels with rates applicable five years ago, and to indicate whether the current rates are lower, higher, or substantially the same. Further, the League was interested in shippers' general impression as to the impact that immunity from antitrust laws has had upon rate levels. The OTC members were specifically asked whether they believed that rate levels would have increased, decreased, or stayed the same over the past five years if carriers belonging to conferences/discussion agreements were not permitted to collectively establish or discuss rates.

Part IV of the survey was limited to the issue of carrier surcharges. In this part, the League was interested in learning whether the number and kinds of surcharges have changed over the past five years, and whether the members of carrier agreements and independent lines deviate from each other in assessing surcharges.

Finally, in Part V, the League sought to obtain the impression of shippers regarding whether the existence of carrier agreements has generally affected the rates and service terms that are negotiated with members of the agreement.

It should be noted that the League's survey, by design, did not seek to obtain the actual prices and charges that its members have been assessed by ocean carriers. Unlike ocean carriers, shippers do not have immunity from antitrust laws. Thus, the League was careful not to request that specific pricing data be provided. The sharing of such information by its members could be perceived as contrary to U.S. competition laws. Additionally, many League members ship the majority of their cargo under service contracts that contain confidentiality provisions. Consequently, a number of shippers are restricted from disclosing specific pricing information.

B. Responses to the Survey

The League received fifteen responses from the members of the OTC. Although the responses to the survey comprise a relatively small sampling of U.S. shippers, the results provide some insightful data and interesting trends. In addition, the League understands that other shipper organizations responding to the OECD's request for information have issued surveys similar to the League's. Thus, it is expected that the totality of the data collected from all of the shipper surveys should provide the OECD with useful information to assist in analyzing the impact of collective carrier pricing.

1. Shipper Respondents

The respondents to the League's survey included U.S. companies that ship products in the major trades around the world and that ship both small and large volumes in these trades. The individual respondents may be considered "small," shipping between 1-1000 TEUs. The

respondents also were "medium" or "large," shipping between 1000 and 5000 TEUs or more than 5000 TEUs, respectively. The respondents included shippers of a variety of goods, such as chemicals, agricultural, retail, and various manufactured commodities.

2. Contract Versus Common Carriage

One clear finding from the survey results is that shippers prefer overwhelmingly to ship their products under contracts rather than under tariff rates. All of the shippers, except one, ship at least 80 percent of their cargo volumes under contracts, with the majority of the respondents shipping at least 90 percent of their cargo under contracts. This result is consistent with other surveys conducted by the League on the impact of OSRA and with recent findings of the Federal Maritime Commission in evaluating OSRA's effect on the U.S. liner shipping industry. There can be little doubt that in the major U.S. trades, service contracts form the basis of international ocean shipping transactions.

3. Rate Volatility

The responses indicate that rate levels in the major U.S. trades are generally more volatile than stable. The League sought to measure volatility by obtaining the percentage change in shippers' rate levels for each year between 1996 and 2000, in each direction in which they ship in the North Atlantic and Pacific trades (or in any other trade designated). The results show that, regardless of their size, each of the respondents experienced some degree of volatility in the eastbound and westbound trades of the North Atlantic and the Pacific between 1996 and 2000, with some shippers experiencing substantial volatility. The League considered rate levels to be volatile to the extent that the percentage change in the rates charged by carriers in a given trade fluctuated by more than three (3) percent (the standard rate of inflation) from one year to the next.

To assist in illustrating the rate volatility experienced by some U.S. shippers, the League has attached hereto as Exhibit 2 graphs showing the actual percentage change in rate levels for six respondents. Of the respondents chosen, two were considered small shippers (they ship between 1 and 1000 TEUs in at least one trade), 2 were considered medium shippers (they ship between 1001 and 5000 TEUs in at least one trade), and two were considered large shippers (they ship more than 5000 in at least one trade).

As the attached graphs show, rate fluctuations are common regardless of shipper size and consistently are reflected in more than one U.S. trade. In addition, the League calculated the average percentage change in rate levels for each respondent for each trade direction.

In the North Atlantic eastbound trade, the percentage change in rates fluctuated between an average annual decrease in rates for the four year period of 19 percent to an average annual increase in rates of 10 percent. As for the North Atlantic westbound trade, the percentage change in rates fluctuated between an average annual decrease in rates for the four year period of 5.3 percent to an average annual increase in rates of 7 percent.

