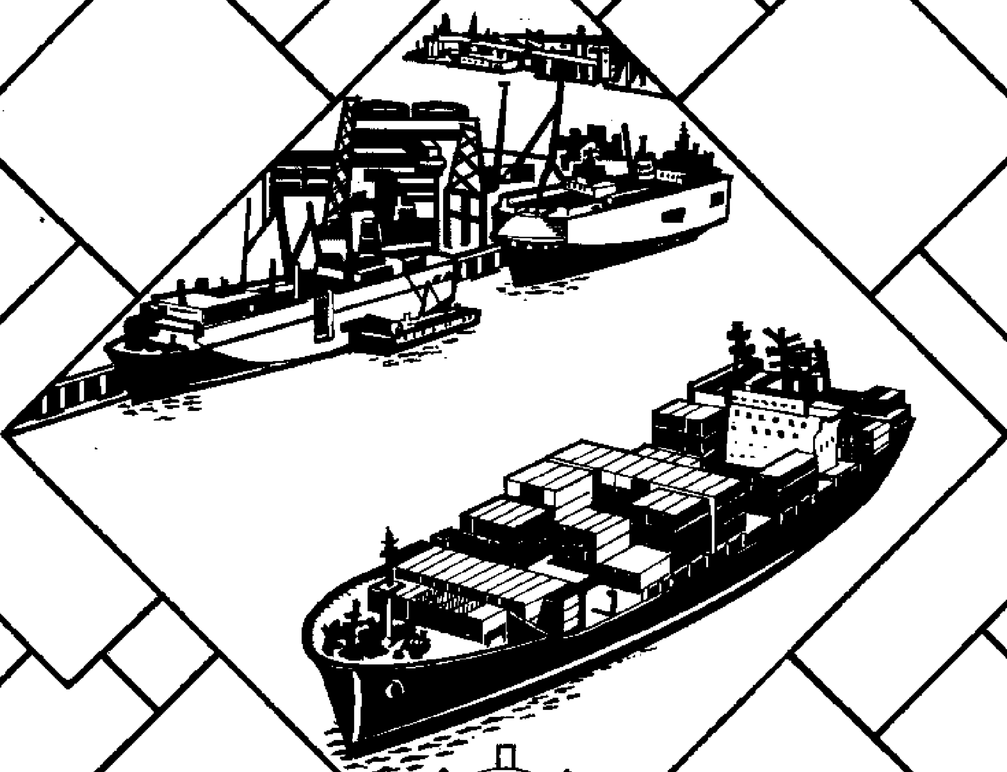
Proceedings:

The Shipping Act of 1984

A Debate of the Issues



Federal Maritime Commission
and
Sea Grant Program
University of Southern California

February 18-19, 1988
Queen Mary
Long Beach, CA

Phyllis Grifman, Editor

The Shipping Act of 1984
A Debate of the Issues

Proceedings of a Conference

Sponsored by

The Federal Maritime Commission

Sea Grant Program
University of Southern California

The Paul Hall Endowment in Marine Transportation
University of Southern California

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TABLE OF CONTENTS

Introduction

In creating the Shipping Act of 1984, Congress recognized that it would significantly affect an industry that had relied on a consistent Congressional charter since 1916. In order to create an appropriate evaluation of the changes in liner shipping occasioned by the implementation of the recent Shipping Act, Congress mandated that the Federal Maritime Commission host two colloquia to be held in 1986 and 1988 to address specific questions of implementation.

The first of these meetings was held in association with Old Dominion University in 1986 and provided an opportunity for east coast U.S. and European carriers, shipping associations, shippers, NVOCCs and regulators to come together to address the question of whether the changes mandated in the Act were achieving the desired ends. The second meeting, on which this Proceedings reports, was held February 18 and 19, 1988 at the Queen Mary Hotel in Long Beach, California and was attended by over 350 individuals.

Sponsored by the Federal Maritime Commission, the Sea Grant Program of the University of Southern California and the Paul Hall Endowment in Marine Transportation at the University of Southern California, this second meeting was similarly designed to elicit the comments and experience of U.S. and foreign companies engaged in maritime transportation of goods. The location on the west coast of this second meeting was designed to facilitate the participation of west coast and Asian companies.

The objectives of both meetings have been to elicit information on the current status of various sectors of the shipping industry; to explore the impacts of expected global changes in the industry on U.S. trade and shipping; and to exchange views on current theories and practices of government regulation in international transportation.

The Conference also saw the inauguration of the Paul Hall Memorial Lecture Series, a program of the Paul Hall Endowment in Marine Transportation at USC. The Endowment was established in 1981 to promote marine transportation educational programs. The Memorial Lecture Program was developed in 1987, and honors distinguished contributors to marine transportation. Herbert Brand, a longtime associate of Paul Hall and the Chairman of the Board of the Transportation Institute, was the first recipient of the Paul Hall Award and presented the first Memorial Address at the conference.

These proceedings contain the complete texts of written statements prepared by the panelists and the documents prepared by the staff of the Federal Maritime Commission. They are organized by panel, and serve to illustrate the range of views held by representatives of various sectors of the industry and by those in government. Biographical information on the Conference participants, as well as a list of those in attendance, have been included in this volume.

We owe particular thanks to the program committee for the success of this meeting: Robert S. Agman, Robert A. Ellsworth, William B. Kelly, Sandra L. Kusumoto, Robert A. Peavy, Thomas D. WIlcox, Peter G. Sandlund, Edward J. Sheppard, R. Erik Stromberg, Don Walsh and Roger Wigen. They succeeded in assembling a distinguished group of panelists whose contributions helped make the Symposium a great success.

The staffs of the Ports of Long Beach and Los Angeles, and Crowley Maritime were instrumental in making this meeting so enjoyable. James McJunkin Executive Director of the Port of Long Beach, and Ezunial Burts Executive Director of the Port of Los Angeles, addressed our February 19 luncheon, presenting their views of the impact of the Shipping Act on their own ports. Julia Nagano, Manager of Media Relations for the Port of Los Angeles and David Zanotta, Director of Public Relations for the Port of Long Beach, handled all of the arrangements for the two host ports. Brent Steineker and Esther Chavez of Crowley Maritime made all of the arrangements for the harbor tour on the evening of February 18.

Robert L. Friedheim, co-convener of the symposium and Director of the Sea Grant Program at the University of Southern California, marshaled the efforts of a very capable Sea Grant staff -- notably, James A. Fawcett, Director of the USC Sea Grant Marine Advisory Services and Seaport Management Specialist, and Lola Williams and Lori Fleming, who coordinated all of the arrangements for the Symposium.

For their assistance in producing this volume, thanks to Lori Fleming of USC Sea Grant, and Maria G. Aguilar for her cover design.

Phyllis M. Grifman
Editor
Sea Grant Program
University of Southern California

Opening Remarks

Edward J. Philbin
Commissioner
Federal Maritime Commission

Although the co-sponsor of this symposium is a great educational institution, the University of Southern California, this is not going to be an academic exercise. We are here for a debate of the issues raised by the Shipping Act of 1984. The ideas, opinions and information generated here without doubt will have a direct impact on the upcoming Congressionally mandated review of the 1984 Shipping Act. Therefore this symposium is a very important preliminary step in the evaluation process that is about to begin.

Section 18 of the Act directs the Federal Maritime Commission (FMC) to gather and analyze trade data and other information concerning the impact of the Act, to consult with other federal agencies concerning that data collection and to issue a report within six months after the five year data gathering period. At that time an advisory commission on conferences and ocean shipping composed of government and private sector appointees will be formed. The advisory commission will receive the FMC report and old hearings and make recommendations to Congress and the President on future legislation. Therefore, the FMC's report and analysis almost certainly will have a major impact on the review process and on any future modifications of the 1984 Act.

To insure the accuracy of our data collection the Commission has, I think with great foresight, labored mightily to involve every element of the maritime community. The report to the advisory committee will not have been prepared in an ivory tower. Carriers, shippers, ports, independent marine terminal operators, NVOCCs, freight forwarders and shippers' associations have been and continue to be consulted regularly, either through surveys or as study groups, and shortly as a legally constituted advisory committee to the Federal Maritime Commission. But it is through meetings such as this that the various components of the industry and government can meet in an open arena to candidly and hopefully peacefully exchange views and opinions. That's what we concluded from our very successful symposium in Norfolk, Virginia in June of 1986, which featured a wide range of very frankly stated perspectives on the current regulatory program. At that time, concepts such as service contracts and mandatory independent action were advocated and villified. We heard the Shipping Act being praised for its great impact, derided for having no impact, condemned as disastrous, and lauded for its positive effects on shipping.

This symposium provides another opportunity to engage in, as the diplomats put it, a full and frank exchange of views as we approach the fifth and the final year of our mandatory data collection and analysis period. Opportunity is the operative word here. Section 18 provides all members of the maritime community with the rare opportunity to participate directly and officially in the review of the legislation which is critical to their operations. I am aware of no other instance in which agency and industry input has been built into the legislative process. In the same spirit, the Commission is determined to insure that the exercise of its statutory responsibilities fully utilizes industry insights and experience, and therefore the opportunity to be an active player in the review and possible reformulation of U.S. maritime regulatory law is here today.

I think it is significant that representatives of non-U.S. interests, such as foreign flag carriers, are also availing themselves of this opportunity. Their contributions during the Norfolk symposium were an important element in the success of that effort, and I am especially happy to welcome them again as important members of the U.S. trade community. A special welcome to Dr. Henry de la Trobe for traveling all this distance to attend.

The Commission is committed to involving every sector of the maritime industry in the review and assessment of the 1984 Act, as evidenced by its encouragement of broad participation in this symposium. I refer not only to those who make formal presentations and serve as panelists, but also to those who are here to listen and to challenge the views and opinions which will be expressed. Again, I welcome you all and I wish for us all an informative and a productive symposium. Bob Ellsworth, who has been primarily responsible for guiding this Section 18 study for the FMC, will now present the findings on "The Shipping Impact of 1984 - Four Years after Enactment."

Findings on the Impact of the Shipping Act of 1984 Four Years After Enactment

Sandra L. Kusumoto
Dr. Robert A. Ellsworth
Bureau of Economic Analysis
Federal Maritime Commission

Good morning. It is a pleasure to be with you today to participate in what should prove to be a most informative and interesting symposium. We have been fortunate indeed to have with us panelists and guests from all over the world.

Before we begin our panel discussions, I thought it might be helpful to give you a little background about the review process which Congress built into the Shipping Act of 1984 and then briefly tell you about some of the information we have collected thus far to evaluate the impact of the Act.

Let me begin with a brief outline of section 18 of the Act which establishes the review process.

Section 18 requires that the Commission, for a period of five years after enactment, collect and analyze information concerning the impact of the Act upon the international ocean shipping industry, including data on:

(1) increases and decreases in the level of tariffs;

(2) changes in the frequency or type of common carrier services available to specific ports or geographic regions;

(3) the number and strength of independent carriers in various trades; and

(4) the length of time, frequency, and cost of major types of regulatory proceedings before the Commission.

In addition, the Commission must also prepare reports on the following topics:

(1) the advisability of adopting a system of tariffs based on volume and mass of shipment;

(2) the need for antitrust immunity for ports and marine terminals; and

(3) the continuing need for the statutory requirement that tariffs be filed with and enforced by the Commission.

Six months after the expiration of the five-year period, the Commission must report the information, with an analysis of the impact of the Act, to Congress, to the Advisory Commission on Conferences in Ocean Shipping and to the Department of Transportation, the Department of Justice and the Federal Trade Commission. The Advisory Commission is to be formed five and one-half years after enactment and will be comprised of 17 members including a cabinet level official, four members from the Senate; two from the Committee on Commerce, Science and Transportation and two from the Committee on the Judiciary; four members from the House of Representatives; two from the Committee on Merchant Marine and Fisheries and two from the Committee on the Judiciary; and eight members from the private sector.

The Advisory Commission is instructed to conduct a comprehensive study of, and make recommendations concerning, conferences in ocean shipping. The study shall specifically address whether the nation would best be served by prohibiting conferences, or by closed or open conferences. The Commission's final report is due in one year and should include recommendations for such administrative, judicial and legislative action as it deems advisable.

Clearly, the Advisory Commission has a very broad mandate to produce recommendations that could dramatically alter the regulatory regime in the international ocean shipping industry. It is expected that the information collected by the FMC will influence the recommendations of the Advisory Committee so we would like to turn now to a brief discussion of our collection efforts and findings thus far. First, we will discuss our data collection efforts in regards to the questions we must address about the impact of the Act on rates, service, competition and regulatory costs and second we will review the results of surveys we have sent to various segments of the industry soliciting their views on the impact of the Act and their suggestions for revisions. For the presentation of the results of our data collection efforts I would like to pass the baton to Ms. Sandra Kusumoto who is also with the FMC's Bureau of Economic Analysis.

Thank you, Dr. Ellsworth. I would like to briefly outline the Commission's section 18 efforts to date regarding the collection of data. One important question facing the Advisory Commission on Conferences in Ocean Shipping will be what has happened to the level of tariffs - i.e., freight rates since the Act was enacted. Since March 1984, a considerable amount of staff time has been spent compiling tariff rates for the following country-to-country trades:

Australia - To/From:

U.S. Pacific Coast

U.S. Atlantic Coast

Brazil - To/From:

U.S. Atlantic Coast

U.S. Gulf Coast

Italy - To/From:

U.S. North Atlantic Coast

Japan - To/From:

U.S. Pacific Coast

U.S. Atlantic Coast

Taiwan - To/From:

U.S. Pacific Coast

U.S. Atlantic Coast

West Germany - To/From:

U.S. North Atlantic

U.S. South Atlantic

The Commission staff is collecting <u>conference</u> port-to-port tariff rates, and surcharges such as the CAF (currency adjustment factor), the BAF (bunker adjustment factor), terminal handling charges, container yard origin and destination charges, and any discounts. Based on the top moving commodities of the conference in each of the trades mentioned above, these charges were determined by the staff -- working closely with conferences and the carrier study group, about which I shall have more to say in a moment -- as the most important surcharges to capture in determining the rate the shipper would be charged. The top moving commodities of the conference in each trade were ascertained in one of two ways. First, the Commission staff used a publicly available data base, the Journal of Commerce's PIERS (Port Import and Export Reporting System) to determine the top moving commodities by weight of each of the various conferences for 1984. For several trades, especially the measure trades such as the inbound Japan/Taiwan to the U.S., the staff received revenue tons from the conferences and carrier study group. As you can see, the Commission is working very closely with the carriers and conferences, as well as other groups, to ensure that the data being collected are accurate. It is important to note that shortly after the passage of the Act, the staff concluded that the collection of information in isolation might result in misleading or erroneous data. It was believed that it would be very beneficial if the methodology, and the data collected by pursuing an agreed upon methodology, could be verified by the affected parties. The staff contacted carriers, shippers, ports and other groups to see whether they would be interested in forming study groups to meet occasionally with the staff to help verify data. To date, carriers, shippers, ports, marine terminal operators, freight forwarders, shippers' associations and non-vessel operating common carriers have formed study groups to work with the staff of the Commission.

These study groups have been instrumental in ensuring that the data collected are accurate and properly indicate the impact of the Act. Thus far, the most important functions of these groups have been to work with the staff to verify data collected to determine the impact of the Shipping Act of 1984 on freight rates and to participate in surveys sent to each segment of the industry requesting their views on the Act.

In addition to the collection of port-to-port conference tariff rates, the staff is also collecting information on service contracts, independent action, and single factor through rates. Independent action rates are rates, including terms and conditions of service, published in the conference tariff which are different from the common rate published in the tariff. One benefit of meeting with various industry study groups has been that they recognize that a rate study would be incomplete and erroneous if the Commission did not also have information on the impact of service contracts, independent action and the ability of conferences to file conference intermodal rates. Thus a form was developed that would help the staff capture information on the volume of conference traffic moving under conference port-to-port, independent action, service contracts, and single factor through rates. This form is sent to the conference chairmen each year and to date information has been received for calendar years 1985 and 1986. By having this information, the staff is able to distinguish between "paper rates" and rates under which cargoes move. For example in the U.S. to Far East trades, since enactment of the Act through fiscal year 1987, 965 service contracts have been filed by liner operators. In the inbound Far East to U.S. trades, this number is 5,049. As you can see, it is important that a rate study include information about service contract rates. I would like to now show you what the staff has done with some of the information provided by the conferences for the North Europe and Japan trades.

For the U.S. Atlantic to North Europe trade, a few examples which have been compiled indicate that for some commodities the port-to-port tariff rates have steadily increased since 1984 following each general rate increase, while the rate which applied to most of the cargo, which moved under one of the other tariff systems or arrangements, declined during the same period. The upward drift in tariff rates, relative to service contracts, single factor through rates (single factor intermodal rates - SFI), or independent action (IA) rates, is an indicator that these other tariff systems are actually moving most of the traffic. The port-to-port rates therefore represent "paper rates" in the sense that shippers will have no incentive to use them (so the rates exist only on paper), as long as they remain higher than alternative rates.

An important task is therefore to determine, first, how many "paper rates" exist for the selected commodities and, second, what adjustment, if any, is required for those commodities having "paper rates" in order to convey the changes in the rate under which most of the selected commodities moved. For the remaining commodities, which move under the tariff rates, the port-to-port rate will provide the necessary information about rate levels.

Results from completed forms for the U.S. Atlantic-North Europe Conference clearly indicate that port-to-port "paper rates" exist where most of the cargo moves under intermodal or service contract rates. Graph 1 compares the Consumer Price Index (CPI) with an aggregated weighted index of port-to-port tariff rates for major moving commodities (unmanufactured tobacco, hardwood lumber, medical supplies, corn seed, veneers, cigarette filter fiber, frozen pork offals, and graphite and carbon electrodes). The weighted index, based upon

1984 tonnage obtained from the PIERS data base shows that the port-to-port tariff rates are depressed and have been declining since 1981. These commodities are shipped primarily under port-to-port rates.

Graph 2 is also based upon 1984 tonnage from PIERS and similarly compares the CPI with a port-to-port tariff rate index of six other major moving commodities (roadmaking equipment parts, automobile parts, engines, photographic equipment, synthetic rubber and synthetic yarn). The rate index appears to indicate that the port-to-port tariff rates for these commodities have kept pace with inflation, and have done better than those in the first graph. However, this group of commodities has another characteristic in common; they may have been moving under intermodal rates since 1983 and since 1985 under service contracts. In fact, data provided from the transport movement questions indicate that very little tonnage is actually moving under the port-to-port conference tariff rate. For example, only 10 percent of the U.S. Atlantic-North Europe Conference's total tonnage of roadmaking equipment parts moved under the port-to-port tariff rate. The other 90 percent moved under conference port-to-port service contracts. Graph 3 illustrates the disparity between the conference's port-to-port tariff and service contract rates.

Graph 4 compares another port-to-port tariff rate with an intermodal point-to-point service contract rate for engines. The intermodal rate is lower than the port-to-port tariff rate. If the service contract inland transportation costs could be isolated, the port-to-port transport revenue would be substantially lower than the tariff port-to-port revenue.

Let us now turn to the Trans-Pacific trades. In the U.S. West Coast to Japan trade, we have been collecting port-to-port rates beginning with 1976 rates on 14 of the top moving conference commodities. Graph 5 is weighted by 1984 PIERS tonnage for each of the fourteen commodities and is in U.S. dollars per long ton. Dollars per long ton is the standard measure on the vertical axis so that twenty-foot and forty-foot container revenue could be added together based on a common factor. From 1976 through 1984, the dollars per long ton reflect the port-to-port rates. However for 1985 and 1986, based on the information supplied by the Transpacific Westbound Rate Agreement, the Commission staff weighted the various rate systems under which the cargo moved, i.e., from 1985 onwards the dollar per long ton graph includes service contracts, independent action, port-to-port, and single factor through rates. This was done, because as in the U.S. Atlantic to North Europe trade, since the Act, many of the commodities are moving under service contracts, independent action and single factor through rates. As you can see from Graph 5, revenue yield (based on 1984 PIERS tonnage) per long ton was starting to slip from as early as the first quarter of 1981. It is not until the second quarter of 1986 that an upturn is seen in the revenue yield per long ton index. There has been a large decline in the dollars per long ton index from the second quarter of 1982 when it was approximately $120.00, to a low of about $50.00 per long ton in the first quarter of 1986.

Let us focus our attention on two of the fourteen commodities. The first, frozen beef, moved primarily under service contracts during 1985 and 1986. As you can see in Graph 6, the dollars per long ton for a port-to-port rate (represented by the black line) is much higher than for a service contract rate (the red line). Most of the frozen beef moved under service contracts during these two years. Graph 7 of hides and skins shows another important reason for collecting information on independent action rates. (The black line represents the dollars per long ton under the conference single factor through rate. The red line represents the service contract rate. The blue line is the revenue yield under an SFI independent action rate.) As you can see, the revenue yield for an independent action rate was below the service contract rate during 1985. Based on information from the cargo movement forms, it is also important to note that much of this commodity moved under the independent action rate and not the service contract rate. What is even more interesting is the fact that the staff would have continued to collect port-to-port rates for this commodity even though hides and skins primarily move intermodally were we not able to determine how the cargo actually moved. This is a very important reason why it is necessary to obtain verification of the data collected.

The staff recognizes that there may be problems associated with using weighted revenue yield per long ton for the top moving commodities. However, it is interesting to see not only the difference in rates under different rate systems, but also the effect of various rate systems on the average rate for a commodity. For this presentation, it would have been cumbersome to show individual commodity graphs. Therefore, it was decided to show a weighted revenue yield graph of the top moving commodities of the conferences.

Let us switch our attention to the inbound Japan trade. Graph 8 illustrates the weighted U.S. dollars per long ton for eleven of the thirteen top moving commodities based on revenue tons. Only eleven commodities were included in this preliminary review because rates for the two omitted commodities do not go all the way back to 1976. As you can see, the revenue yield per long ton, weighted by conference revenue tons for these 11 commodities, peaked in third quarter 1978 and hit the low point in third quarter 1981. In general, since 1982, except for a sharp drop in third quarter of 1985, the revenue yield index seems to be moving upwards. Like the U.S. Atlantic to North Europe Conference, many of the top moving commodities tend to move under other rate systems such as service contracts. For the Trans-Pacific Freight Conference of Japan, this is also the case for automobiles (complete knocked-down units - CKD) and video and TV equipment such as TV cameras. Graphs 9 and 10 illustrate this and the information received from the conference also indicates that a large share of both these commodities moves under service contract rates. Note that both graphs compare conference port-to-port tariff rates with port-to-port service contract rates.

Because the staff is using a common factor - e.g., revenue yield in U.S. dollars per long ton, as weighted by either long tons or revenue tons, we can plot the two Trans-Pacific trades on one graph. Graph 11 shows that the weighted revenue yield index of the inbound conference 11 top moving commodities exceeds the weighted revenue yield of the outbound conference 14 top moving commodities.

Graph 12 has been constructed from Graph 11 by averaging the weighted revenue yield indices of the top conference commodities moving in the outbound and inbound Trans-Pacific trades. (This is represented by the blue line.) The horizontal (black) line on this graph represents the 1976 average revenue yield index line and can be used as a reference line to gauge how revenues fluctuated from 1976 to 1986. As you can see, in the last quarter of 1985 the revenue yield index dips slightly below the 1976 revenue yield. It should be pointed out that these revenue indices are unadjusted for any increases in costs due to inflation or other factors. Assuming the conference lines were breaking even in 1976, a hypothetical profile of cost increases averaging 4 percent per annum has been superimposed on the graph (red line).

A rates profile in isolation indicates little about the financial health of the carriers in the trade. For instance, our hypothetical cost profile implies that an index of costs, increasing at 4 percent per year, would have been in excess of revenues during the 1980s. However, the actual position of the cost profile will depend on whether or not the carriers' revenues exceeded costs in 1976 and the actual behavior of costs. If revenues exceeded costs in that year, the 4 percent per annum cost profile would be some distance below that shown in the graph. Depending on how far below revenues their costs have been, the carriers may or may not have been making surpluses during some part of the 1980s. Secondly, costs may not have increased at 4 percent per annum, but at a greater or lesser rate. If, for example, costs increased 2 percent per annum, there would have been periods in the 1980s when revenues exceeded costs.

