WINDOW ON WASHINGTON

What's Old is New Again: U.S. Liner Antitrust Immunity Review

By Bryant E. Gardner

Since the advent of the steamship service in the late 19th century, the international liner industry has been organized into horizontally cooperating "conferences" and shielded from open competition. In the early 1900s, governments expressly exempted the liner industry from the new antitrust legislation, including the Shipping Act of 1916 in the United States, which provided legal sanction for horizontal cooperation, including price fixing and supply control by the conferences.[1] This immunity continued through the 1961 amendments[2] to that act, the comprehensive Shipping Act of 1984,[3] and the Ocean Shipping Reform Act of 1998 ("OSRA").[4]

Periodically, the liner antitrust exemption has come under scrutiny by U.S. lawmakers, and each review appears to have inched closer toward dismantling the immunity. In the United States, the Reagan-era enthusiasm for deregulation ushered in the Shipping Act of 1984, which brought about major changes but continued immunity under the oversight of the Federal Maritime Commission ("FMC") through an arsenal of filing and disclosure requirements backed by an autonomous enforcement authority. OSRA, which was a compromise largely struck between U.S.-flag carriers and the National Industrial Transportation ("NIT") League, is widely credited with further eroding the conference system by establishing the current system of confidential service contracts between shippers and carriers, which now account for approximately 80%-90% of all shipments and which undercut the uniform tariff pricing authority of the conferences.

Most recently, the European Union's decision to repeal liner antitrust immunity effective October 2008, the growing influence of shipper groups, the disappearance of the U.S. liner carriers, and the recent economic downturn have all fueled new calls for another look at liner antitrust immunity in the United States. Despite strong opposition by international carriers, the 111th Congress saw a proposal introduced late in the session to repeal the immunity, and the FMC commenced a fact-finding mission to examine the costs and benefits of retaining the immunity, which will extend the debate into the 112th Congress.

Carrier groups have historically defended their antitrust immunity on a variety of grounds, noting that the conference system has produced an increasingly efficient ocean transportation system, which has seen prices fall for twenty consecutive years, and that FMC oversight curbs any potential for abuse. Additionally, carriers assert that the conference system helps counter the effects of government support for shipyards and

[1] Pub. L. No. 64-260, 39 Stat. 728 (1916).

[2] Pub. L. No. 87-346, 75 Stat. 762 (1961).

[3] Pub. L. No. 98-237, 98 Stat. 67 (1984). The Shipping Act, as amended, is codified at 46 U.S.C. §§ 40101-41309.

[4] Pub. L. No. 105-258, 112 Stat. 1902 (1998).

national fleets, regulates oversupply and price volatility, avoids consolidation to oligopoly, and promotes efficient sharing of vessel space and other transportation assets, among other benefits. Critics of the immunity argue that deregulation and competition have proven to be the most successful means of ensuring efficiency in other industries and that liner shipping has been shown to be no different.

Reform Discussions after OSRA

FAIR Act and OECD Study

Almost immediately following OSRA, Representative Henry Hyde (R-IL) convened hearings to review the adequacy of OSRA and to consider repeal of liner antitrust immunity. Observing the sale of the last of the major U.S. lines to their foreign competitors in the 1990s, Hyde announced that "the industry has evolved to the point that the immunity now benefits foreign-owned carriers at the expense of American shippers and non-vessel operating common carriers."[5] During the Hyde hearings, then-FMC Chairman Harold Creel warned against drastic change without specifically arguing for or against repeal. The U.S. Department of Justice called for repeal of the antitrust immunity, however, which it alleged "rests upon a number of economic and legal assumptions that were dubious even at the time of enactment and have not improved with age."[6] Predictably, representatives from the American Shippers Alliance ("ASA") and the National Customs Brokers & Forwarders Association of America ("NCBFAA") testified in favor of repeal, while American President Lines ("APL") Chief Executive Officer Tim Rhein and Sea-Land Service, Inc. Chief Executive Officer John Clancey called for patience to let OSRA reforms "grow and blossom" before undertaking new initiatives.[7]

