STATEMENT

OF

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ON BEHALF OF THE

INTERMODAL MOTOR CARRIERS CONFERENCE

OF THE

AMERICAN TRUCKING ASSOCIATIONS

BEFORE THE

ANTITIRUST MODERNIZATION COMMISSION

ON THE
SHIPPING ACT

OCTOBER 18, 2006

American Trucking Associations
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My name is Greg Stefflre. I am a transportation lawyer by education and training and serve as Chief Executive of our family owned trucking company which is exclusively engaged in interstate intermodal transportation. I am appearing here today on behalf of the American Trucking Associations' (ATA) Intermodal Motor Carriers Conference (IMCC).

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

In its comments filed previously with the Commission (July 15, 2005), the IMCC urged the commission to consider and address the adverse economic impacts resulting from the application of antitrust exemptions granted to foreign owned ocean carriers under the *Shipping Act of 1984.* We are therefore most encouraged that the AMC has indeed included this issue in its deliberations and hearing process. Moreover, review and examinations of the impacts and need for *Shipping Act* antitrust regulations is particularly timely given the European Union's (EU) action September 25 to end liner exemptions in the European trades effective October 2008.

Specifically, the Competitiveness Council of the European Union (EU) has unanimously approved the repeal of existing exemptions from trade regulations which otherwise ban restrictive business practices for ocean liner conferences on routes to and from the EU. The current block exemption allows ocean carriers to jointly fix prices and regulate capacity. Liner shipping (scheduled maritime freight transport mainly via intermodal container) has been organized in the form of cartels – called liner conferences - since the 1870s, and are most prevalent on routes between Europe, North America and the Far East. Because liner conferences will continue to exist in other jurisdictions (U.S.-Asia for example), the Commission has indicated that it will undertake appropriate initiatives to advance the removal of price fixing liner conferences elsewhere to promote further competitive reform of the liner shipping sector.

Given the economic magnitude and rapidly evolving nature of global trade and intermodal logistics that have occurred since the enactment of this legislation, we continue to believe the time is indeed overdue to reassess the rights, interests and legal protections that all major stakeholders have or should have in the maritime trade related transportation sector, including those of domestic intermodal motor carriers.

Using 2005 as a recent example of volumes, intermodal growth has been staggering. In 2005 over two million international containers moved domestically over United States railroads. International moves are generally divided as 50% local and 50% via rail. The former involves a minimum of two moves (ocean to receiver, receiver to ocean) and the latter involves a minimum of three moves (ocean to rail, rail to receiver, receiver to ocean). Thus in 2005, international intermodal movements were 2,050,000 and 3,075,000, respectively for a total of 5,125,000 intermodal highway movements. Each of these movements necessitates modal equipment interchanges involving motor carriers subject to commercial rules established by foreign ocean carriers.

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

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

Intermodal Trucking-Maritime Container Transportation Overview

Domestic-U.S. intermodal motor carriers generally handle the first and last segment of container transportation that utilizes a ship for the major portion of the container line haul, i.e. the segment between the port and the shipper or consignee. Our length of haul varies from a few miles to a few hundred miles. Intermodal truckers also generally do not arrange for the entire transportation movement from container pick-up to delivery; instead, the importing ocean carrier often arranges the transportation segments and chooses which trucker to use for a designated portion of the container move. The rates for such continuing land shipments are normally set by the importing ocean carrier as a portion of the door-to-door rate charged to the shipper. The amounts are unilaterally established and offered to the motor carrier on a 'take it or leave it' basis.

Because the other intermodal participants (ocean carriers, railroads, terminal operators) are of greater size and economic influence compared to intermodal motor carriers, the truckers' "partners" very often dictate the business terms of our day to day activities. Intermodal equipment (containers and chassis) interchanges are conducted pursuant to agreements executed under the industry's controlling Uniform Intermodal Interchange and Facilities Access Agreement (UIIA). The UIIA provides standard-uniform provisions for the non-commercial aspects of the motor carrier- equipment provider (ocean carriers and railroads) chassis and container- interchange, leaving the commercial aspects (rates, per diem, free time, demurrage, equipment loss and repair, etc.) to individual addenda drafted by the equipment providers and issued to participating motor carriers following a cursory review by the UIIA's administrative body- the Intermodal Interchange Executive Committee (IIEC).

Unfortunately, it has become all too common for the equipment providers and particularly the foreign owned ocean carriers to make decisions that are beneficial to their operations but otherwise often add significant and unexpected costs to an intermodal shipment and the trucker, as underscored by the almost uniform increases in container related fees, per diem and reduction in terminal storage-dwell times, etc. that have been instituted across the nation's intermodal network. Because the UIIA process was created through industry consensus, it has no real enforcement or arbitration processes, is structurally dominated by the equipment providers (discussed in more detail below) and has no appeal process. As a result, otherwise mandatory operational edicts emanating from the ocean carrier's addendum to the UIIA not only adversely impact motor carrier financial resources but also cause well documented scarce driver resources to be inefficiently deployed to meet arbitrary operational procedures mandated by ocean carriers and marine terminal operators who operate under the protection of current antitrust exemptions.