In the Pacific eastbound trade, the percentage change in rates fluctuated between an average annual decrease in rates for the four year period of 10 percent to an average annual increase in rates of 15 percent. The Pacific westbound trade showed a percentage change in rates that fluctuated between an average annual decrease for the four year period of 18 percent to an average annual increase of 7.5 percent.

Ocean carriers have long argued that collective rate setting is required in order to ensure rate stability. However, the data obtained by the League suggests that rate levels in the major U.S. trades are far from stable. The experiences of the shipper respondents were vastly different in many cases (which can be expected given differences in volumes and commodities shipped, among other factors), with some shippers in a given trade experiencing only rate decreases, others experiencing only rate increases, and yet others experiencing both increases and decreases over the four year period. However, for virtually all of the shippers, rate levels fluctuated significantly from year to year.

4. Rate Variance

Set forth below is a summary of the responses provided to questions addressing rate variances (1) between members of the same conference or discussion agreement operating in the listed trades and (2) between members of a conference or discussion agreement and independent carriers operating in the same trade.

RATE VARIANCE: Small=1-5% Moderate=6-10% Substantial=>10%

Among Carriers in the Same Agreement:

U.S. N. Atlantic Eastbound:	7 Small	2 Moderate	2 Substantial
U.S. N. Atlantic Westbound:	3 Small	2 Moderate	1 Substantial
U.S. Far East Eastbound:	4 Small	2 Moderate	4 Substantial
U.S. Far East Westbound:	4 Small	4 Moderate	4 Substantial
U.S. S. America:	4 Small	0 Moderate	1 Substantial
TOTAL	22	10	12

Between Agreement Carriers & Independents:

U.S. N. Atlantic Eastbound:	2 Small	6 Moderate	3 Substantial
U.S. N. Atlantic Westbound:	3 Small	3 Moderate	1 Substantial
U.S. Far East Eastbound:	5 Small	3 Moderate	2 Substantial
U.S. Far East Westbound:	4 Small	5 Moderate	4 Substantial
U.S. S. America:	1 Small	1 Moderate	2 Substantial
TOTAL	15	18	12

This data does not appear to establish any obvious trend or pattern with respect to the pricing behavior of carrier members of an agreement and with respect to these same carriers and independent lines. In other words, shippers have had different experiences regarding rates depending on the particular trade in which they ship. A number of other factors could have contributed to this result including, the shippers' volumes, commodities, and service

requirements, among others. However, because more respondents indicated that there are greater variances in rate offerings when independent lines are considered, one could argue that the inclusion of independent carriers in a trade leads to greater flexibility in the pricing options available to shippers. Perhaps most significant is that the data does not tend to establish that members of carrier agreements price in lockstep with each other. Presumably, trade conditions, the forces of supply and demand, as well as the respondents' individual shipping characteristics, were significant factors affecting their rate experiences.

5. Other Rate Experiences

The League's survey also sought to obtain from shippers an indication as to whether rates had increased, decreased, or stayed substantially the same when compared to rate levels five years ago, for the major U.S. trades listed. In responding to this question, the League asked shippers to factor in surcharges that apply to their shipments. A summary of the responses follows:

RATE LEVELS (1995-1996 compared to 2000-2001)

U.S. N. Atlantic Eastbound:	9 Lower	2 Higher	0 Same
U.S. N. Atlantic Westbound:	3 Lower	4 Higher	0 Same
U.S. Far East Eastbound:	3 Lower	5 Higher	1 Same
U.S. Far East Westbound:	10 Lower	2 Higher	1 Same
U.S. S. America:	3 Lower	2 Higher	0 Same

These results seem to show that whether shippers are paying higher or lower rates today than they were five years ago depends upon the specific trades in which they ship their goods. For example, while the majority of the respondents are paying lower rates in the U.S. North Atlantic eastbound trade than they were five years ago, the opposite is true for the North Atlantic westbound trade. The same dichotomy exists in the Far East trade. The majority of the respondents are paying lower rates in the Far East westbound trade and higher rates in the Far East eastbound trade. Again, these results would tend to indicate that general trade conditions and supply and demand are a major factor impacting rate levels.

6. Surcharges

The OECD specifically requested information regarding carrier surcharges, and the League's survey included several questions in this area. While, for the reasons set forth above, the League did not ask shippers to provide the specific levels of surcharges assessed by carriers in various U.S. trades, it sought general information regarding the number and kinds of surcharges being assessed, and whether carriers deviate from each other in assessing surcharges.