Hyde subsequently introduced the Free Market Antitrust Immunity Reform ("FAIR") Act of 1999,[8] which aimed to repeal completely the liner antitrust immunity. The legislation was subsequently reintroduced in the 107th Congress with Rep. Hyde joined by Judiciary Chairman James Sensenbrenner (R-WI) and Rep. Asa Hutchinson (R-AR).[9] Although the proposal was given a boost by a 2002 Organization for Economic Cooperation and Development ("OECD") report that recommended abolishing antitrust immunity for carriers because it had "not found convincing evidence that the practice of discussing and/or fixing rates and surcharges among competing carriers offers more benefits than costs to shippers and customers," and "antitrust exemptions for [carrier] conference price-fixing no longer serve their stated purpose. . . and are no longer relevant," the legislation did not ultimately pass.[10]

Antitrust Modernization Commission Inquiry

At about the same time, in 2002, Congress passed the Antitrust Modernization Commission Act,[11] which created the Antitrust Modernization Commission charged with review of existing antitrust exemptions, including the Shipping Act. The commission held extensive hearings in 2006, at which various shipper organizations, the FMC, and the carriers' World Shipping Council ("WSC") presented extensive testimony.[12]

While the carriers and shippers dug in along the usual battle lines, the FMC presented a fractured analysis. Commission Chairman Steve Blust represented the majority of the FMC and testified that the current system wherein the FMC polices the immunity appears to be working well. Commissioner Brennan submitted a separate statement, however, in which he called for repeal of liner antitrust immunity.[13] This difference may be significant, given that Chairman Blust and his majority have all departed the FMC with the exception of Commissioner Rebecca Dye and Commissioner Brennan, who remain. Also testifying at the Antitrust Modernization Commission hearings were a representative from the Antitrust Law Section of the American Bar Association, who questioned the need for continued immunity, and a witness from the European Commission's Directorate General for

[5] *Hyde, After Antitrust Testimony, Decides not to "Rush Ahead"*, PACIFIC SHIPPER, May 10, 1999. *See also* Erik S. McMahon, *Next Battle Looking for Ocean Carriers*, PACIFIC SHIPPER, June 1, 2000 ("Hyde lamented, 'these foreign ship owners have antitrust immunity to fix prices at the expense of American consumers. Congress originally intended this law to protect American ship owners, but there are almost none left. Clearly, the justification for this provision has long since passed.").

[6] *Hyde, After Antitrust Testimony, Decides Not to "Rush Ahead",* PACIFIC SHIPPER, May 10, 1999.

[7] *Id.*

[8] H.R. 3138, 106th Cong. (1999); H. Rep. No. 106-1048 (2001).

[9] H.R. 1253, 107th Cong. (2001); H. Rep. No. 107-807 (2003). Rep. Sensenbrenner is still on the House Judiciary Committee and will be number two in seniority behind Chairman Lamar Smith (R-TX) for the 112th Congress according to recent reports.

[10] H. Rep. No. 107-807, at 25 (2003).

[11] Pub. L. No. 107-273, §§11051-60, 116 Stat. 1856 (2002).

[12] Antitrust Modernization Commission, Public Hearing, October 18, 2006.

[13] Federal Maritime Commission, *Commissioner Brennan Issues Statement to the Antitrust Modernization Commission*, Oct. 11, 2006.

Competition, who testified regarding the European Union's September 25, 2006, decision to repeal antitrust immunity for liners serving that continent effective October 2008.