I have put this graph on display to illustrate several points. One is that the staff is working with the carrier study group to obtain cost, revenue and vessel utilization information. The graphs based on actual data shown in this presentation have been revenue yield graphs. It is important to show not only what has happened to revenue but what has also happened to costs and vessel utilization. Secondly, the staff is also collecting tonnage, value, stowage factors, foreign exchange, fuel price and gross national product information. These may be helpful in explaining the impact of the Act on rates in particular, and on the liner shipping industry in general. Lastly , this presentation so far has been about conference rates. The staff has also embarked on a study of the rate actions of selected independent operators in some of the major U.S. trades. This study will probably confine itself to an analysis of rate activity in the post-Act period. For a number of important categories of cargo, those conference rates under which the cargo actually moves (be they port-to-port tariff rate, service contract, independent action, or single factor through rate) may be compared with the equivalent rates offered by the independent carriers. The cooperation of carriers is being sought to help facilitate this task.

In addition to collecting data on rates, the staff is also concerned with "changes in the frequency or type of common carrier service available to specific ports or geographic regions." The Commission has entered into an arrangement with the Lloyd's of London SEA Group to prepare reports on the level and quality of service offered by conference and nonconference carriers in the North Europe, Far East, Brazil, Australia, and Italy trades. These data will be supplemented by data received from ports, carriers, and shippers. The staff plans to compare service quality levels in closed conference with open conference trades.

Another area where the staff is collecting information is about the number and strength of independents. The "number" of independents can be defined to mean the number of individual liner operators who are not members of a conference in various trades; "strength" of independents, however, can be interpreted in several ways.

The staff intends to measure strength by: number of vessels operated by independent operators; total capacity made available by independents (i.e., the number of vessels multiplied by the capacity per vessel); value of cargo carried by independent operators; tonnage of cargo carried by independent operators; and average independent operator size compared to average conference operator size.

The Commission is also required to collect information concerning the length of time, frequency, and cost of major types of regulatory proceedings before the Commission. A policy goal of the 1984 Act was to establish a nondiscriminatory regulatory process for the common carriage of goods by water in the foreign commerce of the United States with a minimum of government intervention and regulatory costs. The data gathered about the costs of proceedings will help determine whether that goal has been achieved. In this regard, the staff has been working with the Maritime Administrative Bar Association (MABA) and the industry to gain some appreciation of the costs borne by the shipping industry.

As Dr. Ellsworth noted, the Commission is also collecting information through surveys. I would like to toss the ball back into his court so that he can share some of the findings of the surveys with you.

In addition to the more "objective" data, such as that obtained from the tariffs and Lloyd's of London, the staff has also been collecting information of a more "subjective" nature. This information was collected via surveys sent to various segments of the industry in 1986 and 1987. The first year, surveys were sent to carriers, shippers, ports and non-port terminal operators; the second year freight forwarders were added to the list. It is planned that in 1988 all of the above plus NVOCCs and shippers' associations will be sent surveys.

In 1986 and 1987 approximately 2,000 shippers, 150 carriers and 100 ports and non-port marine terminal operators were sent surveys. In 1987, approximately 1,700 freight forwarders were sent surveys. The response rate for all the surveys has been very satisfactory. It is also worth mentioning that the number of shippers responding to the 1987 survey, 388, was more than twice the number that answered the 1986 survey.

I would like to now share with you some of the more important findings of the surveys. One interesting point to mention up front is that the 1987 results were, in most cases, similar to the 1986 survey results. I should point out also that when comparing the 1986 and 1987 results we should be aware that, especially in regards to the shipper survey, the respondents are not identical. The 1987 shipper mailing list was altered by eliminating from the 1986 list approximately 400 names obtained from a directory of exporters. In 1986 1600 names were used from this directory but the return percentage was quite low. Those 400 slots were filed in 1987 with names obtained from various export/import associations. Also, the percentages mentioned throughout will not always add up to 100 percent because there were other choices that I may not specifically mention or the respondent had no opinion.

With those caveats, I would like to concentrate my remarks on those three issues which will be discussed on our panels today: tariffs, service contracts and antitrust immunity. Unless otherwise specifically mentioned the percentages given apply to both the results of the 1986 and 1987 surveys.

As was discussed previously, a very important issue on which the FMC must report is whether tariff filing, and its accompanying enforcement by the Federal Maritime Commission, should be continued. The staff gave each survey respondent several choices on this issue ranging from retention of the current system to freight tariffs being neither filed, nor enforced nor publicly available.

In both 1986 and 1987, shippers, carriers and ports voted for retention of the status quo. While carriers voted 94 percent and ports 82 percent for the current system, shippers and non-port marine terminal operators were less unified in their responses. Though 53 percent of the shippers cast their votes for the current system and no other choice got more than 13 percent, it is interesting to note that collectively about 30 percent of the shippers opted for a choice of filing but no enforcement, or no filing but enforcement, or no filing, enforcement or public availability. Non-port marine terminal operators were evenly divided either for the status quo or a system where tariffs are filed but not enforced. Approximately 60 percent of the freight forwarders favored retention of the status quo, with the remainder evenly distributed among the other choices. Clearly, while there is a consensus to retain the tariff filing and enforcement system, it is far from unanimous, and remains a topic of controversy. I'm certain we will hear more from our first panel on this issue.

As to the question about whether it would be advisable to adopt a system of tariffs based on volume and mass, opinions varied widely. It should be noted that the staff has rephrased one of the choices so that the 1986 and 1987 results may not be strictly comparable.

Respondents were given several options, including the existing system of weight or measure varying by commodity, a system with rates based on either weight or measure but not varying by commodity, lump-sum rates or freight-all-kinds (FAK) rates. In 1986 40 percent of the shippers voted for lump-sum rates; 17 percent for the existing system and 17 percent for FAK rates.

Carriers, ports and non-port MTO's voted overwhelmingly for the current system although the latter two groups cast about 15 percent of their votes for collectively lump-sum or FAK rates.

As was mentioned above, the 1987 survey was revised slightly. The reason for the change was to eliminate a possible source of confusion in regards to the first choice. As originally phrased it wasn't clearly stated that the current system also permits the use of lump-sum and FAK rates. That was made explicit in the 1987 survey.

In 1987, 37 percent of the shippers selected the status quo versus 31 percent who voted for for lump-sum rates and 20 percent for FAK rates. Carriers remained firmly in support of the current system as did ports and non-port marine terminal operators. Approximately 40 percent of the freight forwarders favor the status quo with about 17 percent selecting the lump-sum option and 20 percent preferring FAK rates. Thus, while the current system won in 1987, there still seems to be a significant proportion of the non-carrier population in favor of a lump-sum or FAK rate system. This might indicate a belief that the tariff system should be simplified.

Finally, shippers and carriers were asked which notice period they preferred for independent action. The alternatives ranged from 0 days (immediate) to more than 30 days. The Shipping Act of 1984 requires that the notice period not exceed ten days. The vast majority of the shippers, 87 percent, voted for a ten-day or less period, being evenly divided between immediate and one to ten days notice. Carriers, on the other hand, were more divided with votes fairly evenly distributed among one to ten days, 11-30 days, and more than 30 days.

A second area of great interest is service contracts. The two major issues here appear to be whether service contracts should continue to be filed with the FMC and the essential terms made available to the public and whether independent action should be mandatory on service contracts.

As to the first issue, shippers and carriers, voted as follows: on the filing question - shippers voted in 1986, 60 percent for filing versus 25 percent against (the remainder had no opinion). In 1987, shippers appeared a little more favorably disposed towards filing with 72 percent voting for filing and 20 percent voting against. Carriers were almost totally in favor of requiring filing, with 90 percent in 1986 and 95 percent in 1987 voting for maintaining the status quo. Freight forwarders cast a vote of 77 percent in favor of filing.

On the issue of making the essential terms publicly available in 1986, shippers voted 39 percent for and 47 percent against. In 1987, they were almost evenly divided on the issue. Freight forwarders, in 1987, voted 64 percent for and 21 percent against making the essential terms public. Carriers, on the other hand, voted 73 percent in favor and 20 percent against in 1986. In 1987 the carrier vote was 58 percent for and 36 percent percent against public availability of essential terms. There would appear to be a shift of carrier attitude on this question.

Perhaps the issue where the users and providers of service contracts were the widest apart was on whether independent action should be required on service contracts. In 1986 shippers voted 81 percent to 19 percent in favor of requiring independent action and 77 percent to 10 percent, with 15 percent no opinion, in 1987. Forwarders voted 44 percent for, 21 percent against, with 35 percent having no opinion on this issue. The carriers voted 86 percent to 14 percent against the requirement in 1986 and 94 percent to 6 percent against in 1987. Clearly, this will no doubt be one area where there will be much debate.

One of the most interesting and perhaps controversial areas to be reviewed by the Advisory Commission will be the issue of antitrust immunity. As was previously mentioned, the question of whether conferences should be prohibited is an issue which Congress explicitly requested the Advisory Commission to express.

There are three major segments of the industry which could be affected directly by antitrust immunity. The first being the carrier community which under current law is permitted to organize conferences of carriers to, among other things, fix rates and pool or apportion traffic, earnings or losses. The antitrust immunity accorded to conferences has long been a topic of controversy and will no doubt remain so.

The second area of inquiry about antitrust immunity involves maritime terminal operators. Under current law, MTO's are permitted to file agreements with the FMC to fix rates or conditions of service and engage in exclusive, preferential, or cooperative working arrangements. As previously mentioned, the FMC in its report must address specifically "the need for antitrust immunity for ports and marine terminals."

A final area of potential antitrust immunity is found in the concept of granting antitrust immunity to shippers' councils. Shippers' councils, although common in many other countries, do not exist in the United States, partly some alleged, because of concerns about exposure to antitrust laws. Shippers' councils abroad often have authority to negotiate with conferences on issues such as general rate increases and the level of bunker and currency surcharges.

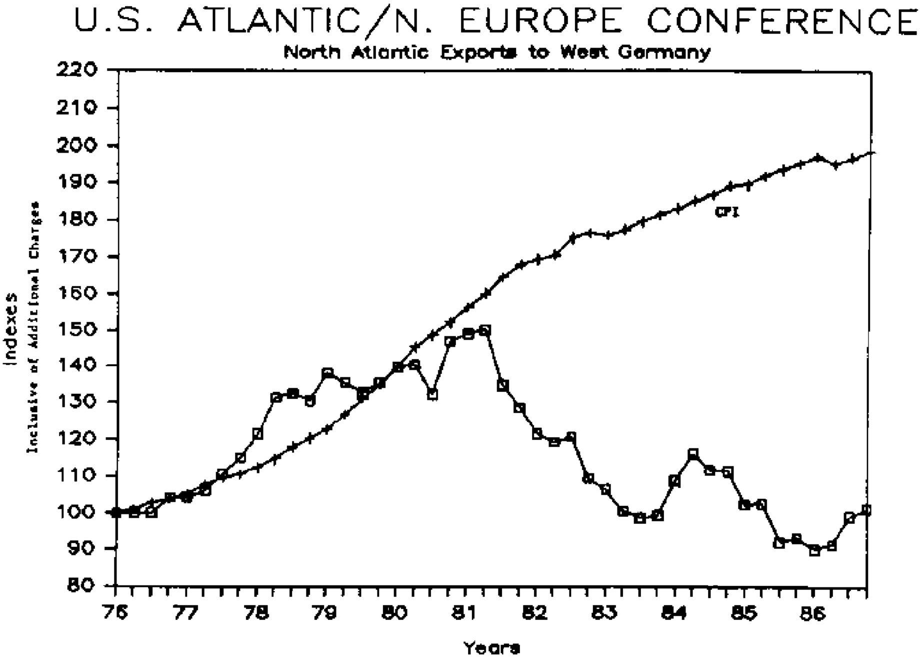
When asked in 1986 if U.S. shippers' councils should be granted antitrust immunity, those shippers that had an opinion were evenly divided, i.e., 31 percent in favor, 31 percent opposed, with 38 percent having no view on the matter. In 1987 the split was 41 percent in favor and 31 percent opposed with again a significant no opinion vote. Those carriers that had an opinion were strongly opposed in both years to granting antitrust immunity to shippers' councils.

The question of antitrust immunity for terminal operators was phrased such that the respondent had several options ranging from granting even more antitrust immunity to elimination of all immunity. Those carriers that had an opinion on the matter were in favor of retaining the status quo, with approximately 70 percent voting for the status quo. Ports were overwhelmingly in favor of maintaining their antitrust immunity with 80 percent voting for the status quo and 15 percent voting for additional immunity. Non-port marine terminal operators were also strongly in favor of either retaining the existing immunities or adding new immunities.

And last but not least, the question of prohibiting conferences was addressed by all parties. Carriers voted almost unanimously against prohibiting conferences. Those ports and non-port marine terminal operators who had an opinion on this issue were likewise strongly opposed to prohibiting conferences. Those freight forwarders who had a view on the matter voted 54 percent no and 29 percent yes on prohibiting conferences. Shippers in 1986 were evenly divided on the issue. In 1987, the shippers' vote was a little more tolerant of conferences with 50 percent voting not to prohibit them versus 38 percent in favor of prohibiting conferences and the remainder with no opinion.

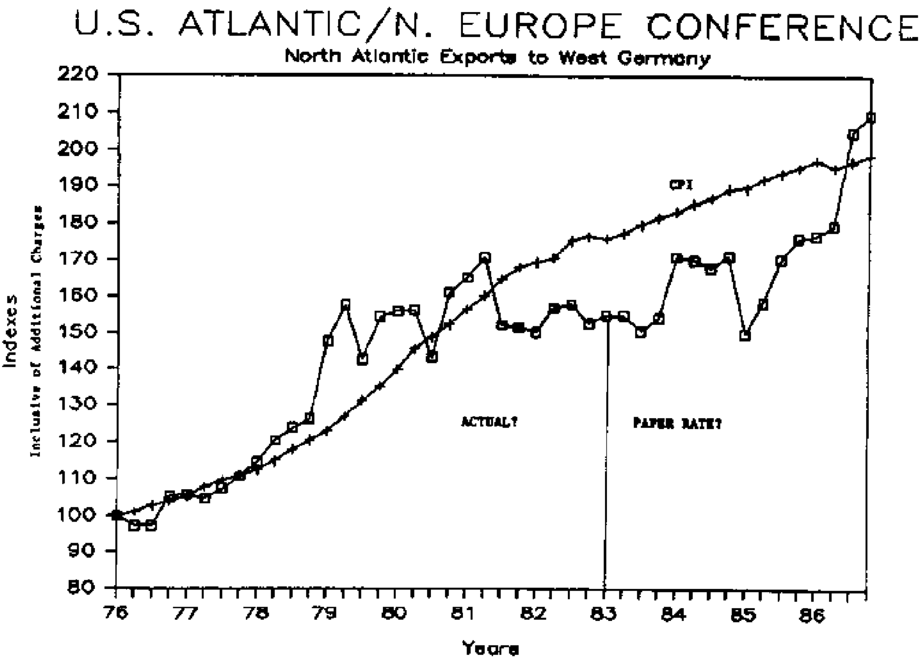
Well enough facts and figures. The plan is to take a short coffee break so we can prepare the stage for our first panel, which will discuss the important issue of tariffs and independent action. So, as they say in show business, "take five" and then let's get on with the show!

GRAPH 1



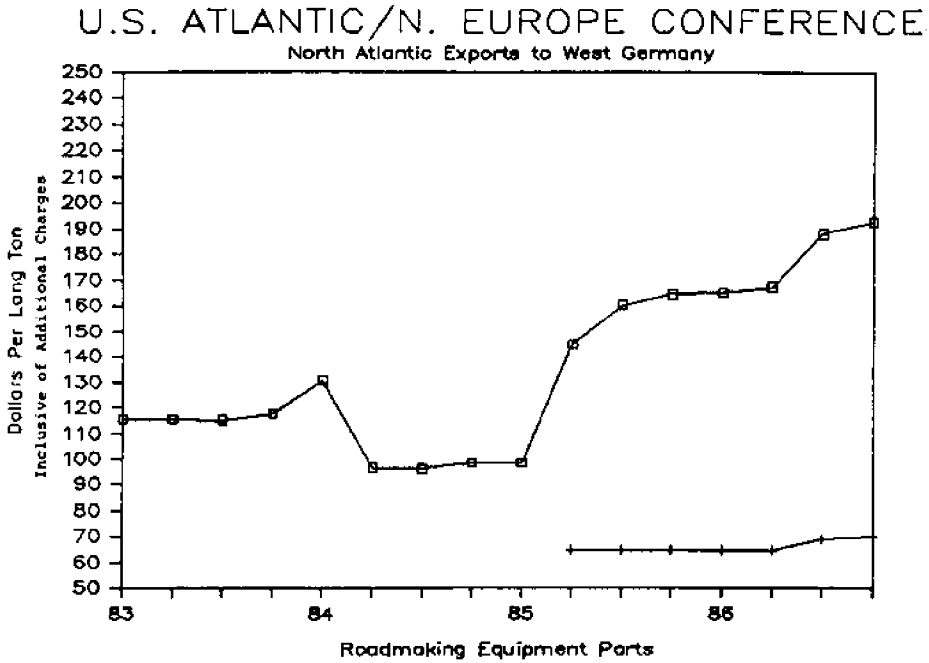
KEY: [] Weighted index of eight major commodities that moved predominantly under port-to-port tariffs from 1976-1986.

GRAPH 2



KEY: [] weighted index of port-to-port tariff rates for six major commodities that currently move under service contracts. Since 1983 some of these did not move under port-to-port tariffs, but rather intermodal rates or service contracts.

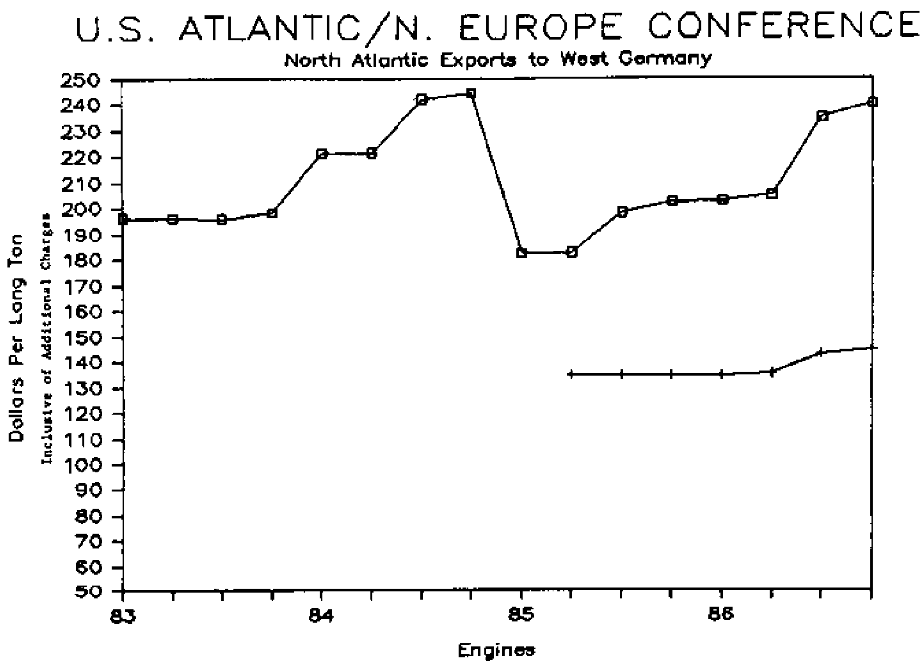
GRAPH 3



[] Tariff port-to-port rate.

\+ Service contract port-to-port rate.

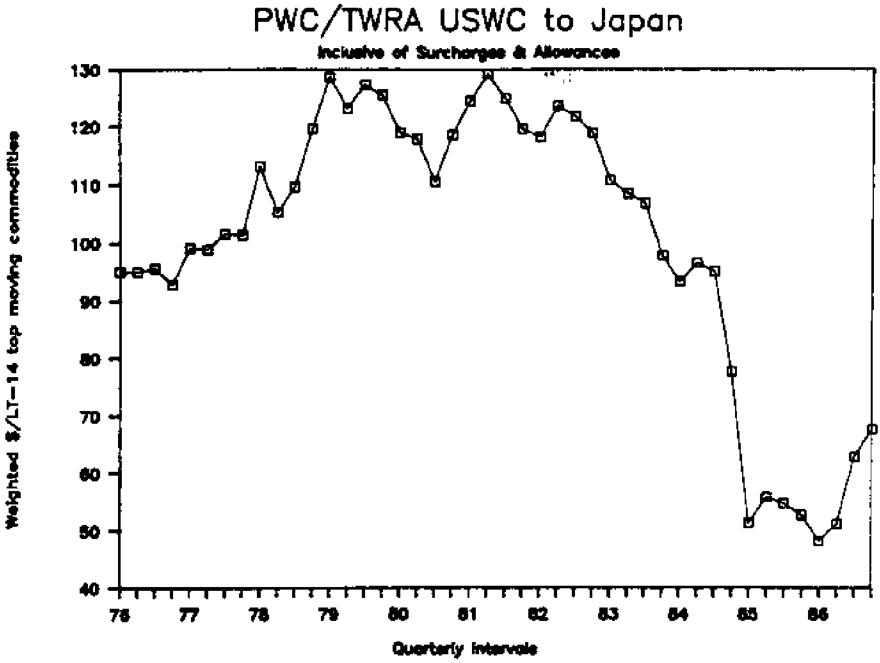
GRAPH 4



KEY: [] Tariff port-to-port rate.

\+ Service contract intermodal point-to-point rate.