The League first asked shippers to indicate whether, over the last five years, the number and kinds of surcharges imposed by ocean carriers have either increased, decreased or stayed the same. All but one of the survey respondents indicated an "increase." The League then questioned whether "conference/discussion agreement carriers generally deviate from each other on the surcharges they assess?" Again, all but one of the respondents answered "No." Finally, the League asked if independent carriers generally impose the surcharges announced by the

agreement carriers. Here there was approximately a 60/40 split in the answers, with the majority indicating that most independent lines will impose the surcharges announced by the carrier agreements.

The results on carrier surcharges, while intended to provide only general information and trends, are significant in that they show that ocean carriers are creating and assessing more surcharges than ever before.³ They also showed that surcharges appear to be a component of collective carrier pricing where there is less deviation among the members of carrier agreements assessing such charges.

Many shippers have criticized the use of surcharges by ocean carriers for not bearing a valid relationship to the costs of the carrier. These shippers view surcharges as an unjust means for carriers to generate additional revenue. However, it should be noted that a number of shippers address the assessment of surcharges in their contract negotiations.

7. Shipper Impressions About Antitrust Immunity and Carrier Agreements

Lastly, the League sought to obtain shippers' general impressions in two key areas. First, on the impact that collective pricing authority has had in general on rate levels over the past five years. Second, whether the existence of carrier conferences and discussion agreements has affected the terms that shippers have been able to negotiate with carrier members of the agreements.

With respect to the first area, the respondents overwhelmingly felt that if antitrust immunity did not exist, over the past five years, their rate levels would have been lower. This result plainly shows that, regardless of the forces of supply and demand, shippers generally believe that collective price setting authority has an impact on rate levels, and that impact is to increase rates to a level higher than what they would be if true market forces controlled.

As to the second area concerning the impact of carrier agreements, the respondents largely believe that the mere existence of the agreements has an impact on the terms negotiated with the members of the agreement. The implication here being that the existence of collective pricing authority is viewed by shippers as having an influence, presumably a less favorable one, on the rates and service terms obtained for ocean transportation.

³ This result seems consistent with recent trade reports on surcharges. See *TSA sets charge for providing chassis*, JOC Online, Oct. 26, 2000; *\$25 per bill of lading ?*, JOC Week, Sept. 11, 2000, at 14; *Peak-season Surcharges Return*, JOC Week, June 26, 2000, at 10; *Carriers Impose Fuel Surcharges*, J. Com., March 31, 2000, at 11; *Radar Screen*, JOC Week, Oct. 30, 2000, at 6 (discussing SED surcharge).

**IV.
REVIEW OF THE IMPACT OF COLLECTIVE
CARRIER PRICING IS APPROPRIATE**

As noted above, statutory changes made in the United States under OSRA, which have fostered one-one-one contractual relationships between shippers and ocean carriers, have made the issue of antitrust immunity less significant to U.S. shippers. The League believes that further experience operating under OSRA is needed before this issue should be revisited by the U.S. Congress. Nevertheless, the League supports the OECD's efforts to examine the effects of collective carrier pricing and the existence of discussion/conference agreements with an eye toward obtaining a greater understanding of whether current regulatory systems are working as intended.

It is also important to emphasize that the OECD is in a unique position and possesses valuable resources for determining whether further improvements and efficiencies can be achieved in the regulatory regimes of member nations, including what the possible effects of the removal of antitrust exemptions would have for liner shipping. Thus, the League supports an objective and candid examination into the impact of common pricing among carriers and the impact that discussion and stabilization agreements have on both shippers and carriers. Shippers from the world freight community agree that periodic reviews of national competition laws, including those pertaining to antitrust immunity, are necessary in order to ensure that those laws result in an efficient and effective international liner transport system.

After all, the reforms that occurred in OSRA came about because both shippers and carriers agreed that the then-current system could be improved. To foreclose an examination into the effects of antitrust exemptions on the global maritime community (as was advocated by carrier representatives at the May 2000 OECD maritime regulatory reform workshop) would be to ignore even the possibility of a better system.

It should be noted that antitrust exemptions, in particular those allowing collective rate setting, are an extraordinary privilege. They have been bestowed by national governments dating back over 100 years ago. Service conditions, global communications and technologies are just a few of the changes that have occurred since that time. The old arguments for maintaining the privilege should be periodically examined to determine whether its retention continues to make sense.