The Antitrust Modernization Commission Report and Recommendations, issued in April 2007, stopped short of an explicit recommendation to repeal liner antitrust immunity but broadly concluded based upon a review of the of the Shipping Act, that "Antitrust exemptions can harm the U.S. economy and, in the long run, reduce the competitiveness of the industries that have sought antitrust exemptions. . . . Statutory exemptions from the antitrust laws undermine, rather than upgrade, the competitiveness and efficiency of the U.S. economy."[14]

Renewed Focus on Liner Antitrust Immunity in the 111th Congress

Export Capacity and Service Concerns

Due to the 2008-2009 recession, the liner operators sustained record losses compelling drastic cost-cutting and reductions in capacity. Vessels were scrapped, laid up, or put into slow steaming regimes to save costs and reduce surplus supply. In late 2009 and early 2010, shippers and carriers alike were surprised by a dramatic rebound in cargo flows, resulting in a capacity shortage that threatened to restrain the fragile global recovery that continued throughout 2010.

As early as February 2010, members of the House Transportation and Infrastructure Committee questioned FMC Chairman Lidinsky about inadequate liner capacity to handle U.S. exports, specifically inquiring what the FMC was doing to ensure that conferences were not unreasonably limiting capacity to drive up rates and what could be done to ensure both vessel space and the availability of containers for U.S. exporters.[15]

On March 17, 2010, the Coast Guard and Maritime Transportation Subcommittee held hearings on the "Capacity of Vessels to Meet U.S. Import and Export Requirements," at which FMC Chairman Lidinsky, the NIT League, APL, and U.S. exporter groups testified regarding capacity shortages in both vessels and container equipment. The hearings were initially focused on U.S. export promotion, and not expressly noticed to discuss liner antitrust immunity, but, nevertheless, the discussion turned in that direction with shipper groups blaming service failures on the carrier cartels.[16]

During the hearings, the Subcommittee heard shipper complaints not only about inadequate capacity but also about carrier surcharges and fees, arbitrary vessel space cancellations, short notice general freight rate increases, and cargo "rolled" from confirmed vessel sailings to later sailings. Exporters, in particular, complained about the inability to get shipping containers to inland agricultural areas where many U.S. exports originate, increased vessel space reservation lead times for exports to Asia, and the carriers' unwillingness to permit shippers to use their own shipping containers in lieu of carrier-supplied containers.[17]

In response, APL's representative presented a glimpse into the harsh economic reality faced by the lines, reporting that imports were down industry wide 15% and that APL earnings went from a $73-million gain in 2008 to a $731-million loss in 2009. He further stated that 2009 was the worst year ever for liner shipping, during which carriers lost almost $20 billion.[18] As a result, APL idled up to 1/5th of its fleet in 2009, expecting flat to low single-digit growth through 2010. Instead, volumes increased by nearly 30% resulting in a tight capacity.

APL also explained that approximately 20% of shipper bookings fail to materialize, meaning that carriers must overbook vessels to maximize capacity utilization and, therefore, cargo can be rolled if an exceptional number of reservations do materialize.[19] The witness also deflected some of the blame onto the redeployment of bulk vessel capacity from the U.S. trades to the Brazil-China and Australia-China trades, which ships historically carried much of the heavy agricultural and scrap exports from the United States. Finally, he outlined the complications and high additional costs associated with repositioning containers from seaside port cities to interior agricultural export centers and with repositioning and returning shipper-owned containers through a transportation system that requires containers be treated as fungible assets.

The discussion about vessel capacity and carrier service failures continued through the spring and summer of 2010, fueled in part by a series of articles

[14] ANTITRUST MODERNIZATION COMMISSION, REPORT AND RECOMMENDATIONS 335 (April 2007).

[15] *Hearing Before the Subcomm. On Coast Guard and Maritime Transp., House Transp. & Infrastructure Comm.*, 111th Cong. (Feb. 25, 2010).

[16] *Id.* (testimony of Michael Berzon, President, Mar-Log, Inc. on behalf of the NIT League).

[17] *Id.* (testimony of Chris Mullally, President, Mohak Trading Co., Inc.).

[18] *Id.* (testimony of Robert F. Sappio, Senior Vice President, Pan-Americas Trade, APL Limited).