GRAPH 5



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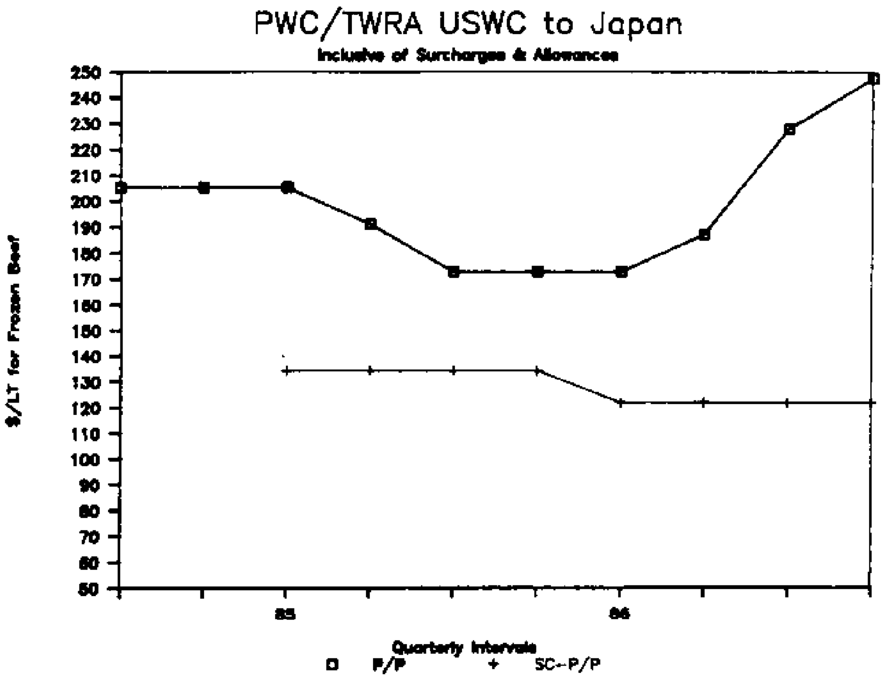

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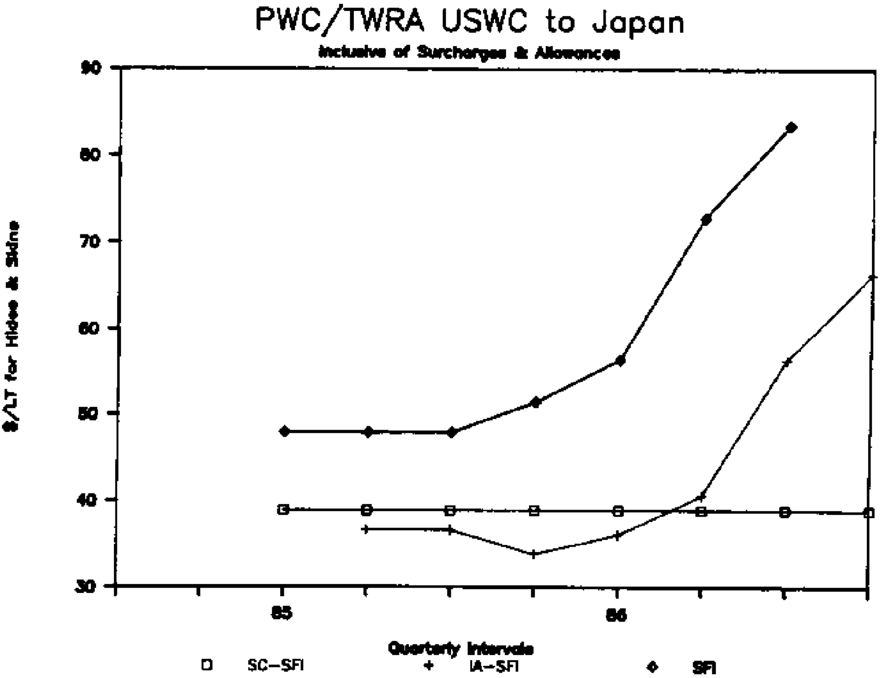

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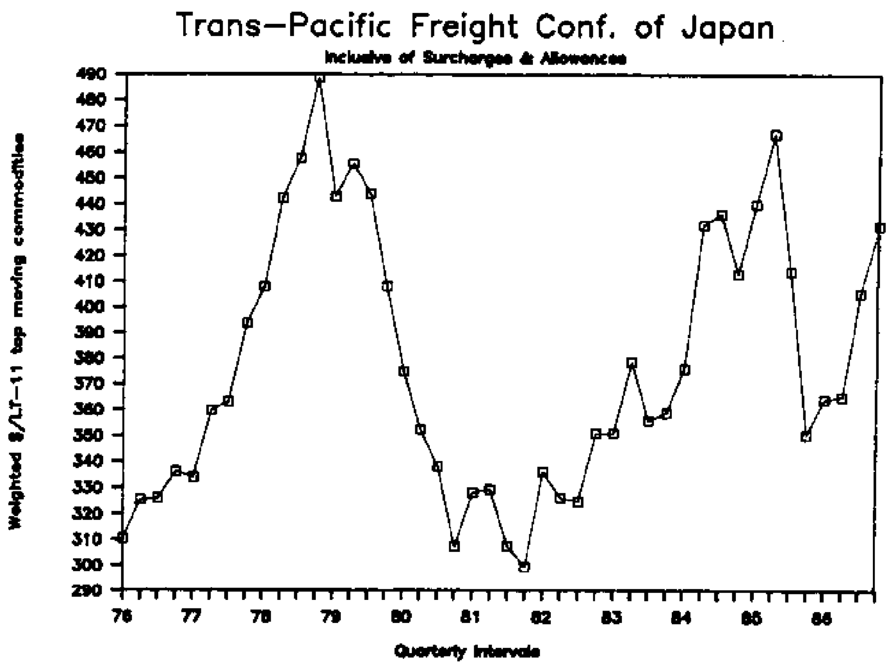

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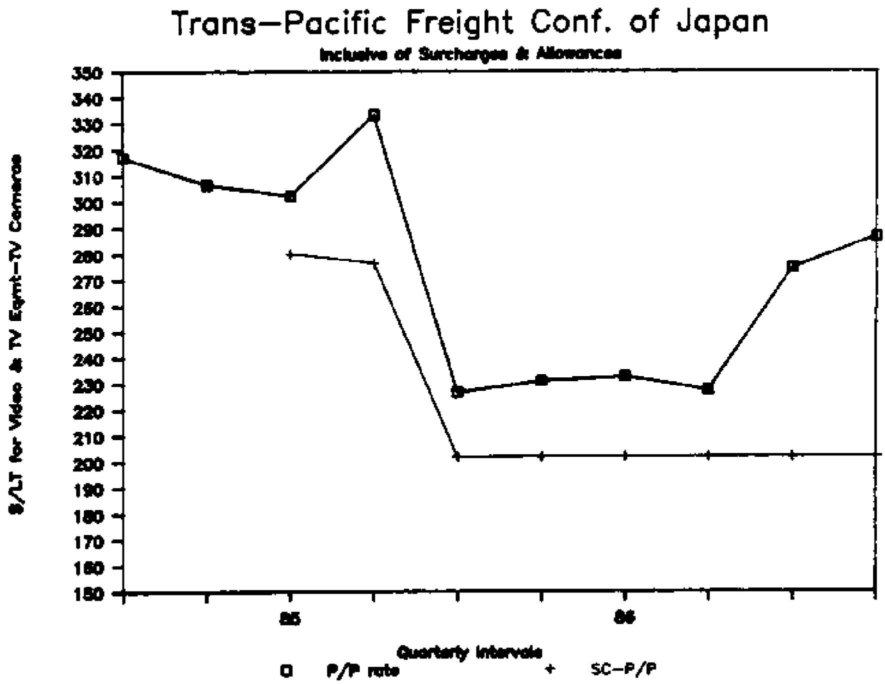

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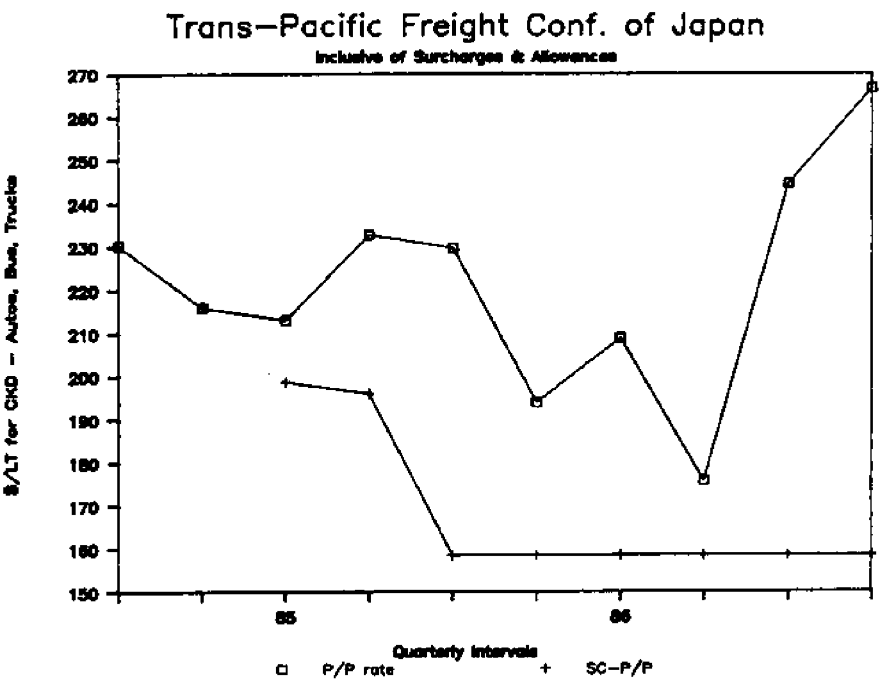

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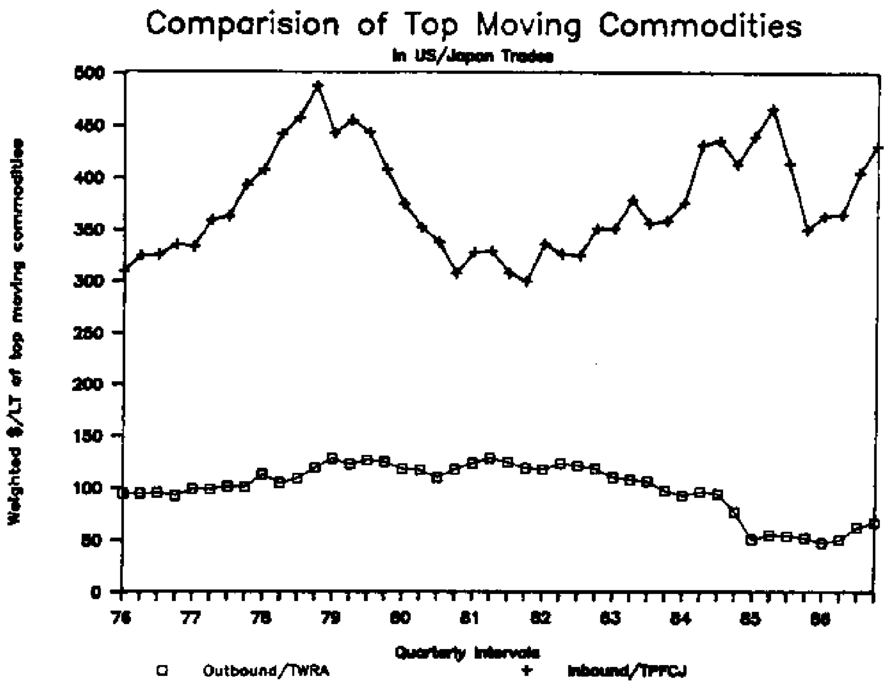

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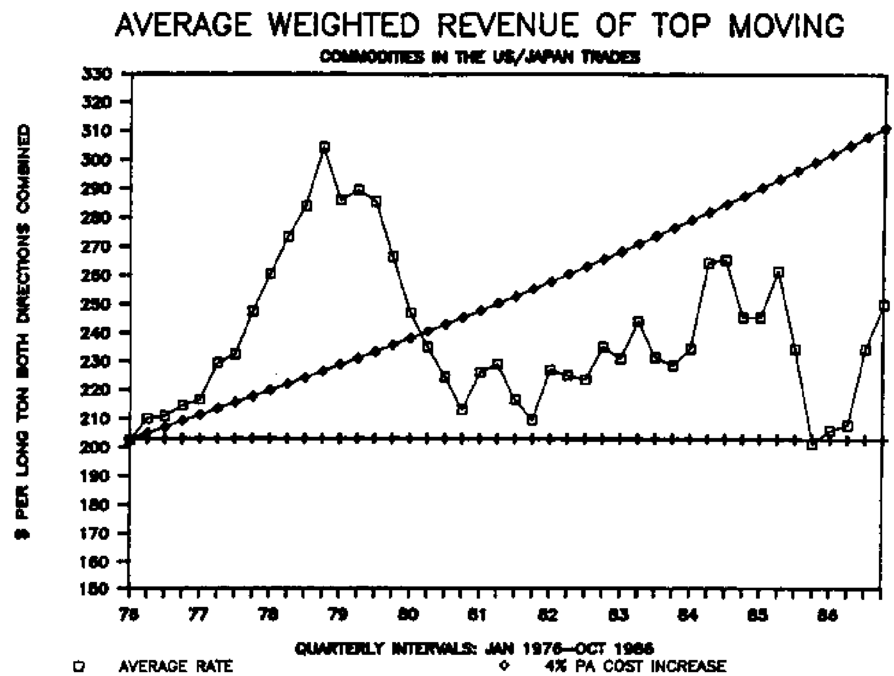
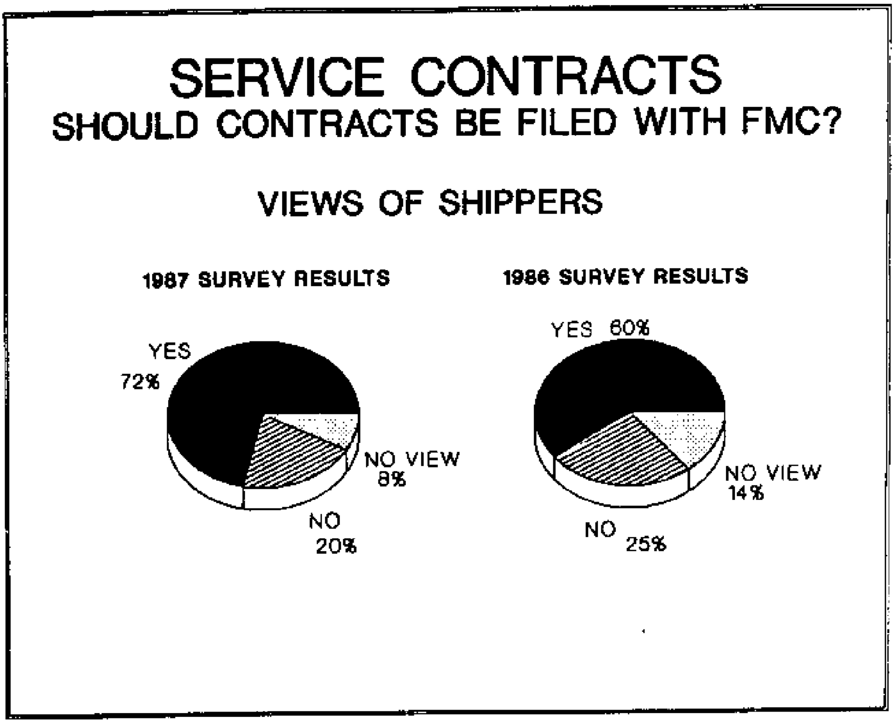


CHART 1



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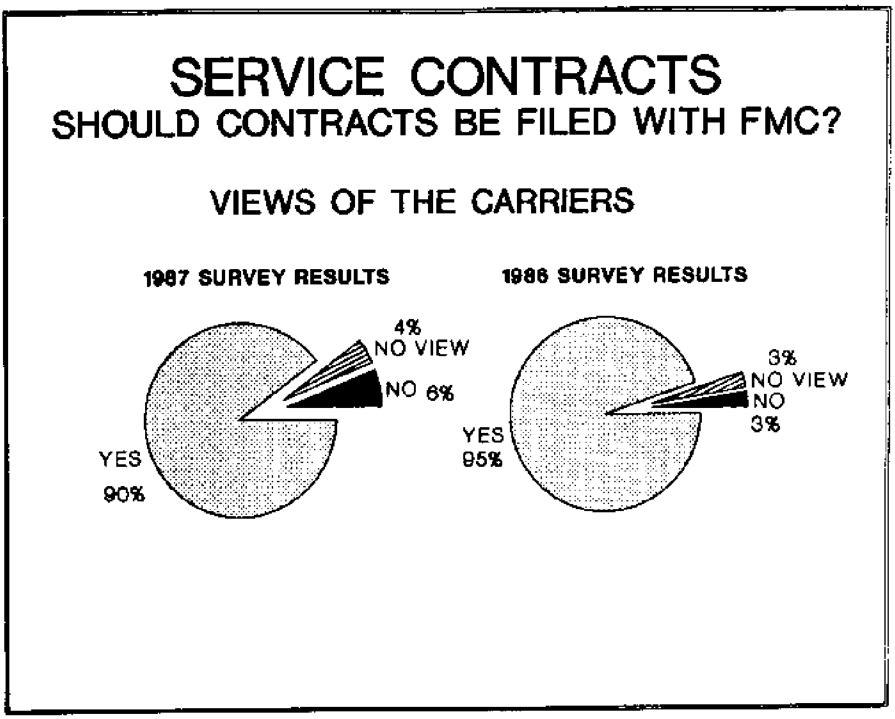
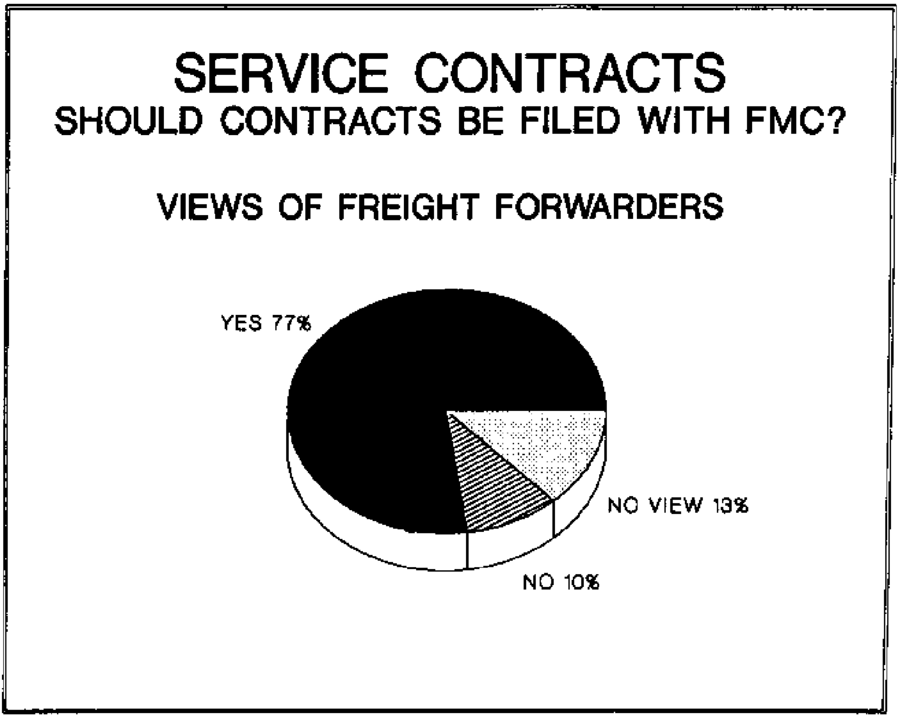


CHART 3



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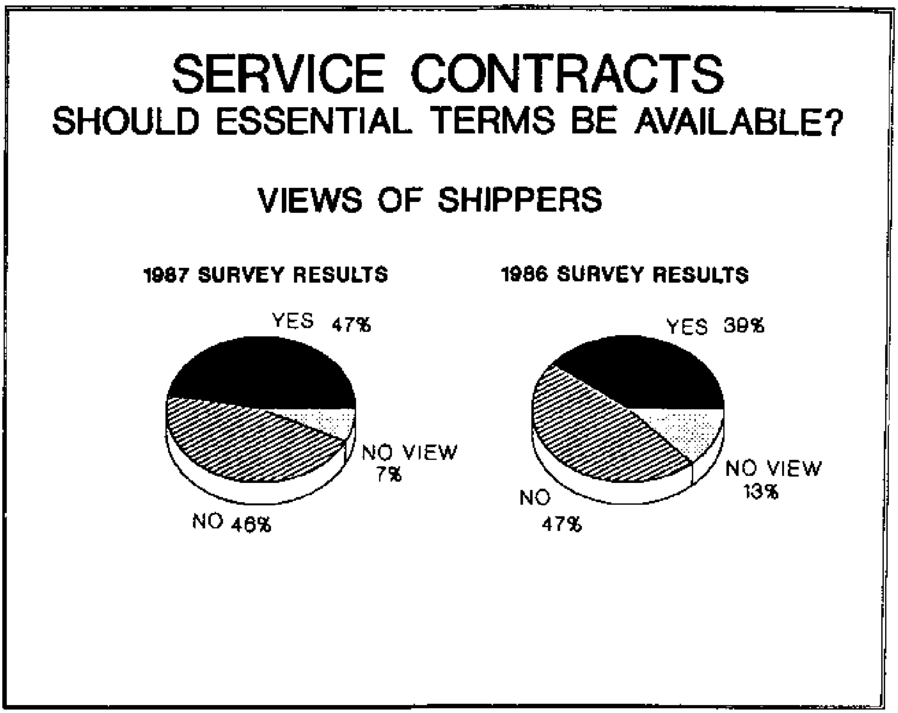

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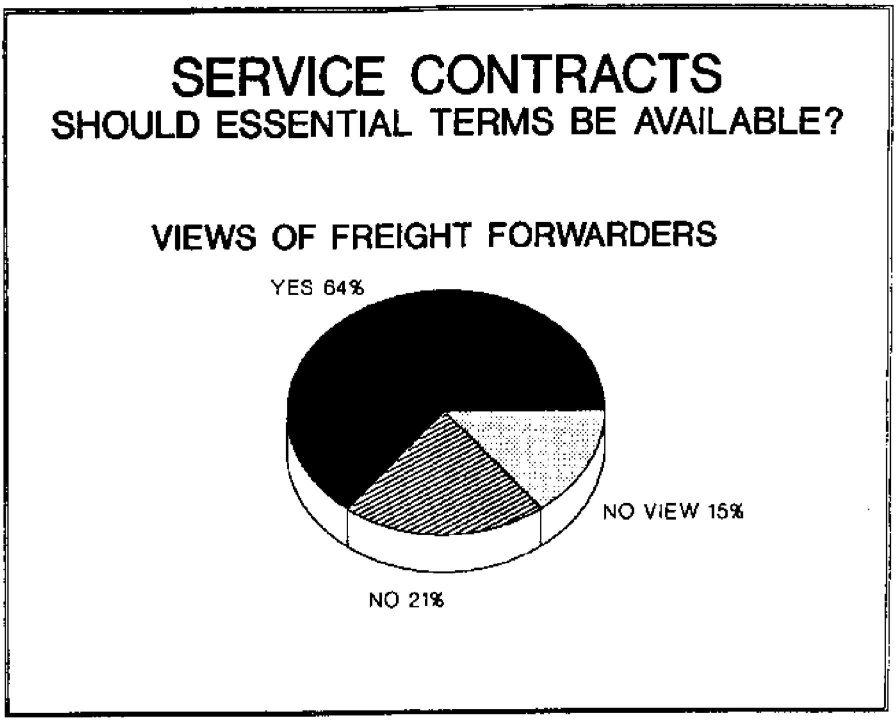

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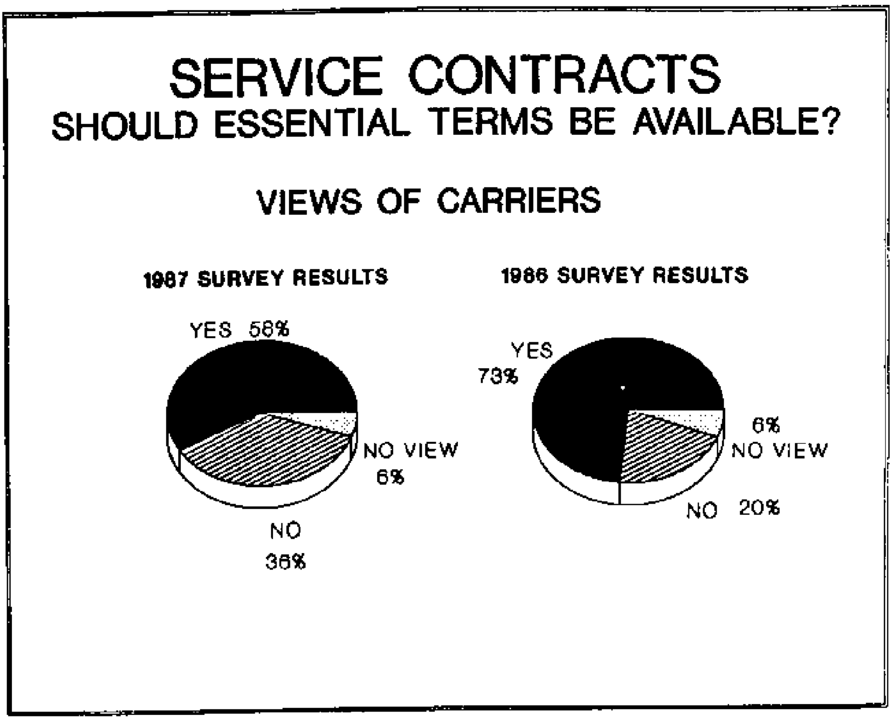