Accordingly, as the OECD continues to gather and analyze data regarding the effect of ocean carrier collective pricing authority, the League believes that it should carefully consider the following key questions: (1) are the claimed benefits of antitrust immunity being achieved?; (2) do the workings of today's international ocean liner shipping industry justify the continuation of antitrust exemptions?; and (3) does the continuation of collective price setting authority allow for maximum efficiencies and enhancements in international commerce to be achieved? In other words, would the industry be better or worse off if antitrust immunity was eliminated? Obtaining the answers to these questions should assist the OECD in evaluating the potential effects should antitrust exemptions be eliminated and in formulating recommendations in the future.

A. Are the Claimed Benefits of Antitrust Exemptions Being Achieved?

Ocean carriers have long asserted that antitrust immunity serves a number of important purposes. One of the most often cited benefits is that antitrust immunity enables ocean carriers to discuss and exchange market information, and agree upon pricing proposals, in order to facilitate trade stability. However, as discussed above, pricing by ocean carriers in certain major trades may be more volatile than stable. If this is true, that would beg the question whether antitrust immunity is actually serving one of the primary purposes for which it has been granted, namely, does it lead to reasonable levels of market stability? And, if not, should antitrust immunity for collective pricing be continued? Accordingly, the League believes that the OECD should evaluate whether collective pricing authority under antitrust immunity leads to pricing stability. Moreover, if the OECD should conclude that collective pricing authority under antitrust immunity leads to pricing stability, the OECD should evaluate whether the benefits of such pricing stability outweighs any harms that flow from the immunity.

Another reason provided by carriers to justify antitrust immunity is that it enables the carriers to better manage the problem of chronic excess capacity. However, it is not clear that excess capacity is a structural problem. A recent study commissioned by ocean carriers and submitted to the U.S. Congress noted that “[c]arriers have demonstrated their willingness to leave even the largest trades or to reduce service frequency if financial returns are not adequate. Moreover, the various forms of alliances have made it easy to withdraw chartered or shared slots (unused vessel capacity) in unprofitable trades.”⁴ Thus, at the very least, the various forms of operating alliances and space sharing arrangements appear to be an effective, pro-competitive, way of managing over-capacity problems.

Even if it is concluded that excess capacity may be a problem, the problem may be caused, in part, by the carriers’ themselves who continue to purchase more vessels with even greater capacity to be introduced in trades where excess capacity is already apparent.⁵

Moreover, “excess” capacity may not be a detriment to the carriers, since the purchase of new ships appears to result in decreasing costs to the carriers. The Mercer Statement, for example, shows that while a new 5,000 TEU vessel has about 43% more capacity than an older 3,500 TEU vessel, the total daily cost of operating the newer vessel is only 28% higher than operating the older vessel.⁶ Thus, the average cost per TEU of operating the newer vessel is significantly less than the older vessel. Moreover, the carriers appear to have a rational basis to conclude that, over time, the newer vessel will be filled to capacity, given the strong growth in oceanborne container trade in the past, and the expected growth in such trade in the future, topics discussed in subsection C. below.

Thus, the OECD should evaluate whether the problem of excess capacity requires antitrust immunity to be managed appropriately.

⁴ Statement of Mercer Management Consulting before the U.S. House Committee on the Judiciary, dated March 27, 2000, p. 30 (“Mercer Statement”).

⁵ Mercer Statement, p. 14.

⁶ Mercer Statement, p. 9.

The carriers have also claimed that there is no need to eliminate antitrust immunity because shipping rates have declined substantially in the past twenty years. However, the OECD needs to evaluate whether such price decreases, even if they have occurred, would have taken place with or without antitrust immunity. A useful point of comparison may be transportation industries in which antitrust immunity has had little or no role.

Moreover, carriers have claimed that international comity requires that exemptions from competition laws be continued, in order to minimize conflicts in the regulatory systems under which the carriers must operate. The League agrees that conflicts in international maritime policies should be avoided when ever practical but it does not believe that absolute uniformity is essential to the workings of an effective and efficient international liner shipping industry. It can not be ignored that there are numerous differences in the international maritime regulatory regimes in effect around the world today. Furthermore, the League views the OECD study of antitrust immunity as an opportunity to bring about changes that could help minimize conflicts.