[19] *Id.*

in the *Wall Street Journal*, which reported container shortages hampering U.S. agricultural exports. By June, the Senate had taken an interest, and Agriculture Committee Chairman Blanche Lincoln (D-AR) and Ranking Member Sen. Saxby Chambliss (R-GA) sent a joint letter to FMC Chairman Lidinsky, inquiring about reports of agricultural exporters having difficulty finding export capacity and adequate international service. Also in June, Rep. Jim Oberstar (D-MN), Chairman of the House Transportation and Infrastructure Committee, announced: "I think we should end the anti-trust immunity that allows carriers to talk to each other about rates. And if we replace that with full competition, there will be a real marketplace that would see improvement in rates and service."[20]

Shipper groups, including the NIT League and NCBFAA, continued their push into the fall, and, on September 22, 2010, Rep. Oberstar introduced the "Shipping Act of 2010" aimed at stripping away the liner antitrust immunity exemption.[21] In addition to removing the exemption, the bill would also establish an "Office of Dispute Resolution and Customer Advocate" to help mediate disputes between carriers and shippers, a new layer of dispute resolution based upon binding arbitration before the FMC, and an "Ocean Shipping Advisory Committee" composed of industry representatives spread among common carriers and shippers to advise the FMC.[22] The bill would also strike the current statutory purpose of the Shipping Act to "encourage development of an economically sound and efficient liner fleet of vessels of the United States capable of meeting national security needs" and, instead, proclaims its purpose "to allow, to the maximum extent possible, competition and the demand for services to determine fair and efficient market rates and charges for transportation by common carriers."[23]

The Shipping Act of 2010 would also impose a battery of new regulatory burdens on the industry. Currently, filed agreements are valid if not rejected within 45 days, but the bill would turn that around to require affirmative FMC approval, allowing it up to 90 days for review or longer if the FMC believes additional information is required.[24] Additionally, the act imposes an annual reporting burden on carriers regarding "frequency and duration of delays in shipments, all instances in which cargo has not been transported on a voyage for which it was booked, and other service or reliability indicators as determined by the Commission to be appropriate" and appears to require FMC approval for carrier mergers or acquisitions that result in a change of control.[25] The bill also requires separate statements of equipment charges in service contracts, forbids carriers from refusing cargo space "when available," prohibits "discrimination against a shipper or ocean transportation intermediary for supplying their own equipment," prohibits failure to provide transportation services as agreed, and forbids the imposition of "unreasonable" surcharges.[26]

Speaking through the WSC, the ocean carriers expressed their disappointment and concern early on and argued that a better approach would be for carriers and shippers to work cooperatively through the FMC to improve contracting practices for all parties under the existing regulatory framework. Additionally, WSC asserted that the perceived service problems were caused by the market-driven capacity shortages in late 2009 and early 2010, not by regulatory shortcomings, and suggested that the problems would be ironed out as additional capacity came on line throughout 2010 and into 2011. WSC also cautioned that the bill, as proposed, would "create an ocean transportation system that would make U.S. trades less efficient and more costly for carriers, resulting in less choice, less capacity, lower service quality, and higher costs for U.S. exporter and importers."[27]

Even before Oberstar introduced the legislation, the NIT League and other powerful U.S. shipper groups pledged their "cooperation and support" for the new legislation and vowed to end what they described as the "antiquated and inappropriate exemption from our antitrust laws."[28] The NIT League called the bill "an appropriate first step toward achieving a more robust, competitive, and efficient maritime industry" and stated that "[t]he time has arrived to reexamine the U.S. Shipping Laws governing the international liner trades, and . . . the proposed legislation provides an appropriate starting point to achieve regulatory reform."[29] Notably, the NIT League was instrumental

[20] *Oberstar Calls for Broad Ocean Shipping Reform*, J. COMM. (June 11, 2010).

[21] H.R. 6167, 111th Cong., § 10 (2010).

[22] *Id.* §§ 3-4 & 17.

[23] *Id.* § 5.

[24] *Id.* § 11.

[25] *Id.* § 9 & 16.