Existing Antitrust Exemption Impacts

Even a cursory review of the existing *Shipping Act*-maritime related antitrust regime supports a conclusion that competitive impact analysis and governmental concerns regarding freight transport capacity and availability have historically focused exclusively on the ocean carrier-products shipping community and have totally ignored the key lynch-pin of the intermodal transportation network…the trucking company. Indeed, as sanctioned pursuant to the *Shipping Act of 1984* and expanded in the Ocean Shipping Reform Act of 1998 (OSRA), ocean carriers are permitted to discuss and collectively set rates that include the inland "through intermodal" or "store door" rates they will charge their customers for container delivery. Having thus negotiated and agreed with a shipper for an all inclusive "store-door" delivered price, ocean carriers and their brokers thereafter will logically seek to obtain the lowest-bidding trucking firm to maximize their own profit against the all inclusive rate.

The motor carrier's potential fee/income for moving the container from the port to the customer's facility is thus already embedded in the through rate established by the antitrust exempted ocean carrier, without regard, understanding or input on what the economic costs and competitive and resource impacts these decisions have on the trucking transportation segment. As a result, intermodal motor carriers who provide vital transportation services to our ports, that are obviously much smaller business entities and, under U.S. antitrust laws are forbidden from collectively discussing rates and operating practices, are virtually powerless to negotiate higher rates against this "done deal-store door" rate process.

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

In addition, FMC actions citing *Shipping Act* authority have extended antitrust protection to West Coast Marine Terminal Operators (MTO, FMC Agreement No. 201143), defined, in part, as "person[s] engaged in the United States in the business of furnishing wharfage, dock warehouse, or other terminal facilities in connection with a common carrier." 46 U.S.C. app. § 1702 (14). As a result, port operational activities and fees (such as PierPASS discussed below, and joint ‘neutral’ chassis pools) are being planned and implemented by otherwise competitive port terminal operators who now operate under antitrust protections, while the port truckers are legally forbidden to even discuss and potentially react in a coordinated response to procedures and fees they consider unreasonable/excessive/unjust.

PierPASS is a not-for-profit organization created in July of 2005 by marine terminal operators in and around the Ports of Los Angeles and Long Beach. By charging customers-shippers extra (a $100 per 40 foot container Traffic Mitigation Fee) for moving their containers during the heretofore traditional day time shifts, this “Off Peak” program is intended to provide an incentive for cargo owners to move cargo at night and on weekends…thereby reducing truck traffic and pollution during peak daytime traffic hours and also alleviating port congestion. Large shippers whose operations are run on a 24-7 basis are also a prime beneficiary of this late-gate lower fee program.

During the otherwise closed-antitrust protected planning process, PierPASS officials made the decision that the fee would be set at a level sufficient to cover terminal operational costs, labor night shift costs and system administration. Port truckers, however, who have generally supported the need to increase port throughput by extending gate-terminal operating hours, were not covered in the fee program, but instead were compensated with the promise- “possibility” of being able to make more turns (pick-ups and deliveries for which they are paid) under the new night gate system. Unfortunately, that promise of additional turns and increased compensation for night shift work has yet to fully materialize.

As referenced above, the vast majority of ocean carriers are signatories to the UIIA which is governed by the IIEC comprised of three representatives each from the motor, rail and marine carrier sectors. This committee is rightly prohibited from discussing or considering the commercial (economic) terms of the individual carrier addenda leaving the agreement itself largely a detailed set of procedures and rules governing the parties’ functional responsibilities throughout interchange and return of equipment. Since the inception of the above referenced West Coast MTO Agreement, however, the marine carrier members of the UIIA executive committee have begun to vote in bloc on matters before the committee apparently based on decisions made outside of the committee but within the MTO agreement, thus cloaking their joint activities with antitrust immunity.

One effect of this change has been to bring the otherwise important work of the UIIA to a complete stalemate in any situation where the MTO agreement members oppose the intermodal transportation issues that are before the committee for decision. A clear consequence is that marine carrier competitors can/are now setting rules and rates free from antitrust consequences, even though the effect of such activities restrains the free marketplace and negatively impacts the economic well-being of the domestic intermodal trucking industry.

I was the principal drafter of the modern era UIIA. From its adoption in 1994 until the advent of the Ocean Carrier Equipment Management Association (OCEMA) in 2005, bloc voting by mode was non-existent. Following the creation of OCEMA, virtually every vote concerning language involving ocean carrier interests has been uniformly defeated through 'bloc voting'. Moreover, the freedom of ocean carriers to jointly agree allows them the opportunity to place significant joint commercial pressure on the railroad members of the IIEC to join their 'bloc' in such votes. The obvious effect is to severely marginalize motor carrier interests.

In sum, the UIIA has been a remarkable document in helping fuel the efficient growth of intermodal freight movement in the United States over the past decade but is now severely hampered in its operation by ocean barrier anti-trust exemption. The UIIA is a necessary productivity tool to intermodal and should not be marginalized in such a manner.

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

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

Conclusion

This spring's government and media frenzy regarding the proposed Dubai Ports World's purchase of various port terminal facilities in the U.S. served as a beacon to highlight the pervasive operational role of foreign owned ocean carriers and often affiliated port-terminal operators in our domestic ports and marine transportation system. The debate also highlighted the embarrassing lack of understanding by our elected officials and the media on how our ports operate as part of today's global economy. Historically, protective concerns over U.S. Flag ocean carriers being disadvantaged in international commerce prompted antitrust exemptions for ocean carriers. Today, international containerized shipping is absolutely dominated by non- U.S. Flag carriers. Obviously, when the reason for a rule ends - so should the rule.

The IMCC respectfully submits that given the importance that global trade and intermodal transportation have to this country's present and future economic well being, this commission's review and recommendations regarding what we believe is *the lack of* a continuing need or justification for the *Shipping Act* antitrust regimen are essential to facilitating a much needed competitive realignment in this country's vital maritime logistics network.

Thank you.