B. Are Antitrust Exemptions Justified in Today's Modern Ocean Liner Industry

As discussed above, changes to the U.S. regulatory system brought about by OSRA have led to significant improvements for shippers and carriers, by fostering a more competitive and efficient liner shipping industry through the use of confidential contracts. These changes also brought the U.S. system more in line with the ocean shipping industry's practices in other parts of the world, where shippers were already enjoying greater flexibility and pricing options.

There can be little doubt that the elimination of regulatory burdens by OSRA has been beneficial to both carriers and shippers. Indeed, carriers have maintained that the international liner industry is highly competitive, provides sufficient capacity and reliable service, and that supply and demand essentially control pricing levels, rather than collective carrier pricing decisions. These circumstances, if true, should raise the question among ocean carriers as to whether they need antitrust immunity to operate effectively under the more flexible and modernized shipping environment that exists today.

C. Would the International Ocean Liner Industry Be Better or Worse Off Without Antitrust Immunity

A critical aspect to the work of the OECD on maritime regulatory reform is what would be the impact upon the maritime industry stakeholders if antitrust exemptions were to be removed. The League believes that in evaluating this issue the OECD should consider the effects of elimination of antitrust immunity, particularly with regard to collective price setting, upon the maritime industry as a whole, as well as the global economy, and not just on the impact (if any) on carriers.

Carriers have in the past claimed that their relatively weak financial position supported the continuation of antitrust immunity. The League believes that the OECD should in its study carefully evaluate this matter. As noted above, the industry has invested strongly in new ships

and equipment, activity that is inconsistent with weak financial returns. Industry demand has grown substantially in recent years and is expected to grow further in the future. The Mercer Statement, for example, noted that U.S. oceanborne container trade had a compound average growth rate of 8.6% from 1993-1997, and is expected to have a compound average growth rate of up to 8% per year between 1998-2002.

Moreover, even if the OECD concluded that the removal of antitrust exemptions might cause some disruption in some trades, depending upon specific conditions, the League believes that the OECD should evaluate whether any such disruptions would likely be long-term or short-term problems. In other words, the OECD's review of this issue should include both the immediate and projected costs and benefits that would result if antitrust exemptions were eliminated. Before recommending that antitrust exemptions should be removed, it would seem appropriate for the OECD to have an understanding as to whether the effect of such removal would likely lead to a more or less competitive, efficient, and stable ocean liner industry.

To assist in obtaining an understanding of the effects of removal of antitrust exemptions, the League believes that the OECD should study the impact of deregulation and removal of antitrust immunity in other transportation sectors. While a review of the experiences under other international transportation industries, namely bulk shipping and air, would seem most relevant and should be a primary focus of such a study, the OECD should not avoid reviewing the experiences under deregulation of domestic transportation industries, where justified. This study should include an analysis of the economic consequences following deregulation, including the levels of price volatility and competitive conditions.

In addition, in evaluating the impact of removal of antitrust exemptions, the OECD could draw upon its work on regulatory reform in other economic sectors, such as telecommunications and electricity. In doing so, it would seem prudent for the OECD to clarify the similarities and differences between maritime transportation and these other industries, which could affect the extent to which the experiences following deregulation of these other industries provides meaningful guidance.

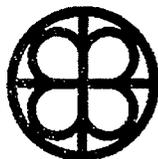
CONCLUSION

The OECD should be commended for its work on regulatory reform in maritime transport. For the foregoing reasons, the League supports this effort and believes that its findings will be helpful to national governments in evaluating their own national regulations regimes affecting maritime transportation.

Respectfully submitted,

THE NATIONAL INDUSTRIAL
TRANSPORTATION LEAGUE
1700 North Moore Street, Suite 1900
Arlington, VA 22209

March 27, 2001



THE
NATIONAL
INDUSTRIAL
TRANSPORTATION
LEAGUE

July 27, 2006

Mr. Angel Tradacete Cocera
Acting Director Directorate D – Services
Directorate General Competition
European Commission
70 Rue Joseph II
B-1000 Brussels

Dear Mr. Cocera:

Re: Revised Proposal of the European Liner Affairs Association

The National Industrial Transportation League ("League") appreciates the opportunity to submit its views to European Commission, Directorate – General for Competition on the Revised Proposal of the European Liner Affairs Association ("ELAA"), dated June 16, 2006. The League understands that the Revised Proposal was submitted as recommendations for the forthcoming Guidelines, which are to be issued by the European Commission as a result of its decision in December 2005 to repeal the Block Exemption for Liner Conferences contained in Regulation 4056/86.