[26] *Id.* § 14 & 26.

[27] *Bill Calls for End to Liner Antitrust Immunity*, AM. SHIPPER (Sept. 24, 2010).

[28] Katerina Kerr, *Shipping Lines Pledge to Fight Move to End Their U.S. Anti-Trust Immunity*, IFW (Sept. 20, 2010).

[29] R.G. Edmonson, *Shippers Group Supports New Shipping Act*, J. COMM. (Oct. 1, 2010). *See also* Press Release, Statement of The National Industrial Transportation League on H.R. 6167, the Shipping Act of 2010 (Oct. 1, 2010).

in crafting the OSRA reforms together with WSC, and while NIT endorses the principles of antitrust exemption repeal and service improvement set forth in the bill, it appears to view the Shipping Act of 2010 as a starting point, not a finished product. Indeed, NIT League President Bruce Carlton announced that the bill was "essentially dead on arrival," given the timing of its introduction going into midterm elections and the lame-duck session of Congress.[30]

On November 1, 2010, the FMC issued a "Notice of Inquiry" soliciting information and comments "concerning the effects on international liner shipping of the European Union's ('E.U.') repeal of the liner block exemption from competition laws that took effect on October 18, 2008."[31] The FMC notice announces that the inquiry is part of a comprehensive study examining the impact of the European repeal during the 2006-2010 period. Although framed as a study of the European experience, the inquiry deploys detailed questions that appear geared toward a broad assessment of the repeal's effect on quality of service, prices, service availability, and freight earnings and profitability by carriers through an examination of trades subject to the antitrust exemption versus the Europe trades where the exemption no longer exists. Comments were due to the FMC on January 18, 2011, and the FMC will likely publish its report in late 2011 or 2012.

Liner Antitrust Immunity Going Forward in the 112th Congress and Beyond

It appears that examination of the liner antitrust immunity exemption will remain on the table through the 112th Congress. Some commentators have suggested that liner immunity reform was an Oberstar priority scuttled by his failure to win reelection. The Shipping Act of 2010 was really only a starting point, however, which was intended to open the debate, and a variety of factors suggest that liner antitrust immunity will remain a live issue during the 112th Congress.

First, Rep. Oberstar's proposal was a response to the amassed momentum of real shipper discontent, embodied most clearly in the aggressive position of the NIT League and NCBFAA. These large and influential groups should be expected to continue their push to remake the Shipping Act and search for a new champion. Furthermore, the debate may be significantly different than it was when the OSRA compromise was reached in the late 1990s because, on the one hand, the shipper-importer lobby has grown stronger while, on the other hand, the U.S. liner carriers have disappeared from the international trades, diluting the industry's U.S. constituent base. Finally, the shippers' ability to incorporate the agricultural community, if it persists, will almost certainly be a powerful new arrow in their quiver.

Second, antitrust reform and the decreased federal regulation in favor of market forces have historically tended to be Republican priorities, so it would seem that the GOP takeover of the House may stimulate, rather than suppress, the drive to impose competition laws on the liner industry and fold the FMC bureaucracy. Indeed, it was the Republicans who proposed total removal of the immunity less than a decade ago.

Third, and finally, the ongoing FMC study will keep this issue in the spotlight and renew the discussion as it progresses. Because there has been significant turnover in the Commission, it is unclear how it might be disposed to conclude, but one thing for sure is that Commissioner Brennan is on record in favor of antitrust immunity repeal. Furthermore, the kinds of questions the study asks, which go to comparative profitability of conference versus non-conference lines and give the shippers an open check to complain about the conferences while reporting good results in the non-exempt Europe trades, portend the possibility of some real challenges for the WSC and liner carriers as they head into the next session.

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[30] *Shipping Antitrust Bill Dead in the Water, Possibility of Resurrection Next Year*, BUS. MON. ONLINE (Nov. 3, 2010).

[31] 75 Fed. Reg. 67,970 (Nov. 4, 2010).