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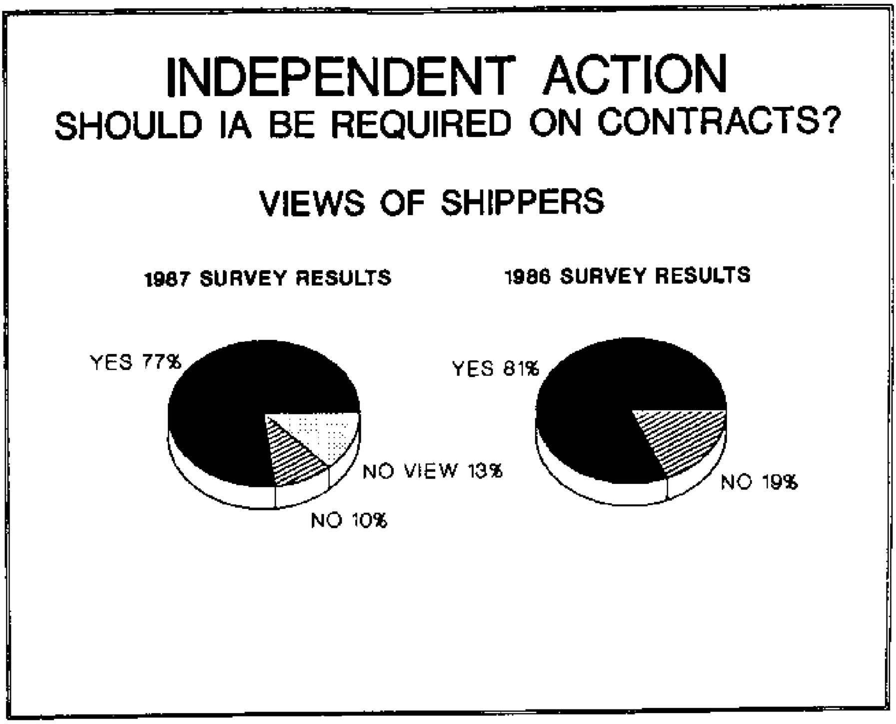

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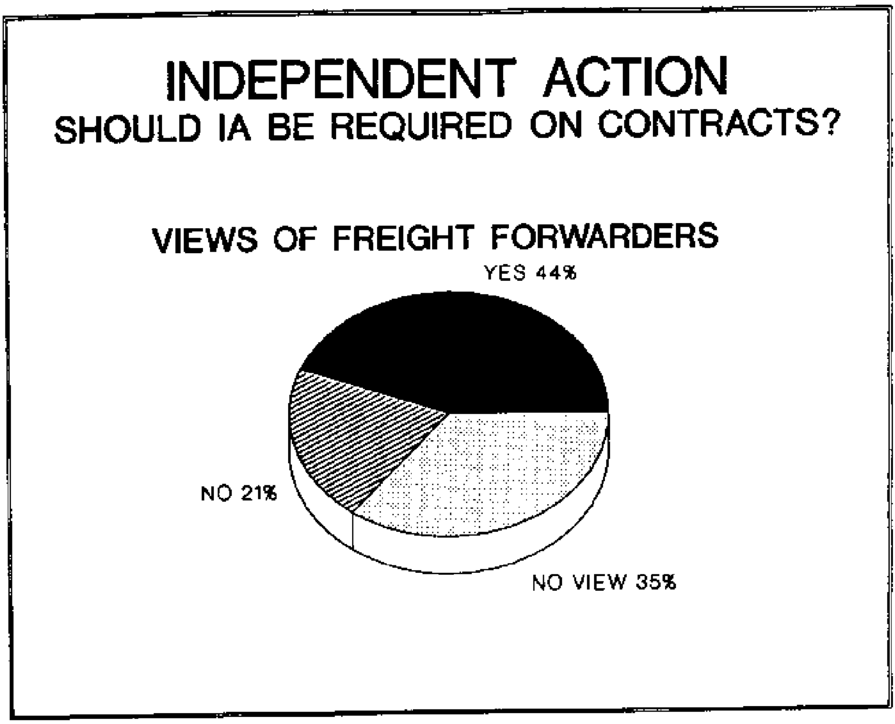

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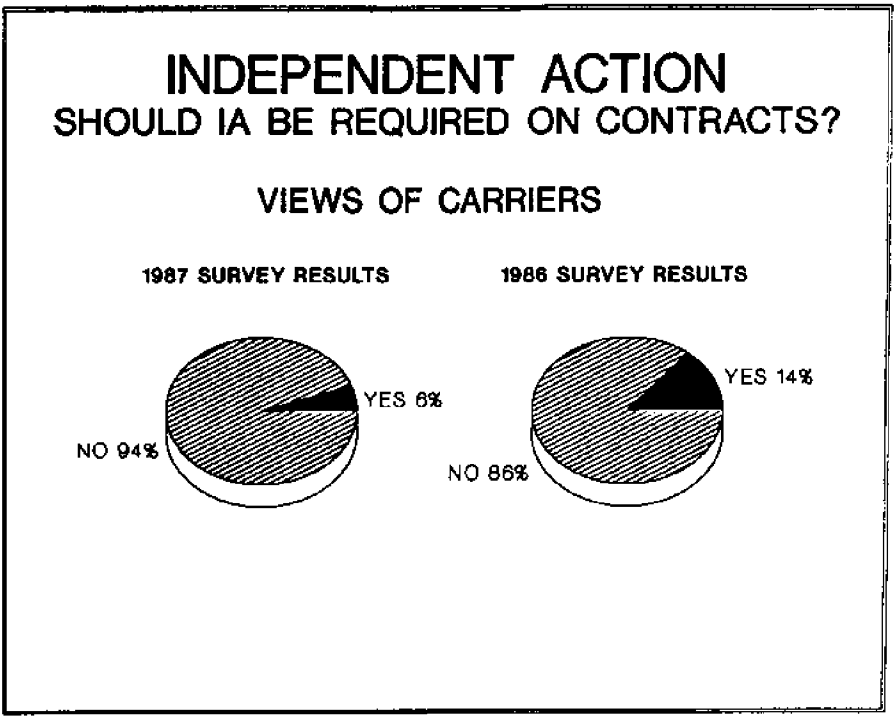

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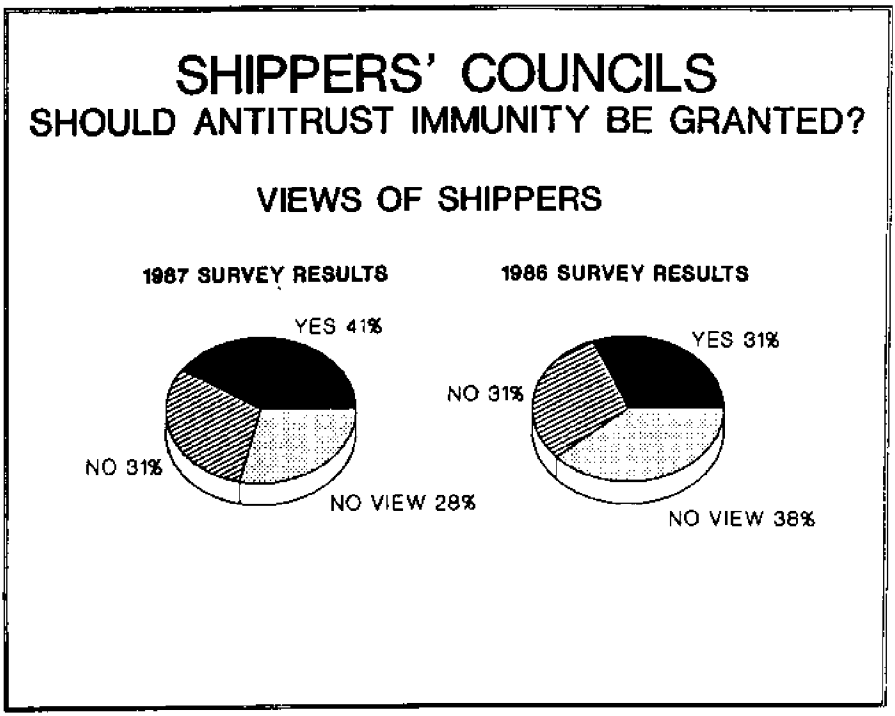

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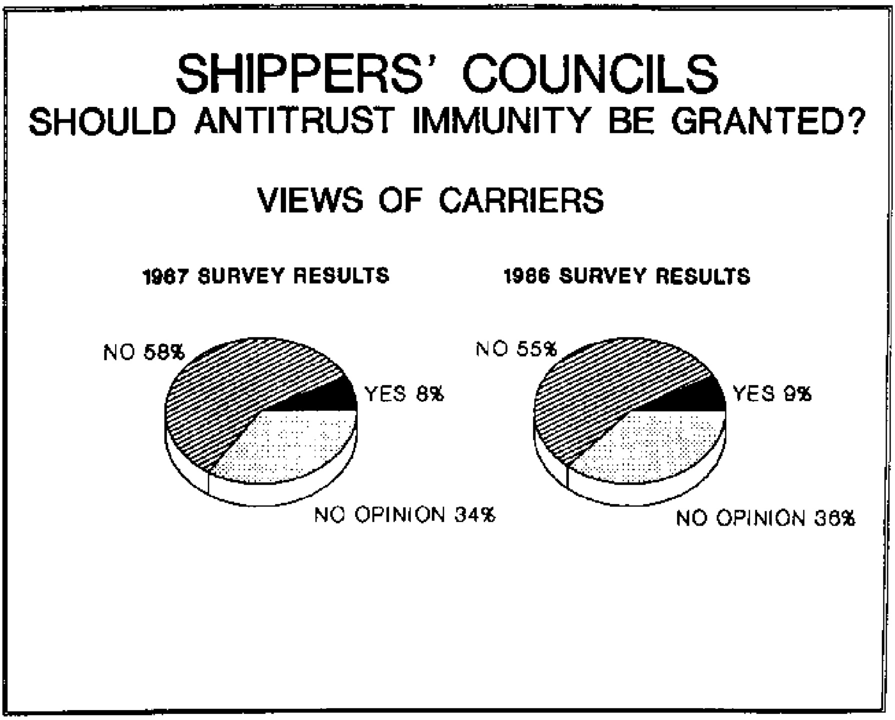

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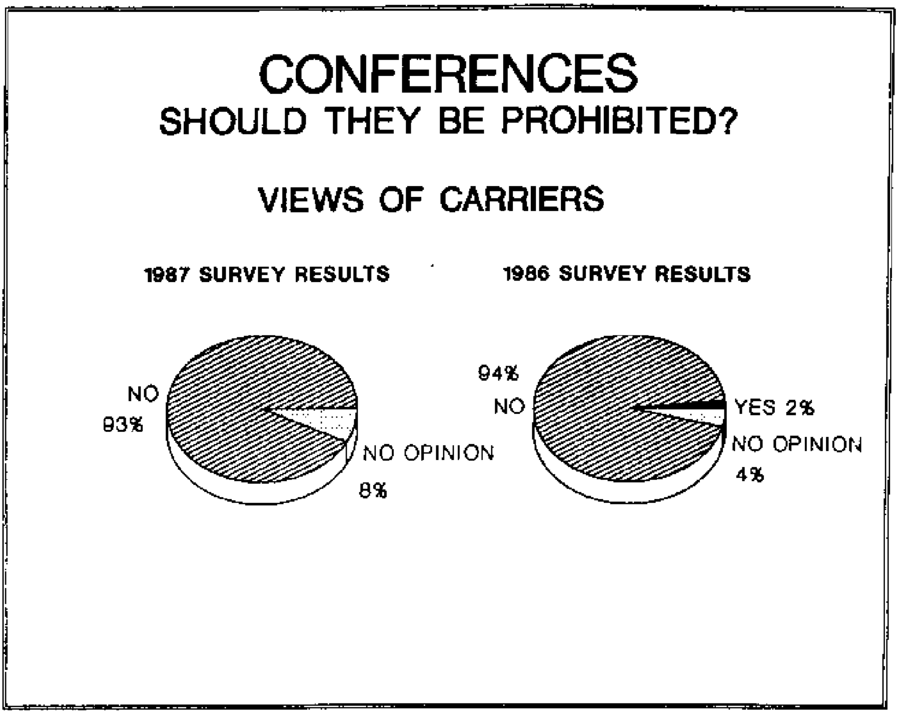

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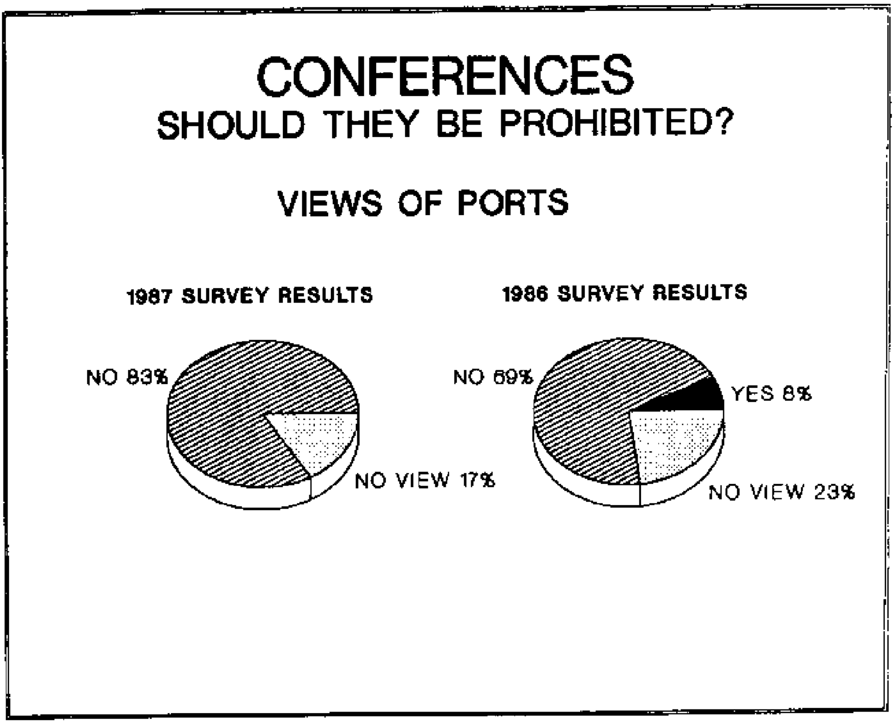

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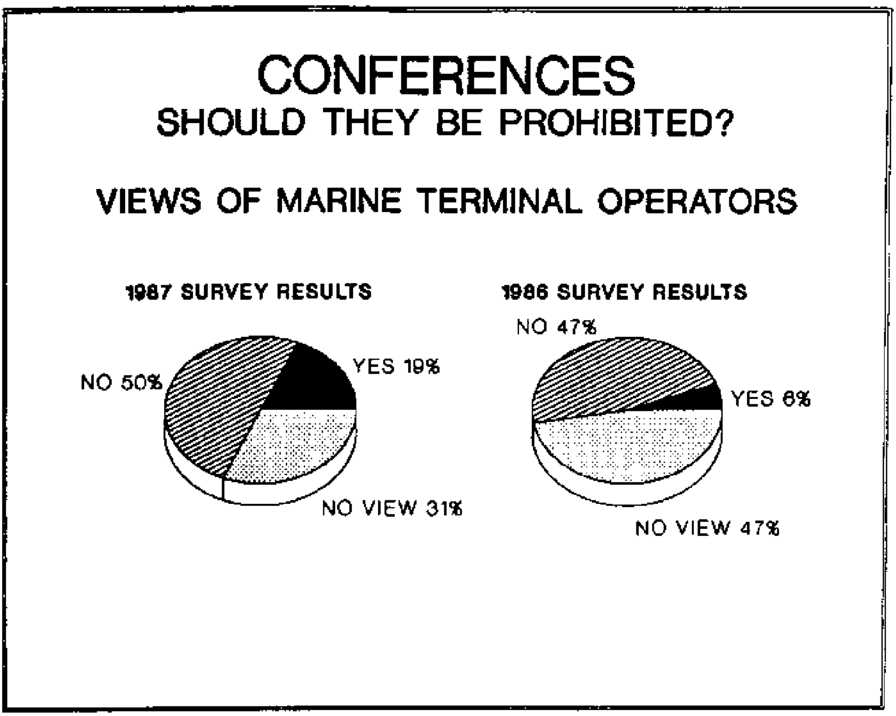

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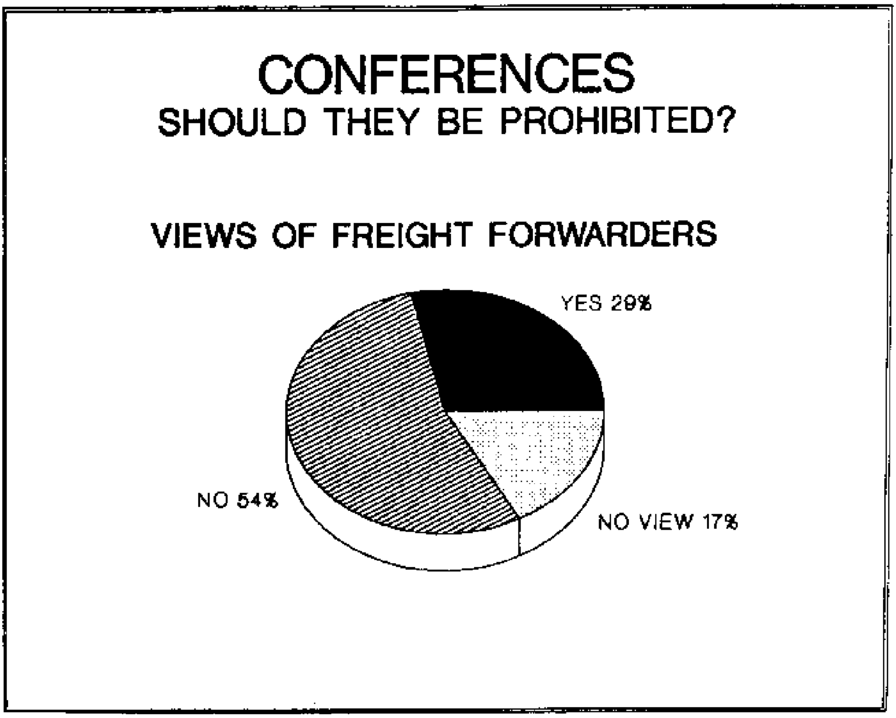

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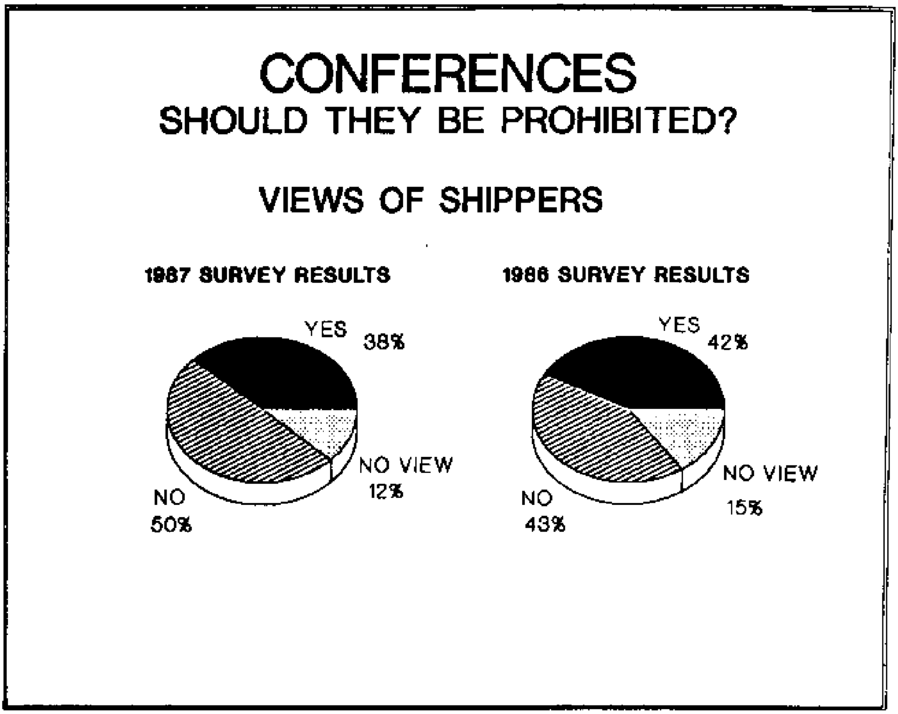

Session 1
Tariffs and Independent Action

Chairman: Gerald Seifert, General Counsel
Merchant Marine and Fisheries Committee
U.S. House of Representatives

Tariffs and Independent Action
Howard A. Levy, Attorney at Law
Counsel for U.S. Atlantic and Gulf-North Europe Conferences

Tariffs and the Conference System
Thomas C. Spence
Vice President, Pacific Lumber and Shipping Company
Seattle, Washington

The Advisability of Statutory Tariff Filing Requirements
Anthony Barone
Manager, International Transportation
Warner-Lambert Company

Pros and Cons of Tariffs and Independent Action
Richard V. Collins
President, Draco Marine, Ltd.
Stamford, Connecticut

Tariff Filing and Enforcement
John P. Clancey
Group Vice President, Pacific Division
Sea-Land Service, Inc.

James Rendeiro
Vice President, Regulatory Affairs
The Meyers Group, Inc.
(Mr. Rendeiro's remarks were not available for publication.)

Introduction

Gerald Seifert
General Counsel
Merchant Marine and Fisheries Committee
U.S. House of Representatives

For those of you who don't recognize me I'm not Adolph Hitler with his mustache shaven, as might have been indicated by Bob Ellsworth, but I am Gerald Seifert with his beard shaven off. With regard to the surveys produced in graph form on the screen by the Federal Maritime Commission, I think it is interesting to note that while it was indicated that they were in response to the general charge that was given by Congress for the ultimate study that will be undertaken on the effectiveness of the 1984 Act in the five year period following its enactment, one factor was omitted that may play a major role, if considered, in obviating many of the problems which are being addressed by this conference today and tomorrow. That is the one question with regard to conference structure -- whether they should be closed or open.

The charge to the Commission is very specific. It is whether the nation would be best served by prohibiting conferences, or by closed or open conferences. I think it was quite obvious from the survey that the questions were answered as to whether indeed there would be conferences or no conferences or whether they should be granted antitrust immunity. But whether they should be closed or open is significant, and may go a long way to indicate how the problems which are being addressed today and tomorrow might indeed be solved in ways other than those that are being considered by the several panelists. That being the case and not being the charge of this panel, let us proceed with the discussion of tariff filing and mandatory independent action.

It is generally agreed that tariff filing of some form, or publishing, is necessary as a function of the general holding-out requirement that's incumbent upon common carriers. In terms of regulation of this area, however, the question is where the enforcement is necessary. By those who participated in the process of developing the 1984 Act, enforcement of tariffs was viewed as a necessary part of the balance with the open conference system. This is why I indicated it is important to address whether the conferences should indeed be closed or open; it was only because of the assumption that we would have to operate in an open conference environment that all these other issues were discussed. It is possibly arguable that we wouldn't even be here today to discuss most of the issues before us if indeed the Congress had adopted a regime which would have contemplated closed conferences. Everything else we did was a trade-off in order to make the open conference system, which is inherently defective, operate effectively.

From a policy maker's viewpoint, now that we have open conferences, the question is to artificially create the kind of environment that would have existed without government intervention, (i.e.) with a closed conference system as we viewed it around the world. What we created, in fact, was a quasi public utility regulatory regime in which we require conferences to file their tariffs for two reasons. That is the way to make them economically viable, to guarantee that they will have the stability to continue to function and serve the public, and at the same time provide a basis for measuring discriminatory conduct against shippers. This was the scheme that had been set up in 1916, so even though we granted greater antitrust immunity, all we did was carry along the sometimes problematic structure that had been created in 1916 because we insisted and assumed that we were going to retain the open conference system.

Regarding independent action, one of the balancing factors, as with service contracts and the others which we will discuss during the course of the next two days, it was decided that it would be mandatorily imposed upon conference rate-making. Those who supported the concept of independent action -- mandatorily imposed upon conference rate making -- were several: One, shippers viewed the price-fixing authority that was granted conferences as probably too anti-competitive to allow continued in an unmodified form. When examined in light of the absence of independent action under the 1916 Act, the argument in favor was always, and I am paraphrasing, that under the new law the carriers are not required to have preapproval of their agreements, and the elimination of the public interest standard which has always plagued the carrying community was now eliminated. Therefore, it was necessary to counterbalance that which was given the carriers with something else -- in this case, independent action.