IDENTITY AND INTEREST OF THE LEAGUE

The League is one of the oldest and largest national associations in the United States representing companies engaged in the transportation of goods in both domestic and international commerce. The League was founded in 1907 and currently has over 600 member companies. These company members range from some of the largest users of the United States' and the world's transportation systems, to smaller companies engaged in the shipment and receipt of goods. For many years, membership in the League was open only to shippers and receivers of goods. However, in 2003, the League broadened its membership to permit carriers and other persons engaged in the transportation of goods to become members. Although the majority of the League's members include traditional shippers and receivers of goods, its constituents now also include carriers, third-party intermediaries, logistics companies, and others. Members of the League are involved in all modes of transportation, including ocean, air, rail and motor carriage, and ship all kinds of commodities in both domestic and foreign commerce.

Moreover, the League is a member of the Tripartite Shippers' Group (TSG), an association of shippers' groups worldwide. Members of the TSG include the European Shippers' Council, the Asian Shippers Council, the Japanese Shippers Council, and many others. Members of the TSG meet at least annually to discuss common problems and agree upon common public policy positions. In addition, the TSG sponsors the Global Shippers Network, a web site designed to enable shippers' groups worldwide to communicate with each other on developments and common concerns.

**LEAGUE'S INVOLVEMENT
IN U.S. REGULATORY REFORM OF THE OCEAN LINER INDUSTRY**

The League was instrumental in bringing about regulatory reform of the ocean liner industry in the United States through passage of the Ocean Shipping Reform Act of 1998 ("OSRA"). In the mid-1990s, the members of the League sought to change the regulatory landscape for liner shipping after ocean carrier conferences abused their dominant position in the marketplace by refusing to negotiate individual

contracts with their customers, failing to respond to customer requests in a timely fashion, and by proposing to implement programs that would reduce capacity. The League worked directly with the stakeholders in the U.S. liner industry, including the U.S. liner carriers in existence at the time, and with the Congress to develop reform proposals designed to make the U.S. liner shipping industry more competitive, efficient, and responsive to shippers' business requirements. This process led ultimately to the adoption of OSRA, which became effective in May 1999.

U.S. shipping law, as modified by OSRA, encourages one-on-one business arrangements between shippers and individual liner operators in the form of confidential service contracts. Since OSRA became effective, both shippers and carriers have embraced the flexibility and freedoms authorized under the new law and customized contractual arrangements have become overwhelmingly the preferred means of conducting business today in the U.S. trades. These contracts are modeled after proprietary relationships which exist in virtually all other U.S. industries, including the other modes of transportation. The League strongly believes that a legal regime which authorizes confidential contractual partnerships, like those spurred by OSRA, helps to build trust between shippers and carriers and promotes competition among the liner operators.

Although the U.S. regulatory system implemented under OSRA is working well, it could be further improved. The steamship lines continue to have antitrust immunity and use this protection to participate in collective discussions of the liner trades as part of Discussion Agreements. These agreements permit the carriers to discuss supply and demand information and to establish pricing guidelines on a "voluntary" basis, usually published in the form of general rate increases and a variety of surcharges. Market conditions tend to determine whether or not the voluntary pricing guidelines are actually charged to the carriers' customers operating in the U.S. trades. However, even though these pricing guidelines are negotiable, small or less experienced shippers with limited volumes and negotiating leverage are more likely to have to absorb the prices established by collective discussion among the service providers, rather than by competition. In addition, the level of surcharges for both large and small shippers appears to be particularly influenced by the antitrust immunity still enjoyed by ocean carriers. Thus, the League believes that collective activities through the mechanism of Discussion Agreements by ocean carriers still has an influence on the prices (both base line freight and surcharges) charged to shippers in the U.S. trades, and that such influence, in many cases, is likely to result in prices that are higher than would otherwise be established in a purely competitive marketplace.

THE LEAGUE'S INVOLVEMENT IN THE EXAMINATION OF COMPETITION RULES

In 2001, the League participated in a project commenced by the Organization for Economic Co-operation and Development ("OECD") concerning the matter of "Regulatory Reform in International Maritime Transport." Specifically, the OECD solicited information from the stakeholders involved in the maritime industry regarding the impact on shippers of collective pricing under antitrust exemptions. In response, the League surveyed its members to gather data on the shippers' experiences with the liner carriers and provided a submission to the OECD, which is attached. At that time, OSRA had been in effect for only two (2) years and the League believed that more time was needed to evaluate its impact on shipping in the U.S. trades before additional regulatory reforms should be considered. However, the League also asserted that the OECD should evaluate whether antitrust exemptions were still necessary based on the workings of the more modern liner industry and whether the costs of collective pricing outweigh any claimed benefits.