From the carriers' perspective (primarily Sea-Land in that group) at the critical juncture in consideration of the legislation, [they] had pulled out of the Pacific conferences, in order to react to the fast-developing outsider competition in that area more effectively than they were able to otherwise. They held independent action out as a more civilized and less destructive way of meeting outsider competition. The alternative obviously was, we will jump in and out of the conference as we are now doing. So, once again the alternative to that opportunity to jump in and out of the conference, which is still available (we have an open conference system, remember) was the independent action component.

Now just think how all these problems go away if you have more discipline imposed upon the members of the conference by requiring or by allowing for closed conferences. I think that this meeting is a two-way osmotic process -- we absorb from the Federal Maritime Commission what they've collected, and I think that the Federal Maritime Commission should appreciate what is missing in their analytical process. They should include the question contained within the charge of the 1984 Act -- and consider whether closed conferences should be considered as a way of eliminating some of the problems, and as a way of even further harmonizing our conduct with those of our overseas brethren.

I think it is important that we get from our panelists those things over which they have labored so hard. Since I just put these notes together yesterday after having received their comments, I don't think I have earned the right to spend more time than I already have on the few preliminaries. Without further regard I will introduce our first panelist. I don't have any biographical sketches, but I don't think biographical sketches are necessary for you. These people, by virtue of their positions, have earned their way up on the platform and are known to most of you. Their positions indicate exactly who they are and all that is necessary for our consideration. Our first speaker is John Clancey, who is group Vice President of the Pacific Division of Sea-Land Service, Inc.

Tariffs and Independent Action

Howard A. Levy
Counsel for U.S. Atlantic and Gulf-North Europe Conferences

A centerpiece of the Shipping Act of 1984 (the "1984 Act") is the preservation of the statutory tariff filing system established by the 1961 amendments to the Shipping Act of 1916 (the "1916 Act"). During the formulation of the 1984 Act, Congress considered proposals to (i) abolish tariff filing altogether and (ii) substitute private sector tariff publication requirements for filing with the Federal Maritime Commission (FMC).

Advocates of abolition viewed it, together with elimination of ocean carrier ratemaking agreement authority, as a key element in an overall program to achieve deregulation of the liner shipping industry, sunset the FMC, and entrust the Nation's ocean common carrier transportation interests to the free-play of market forces under the guardianship of antitrust law, a program Congress first rejected in 1916 and declined to adopt ever since.

Advocates of private sector tariff publication viewed that alternative as a practical compromise between bald abolition on the one hand and preservation of the status quo on the other. It would relieve government of the cost and burden of maintaining tariff archives while presumable permitting continuation of FMC's traditional tariff enforcement functions.

In opting to preserve statutory tariff filing, Congress did not, however, remove the issue from its agenda. It directed that agency reports required by Section 18 five years following enactment of the 1984 Act specifically address "the continuing need for the statutory requirement that tariffs be filed with and enforced by" FMC. That issue will therefore soon be revisited. Owing to the acute intensity of prevailing and foreseeable carrier price and service competition, and the resource concentration, instability and upheavals being occasioned thereby, it would appear less likely than ever that Congress will abolish tariff filing, sunset the FMC and turn to antitrust for the purpose of stimulating competition already run amuck. The issue of private sector tariff publication versus governmental tariff filing may, however, be strongly influenced by FMC's ability to have a viable electronic filing system seasonably in place. Once on line, such a system would be extremely difficult to displace. Conversely, perpetuation of the existing manual paper system may be extremely difficult to justify.

In maintaining tariff filing, Congress did not leave the 1916 Act system entirely intact but effected several departures of which the following are particularly significant:

(a) Substantial expansion of classes of cargo excepted from mandatory tariff filing requirements to include forest products, recycled metal scrap, waste paper and paper waste in addition to cargo loaded and carried in bulk without mark or count and softwood lumber;

(b) Exception of newly authorized service contracts from (i) tariff filing requirements in favor of non-tariff filing; (ii) prohibitions against specified unfair or unjustly discriminatory practice and undue or unreasonably preference or advantage; and

(c) Provision for the filing of through rates covering through routes between U.S. and/or foreign inland points but (i) stipulated that inland divisions need not be separately stated or otherwise revealed and (ii) an "inland division" distinguished from an "inland portion," the former referring to the amount an ocean carrier pays to an inland carrier for service and the latter to the amount an ocean carrier charges to the public for resale of the service; and most critically,

(d) A mandatory requirement that each conference agreement provide that any member may take I.A. on any rate or service item required to be filed in a tariff under S8(a) of the 1984 Act in accordance with procedures, and in the manner, prescribed thereby.

The FMC has addressed and settled numerous issues arising in connection with foregoing new tariff filing departures; several are pending consideration; more are likely to arise and Congress may be expected to reconsider many when it reviews the operation of the 1984 Act as a whole. That five year record will all but certainly show that mandatory I.A. constitutes the most dramatic departure from 1916 Act practice and has had a greater impact upon the ocean carrier industry than any other feature of the 1984 Act. I.A. is, however, a newly favored legislative device to effect a balance between shipper and conference carrier interests and it may be expected that it will not be abandoned, or even significantly modified, in the absence of compelling evidence of harmful effects substantially outweighing perceived or purported shipper cost benefits. The forthcoming I.A. battle before Congress may consequently be waged in the grey no-man's land at its outer edges, the field of conflict before FMC, and not within the apparent sanctuary of its inner walls. Thus, for example, FMC has held that the level of ocean freight forwarder compensation, although required to be stated in tariffs, is not a "rate or service item" and is not therefore subject to mandatory I.A. (a holding mooted by the subsequent enactment of a rider to the Tax Reform Act of 1986 providing for such I.A.) and also that a "time-volume" contract is not a "rate or service item" but a type of service contract excluded from mandatory I.A. because not required to be filed in a tariff. Most recently, FMC has instituted proceedings to determine whether loyalty contracts are rate or service items subject to mandatory I.A. or, like service and time-volume contracts, excluded therefrom. Regulatory adjudication of such issues at the perimeters of I.A. are not more skirmished but engage the concentrated forces of opposing interests and are apt to lead to judicial as well as legislative review. The following anomalous circumstances explain the ferocity of that combat.

Service and time-volume contracts are clearly excluded from mandatory I.A.; time rates are clearly subject thereto; and the status of loyalty contracts is in issue. But query, however (i) what are the legal differences between the elements of these presumable discrete categories of carrier/shipper transportation arrangements and (ii) do those differences, whatever they may be, have any commercial consequence? It is suggested that necessary line drawing to distinguish between the legal elements of service/time-volume contracts, loyalty contracts and time-volume rates is at an incipient stage at best and that any one of the three therefore can be passed off as any other by superficial disguise. Moreover, experience indicates that given this lack of legal definition, and the resulting service contract, time-volume rate, loyalty contract interchangeability it breeds, the commercial consequences of any one are consequences of any one are indistinguishable from those of any other. Thus, so long as any one is clearly subject to I.A., an issue as to whether another is not may be of more theoretical than actual import.

But these anomalies, whether occasioned by legislative ambiguity, oversight or otherwise, need to be reconciled if the 1984 Act is not to be at odds with itself. Moreover, if the shipper/conference carrier equilibrium Congress sought to achieve is not to be radically upset, it is submitted that both loyalty contracts and time-volume rates, like service contracts, ought be excluded from the reach of mandatory I.A.

Indeed, and as a final thought on the issue, it is further suggested that the clearest and most immediate danger to the long term survival of mandatory I.A. is its own potential excess. If I.A. accounts for more harm than good, Congress may be expected to reopen the question in its entirety and take remedial action. At the moment, the application of I.A. to time-volume rates, as a means to circumvent service/time-volume contract I.A. prohibitions, and the uncertainty of the application of I.A. to loyalty contracts, renders it particularly vulnerable to such excess. Perhaps those who hold I.A. most dear ought consider resisting and opposing these unforeseen consequences of I.A. lest they become the instruments of its demise.

In closing, and with regard to the question as to whether Congress should mandate FAK rates (or, for that matter, any other single system of stating ocean carrier transportation prices), the briefest and best answer would appear to be a resounding No. Neither shipper nor carrier interests would be served by such a legislative straight-jacket. It would freeze innovation, chill competition and pave the path of progress with a sheet of ice. Ocean carrier ratemaking is not an exact science but an ever shifting variable function of market forces driven by the cross-currents of innumerable and unpredictable economic factors. To decree FAK rates based on no other criteria than cargo weight and measurement characteristics in the name of "tariff simplification", or any other such cliche, would be to throw the baby out with the bath water. The dictates of the computer and EDP, tempered by marketplace demand, may be anticipated to produce all the tariff simplification that is needed to serve any worthwhile purpose.

Tariffs and the Conference System

Thomas C. Spence
Vice President, Pacific Lumber and Shipping Company
Seattle, Washington

I do not pretend to be a scholar on the original rational determining that the conference system was necessary to maintain a viable and effective maritime trade. Certainly the reasoning was sound and judgement good, and encompasses many issues and needs concerning maritime interests. We have decades of precedent and review, including through the process of developing the current shipping act of 1984. Nor can I profess to being anything close to an expert on the maritime industry, although having worked with it for nearly fifteen years one cannot help but acquire at least some measure of the basics that comprise its many facets. The conference system is one of those facets, and while debated heatedly from many sides, I believe it is necessarily here to stay, and is a part of the total framework that shippers must incorporate into their total business operating infrastructure, and find a way to deal with in a commercial and non advisarial relationship.

I am however sometimes reminded, when contemplating the conference system, and the Shipping Act of 1984, of Sir Winston Churchill's comment regarding democracy, when he stated "I sometimes feel that democracy is the worst form of government.....except for all the others that have ever been tried". And so too I believe it is with the conference system. That it is perhaps the worst of our choices, except for all the other possibilities that may arise. Certainly a totally deregulated nonconference system has its potential dangers, ultimately that of Oligarchy being the worst. On the other hand, at the other side of the spectrum, but equal in results is the stifling danger of Monopoly (monopsony?). Both end result in control, and power. There is a delicate balance between the power of monopoly price fixing, and the need to have adequate and competitive service to overseas markets for American materials and products.

This, then, brings us to the heart of the issues surrounding the conference system, and discussion regarding its final structure, which is yet to be resolved. Lets be frank about the realities of such a system. Power, and control, and the effects of proper, or improper management of the conference entities allowed under the shipping act must be considered. It must be realized that the issue at hand here is the macro administration of the transportation system upon which this countries exports are dependent. It is ironic, isn't it, that this issue should be addressed at a time when the issue of exports and trade imbalances are so foremost in the topic of international economics, and to our own domestic economic dilemma's. We are talking about the right of one industry to form a cartel, and allowing that cartel to operate outside of the "rules of the game" that other industries, operating within the framework of this nations philosophy of democracy and the free enterprise system must adhere to. These other industries, in total, are for obvious reasons, dependent upon the Shipping Industry which is serving this country, for transport of their products to foreign markets. To complicate the issue, the members of the cartel or cartels formed do not necessarily form a majority of American Flag Lines, but rather are foreign managed or indeed foreign government owned!

What? Is it to be understood then, that a majority of members of a particular conference, can then collude together, within the bounds of the laws of the United States, even though those members may be of foreign interests, and ultimately set transportation rates for this countries exports without some limits? What regulatory measures are needed to counteract this situation? How are we to ensure, that now and in the future this countries exports of goods and raw materials are not compromised, and remain competitive? How are we to ensure that members of these entities will act with due diligence to the responsibility, and power, bestowed upon them by this act? It must be understood that we are expecting an additional measure of responsibility from the management and/or governments that are participating in these conferences. They must not only assume the responsibility for the fiscal well being of their respective firms, but also an added burden of responsibility of acting within the scope of a free market system, combined with the power of a cartel, even though such action may not be in their immediate or long term self interests.

The fathers of this nation, as every school child learns, deemed that it was not sound judgement to lay too much power and control upon a single branch of government. They devised a means by which a series of checks and balances are in place. It seems fairly clear that the authors of the Shipping Act of 1984 had something similar in mind. A series of "checks and balances" so to speak, to insure that the power given to these entities does not exceed their intended design. Shippers Associations, Service Contracts, the oversight powers of the Federal Maritime Commission, and finally, Independent Action were, and are, the means by which protections were to be afforded to shippers under the act. It is absolutely clear that each of these protections provided in the Shipping Act must be maintained and strengthened, if we are to bestow such responsibility to a conference system. The FMC must continue to act as a regulatory body. They must assume the role of a kind of "supreme court" with regard to the mandates of the Shipping Act, hopefully soon to be revised and strengthened. Tariffs must continue to be filed with the FMC for their constant review, and opportunity for shippers input. The government has created an act which has both benefits and disbenefits. It must therefore, be a function of government to oversee the proper intended application of that act.

The protections intended by the provision of Independent Action must be more definitive and strengthened. At a glance, this term is quite evidently a synonym for.... Free Enterprise. I am sure that at no time was the complete abandonment of the basics of the free enterprise system with regards to the maritime industry on the minds of any of those in legislative position, when devising the shipping acts. In this regard not only should mandatory independent action requirements on tariff rates and service contracts be maintained, but also these actions should be required to be filed with absolute confidentiality with the FMC, in order to protect against what I have referred to as the "smoking gun syndrome", among member lines. I.e. the past has shown that individual lines have been hesitant, indeed have declined to take independent action, when absolutely warranted, for fear of the reaction from other members of that particular conference. The results has been, that in some cases, subsidy of other nations exports by those lines, at cost to this nations export trade, and individual firms involved therein. Rather than concern about weakening the conference system, I believe this requirement balances the unusual ability of members of the conference system to work in concert. The conference system must be subject to some forces of supply and demand, to ensure that transportation rates for American commodities remain competitive with other international rate structures. Members of the conference must be free to act of their own volition, when warranted, without fear of some sort of reprisal from other members or dissolution of the conference itself. The key to both shipping lines and shippers benefiting equally under the conference system is confidentiality when independent action is taken on a filed tariff rate. This is also the only effective means to neutralize the potential and timeless problems of rebating, should tariff rates become overpriced in relation to demand.

The marketplace is continually in a state of transition. This is particularly true for commodity items. Because of this fact the filing period for Independent Action must not be prolonged. Both lines and shippers need the ability to react immediately to changes in market status. Excepted commodities were "excepted" for good reason. These commodities, because of their nature, are particularly susceptible to the laws of supply and demand, and equally concerning, to the effects of foreign competition. Prices on lumber, for example, are particularly volatile, and subject to competitive pressure not only within the U.S., but also from Canada, Scandinavia, Russia, South America, the South Seas, and the East European nations. The nature and international competitiveness of these commodities dictates that it is in this nations best interests to retain them as "excepted commodities", not requiring rate filing.

Here, then, it is necessary to make definite decisions on the treatment of exempt commodities. If they are to be truly "exempt", then the conference should not be able to regulate them in any way whatsoever, i.e.; file minimum rates, deny independent action, deny service contracts, or even require publication of rates and tariffs with the FMC. However, if it is decided that exempt commodities should be subject to the same regulations as other commodities, then the FMC must be given the power to enforce them as any other aspect of the act. My own opinion, for reasons explained just previously is that "excepted" commodities should be treated as "open tariff items". Should a conference decide to file tariff rates for these commodities, then fine, however the right of, and mandatory confidential Independent Action must be defined to be included for these commodities in such cases. To otherwise deny the right of or requirement of independent action on such rates, only serves to make a sham of the intentions of the Shipping Act itself.

There is another issue surrounding the question of rate structures, which relates to rating commodities on a volume or mass basis across the board. This makes about as much sense as requiring grocery stores to sell hamburger at the same price as Filet Mignon.(Is this considered "discriminatory"?). Again the issue is clear. Transportation rates for various commodities must be related to the principles of supply and demand. It is not by any means in this nations interest, nor in the interest of the many individual industrial sectors, which must warrent consideration, for their ability to penetrate foreign markets to be hampered by irresponsible decisions or policies. These many other sectors success are dependent on quite the opposite, and international market structures must ultimately be the determining factor for rate structures.

In conclusion, there are specific reasons for giving the maritime interests of this nation certain considerations provided for in the Shipping Act of 1984, and its predecessors. There must be strength in the balances provided within the act as well. It is not in this nations interests to ask or require that all the other industries relying on maritime transportation within this country to subsidize the conference system. Efforts must continue to be made to insure that this does not happen. The potential costs are huge, and beyond exact quantification. Independent Action is probably the greatest safeguard provided within the Shipping Act of 1984. With its continued exsistence and additional strengths provided, I feel we can move toward a system that meets all of our national interests, both within and outside of the maritime industry, and helps insure successful commercial and non advisarial relationships between those interests.

The Advisability of Statutory Tariff Filing Requirements

Anthony Barone
Manager, International Transportation
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The issue I will address is the advisability of continuing the current statutory requirement that freight tariffs be filed with and enforced by the Federal Maritime Commission.

This is a particularly difficult question. It is one on which a thoughtful person can vehemently disagree with himself. Indeed the arguments on both sides are both valid and compelling. It is, therefore, understandable that there should be widespread disagreement on this matter. Indeed, there is disagreement on this point even within my own company.

Reaching a decision on where one stands on the issue might well be facilitated by putting the matter of tariff filing into a broader context. Indeed, it may not be possible to do otherwise because the whole question of tariff filing is integral to the wider question of what federal maritime regulatory policy should be.

The contentious issue of service contracts, for example, is fundamentally a tariff question. It is a system of putting outside the tariff structure a particular piece of traffic. Service contracts are a means of discriminating traffic, of providing something special not available to all shippers in the same public utility manner.

Congress believed that such discrimination was appropriate in today's environment and, thus, specifically provided for this special ex-tariff means of accommodating the economic and commercial realities of the market place. In the Conference Report accompanying the bill, the conferees stated:

"Because service contracts will selectively favor some shippers, several of the proscribed acts (section 10(b)(6) and (11)) were amended to assure that service contracts may discriminate as to rates and cargo classifications, and provide distinct advantages of preferences that might otherwise be in violation of the Act. Such differentials are the very nature of contract service." (Conference Report, Page 40)

And yet, apparently unconvinced it was doing the right thing, Congress required that these contracts be filed in tariff format with the Commission. Congress thus seemed to be undecided as to whether it should permit free and unconstrained commercial conduct, or whether it should continue the government's traditional involvement in safeguarding the public as a whole by providing for an enforceable system of public tariffs.

Congress seemed similarly undecided with regard to independent action. It recognized the need for, and sought to encourage, commercial competition by providing for a system whereby a carrier might act outside the officially sanctioned system of cartel rate making. It recognized the economic benefits of permitting an individual carrier to respond to the needs of an individual shipper by establishing an independent rate. And yet, Congress hesitated in opening the field up entirely by insisting that the special situation be filed in a tariff.

On a broader scale, congressional indecision is reflected in the way in which the whole cartel system is regarded. Federal policy is that it supports the conference system, but it simultaneously assures its weakness through such statutory requirements as the mandatory right of IA. We state as a policy objective our national interest in harmony with the rest of the world and yet we reject the UNCTAD code of conduct because of its anti-competitive features. We say we want a nondiscriminatory regulatory policy, and yet, as far as shippers are concerned, we write in specific discriminatory provisions.

If we back out of this forest and attempt to observe our maritime regulatory policy from a distance, we are confronted with a number of apparent and confusing inconsistencies and contradictions. This may be due to the fact that the Act represents a number of compromises on a number of issues. In a major sense, it is a balancing act. Nevertheless, to the lay observer, the Shipping Act of 1984 appears to be somewhat undecided, tentative, and lacking in fundamental governing philosophy which might logically point to an answer to a variety of questions including the one at hand.

Insofar as tariff filing may be the fundamental question, Congress simply put it off for five years in the classic manner of referring it to study. I personally do not believe that five years is giong to make it any easier to answer the question. Widespread disagreement will be as pervasive in 1989 as it was in 1984.

The principal obstacle may have nothing at all to do with such weighty questions as what federal maritime policy should be. The major inpediment to the elimination of federal filing requirements may well have more to do with a natural aversion to change. With the simple inertia of an industry accustomed to having tariffs.

But as to the practial question "do federally filed tariffs serve an essential function?" we might do well to consider who uses them and for what purpose. Shippers generally do not use tariffs as such. The cost of maintaining large tariff libraries rendered them largely uneconomical a long time ago. Specific information is, therefore, obtained on other ways. That may be a subscription to a tariff watching service or on-line facility. Or it may be simply to ask the carrier for the needed information.

Indeed, I would go so far as to say that most shippers today could not even read a tariff if it were placed in front of them and that those that can, do not need them.

Thus, for the shipper, tariff mechanics is somewhat irrelevant. What is relevant is the rate itself, not the form in which it is filed or maintained. What matters to the shipper is that the rate he or she is quoted is, in fact, the rate which will be charged and that there is some authority somewhere that is going to guarantee that.

I believe there are other things that shippers want and believe tariffs provide. Among these is the assurance that they are being treated fairly and equitably. Liner carriers are common carriers, public utilities, and size alone, this group would say, should not be the basis for unfair discrimination as between shippers. Again, tariffs and the Commission are perceived as fulfilling this policing role.

Because tariffs are taken to be gospel, for some shippers, tariffs are used as the source of information on what the competition is paying. That the competition should not pay less for the same traffic is fundamental to the traffic managers' psyche. Indeed, it is perceived by many to be the TM's reason for being on this earth. Tariffs are the source of information in this connection.

Similarly, even when a competitive product is not involved, tariffs serve to assure the shipper that he is not being overcharged relative to comparable commodities. These shippers use and want tariffs as a barometer for what rate should apply, for the appropriate and fair rate, given what competitors or similar traffic are charged.

Finally, I believe shippers want to have someone to complain to, some official body to appeal to, some authority which has the power to compel carriers to reverse wrongs committed against them. Tariffs are perceived as the book of rules in this regard. Tariffs are the Bible, Talmud, and Koran of maritime transportation.

From the shippers' perspective, tariffs, fairness, equity and the Federal Maritime Commission are all rolled into one. They are inseparable.

These may indeed be valid arguments in support of continued tariff filing. However, I doubt there ever was a time when reality lived up to the perceptions shared by this group of shippers. Tariffs as such do not guarantee equal treatment. Indeed, as indicated earlier, tariffs simply serve to legitimize discriminatory treatment as between shippers and certainly as between commodity classes.

Therefore, it does not occur to me that it should be necessary for the United States government to legitimize or enforce such discrimination. Neither does it seem to me appropriate that American taxpayers should be held to bear the expense of providing a verified data base of freight pricing information.

What does seem to be appropriate is that the government provide a relatively inexpensive and accessible means of adjudicating technical disputes between carriers and shippers. Thus, it would seem entirely reasonable that a carrier or conference might confirm a rate to a shipper in the form of a letter or telex that either party might produce as evidence in administrative proceedings in the event of a dispute. If there is no dispute, then the small cost of that letter will have simply been an inexpensive insurance. This is to be compared to the monumental task of filing hundreds of thousands of tariff pages which are statistically seldom referred to.

Thus, in my opinion, the statuatory requirement that tariffs be filed with the Commission is not justified and should be eliminated except in unusual circumstances such as when necessary to maintain vigilance over the rate levels of controlled carriers or carriers otherwise found to be engaging in unfair or unlawful competition.

Elimination of the tariff filing requirement would simultaneously eliminate a number of related contentious issues. For example, when shall a rate become effective? This should not be a question for Washington to decree. Rates should become effective when the parties agree.

Clearly, large shippers would have a substantial advantage in such a system as opposed to small shippers. However, that advantage clearly already exists and has been decidedly perpetuated in the Shipping Act through the Independent Action and Service Contract provisions and through the mechanism of tariffs based on time and volume through our system of differentiated cargo pricing on the basis of commodity and through the mechanism of point-to-point intermodal ratemaking.

All of these mechanisms serve but one purpose and that purpose is to legally differentiate a portion of traffic in order to grant that traffic special advantage.