Moreover, in February 2006, League staff and counsel met with several members of the European Commission Directorate – General for Competition to discuss the status of the agency's review of the Block Exemption for Liner Conferences contained in Regulation 4056/86, as well as the experience of U.S. shippers under OSRA. This useful and wide-ranging discussion covered a number of topics, and the

League offered to provide the agency with whatever further information it might need for its analysis of Regulation 4056/86.

COMMENTS ON THE REVISED ELAA PROPOSAL

The League supports the decision of the European Commission to repeal the Block Exemption applicable to liner conferences. From the League's perspective, the overall objective of the European authorities should be to create an environment where competition among carriers and the forces of supply and demand determine shipping rates and charges in the liner trades. To the maximum extent possible, rates should be formulated based on an individual carrier's calculation of its individual costs and necessary return on investment and the carrier's individual evaluation of market conditions, and should not be influenced by collective carrier discussions.

1. Information Exchange and Consultations

ELAA appears to recognize the need to change and replace the old-line conference system with a more modern regulatory scheme that promotes efficiency and reflects the workings of global trade. However, its Revised Proposal still seems to reflect a "mind-set" that aims to preserve traditional collective discussions among the carriers to the maximum extent possible in light of the decision of the European Commission to repeal the Block Exemption. However, the League believes that these collective discussions are not necessary and, more importantly, potentially can influence the pricing, investment, and vessel deployment actions of the carriers to the detriment of the shipping public.

The underlying basis for the Revised Proposal is to ensure the stability of vessel supply. The ELAA submits that this can *only* be accomplished if the carriers have access to an "information exchange" system, and, most significantly, continue to have the right to collectively discuss the data; first, among carriers, and, second, among all industry stakeholders. Specifically, the carriers desire to obtain, on a monthly basis, reports containing historical demand data (e.g. monthly aggregated volume and utilization figures by trade and port pair produced with at least 8 weeks delay) and a price index covering three-months' data with at least three months' delay; and, on a quarterly basis, reports containing forecasted supply and demand data (e.g. quarterly estimated supply and demand figures per trade for the upcoming 18 months divided by quarter). Revised Proposal, pp. 10 and 15, paras. 37 and 50. As noted, it is proposed that the carriers would then engage in a two-step consultation process on a quarterly basis. The carriers would meet among themselves first to interpret and *improve* the forecasted supply and demand information on a per trade basis. The carriers would then organize consultations with shippers, freight forwarders and others, at which generalized discussions regarding the forecasted supply and demand data could occur. Revised Proposal, p. 16-17, paras. 55-61.

Although the data collection and dissemination of reports to individual ocean carriers can be largely benign if conducted carefully under the proposed structure (as modified below), the League does not agree that joint discussion of the data by carriers is necessary or desirable. The League does not dispute that carriers should have an understanding of the state of the markets they service but the League believes that carriers, like service providers in virtually all other industries, can *individually* evaluate the market data and make *individual* decisions as to how to conduct their business based on their own business models. The thrust of the Revised Proposal is to continue to keep all carriers on a level-playing field based on the information exchange:

By making all information public, the Revised Proposal creates a level playing field with *equally well-informed carriers*, transport users and other industry stakeholders. Thus, the Revised ELAA Proposal is pro-competitive, as in the words of Commissioner Reding, "only a well-

informed consumer is a well-armed consumer." Revised Proposal, p. 2, Executive Summary.

However, the ELAA members are *not* consumers of transportation services. They are the service providers who, when competing "fiercely", as ELAA claims, should be more interested in distinguishing themselves from their competitors, rather than ensuring that no one competitor has a market advantage. Indeed, the ELAA model, which would provide all competitors with the same data upon which to make business judgments, contrasts with the workings of a highly competitive industry in which savvy operators seek to gain a "leg-up" on their competitors on the basis of *better* information that they have been able to develop compared to their competitors. In other words, information – especially in today's environment – is a *means of competition* just like a carrier's operational efficiencies, shrewd investments, and sound marketing strategies. But instead of treating market information as a competitive tool, the carriers' proposed information exchange would appear to provide a buffer that would insulate the carriers from business judgments and risks that occur every day in other industries subject fully to competition rules.