Assuring that such advantages are not carried too far as a means of eliminating competition or otherwise restraining trade in an approropriate matter for federal attention and it is a legitimate subject of federal concern.

Indeed, I started these comments by saying that it would be helpful to put the question of tariff filing into context. Up until now, the context I have used has been the current environment. But there is also a historical context which we would be well served to recall.

The period I have in mind is the late nineteenth century. It was the era of trusts, combinations, and monopolies which directly led to the Sherman Anti Trust and Interstate Commerce Acts. One such combination was the agreement between a number of eastern railroads and the notorious South

Improvement Company which was in turn controlled by John Rockefeller's Standard Oil Company.

The purpose of this combination was simply to control the oil industry. The way it worked was that rebates were paid to the South Improvement Company on every barrel of oil shipped. Now rebates were fairly common in the oil regions at that time. What made the South Improvement Company different was that it wound up receiving rebates not only on its own freight, but also on every barrel of oil shipped by its competitors. (Tarbell, 1904)

Why was the South Improvement Company granted such favorable treatment by the railroads? Because it was the biggest shipper. Because it was the biggest shipper and because failing to go along would mean losing the traffic to competitors.

Can it happen again? Need we worry? Or have we instituted federal programs that assure such abuses cannot reoccur? Considered in this context, tariffs filed with a federal authority may well be an anachronism.

This is not to say that I see no role for the Commission with regard to rates and tariffs. The liner industry is an oligopoly and, because of that, the general public needs protection from monopolistic actions which affect the shipping public as a whole.

With regard to rates, FMC oversight, and regulations addressing the issues of general rate increases and across the board surcharges would be appropriate. This would assure that the shipping public, which is now prevented from acting in concert, is not regularly abused to the detriment of the commerce of the United States as a whole.

To summarize, the issue of requiring tariff filing is a difficult one with good arguments to be made on both sides. In my own view, however, the statuatory tariff filing requirement is an anachronism dating to an era of robber barons which no longer exists. Otherwise, tariffs serve a purely commercial function and, as such, generally belong to and in the private sector with some limited exceptions. These would relate to enforcement circumstances where tariffs should be required on a case-by-case basis.

Thank you.

Footnotes:

Ida Tarbel, "The Standard Oil Company", John D. Rockefeller, Robber Baron or Industrial Statesmen?, D.C. Heath & Co., Boston, 1949

Conference Report 98-600, US House of Representatives, Washington, February 23, 1984

Pros and Cons of Tariffs and Independent Action

Richard V. Collins

President, Draco Marine, Ltd.

Stamford, Connecticut

Ladies and Gentlemen, Panel Members, Mr. Chairman,

It is an extreme pleasure to be here today - for several reasons: Any place is better than New York in mid February, of course. How many of you are here from New York? And agree with me?

Actually, the most important reason we are all here is to participate in a democratic forum for reviewing federal legislation created in 1984 -- The Shipping Act.

It is highly likely each of you here today has strong opinions about each of the topics chosen for the sessions in the symposium. I certainly do and my fellow panelists also do. One thing this legislation has done and I believe we here all agree is that it has created ample opportunity for controversy between opinionated shippers and carriers. The only sure winner is the media.

I wish I could proclaim that shippers and carriers have fought to a draw and hence we are all winners in a sense, but the debates will continue until 1989 when the FMC as referee will announce the results of their scorecard. Until that time we can expect to keep hearing strong views that the Act is a "shippers act" or a "carriers act" and continued attempts by the FMC, carriers and shippers alike will be made to make changes or modifications even before the last rounds of the battle are staged. Our panel today represents one of those significant battle areas.

Tariffs and independent action could each alone occupy the total time allotted to the symposium. In addition, they are intertwined as factors in many aspects of the other scheduled discussion sessions. I can clearly agree with both the pros and cons of their impact on our business. Perhaps this is also a result of my having been on both sides of the shipper/carrier fence.

This being the case, let me list what I feel are important, certainly not all-inclusive, factors pertaining to the two areas. Let's begin with tariffs.

Tariffs and the Use Thereof - In the Perfect World!

Pros

1. They tell shippers what a shipment will cost.

2. They tell carriers what revenue to expect for a shipment.

3. They tell carriers what their competition is charging.

4. They tell shippers what their competition is paying.

5. They allegedly provide for stability and competition in pricing.

6. They are allegedly non-discriminatory and assume all carriers are equal and shippers are equal.

7. Changes are published in a timely fashion to provide for future business arrangements.

8. They are readily available and accessible for immediate review.

9. The rules or regulations sections are easy to interpret and all encompassing.

10. The FMC can "pull" them to keep non-complying carriers or agencies from participation in U.S.A. trades.

11. The FMC can generate revenue through fines for non-compliance.

12. Tariffs have created jobs and an entire industry dealing with the filing and updating process.

13. Regardless of the problem or reason, carriers must charge and shippers must pay the filed tariff rates.

14. Point to point and port to port rates are evenly regulated and allow for all types of possible variations in costs and overlapping regulatory authority.

15. The FMC is fully capable of policing and reviewing all tariffs filed. Conferences use third party police groups to keep themselves honest.

16. Even though not required the FMC is willing to act as librarian for the filing of foreign to foreign tariffs.

In the interest of time, let's move now to some of the negatives surrounding tariffs. You will recognize immediately some of these are also on the pro list; again, this assumes "perfect world" conditions.

Tariffs and the Use Thereof

Cons

1. They tell shipper competitors what you are paying to move freight.

2. They tell competing carriers what to charge to obtain business.

3. They allow third party non-U.S.A. competitors to analyze your costs and take your business. You don't know theirs.

4. They create an umbrella of rate levels wherein those not requiring to comply can easily survive beneath.

5. It permits the FMC to act as a policeman in international trade of the U.S.A. already stifled by the consequences of violating the infamous Foreign Corrupt Practices Act, only one of the many political constraints with which U.S. international traders must deal.

6. Tariffs are discriminatory and do not provide stability.

7. They are not readily available or accessible or cost free.

8. They provide for direct government intervention between business to business dealings already layered in regulation.

9. Liner activity is singled out for regulation but bulk, neo bulk and excepted commodities operate in a nearly free market environment.

10. Assumes all shippers of the same commodity are created equal regardless of weight, value, risk, or volume shipped.

11. The threat of FMC tariff pulling/fining often arbitrary or discriminatory beyond the impact to carriers.

12. A recent FMC ALJ ruled a service contract is not a tariff and is outside its regulatory authority. If this decision stands, what is the value of tariff filings if the volume of traffic moving under service contracts is as significant as supposed?

As you can see from these lists and except for the last item, I have really broken no new ground on the subject matter. In fact, I believe these lists do nothing more than summarize why in my opinion tariffs ought not to be filed if alternatives or reason will suffice.

Since the FMC is the policeman under whose careful eyes shippers, carriers and ports operate, do we really need them and/or the tariff filings whose words have the impact of a loaded pistol pointed at you? I think not at the FMC's present level of intrusion into our business.

First of all it has been arguably proven that with the exception of the highly protected and politicized Jones Act trades, the world of transportation in the U.S.A. (rail, air, and road) has not greatly suffered through de-regulation. I agree that dislocations have occurred but regulation truly is an indirect subsidy/protection from real world competitive and changing economic factors. In the weaning process away from regulation to de-regulation some merely have adapted better than others.

By not filing or at least enforcing tariffs, the FMC loses an enforcing tool but there is still the Foreign Corrupt Practices Act among others to keep carriers and shippers honest as defined by the United States Government many years ago. In addition, they also have the U.S. Navy or Coast Guard to keep unwelcome vessels from U.S.A. ports. This can be done as easily with Russian flag, Peruvian flag, or Canadian flag as the circumstances permit. In addition, the Department of State and Justice as well as the U.S. Trade Representatives office are keeping a watchful eye on things - aren't they?

Next, we can look at the impact on international shipping whereby the exempt commodities ship without officially filed, regulated tariffs. I do not believe any U.S. companies dealing in these commodities have gone out of business as a result of shipping these commodities without tariffs. On the contrary, it appears both they and their carriers have worked well together - free of tariff constraints. Need I say more on this subject?

Thinking about it I wonder if the approximately 175,000 tons of water we ship may qualify for exemption if tariff filing remains in the future. Certainly our occasional vessel charters are done tariff free.

For your information, we do ship in many trades where tariffs are voluntarily published for guideline pricing. The trades include open, closed, and non-conference participants. Rate negotiations are based more on joint carrier/shipper needs, not what the other guy's tariff says or me too, less ten percent. Why not shop for the best rates or for competitive info via a 1-800 telephone number rather than wait days or months for a conference response.

If we now assume that in spite of this quick and dirty analysis of the pros and cons of tariffs, it is very likely they will continue to be filed and enforced. Too much private investment and FMC interest in automation is at stake in this decision.

However, what value will they render if service contracts are no longer filed since it seems these are not truly tariffs but rather commercial agreements? Should commercial agreements be public knowledge? It's bad enough that our detailed import/export activities are available to competitors via U.S. Customs export declarations and import entries. And what about loyalty contracts since it is likely these too are not tariffs? These are true contracts between a carrier and a shipper, not between a conference and a shipper as a preponderance of service contracts tend to be these days. Conferences' management in their infinite wisdom feel they are somehow better suited to negotiate service contracts than their individual memberlines. Conferences justify this position as creating stability. Stability in their eyes relates to the spiralling upward of rates. Instability exists when rates spiral downward. However, not all memberlines are equal in spite of having equal votes in conference activities. Equipment frequency, capacity, flag and so forth are just some of the aspects creating this inequality between members.

This leads us into the question of mandatory independent action on rates and services. Again, this presupposes tariff filing is to remain mandatory and enforceable. If not then this question is moot because it is unlikely conferences will continue to exist as we know them today.

Conferences may already be on the verge of extinction or certainly major change if the increasing trend of multiple user consortia on a single vessel or small fleet grows as it seems to be. These consortia may easily become an economic force nearly behaving like a mini conference in their own right. Super conferences may then dwell more on policy or strategy similar to the activities of the so-called Box Club, rather than on pricing or service matters. I think this is already happening in certain trades.

In any case, the pros of mandatory independent action as we now recognize it are several:

1. Available on both rates and service items such as credit or free time.

2. Provides a source of relief to political or consortia block voting in conference actions.

3. Allows for innovation or aggressiveness in a reasonable time frame, a trait uncharacteristic of the group behavior of conferences.

4. Conference health is possibly strengthened as a result of the responsiveness characterized by an IA, particularly when utilized to offset intrusions by more efficient outsiders.

5. Ten days is more than ample time for proper consideration by memberlines with today's type of communications systems such as fax, conference calls, or computerized message systems.

6. Provides a balance of market power within the memberlines themselves since individuals within the group may offer something unique from the others on a particular piece of business.

7. Use of mandatory independent action appears to rise and fall with conference share of market liftings and changes of member capacity within the conference. This presumes of course the constraint of revenue pools does not exist in the conference.

It is a bit more difficult to list the negatives of mandatory independent action. Some of these could be:

A. A factor in undermining the conference system if extended past a ten day decision period. Carriers and shippers will quit out of frustration awaiting the famous camel which was originally a horse designed at a conference pricing meeting.

B. It may undermine the allegedly careful balance of power between anti-trust protected carriers, terminals and ports on the one hand and a shipper on the other hand.

C. It does nothing to control market forces dominating the carrier industry such as overcapacity, subsidy support, currency swings, and other non-tariff market basket items.

D. It does nothing to bring realistic pricing and costing into a proper perspective. This is a phenomenon I attribute to the publishing of enforceable tariffs resultant from a conference pricing policy which is based on the needs of its most inefficient member.

E. It seems to work better in a mini conference setting than in the 1984 authorized super conference environment. Today's conferences seem to be getting more and more bogged down in detail in lieu of operating on policy or strategy concerns.

F. It really is not mandatory. Sort of like service contracts, if there is no desire for action by one of the two interested parties, there will be no action.

Well, you have now heard my thoughts on the pros and cons of tariffs and mandatory independent action; not particularly controversial and probably what you would expect to hear from a shipper. My heart really does lie with seafaring, however, and it is probably out of some frustration that I am no longer on the carrier side of the fence.

In conclusion, I remain firm in my conviction that tariffs need not be filed, but if filed then not enforceable. Certainly service contracts and loyalty contracts should not be filed since these are business agreements beyond reach of public scrutiny, presuming they are lawful in all respects.

Mandatory independent action must exist if tariff and contract filing remains the law. It becomes moot if such is not the case since conferences will seek to control their members' activities in other ways. However, I suspect without the protection of the FMC enforcing rates and service, conference structure will substantially change and perhaps we will then hear more about the real need to afford carriers, ports, and terminals special anti-trust immunity.

I sincerely believe that risk and reward work in unison. Over-protection through regulation reduces risk and it follows that reward is reduced. Let's continue with de-regulation as with the first steps which were provided by The Shipping Act of 1984. Certainly the opposite hasn't worked.
Thank you.

Tariff Filing and Enforcement

John P. Clancey
Group Vice President, Pacific Division
Sea-Land Service, Inc.

Tariffs are an essential and integral part of our system of common carriage in ocean transportation. Since liner shipping was first regulated in 1916, the U.S. Government has taken an active interest in protecting the shipping public against unjust discrimination. The essence of common carriage is the non-discriminatory offering of transportation services to the general shipping public, first come, first served. Without tariffs, how could this system be enforced?

Although the 1916 Shipping Act did not originally require the filing of tariffs in the foreign trades, the Federal Maritime Commission's predecessor agency felt compelled to impose such a requirement by rulemaking as far back as the 1930's. That requirement was formally adopted by Congress with the extensive 1961 amendments to the 1916 Act and remains at the heart of U.S. shipping regulation under the Shipping Act of 1984.

In the course of developing the 1984 Act, a hearty debate arose over whether to abolish tariff filing and enforcement. I'd like to review that debate with you.

In 1983, the Department of Justice and a small number of large shippers capable of protecting their own interests in a tariff-free marketplace, unsuccessfully argued that elimination of tariffs would stimulate competition without adverse effects on the quality of the marketplace. Soon after, a faction in the House Judiciary Committee voted to abolish tariff filing and enforcement, that Committee and the House Merchant Marine and Fisheries Committee considered the matter further and concluded that the tariff system was better retained, explaining in the Congressional Record that: "Tariff enforcement is supported by the carriers and many small shippers who fear unfairly discriminatory rates." This expression of Congressional purpose is quite clear.

What is not often appreciated, however, is that the tariff issue was not merely considered in isolation -- it was part of a package of measures included to balance the competitive interests of all affected parties. The House Merchant Marine and Fisheries Committee explicitly explained in its bill report that although opponents of the tariff system viewed it as anti-competitive, "the Committee put aside the issue of elimination of tariff filing and sought other competitive spurs which would balance the stronger conferences. Consequently, tariff filing and enforcement remain in this legislation." As a direct corollary, the Act includes such pro-competitive elements as open conference membership, independent action, and service contracts. Please bear with me while I quote one final key passage from the Committee's report:

> "Carriers and shippers alike support retention of statutory requirements for tariff filing and enforcement at the FMC pointing out that even in the recent airline deregulation process tariff filing and enforcement has been retained for international air transport. A clear objective of [the bill] is to enable American carriers and shippers to conduct international ocean commerce transportation in a stable, efficient, and competitive manner within a fair trade environment in which malpractices can be found and punished. Shippers support that need and emphasize their own need for knowledge of all available ocean rates in planning their cargo movements."

There is, therefore, no doubt that, faced squarely with the issue, Congress decided that a revised and updated shipping law should include tariff filing and enforcement.

Now then, let me more specifically address the issues posed in the Background Paper prepared by FMC staff.

Should Tariffs Continue to be Filed With the FMC?

At least nominally, Congress kept the debate alive by directing that the FMC's five-year review address "the continuing need for the statutory requirement that tariffs be filed with and enforced by the Commission." So, if the issue is totally open for further review, why did I dwell on past events and legislative history? Because, I firmly believe that given any amount of review the issue will again be resolved the same way. The arguments pro and con will be the same. The politics will be the same. And the outcome will be the same. Unless Congress fundamentally decides to scrap the entire common carriage foundations of shipping law, it will again conclude that tariff filing and enforcement is an essential and integral part of the regulatory scheme.

Should Tariffs be Based on Volume and Mass of Shipment Instead of Other Considerations?

The second tariff-oriented issue that Congress directed the FMC to study and report on is "the advisability of adopting a system of tariffs based on volume and mass of shipment." The staff interprets this Congressional directive as referring to "a system of tariffs in which a single tariff is established for all cargo shipped in units of comparable size and weight with comparable handling characteristics."

The current system of rates based on commodity and stated on the basis of weight or measurement admittedly can be complex. But it is fair and sensible. The commodity-based, weight-measure system permits all variables to be considered. It is the only system that allows carriers to be compensated for the quantity in a container based on commodity. Lump-sum, per-container, Freight-All-Kinds (FAK), and other systems assume all commodities can bear the same price, which is incorrect. The weight-measure system also results in less discrimination against small shippers. Other systems cannot accommodate the whole market. While tariffs might be shorter and easier to read, shippers of low valued or high volume/weight cargoes might be totally unable to afford the higher average cost of transportation.

Does Mandatory Independent Action on Tariff Rates and Services Ultimately Weaken or Strengthen the Ability of Conferences to Work Effectively? Would a Longer Notice Period Lessen Criticism of Independent Action?

Mandatory independent action definitely has not strengthened the ability of conferences to work effectively. However, it may have enabled certain conferences to avoid disintegration. Agreeing to uniform rates and practices, and then maintaining cohesion, are the central functions of a conference. It does little good to reach consensus one day if individual lines are going to abandon consensus the next.

Does that mean mandatory independent action should be repealed? I don't think so, for several reasons. First, Sea-Land itself has found several situations in which independent action makes sense:

- one, to compete with an outsider when the conference at large seems insensitive to market needs;

- two, to overcome block voting of foreign carriers on a matter contrary to its interests; and

- three, to net out the effects of malpractices undertaken by other conference members who only nominally adhere to the published rate. Of course, effective enforcement greatly reduces the need for this use of independent action.

Nevertheless, Sea-Land as a matter of policy desires to support the conferences in which it participates and therefore, in most cases, will refrain from taking independent action just to secure cargo for the short-term. Indeed, it would be fair to say that the values or disadvantages of independent action depend almost entirely on how it is exercised. When a conference member invokes independent action to obtain bookings that would otherwise have gone to other conference members, the very purpose of the conference -- i.e., to eliminate internal price competition among members and reserve competition for service instead--is undermined.

Sea-Land, therefore, agrees that any conference member should have an unfettered right of independent action. However, there is a compromise that can be achieved: first, by extending the notice period to say 45 or 60 days (that is, beyond the "booking cycle"); and, second, by permitting a conference to require that the matter must be tabled for discussion at a conference meeting to permit efforts to reach a conference-wide solution.

A much more subtle problem lingers in the interaction between independent action and volume ratemaking. Congress was quite direct in authorizing conferences to "regulate or prohibit their use of service contracts," including banning independent action on service contracts. Congress could have been more clear, however, in addressing two other relevant matters:

- first, the period during service contract negotiations;
- second, the applicability to time-volume rates and loyalty contracts.

I'm sure many of you know that when the Japan inbound conference amended its Agreement to ban independent action during a 30-day period on any commodity under service contract negotiation, the Justice Department filed harsh comments and the FMC concluded that the provision unduly inhibited independent action. Their reasoning -- that no service contract on which independent action could be prohibited had yet come into force -- is logical.

But consider the practical problems. The moment that the conference staff commences negotiations, an auction for the cargo can begin with each carrier being approached by the shipper to beat the deal under collective negotiation. In such an environment, many service contract negotiations break down entirely; others are concluded, but only at lower rates reflecting the least that any one line would accept. Now transpose the same dynamics to contract renewal time. Before the initial contract has even concluded, the shipper secures offers of independent action that make it impossible to hold renewal rates at prior levels. This may sound like the best of all possible worlds -- competition at work in its purest form. But if it defeats the conference system and consistently incapacitates lines from earning a profit, its long-term effects can be devastating.

The second problem is that time-volume tariff rates and loyalty contracts may theoretically be utilized for essentially similar purposes as service contracts. There is an ongoing debate over the applicability of independent action in these two contexts, with strong arguments on either side. I will not take this opportunity to argue the issue, since the matter will be briefed by all interested parties before the FMC. But I will comment that all the reasons for authorizing conferences to ban independent action on service contracts apply as forcibly to any other volume arrangements, whether time-volume, loyalty, or otherwise.

In conclusion, I don't need to emphasize that where you come down on these issues depends on what you are trying to achieve. And, I readily acknowledge that my vantage point differs sharply from those who view everything about conferences as anti-competitive and counter-productive. I am quite convinced that conferences are useful to carriers and shippers alike in striking for some degree of stability in liner shipping.

Of course, it would make no sense for Sea-Land -- or other carriers -- to simultaneously support conferences and happily accept devices that render them ineffective. Without the existing tariff system and without some moderation in independent action, conferences cannot accomplish their objectives. Sea-Land certainly believes those objectives -- namely, quality service at reasonable rates in a stable market -- are the objectives of carriers and shippers alike. In such an environment an industry leader such as Sea-Land always stands ready to work to meet its customers' needs over the long haul.

Session 2
Service Contracts

Chairman: John D. Hardy, Senior Merchant Marine Counsel,
Committee on Commerce, Science, and Transportation
U.S. Senate

Service Contract Issues
Ronald B. Gottshall
Managing Director
Transpacific Westbound Rate Agreement

Service Contracts Under the Shipping Act of 1984
Manuel Diaz, Executive Director
U.S. Atlantic-North Europe Conference/
North Europe-U.S. Atlantic Conference

Service Contracts and International Distribution
Thomas W. Craig
Corporate Contracting Agent
General Electric Company

Utilization of Service Contracts
Thomas J. Kolakowski
Manager, International Transportation Planning
Ford Motor Company

Experience with Service Contracts Under the Shipping Act of 1984
Jack L. Peluso, Jr.
International Transportation Manager
Union Camp Corporation

Hubert Wiesenmaier
President
Shipper Association Management Company
(Mr. Wiesenmaier's remarks were not available for publication.)

Introduction

John D. Hardy
Senior Merchant Marine Counsel,
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U.S. Senate

When Congress enacted the Shipping Act of 1984, perhaps the most significant departure from the Shipping Act of 1916 was the specific authorization for ocean carriers and shippers to enter into service contracts which differ from the rates and charges in their common carrier tariffs. These contracts are filed with the FMC on a confidential basis, but their essential terms, including rates, routing and service commitments, must be filed in tariff format and made available to other shippers. In this sense, they combine elements of both common and contract carriage.

As one shipper testified during the Subcommittee's consideration of that legislation:

> Service contracts enable shippers to commit their cargo with the assurance of adequate service and a predictable price. Carriers, on the other hand, are able to plan more efficient productive services by availing themselves of an assured stream of revenue for future expansion.

Controversy has surrounded the use of service contracts since 1984. Initially, most carriers were reluctant to offer them, with Evergreen being the notable exception. During the first three months that the new Shipping Act was in effect, only 160 contracts were filed.

In FY 1985, the dam broke and 2,100 contracts were filed with the FMC. In FY 1987, over 4,400 contracts were filed and the trend continues to slant upwards, with the cumulative total as of October 1 reaching over 11,000 contracts.

Some carriers and conferences have been far more active than others in offering contracts. Evergreen continues to be the runaway leader among individual carriers, while the Asia North America

Eastbound Rate Agreement (ANERA) has filed the largest number of conference contracts. On the other end of the spectrum, the Transpacific Westbound Rage Agreement (TWRA) has filed no service contracts since that group took control over their members' contract authority in July 1986.

The FMC has issued various rules governing the use of service contracts which some shippers believe are too restrictive and some carriers criticize as too liberal. One of the more controversial rules requires the rerating of cargo under the carrier's tariff if volume commitments of the contract are not met and the contract contains no liquidated damages. Another provides for complete recordkeeping on service contact cargo and the expeditious production of those records upon request of the FMC. The Commission has also asserted the right to require that such records be kept physically in the United States should the need arise.