Moreover, the Revised Proposal claims that the carrier discussions are needed in order to have meaningful industry-wide consultations. Revised Proposal, p. 18, para. 65. However, the Revised Proposal assumes that all other industry stakeholders desire to engage in consultations with the carriers and that "[s]hippers at the industry-wide forums will ask for a common industry position," (p.18, para. 65). This perspective ignores the fact that the customers of the carriers are already comfortable operating in an environment where they must make individual business judgments based on publicly available market information and that such market information is not always interpreted in exactly the same manner by all who operate in the market. It is evident from the proposal that it is the carriers themselves who want to ensure that there is a common industry view, ignoring the fact that other industries operate successfully everyday even though there may not be a "consensus" among all service providers as to the state of the market. This appears to be precisely the intent of the information exchange and consultations included in the Revised Proposal. Revised Proposal, p. 18, para. 65 ("Carriers will also have different views internally, but will make an effort to come up with a consensus.").

Moreover, while the Revised Proposal makes clear that the carriers do not intend to jointly discuss prices, capacity management, carrier strategies, and other sensitive market information during the consultations, the joint meetings nevertheless provide the opportunity for collusion. This risk is exacerbated by the historical practices of the participants who, for years, have conducted their business based on collectively established prices, guidelines, and decisions. The discussion of trade data desired by ELAA could readily become used as a forum for carriers to signal each other regarding rate fluctuations, surcharges, or the need to remove or add capacity in a trade, which would ultimately impact the prices charged. The League believes that the risk for collusive activity to occur as a result of the carrier consultations far outweighs the tenuous claim that such discussions are needed to ensure stability of vessel supply.

Accordingly, the League does not agree that consultations between carriers as proposed by ELAA are necessary or desirable to promote a highly competitive liner industry and, in fact, could be harmful to achieving this end.

2. Pricing Index and Volume and Utilization Index

Under the Revised Proposal, the carriers will provide average pricing data per TEU on a trade lane basis to an independent body which will aggregate the data and calculate a pricing index. The index will cover aggregated quarterly data and will be published monthly. It also will be made publicly available. In addition, the carriers are proposing that aggregated volume and utilization figures would be published monthly, with an eight-week delay.

The Guidelines published by the European Commission should ensure that any pricing and utilization mechanism distributed to the industry cannot be used as a means for collusion or price signaling by the service providers. The requirement for broadly aggregated data provided on a delayed basis would help to avoid any improper conduct in this regard.

However, the League is concerned that the proposed quarterly delay for prices is too short, and believes that the Directorate – General for Competition should require a delay longer than the proposed quarterly time period. This would go even further toward preventing the index from having any influence on price negotiations between shippers and carriers. Moreover, the price index will be published monthly, covering a three-month period, with at least a three month delay. While the aggregation of data over a three-month period appears useful, it is much less helpful than portrayed by the carriers, since with monthly publication of the price index, it will not be hard to figure out from one month to the next the latest monthly change that produced the new three-month figure.

Even more seriously, the proposed monthly report of volume and utilization figures by trade and port pair with only an eight-week delay is definitely much too short, especially since the volume and utilization figures would be published month by month, rather than covering a quarter (as is true of the price index). An eight-week delay would clearly influence current price negotiations. The League strongly believes that the delay in publishing the volume and utilization figures should be far longer than the eight-weeks proposed by the carriers.

3. Publication of Cost Factors

Finally, carriers will no longer collectively discuss and establish the level of surcharges under the Revised Proposal. Rather, it is proposed that the carriers will provide the shipping industry with greater transparency as to the costs and charges incurred by carriers by publishing the cost factors underlying terminal handling charges, cost and consumption information relating to bunker charges that is publicly available, port charges and canal dues affecting the European trades, and factors underlying the calculation of currency costs, including the fluctuation of the U.S. dollar compared to the average percentage attributed to each currency per TEU on a trade or region. Revised Proposal, p. 22, para. 84. In general, the League believes that this aspect of the ELAA proposal could prove beneficial to the industry as a whole, in particular because making this information available to shippers could lead to a greater understanding of the basis for certain ancillary charges and, therefore, facilitate contract negotiations between shippers and carriers.

Respectfully submitted,



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Attachment