Most recently, the Commission considered a petition filed by the International Council of Containership Operators, known as the "Box Club," to issue rules prohibiting so called "most-favored shipper" or "Crazy-Eddie" clauses and requiring minimum levels of liquidated damages in service contracts. The Commission decided that it had no authority to establish the level of liquidated damages, but did agree to issue a proposed rule prohibiting certain types of most-favored shipper provisions. The Commission also agreed on a 3-2 vote, to extend its earlier requirement on rerating to all instances in which volume commitments have not been met, whether or not the contract provides for liquidated damages. Former Chairman Hickey was part of the majority on that vote, so there is some uncertainty now as to whether the FMC will proceed with that proposed rule.

It has apparently been difficult to obtain statistics on the overall volume of cargo moving under service contracts, but the FMC does have certain information which leads to the conclusion that the importance of these contracts varies widely across trade routes. In the Brazilian trades, for example, there is virtually no cargo moving pursuant to service contracts. Inbound from Japan, on the other hand, as much as 90 percent of some leading commodities are being moved under contracts.

The panel that I am chairing today is far more familiar than any of us in government with the impact of service contracts on international shipping and with the benefits and problems generated by these contracts. I hope all of us will leave here today with a far better understanding of these issues and some clearer views on whether the statute and/or the administration of the statute needs to be changed to better carry out the Congressional intent in enacting the service contract provisions.

Service Contract Issues

Ronald B. Gottshall
Managing Director
Transpacific Westbound Rate Agreement

First, I'd like to thank the Federal Maritime Commission and the University of Southern California for putting on this Shipping Act mid-term review, and for inviting me to participate in this panel discussion of the service contract issue. I had the pleasure of addressing the last such conference in Norfolk in 1986, and found that meeting extremely valuable.

I expect that many of you attending today have already heard most of my remarks regarding both what's wrong with the current Shipping Act provisions for service contracts, and what changes are needed.

It wasn't very long after TWRA'S inception on January 1985 that we came face-to-face with the weaknesses of the Shipping Act's service contract provisions. In January 1985, the FMC service contract regulations had only recently been written, and a strong dollar had brought about a sharp decline in Westbound cargo volume. Capacity in the Pacific was determined by the higher-value Eastbound trade so that, increasingly, Westbound was received as a "backhaul" trade in which too many ships chased too little cargo.

Service contracts, as they were vaguely defined in the Shipping Act language, did not achieve the Act's balanced objectives of pricing flexibility and stability in the kind of trade I have just described. In fact, they accomplished quite the opposite.

In a trade dominated by competition for market share, even small shippers were capable of exerting leverage against carriers who were often hard-pressed just to recover costs. This doesn't even take into account the 500 or so major shippers which together account for 80 percent of the total liner cargo moving Westbound annually. As a consequence, we began to see contracts proposed -- and ultimately signed -- which made little economic sense.

We saw contracts, for example, which offered a "volume" discount in exchange for a commitment to ship 10 containers a year. We saw contracts with terms of as few as five days -- just long enough to undercut a competitor on a single shipment -- and as long as seven years.

I'm sure you can all imagine the consequence of a seven-year, fixed-price contract with any supplier or end user, given recent trends in the financial and currency markets. Even those few long-term contracts with escalator clauses built into them started from such low base rates that revenues were inadequate in both the short and long term.

In some cases contracts signed under duress allowed the shipper to terminate his obligation in the event of a loss of sales, even when the loss was due to factors within his control, such as poor performance by his sales staff or pricing his product too high for the market. And of course there's the now-famous "Crazy Eddie" clause, under which a shipper would automatically be released from his contract if a competing carrier down the street offered a better deal.

We are extremely pleased to hear, by the way, that the Commission has taken seriously the Box Club petition regarding service contracts, and is expected to issue a proposed rulemaking banning Crazy Eddie clauses. That same rulemaking is also expected to provide for a specified penalty in the event that a contract shipper fails to deliver the minimum volume commitment in accordance with service contract terms -- an issue I want to address in greater detail in a few minutes.

One final note: A few months ago I received in the mail a copy of a New York Times article having to do with the original "Crazy Eddie" and his discount electronics store in New York. It had to happen: Crazy Eddie has gone out of business.

Seriously, as we look toward 1989 and Shipping Act reform, I think it's inevitable that we consider strengthening and clarifying the Act's language covering service contracts, for a single, very important reason that I can't emphasize strongly enough:

Service contracts, as currently defined under the Shipping Act, meet few, if any, of the normal criteria for standard commercial contracts. As a result, they are susceptible to uses which undermine carrier viability and promote unequal treatment of customers in certain key trades.

The Westbound Trans-Pacific trade offers ample evidence that service contracts have not always been used for the purposes Congress intended in the Shipping Act. In January 1986, when TWRA Lines voted to phase out individual member line service contracts and negotiate only agreement-wide contracts from that point on, approximately 40 percent of all TWRA liftings moved under individual member line service contracts.

Now, two years later, only a handful of those service contracts remain in force. Although the mechanism is in place for TWRA to negotiate new contracts on behalf of the membership at large, that has not happened. As the last individually negotiated contracts expire this year, the percentage of TWRA liftings under contract is expected to approach zero.

This sharp decline in service contracts following the Agreement's tightening of its policy on contracts suggests two things:

1) That rate levels must be low enough that no discount we could offer a shipper in the foreseeable future would justify the volume commitment; and

2) That a significant number of shippers saw particular benefits to negotiating service contracts with individual lines prior to 1986, beyond the intended benefits of incentive discounts for volume shippers or a hedge against future rate increases. In my opinion, shippers were using their leverage in the marketplace to circumvent the agreement tariff structure.

The potential damage to carriers from such practices are obvious. Freight rate levels in the Westbound Trans-Pacific trade, despite increases taken since 1985, are currently 25 percent below where they were in 1979. That does not even take inflation into account. At the same time, the cost of maintaining current minimum standards which customers have come to expect in the trade -- weekly fixed-day service, slot cost efficiencies of ships in the 2,500 to 3,500-TEU size, port and intermodal terminals capable of fast outturns, and so on -- have increased, particularly for carriers with large capital investments in rapidly appreciating currencies.

Scrupulous service contract shippers, as well as customers with relatively small volumes shipping cargo under tariff rates, also pay a price in this kind of climate -- namely in business lost to the questionable practices of their competitors. I don't think that the kind of competitive edge provided to a single shipper under a five-day service contract is what Congress envisioned. It certainly does not serve the long-term interests of the trade.

I should point out that, in many respects, the Westbound Trans-Pacific market has seen a dramatic reversal of its fortunes since early 1986. The appreciation of the yen, the new Taiwan dollar and the Korean won against North American currencies has boosted exports dramatically since early 1986, so that now many TWRA member lines are running full ships -- albeit at depressed rate levels -- from almost all coasts of the U.S. and Canada.

In fact, volumes are so strong that I would not be surprised if we began to receive some new service contract requests, if only to assure availability of space on ships out of the Pacific Northwest, or all-water from the east coast. I can assure you, however, that any future TWRA service contracts will have to include a quid pro quo of a specified volume in exchange for the guarantee of space; service commitments; and a fair price over a reasonable time period. In short, we're looking for contracts which offer both parties a "win-win" situation.

But we need to go a step further. Whether or not a service contract meets the standard for a viable commercial document should not depend on whether the shipper or the carrier holds all of the cards in the market at any given time. Because the Shipping Act's ultimate objective is to provide a measure of stability to the U.S. trades -- that is, to prevent wild fluctuations in either rate levels or availability of quality service -- we believe that a set of minimum statutory criteria for commercial performance is necessary and reasonable.

At this point, let me take you through some of the changes that we are suggesting toward that end:

Minimum Volume

The principle of a minimum volume commitment, in exchange for space guarantees, priority handling and a price advantage, is meaningless unless that minimum is clearly defined by regulation and based on an amount of freight which would differentiate a legitimate contract from a mere ratecutting device.

I think it's fair to suggest that, in order to maintain the integrity of the tariff structure, service contracts ought to be reserved for shippers who can provide substantial volumes. Obviously, such numbers vary from trade to trade, but a good starting point for discussion in the Westbound Trans-Pacific trade might be a minimum of 10,000 revenue tons or, say, 500 FEUs, a year.

Duration

Most exporters plan their production and distribution costs on an annual basis, based on projections made at the start of each 12-month cycle. This being the case, we think it should be based on a contract period of not less than three months and not more than 12 months.

Again, the objective is to preserve some pricing flexibility for both carriers and their customers, while at the same time preventing the use of service contracts to get around the tariff structure. A shipper with a major ongoing series of shipments -- a construction firm shipping materials and equipment over the life of a large industrial project, for example -- would be free to either substitute or augment liner service with a long-term dedicated charter arrangement, or charters on a spot basis.

Liquidated Damages

I mentioned earlier the anticipated FMC rulemaking that will include some form of penalty for shipper non-performance in fulfilling the minimum volume commitment. While the Commission's willingness to address the issue prior to 1989 represents a step in the right direction, we are concerned by reports in the press that the "penalty" in question will be simply the difference between the contract rate and the tariff rate on the volume shipped.

In other words, a carrier's only recourse -- after having made space available or provided some other special service, possibly at the expense of other shippers -- is to go back through the documentation, review shipments over the contract period to date and re-bill the shipper under the tariff rate.

A true contractual arrangement should provide a formula for liquidated damages, covering both the shipper who fails to deliver the cargo and for the carrier who bumps a shipment or otherwise fails to provide the required service.

For purposes of discussion, damages assessed against the shipper might take for form of a fixed percentage -- say, 50 percent -- of the lowest rate in the contract at which cargo actually moved. Such a standard would prevent the inclusion of artificial rates never intended to move cargo.

Carrier penalties might include a reduction in the minimum volume requirement; payment of the difference between the contract rate and the rate which the shipper paid another carrier to ship the goods; or liquidated damages based upon some other mutually agreeable formula.

Full Disclosure of Charges

Some of the problems which carriers have encountered in negotiating and filing service contracts are directly related to ambiguities in the Act's language. For example, the Act requires us to publish the "essential terms" of signed contracts involving commodities subject to FMC filing requirements, and then to make those terms available to "similarly situated shippers."

"Essential terms" as defined requires full disclosure of the line-haul rate which, at least in the Trans-Pacific trade, does not provide a complete picture. Origin and destination charges, currency adjustment factors, bunker and congestion surcharges and other ancillary charges are left to the discretion of the carrier to include when publishing essential terms.

As a result, competing carriers and competing shippers really have no clear idea of the actual rate being charged when they read the published essential terms of a contract. If we are going to require the publication of essential terms, those terms should accurately reflect the rate at which the cargo actually moves under contract, with full disclosure of current and prospective charges.

Similarly Situated Shippers

Making the same contract terms available for "similarly situated shippers" sounds fine in theory, but the Shipping Act doesn't tell us what that means. Does it mean simply that a shipper moves the same commodity between the same origin and destination? Is a shipper of the same product from a different coast similarly situated? Does the term apply to a shipper with a comparable product but a different end use?

We need to come up with a more precise working definition of a similarly situated shipper, rather than require carriers to second-guess the Act's meaning each time they negotiate a contract, at the risk of facing possible litigation if they make too narrow an interpretation.

A good start would be to insist on similarity in a "commercial" sense -- in other words, not only geographically similar in terms of points and routes, but similar in terms of volumes, competitive stature, credit standing and so forth.

In the past two years we have seen a growing recognition within the trade community that key elements of the Shipping Act will require fine tuning, to guarantee that both the spirit and the letter of the law are upheld.

Ocean carriers are well aware of the damaging effects of too much regulation. For a reminder, we need only look back to the burdensome pre-1984 hearing and reporting procedures. Since the 1984 Shipping Act was meant to accommodate the sweeping industry changes brought about as a result of containerization -- and to anticipate changes yet to grow out of new technologies and market trends -- its language was understandably spare, to allow for flexibility.

But the Act implicitly recognizes that carriers must be able to adequately recover costs if they are to undertake long-range planning and make necessary long-term capital investments in facilities, equipment and services.

The modest reforms I've mentioned here retain flexibility and competition, whether in a shipper's or a carrier's market. That, I believe, is central to the Act's ultimate goals and objectives, and consistent with the purpose behind our meeting here today.

Service Contracts Under the Shipping Act of 1984

Manuel Diaz
Executive Director
U.S. Atlantic-North Europe Conference/ North Europe-U.S. Atlantic Conference

Service Contracts have been with us since June of 1984, and at this point I find it difficult to evaluate them without one very large qualification, and that is the competitive trading climate that has generally existed since their creation. Practically without exception, the major trade routes of the United States have been heavily over-tonnaged since the inception of service contracts. This means that the service contract, this theoretical creation of a legislative laboratory atmosphere, was spawned into trade climates where competitive pressures, not envisioned by the framers of the act, distorted its application and effect. In my opinion, that up until now, the objectives set for service contracts have never really had a chance of being met. Accepting this hypothesis, the choice is between scrapping the program, letting it wither, or bringing it into consonance with the realities of the market place.

By definition, a service contract is a contract between a shipper or a shippers' association and an ocean common carrier or Conference in which the shipper makes a commitment of cargo or freight revenue over a fixed time period and the ocean common carrier or Conference commits to a certain rate or rate schedule as well as a defined service level. The contract may also specify provisions in the event of non-performance on the part of either party. On the surface this seems fair and practical, but the real world market forces have distorted what should have been reasonably balanced straight forward negotiation between buyer and seller of contract ocean transportation services.

Since the enactment of the '84 Act, and the concomitant birth of service contracts, there has evolved a pattern with respect to the increase in service contracts. Where cargo levels have tended to be in reasonable equilibrium with shipping space offered, shippers have been quick to accept service contracts as a means for moving their cargo. Where shipping space has been chasing light cargo offerings, shippers have tended to shy away from utilizing service contracts. In the North Atlantic trades, import cargo has been running about twice the volume of export cargo. Close to 50% of Conference import cargo moves under service contracts, versus 25% of export movements.

The record of Service Contract performance in the U.S. Atlantic/North Europe trade has been one of ever depreciating freight rate levels. Two factors have contributed to this; one, lessening of U.S. imports from Europe and, at least through 1987, no tremendous increase in U.S. Exports; and two, since 1985, an increase in container capacity available, 7% by Conference lines and 43% by independent carriers.

The play of market forces in this trading arena has quite obviously not worked to the interest of the carrier who had expected service contracts to be a vehicle for stabilizing rates and not one for eroding them. Neither have they fulfilled one of the major expectations of shippers who had presumably looked upon service contracts as a means of negotiating long term stability of ocean transportation costs so as to develop long term pricing & marketing programs for their export and import products.

Regretfully, the painful truth has once again been brilliantly highlighted irrespective of protestations to the contrary; success in cargo acquisition is overwhelmingly driven by freight rates not by service. Market power of the shippers far out balances the ability of carriers to attain revenue levels resulting in acceptable rates of return.

This far into the program, 2½ years, Service Contracts have been of immeasurably greater benefit to shippers than to carriers. In return for cargo volume, carriers have offered guaranteed service performance at discounted rates. The problem has been the continual discounting of these contract rates. In great majority Service Contracts have been entered into by shippers to achieve lower freight rates. The over-tonnaged competitive climate has kept continued, pressure on carriers to maintain cargo volumes and forced them to accept service contracts at unsound rates and conditions, and eventually to reacess the efficacy of the service contract system.

At mid-point in the review period, whilst service contracts, one of the centerpieces of the 1984 Act, are receiving applause from the majority of shippers who consider these as the most positive result of the '84 Act, liner Conference carriers have found that this new marketing device, designed to stabilize the trading climate and guarantee service, has in fact exacerbated destabilization in a market which is already inherently unstable. Obviously, non-conference carriers embrace service contracts as a convenient marketing tool to sell service and acquire long term cargo commitments under the umbrella of Conference tariffs and contracts.

Service Contracts are not performing in the way that had been expected. There was meant to be an element of commercial balance achieved by both parties to the contract. This has not happened, and consequently if Service Contracts are to continue as useful commercial transactions between shipper and carriers, the imbalances and faults of the system must be addressed.

The sections that need prompt consideration are:

1. Definition of Similarly Situated Shippers

What is a similarly situated shipper? Does he really exist? How is he to be judged as similarly situated? By similar commodity? By industry? What about geographical location? One shipper may require service hundreds of miles from carrier marine terminals while another is adjacent to the port of loading. Should ability to ship in volume be a factor in this judgement? Perhaps the definition should encompass consideration of the commercial stature of the shipper such as credit rating. It seems near impossible to establish a workable definition from the multitudinous variables. I recommend that the Essential Terms filed with the FMC be confidential and not publicly available, thus, eliminating the requirement of defining the undefinable.

This would probably cause some outcry and consternation among those who believe that discrimination against the small shipper would ensue, but aren't commercial contracts made every day for the purchases of transportation and other goods and services, all confidential, and apparently not unduly discriminatory?

2. Escape Clauses

If Essential Terms were filed confidentially, the proliferation of escape clauses such as "Crazy Eddie" "bonafide offer", and "most favored shipper" would greatly diminish. Service Contracts are a product of a shipper's needs and capability to provide cargo over a given period and in sufficient volume to merit a special service commitment and freight rate from the carrier. Each of these arrangements are individually tailored to meet specific requirements of the shipper, they are not cookie cutter contracts. The required filing of essential terms has thinly veiled the identity of the shipper unleashing market pressure on the carriers spawning an epidemic of most favored shipper clauses, "Crazy Eddie" clauses, "bona-fide offer clauses", and all kinds of devices designed to trigger a continual round of rate erosion hereby defeating the principle of long term stability of rates, a cornerstone of the service contract program, and, to carriers, one of its most attractive features.

The least innocuous of the escape clauses is the "most favored shipper clause" as this allows for some control by the carrier over his own destiny. Others, "bona-fide offer" and "Crazy Eddie", are triggered at the whim and caprice of third parties, most of whom are incapable of offering the service package contained in the original contract.

There is, of course, a necessary requirement for a force majeure clause that clearly reflects actions of third parties over whom neither contractual party has any control. However, there have been increasing examples of vague commercial language creeping into contracts that have nothing to do with acceptable force majeure contingencies.

These escape clauses, and its emasculation by inclusion of commercial escape valves effectively make a mockery of the Service Contract system because contracts including any of these are one-sided, imbalanced, and not what this section of the '84 Act was designed to accomplish. The use of escape clauses should be regulated.

3. Minimum Quantity

Practically the only benefit from the requirement for service contracts to reflect minimum quantity in a fixed amount is ease of administration. If the Act were to permit commitments to be contractually expressed in percentages, the problem of force majeure and legitimate market contraction would be greatly alleviated, making the policing of these contracts by the FMC much easier, through elimination of hard to prove questions surrounding short shipments. The Act should be amended to allow for either a fixed quantity or a fixed percent at the discretion of the contracting parties.

4. Independent Action On Service Contracts

The mandatory independent action provisions of the Act do not apply to Service Contracts. Some Conferences have in the past allowed their members independent action on Service Contracts. In the U.S. Trans-Pacific trades, this privilege resulted in absolute chaos with individual lines negotiating their own Service Contracts causing wholesale rate erosion and a destructive rate war. In the North Atlantic Trades, Conference agreements have mandated that only the Conference can negotiate Service Contracts with the result that in a soft trading climate, heavily over-tonnaged, despite severe rate erosion, a rate war has been up until now avoided. Those who would advocate amendment to the Act requiring I.A. on Service Contracts have no interest in stable or orderly trades.

An attempt has been made to illustrate some significant changes that I believe would contribute to bringing balance to the Service Contract program. If Service Contracts are to continue to be a practical vehicle for securing cargo and offering service, there has to be a recognition that they can only survive if, in return for service, carriers can achieve an acceptable level of return. They must be able to expect profitable results from Service Contracts as they do from other marketing efforts. In present trading climates pervaded by over-tonnaging and cargo scarcity, market pressure of the transport buyers overwhelms the ability of the sellers of transport to resist this pressure. To counteract these kinds of conditions, equilibrium must be brought into the market arena. This, plus some discipline on the part of shippers to recognize that Service Contracts are not merely meant to be a device to reduce rates, and discipline on the part of carriers not to sign diseconomic and one-sided contracts, might yet save Service Contracts as a viable and attractive method of doing business for shippers and carriers alike.

Service Contracts and International Distribution

Thomas W. Craig
Corporate Contracting Agent
General Electric Company

I am here to discuss how Service Contracts have affected General Electric and to offer suggestions on ways to improve them.

My experience with such contracts actually started in 1983 when we negotiated and signed a time-volume contract for shipments of electrical goods from Taiwan to the U.S. Since then I have been involved in numerous service contracts, all involving imports from the Far East. These have been negotiated both on behalf of RCA, prior to the merger with GE, and now GE. I like service contracts.

They have presented us with a way to achieve lower, stable rates. Given the tremendous downward price pressure we have experience with many of our products, service contracts have been very important to us. Obviously, without the rate benefit, we would not be as enthused nor signed as many contracts as we have.

The use of contracts is also changing how we deal with carriers and how they deal with us. When we negotiate for and commit a significant portion of our volume to particular carriers, it does affect how we do business. Contracts have a "negative" side in that they force a more formal structure somewhat in dealings between shippers and carriers. Contract terms must be followed and met by both parties.

The existence of contracts also makes it difficult for those carriers with whom we do not have contracts to participate in our shipping. For both shippers and carriers, the contracting process is changing shipper-carrier relationships.

Quite simply, service contracts serve a useful purpose to both shippers and carriers. They offer some stability and predictability to the shipper in his ocean freight prices and to the lines in establishing base volumes for carryings.

Service contracts are here to stay. They are a viable tool in international distribution. The number of contracts filed since the Shipping Act of 1984 loudly demonstrates this. Over 10,000 contracts filed in really only three years. This is remarkable.

Contracts serve a purpose. Yet they are not usable in all situations. There is a problem making firm commitments with shipments for export sales and; given the current market, it is difficult to set firm prices for the contract period.

For there to be improvements to contracts and to the contracting itself, carriers, shippers, and the Federal Maritime Commission must recognize role of contracts and move forward in establishing broad, flexible contracts.

Lines must stop blaming service contracts for all their problems. Service contracts did not cause over-capacity in key trade lanes, are not to blame for current economic factors which cause directional trade imbalances, and are not responsible for high carrier operating costs.

Shippers should look at service contracts as more than a vehicle to cut rates. Contracts should be structured in a way to satisfy the particular company's rate and service requirements so it may effectively compete in its marketplace and generate profits.

In my experience in both domestic and international distribution, service contracts are real commit agreements, take-or-pay. They are not token best-effort agreements but rather are contracts which must be judiciously negotiated and fulfilled.

The FMC must recognize that contracts are agreements between two contracting parties which must satisfy the needs of both parties. The contracting parties need to operate in an environment which lets them be creative and flexible to negotiate win-win agreements, and not be restricted by regulations which hinder effective contracting and international distribution. This is especially pertinent because the FMC has no authority to adjudicate contract disputes. The Act clearly states that the exclusive remedy for a breach of contract is in an appropriate court. It does not confer this remedy to the FMC. As such, the FMC should not be establishing rules which either party finds burdensome.

Let's forget about Crazy Eddie clauses. These are yesterday's news. They were caused by the lines, not shippers. They were caused by lines who kept cutting rates in return for little volume commitment. Shippers sought protection from this rate-of-the-day insanity with such provisions.

Instead let's look at more pertinent issues.

First, I believe the FMC should exercise a very limited role in service contracts. They should play the role of recordkeeper with regard to service contracts, not rule-setter.

There are complicated issues which the FMC should instead address. Such as, how does a "common" carrier offer contracts and still be a common carrier? Or, how do shippers and carriers really settle contract disputes when one of the parties is a non-U.S. company?

Second, I believe the following improvements should be made:

1) Contracts should not be made public. How can you realistically negotiate a contract between two parties, knowing that it is an open document which will be published and filed in a tariff? A contract is a confidential document and should be recognized and treated as such. Non-disclosure will also stop the Crazy Eddie clauses that so preoccupy many steamship lines.

2) Service contracts should not be one-sided commitments. A contract is a mutual exchange by both parties. But most current service contracts may not really be service contracts. They seem more like price-volume agreements. A shipper commits a certain volume in exchange for a certain price from the steamship line.

   If the shipper does not meet his volume commitment, then he must pay some type of penalty, or liquidated damages to the carrier for failing to meet his commitment. Yet if the carrier fails to carry, to service, the cargo of this contracted shipper, there is no penalty, no liquidated damages payable by the line to the shipper for failure to perform, failure to meet his obligations.

To illustrate this, here is some actual language from the standard boilerplate contract of a major conference. Note, I have eliminated the name of the particular conference -

<u>SERVICE COMMITMENT</u>

(a) The Agreement agrees to make available during the term of this Contract vessel capacity adequate to carry (1) the Minimum Quantity Commitment of cargo and (2) at (Conference's) option any additional cargo tendered by the Shipper during the term of this Contract. The Shipper shall be free to select the Agreement Member or Members on whose vessels the Shipper's cargo shall be transported during the term of this Contract, but the movement of cargo on specific vessels shall be on a space available basis only. The Shipper agrees that as far as possible cargo committed under this Contract will be shipped evenly throughout the duration of the Contract. The Shipper agrees to give fourteen (14) days booking notice, if possible, but not less than seven (7) days, to the Agreement Member or Members it selects for the carriage of its cargo, so as to assist such Agreement Member(s) in making space available on specific vessels. The Shipper agrees that all cargo tendered under this Contract shall be rated hereunder and shall not be subject to any other service contracts, volume discounts, volume rates or other volume incentive programs offered by (Conference) or its members.

(b) In the event the Shipper is unable to secure space on any particular vessel of the Agreement Member or Members with which he normally ships, the Shipper agrees to contact all of the other Agreement Members successively until appropriate substitute space has been found. In the event the Shipper is unable to secure such substitute space from any other Agreement Member, the Shipper may request the assistance of the (Conference) office in securing such space. Unless otherwise stated in Appendix A, if within two (2) business days of such request the Agreement fails to secure space on a vessel scheduled to sail within fifteen (15) days of the date of the request, then, upon written request of the Shipper, the minimum specified in Appendix A of this Contract may be reduced by the quantity of cargo tendered but not carried on Agreement vessels. The specified minimum, however, shall not be reduced where the assistance of (Conference) has not been requested in writing."

Just what has the Conference and its member lines really committed to? Where is the "defined service level", as mentioned in the Act's definition of a service contract? Is this service commitment and hence a service contract? What is a shipper to do if the carrier does not provide space, containers or chasses?

From that same conference agreement, here is the recourse the shipper is permitted for service failures by the carriers, interestingly enough coupled with the provision for failure by the shipper to meet and satisfy his volume commitment.

DEAD FREIGHT

The Agreement and the Shipper recognize that breaches of the Minimum Quantity Commitment cause not only loss of freight but also instability, adverse impact on carrier marketing, logistics, and stowage planning and, accordingly, agree that in lieu of all damages, which are difficult to calculate, dead freight shall be assessed as follows:

(i) If the Shipper fails to tender the Minimum Quantity Commitment specified in Appendix A to this Contract, the Agreement shall invoice the Shipper and the Shipper agrees to pay deficit charges on the difference between the quantity of cargo actually shipped and the Minimum Quantity Commitment at the rate specified in Appendix A. The total of any amounts due hereunder shall be paid directly to the Agreement with thirty (30) days following written notification by the Agreement. Dead freight shall be distributed among the Agreement Members in proportion to the revenue earned by each Member under the Contract.

(ii) If the Agreement fails to fulfill its service commitment in Article 7 hereof during the Contract term, the Shipper's sole remedy shall be a reduction in the Minimum Quantity Commitment specified in Appendix A by the quantity of cargo tendered but not carried as provided in Article 7 and the Agreement and its Members shall not be liable to Shipper for direct, consequential or other damages, not shall any liabilities or obligations of Shipper to the Agreement or its Members be subject to any offset or credit therefore."

Realistically, just what good does this do for a shipper whose cargo is sitting in Singapore and is needed here to make a sale or go into production? The Conference has provided for dollar penalties to the shipper for failure to meet his volume commitment. Yet, the Conference specifically refuses to accept dollar penalties for carrier service failures. Isn't this a little one-sided?

If the FMC wants to investigate a serious contract issue, then I suggest that it look into what I perceive to be a serious lack of service commitment by the lines in service contracts.

3) The FMC should permit contracts to include movements to and/or from non-United States locations. GE is a global company; certain lines are global carriers. We would like to be able to negotiate global carriers. We would like to be able to negotiate global agreements, if both the lines and us have such an interest. Such broad contracts may also present a way for shippers to balance the uncertainties of export sales with the more certain import movements. The mutual contract possibilities are exciting.

4) The right independent action should be mandatory for service contracts with conferences. There is no reason why the right of independent action is required for rate actions, but not for service contracts. This is inconsistent and flies in the face of what contracting is -- a mutual exchange between shipper and carrier.

   A Conference prohibition of independent action on service contracts raises some interesting questions. Is a contract entered into with such a conference really a de facto loyalty agreement? Does such a restriction by a conference constitute a "substantially uncompetitive act"?

In conclusion, we like service contracts and believe they are a viable factor in international distribution. Contracts can provide a way, over time, for shippers and carriers to build strategic alliances. But to be really effective, improvements must be made. The mind-set among all parties -- shippers, carriers, and the FMC -- must change. Regulations cannot be something to hide behind; they cannot restrict and inhibit the opportunities which service contracts can offer.

Utilization of Service Contracts

Thomas J. Kolakowski

Manager, International Transportation Planning

Ford Motor Company

I appreciate the opportunity to be here today, representing Ford Motor Company, to discuss the topic of Service Contracts. As a large shipper we have had considerable experience in transportation contracts for domestic movements and believe this to be the most effective form of agreement. We have had recent experience with service contracts for international transportation as well and despite some of the limitations of this form of contracting our experience to date has been generally favorable. The big question at Ford is, given these limitations and the trend toward more restrictions, whether we will continue to utilize service contracts in the future.

We entered into our first international service contract in 1985. Today we have a number of contracts with both independent carriers and conferences. These contracts account for about 60% of Ford's international movements.

Our service contracts are three year agreements and in that respect are consistent with Ford's operating philosophy of maintaining long-term, partner-type relationships with our suppliers. This philosophy played another role in our establishment of service contracts as well since one of our primary reasons for having these contracts is that this is the form that our carriers preferred having. Since our carriers saw some advantages for themselves and we saw no disadvantage to Ford we agreed to do it. Within this form we then were also able to establish some specific items tailored to our operation, such as credit terms and lump-sum rates, but these really are minor factors. The items which we would perceive as having the greatest advantage to us, and which are available to us in our domestic contracts, i.e., confidentiality and flexibility, we are precluded from having under the current provisions of the Act and FMC interpretations.

Some of the other advantages often associated with service contracts such as low rates and guaranteed service are not uniquely related to service contracts, at least not for large shippers. Quite frankly with more than 35,000 TEU's annually into and out of North America we don't need a service contract to obtain an attractive rate. And with our policy of utilizing only a few carriers and having long-term associations we really don't need a service contract to guarantee cargo space or prompt delivery.

Speaking of rates, please allow me to make one other point. Service contracts are often pointed at as a major reason for rate instability and for the current depressed level of rates. We strongly disagree. Overall low rate levels are really a result of overcapacity in this supply and demand priced industry. There are too many ships chasing too little cargo, or at least cargo movements that are unbalanced due to service currency and trade fluctuations. And rate instability is more a function of lack of self discipline within the carrier industry than it is attributable to provisions of the Shipping Act. Although lack of confidentiality in rates certainly plays a role here too. More about that later.

As mentioned, our utilization of service contracts has been in response to carrier preference and the ability to incorporate several convenient tailor-made features. Also we wanted to experiment with this new type of agreement in the hopes that with the passage of time improvements would be made so that service contracts would become more like their domestic counterparts. Unfortunately this has not been the case; in fact quite the opposite has happened.

Domestic transportation contracts are private, commercially workable agreements with benefits for both shippers and carriers. They are designed to be confidential, flexible and are approached from the standpoint of what is best for the particular piece of business involved. Some of the Act's original provisions, and recent FMC rulings, have made service contracts more cumbersome, more restrictive and less commercially attractive. The trend is toward tighter regulation of the relationship between shippers and carriers at the expense of commercial practicality. The service contract rules seem to be becoming one sided, in favor of the carriers. Perhaps this is being done in an attempt to offset the so-called shipper advantages in rates and service often said to be caused by service contracts and independent action. If this is the case it is unfortunate since any such perceived advantages are not related to provisions of the Act but rather to the industry conditions of overtonnaging and lack of economic discipline.

The recent rulings have cast doubt on Ford's future use of service contracts. An important factor as well will be the outcome of the Box Club petition, which again proposes rule changes that would cause more regulation and less commercial freedom. Ford, along with numerous other shippers, filed comments opposing this petition. But the FMC is apparently about to issue a proposed rule that will include some form of regulation of the level of liquidated damages. Rulings such as this which restrict commercial bargaining between two parties to a contract will likely decrease the use of service contracts in the future.

This would be most unfortunate since the concept of service contracts is a good one. Service contracts should be structured so that carriers and shippers have the ability to work out a commercial agreement that makes sense; to build a partnership that is tailored to the requirements of the market; i.e., the customer. Properly constructed and administered contracts should encourage partnership and customer focus. At Ford we have rediscovered recently, with great success, that focus on the customer is the single most important thing a business can do.

There are several ways in which service contracts could be improved to make them a more workable, responsive type of agreement. Although I mention these improvements as a shipper representative, the benefits need not be one - sided, in fact should not be one-sided. A contract, or any type of agreement, only works well if it works for both parties.

The first and most important suggested improvement that would make service contracts more attractive and more workable is confidentiality of essential terms, particularly rates. Terms could continue to be filed but they should remain private between the negotiating parties, as they are in domestic transportation. Contracts should be geared to the commercial reality of the marketplace, tailored to the unique circumstances of the contracting parties and be kept confidential between them.

Confidentiality would also eliminate the hotly disputed "most favored shipper" and "Crazy Eddie" clauses and alleviate their impact on low rates and rate instability. At Ford we do not believe in or use these type clauses. But consistent with our belief that the FMC should interfere with commercial negotiations as little as possible we do not support a regulatory ban on them. Rather we believe that confidentiality would accomplish the same result. These clauses and this type of pressure on carriers from shippers, most of whom are truly not "similarly situated" exist only because contract terms normally kept confidential in other businesses are in this instance publicly available.

The second improvement would be to allow some degree of flexibility in service contracts, to allow contracts to adjust to the needs and the reality of the market place. As it now stands carriers and shippers are bound to the exact text of the contract once filed. While a contingency clause is allowed, such clause must clearly and specifically describe the event allowing it to be invoked, in advance, and ensure that the event is verifiable and measurable. From a commercial standpoint this is very difficult to do. In our experience we have difficulty with the "no amendment" feature even over such relatively simple matters as adding a new shipping point to our contract that wasn't known at the time it was written. Even if both we and the carrier want to include it to the advantage of both . From a practical standpoint if both parties wish to amend a contract they should be permitted to do so.

The third improvement would be to allow cargo commitments to be stated as percentages as well as absolute volumes. Here we are at odds with the FMC ruling stating that percentage agreements would be loyalty contracts which, the FMC has concluded, are forbidden by the Act. That interpretation difference aside, however, the simple fact is that percentage agreements are commercially desirable. It is often difficult to precisely predict the demand for products in the marketplace, particularly in long-term contract situations. Therefore volume commitments are often hedged, inhibiting effective cargo planning for the carrier, minimizing the bargaining power of the shipper and often permitting other shippers not having as much volume as the original shipper's true quantity to pressure the carrier for similar favorable rates. Percentage commitments would permit more effective response to the commercial requirements of the marketplace. The fourth item is not a call for a change, at least not yet. It is more a hope that the rule the FMC is about to propose in response to the Box Club petition to establish a mandatory minimum liquidated damage rate will not unduly interfere with the Commercial bargaining process. The petition requests service contract liquidated damage provisions be set at a minimum of 75% of the contract rate. Clearly there is no rhyme nor reason for this percentage. We agree that a shipper should not be able to walk away from a contract without penalty. Neither should liquidated damages be truly so minimal as to avoid any legitimate shipper commitment. However, we do not see how a rule could be fairly constructed to cover this latter situation.

While it is not clear exactly what the FMC proposed rule will say, certainly the rule proposed by the Box Club is too extreme. Again it seems only the contracting parties can know for any specific situation what a fair and reasonable level is. The only practical way of establishing liquidated damages is through commercial bargaining. While the Commission may appropriately prohibit contracts that provide for liquidated damages of zero, it should avoid improperly interfering with the shipper and carrier commercial process of establishing damage levels through the normal marketplace mechanism.

These improvements would make service contracts a more effective tool for both carriers and shippers with benefits for both parties. They would be true commercial agreements, responsive to the marketplace and to the needs of carriers and shippers alike. And they would not be responsible, or more appropriately be perceived as being responsible, for industry woes such as rate instability.

Carriers, shippers and the FMC can work cooperatively to improve service contracts. The FMC is doing an excellent job in obtaining input from all parties as it prepares to evaluate the impact of the Act. Any subsequent revisions will hopefully consider the positions of both carriers and shippers.

The revisions and interpretations made to date would seem to indicate a trend toward an increase in regulation. In our opinion this would be a serious mistake. Rather we would suggest that the original intent of the Act be remembered. During the period of its creation both House and Senate committees reported that the intent of the Act was to minimize government involvement in shipping operations. We hope that this principle can be acted on and that working together the various parties can make improvements to the Act to permit service contracts to be negotiated freely between shipper and carrier so as to be responsive to the needs of the marketplace with as few regulatory restrictions as possible. In that way we will have the most effective system and in the long run all parties will benefit.

Experience with Service Contracts Under the Shipping Act of 1984

Jack L. Peluso, Jr.
International Transportation Manager
Union Camp Corporation

I would like to thank the Federal Maritime Commission, the University of Southern California and the Program Committee for the opportunity to participate in this important conference.

This panel was asked to comment on several issues concerning service contracts. They are: Whether contracts are meeting the objectives of carriers and shippers; what changes to FMC rules and/or provisions of the Act may be necessary; are the principles of common carriage slightly disturbed or totally eroded; should service contracts be confidential; and, should independent action be required on conference service contracts.

To briefly summarize my comments, I believe service contracts are meeting the objectives of carriers and shippers, given their individual circumstances and considering related market conditions. The initial FMC rules did not require immediate change and no additional regulation was necessary. Certainly not until the 1989 review process. Finally, that review process should culminate in legislative changes allowing service contracts to be totally confidential and extending to them the right of independent action.

I will cover each of these points in more detail relating actual experiences in support of general comments.

First, are service contracts meeting carrier and shipper objectives?

Timing is critical in business. U.S. export markets began a steady deterioration not long after the Shipping Act of 1984 was implemented.

We can attribute this in part, to an over valued U.S. dollar, customer inventory levels and large quantities of product available from U.S. and foreign competitors. Consequently, U.S. export volume and product prices were falling dramatically.

In this environment, U.S. exporters were reluctant to guarantee volume or commit to firm rate levels. On the other hand, carriers faced with a severe imbalance of outbound and inbound cargoes needed export volume commitments for desperatly low vessel operating rates and equipment repositioning.

Carriers obtained those volume commitments through service contracts. These contracts included various types of optional clauses allowing exporters to justify and receive rate levels necessary to remain competitive. Generally, I would say those service contracts met the objectives of carriers and shippers.

Export markets began to bottom and slowly rebound late in 1985 and during the first half of 1986. Our own contracts allowed ocean rates to ride the bottom until product prices could maintain slow upward progress. Upon their expiration, and as business and carrier loadings improved, new contracts were negotiated with incremental rate increases timed to coincide with product price increases. This achieved true stability in that product prices and ocean rates were relative to one another, responsive to the market and, moving in unison. Therefore, our own objectives were also met. Our carrier partners received anticipated cargo volume, more in fact, which undoubtedly met their objectives as well.

American Shipper magazine reported in January that ANERA is streamlining its service contract process to speed deliberations and expedite the processing of applications. This is another indication that service contracts are meeting carrier objectives.

Next, are FMC rule changes or additional regulation necessary prior to the 1989 review process?

Rule changes and/or new rules have been suggested by some conferences, individual carriers and in a petition by the International Council of Containership Operators, commonly known as the "Box Club". Included are a general minimum volume commitment, a fixed level of mandated liquidated damages and the restriction or prohibition of numerous pro-shipper clauses, such as most-favored shipper, competitor and bona fide offer clauses.

Justification apparently was derived from experiences during the downward export market cycle I discussed earlier. When carriers were desperately trying to fill light vessels and reposition equipment as export volume, product prices and rate levels fell. Service Contracts were one of the vehicles used to remedy the situation along with independent rate action.

Ironically, clauses used at that time to make volume generating contracts acceptable to shippers are the same ones carriers now seek to restrict or prohibit. If successful, what will happen should this flexibility be needed during the next downward market cycle? In any event, a substantial part of that justification was short-term and no longer valid.

Think for a moment, what might have happened had this downward cycle occured under the 1916 Act when few, if any, conferences had intermodal authority. Intermodal rates would have been used and, in fact were used by carriers to attract cargo. Should intermodalism have been restricted or prohibited because of early, short-term decisions?

Regulatory relief strengthening one contract party when the market dictates otherwise may provide that party an unfair advantage when the market adjusts. Contracting parties have the option to compromise on or eliminate objectionable provisions through the negotiating process. The ultimate option is to break off negotiations. Both parties need no further negotiating leverage or limitations, except as provided by natural market forces and their own creativity. There should be freedom to consider any terms and conditions as may be mutually agreeable.

We have negotiated contracts with independent carriers, two individual conference carriers and one conference. Independent carrier contracts have been successfully renegotiated upon their expiration. However, all of the conference and individual conference carrier contracts have expired without replacement. Those conference carriers and others within their ranks have expressed interest in contracting with us but are prohibited from negotiating individually.

Furthermore, they outlined various conditions for conference approval of service contract applications. These included standardized and fixed minimum volume, liquidated damages for shippers without like carrier liability, and rate escalation clauses without most-favored shipper clauses. Consequently, those conditions were either contrary to our needs or otherwise unacceptable. Recognizing an impasse, negotiations were terminated by mutual agreement.

Several conclusions can be drawn from our experiences with service contracts. Individual carriers have demonstrated their ability to negotiate favorable terms in their own behalf and reject those they deem unsatisfactory, even to the point of terminating negotiations. Also, conferences have demonstrated the ability to exert dominance when markets allow by prohibiting individual carrier negotiations, rejecting undesirable provisions and establishing pre-set conditions for contracts.

Therefore, requests to restrict service contract provisions through regulation, such as proposed by the "Box Club" petition, are unnecessary and should be denied.

The FMC service contract rules designed to ensure compliance with the appropriate provisions of the Act were sufficient until conclusion of the review process.

Legislative changes are needed relative to my comments on confidentiality and independent action.

Should service contracts be confidential?

Confidential market information is used as base data for service contract negotiations. The resulting contract is tailor-made to the individual needs and abilities of both parties and should remain confidential.

Our contracts were confidential since they contained only those commodities exempt from the filing requirements of Section 8c) of the Act. I am sure other U.S. suppliers of like products have similar confidential contracts. We successfully compete in foreign markets without contract and rate filing. To the best of my knowledge, no official complaint concerning confidentiality of contracts has been made by any other supplier of exempt products.

In addition, the need for certain pro-shipper clauses would be minimized or eliminated if contracts were totally confidential. Essential terms of new contracts would not be available to trigger those clauses in existing ones and, contract inspired "me-too" reaction in general tariff rates would also be halted.

Finally, should mandatory independent action be required on conference service contracts?

Independent action should be extended to conference service contracts so the carriers may act as individuals or participate as conference members. It is significantly more productive if the decision to contract for either individual carrier or collective conference service is based on mutual benefit rather than a general requirement.

Also, carrier operating philosophy and shipper market range impact on the need for independent action. Many of the world's most efficient carriers have world-wide operations and serve several major U.S. foreign trades. Currently, many are also conference members.

Those conference carriers are prevented from negotiating a multi-trade or round-the-world contract. Seperate contracts are required for the geographic scope of each conference prohibiting individual negotiation.

Furthermore, without confidentiality they are also prevented from expanding the contract to a world-wide basis by including foreign-to-foreign opportunities. Consequently, the number of contracts and administrative costs are increased for both parties, not to mention shipper resistance to fragmented volume.

A shipper's fragmented volume may be unacceptable to some conferences yet acceptable as a whole to an individual carrier. This enhances the value of that carrier and shipper to one another, encourages a long term relationship, maximizes business opportunities for both by integrating operations and promotes rather than inhibits foreign commerce.

In conclusion, we should not expect more of maritime service contracts than we do of contracts in any other business area. We should judge whether service contracts meet the objectives of carriers and shippers on the merits of the individual contract. One thing is certain; there should be no unnecessary regulatory restrictions on either party. Changes that are made should provide more flexibility, such as confidentiality and independent action, rather than less, such as the "Box Club" petition.

Thank you.

Session 3
Antitrust Issues for Carriers and Shippers

Chairman: Robert D. Bourgoin, General Counsel
Federal Maritime Commission

Antitrust Exemptions for Carriers and Shippers
Kenneth M. Kastner
Assistant General Counsel
Chemical Manufacturers Association

Antitrust Issues for Carriers and Shippers
Stanley O. Sher, Esquire
Dow, Lohnes and Albertson
Washington, D.C.

The Future of Competition in U.S. Ocean Trades — More, or Less?
James R. Weiss
Chief, Transportation, Energy and Agriculture Section
Antitrust Division, U.S. Department of Justice

Antitrust in the Ocean Shipping Industry —
Lessons of the Shipping Act of 1984
George E. Garvey
Professor of Law
The Catholic University of America
Columbus School of Law

Introduction

Robert D. Bourgoin
General Counsel
Federal Maritime Commission

The Shipping Act of 1984 and its predecessor, the Shipping Act of 1916, both reflect clear Congressional intentions that liner operations in the foreign commerce of the United States are to be treated differently from other businesses and industries, at least insofar as the U.S. antitrust laws are concerned. But while the liner industry has been statutorily permitted to cooperate on service and rates immune from the antitrust laws, the U.S. policy for regulating liner fleets in its foreign commerce remains based on the premise that competition is the best possible means for ensuring superior service at the lowest possible rates. The resulting regulatory program that attempts to reconcile the needs of the industry with the principles of antitrust is predicated on some fundamental assumptions.

From the outset, it was thought that if the liner industry were left to its own devices, it would create monopolies in U.S. trades with all their attendant abuses. On the other hand, if carrier agreements and combinations in U.S. trades were disallowed and unfettered competition prevailed, the lines would fight rate wars that would eliminate the weak, or they would consolidate through common ownership. In either event, U.S. trades would become subject to monopolies fully as effective as any that could be created by agreement. The objective, than, was to gain the advantages of conferences while checking their abuses through government regulation intended to insure a measure of competition.

So the search began for that formula that would inject just enough competition into this "cartelized" environment to protect against the "abuses" which, it was assumed, would inevitably flow from the enjoyment of monopoly power. The Shipping Act of 1984 represents the latest formula. However, the Section 18(a) study mandated by the 1984 Act suggests that the search may still be on.

Thus, while antitrust immunity for the liner industry was reaffirmed and clarified by the Shipping Act of 1984 after a lengthy legislative process, the need for and the scope of that immunity continues to be debated. This is perhaps inevitable, given the inherent tension between, on the one hand, a regime of immunity for the shipping industry from the antitrust laws and, on the other hand, the full rigors of competition that the industry would face if the exemption were eliminated entirely. Some may question whether the benefits that are expected to flow from granting antitrust immunity can in fact ever be achieved under a scheme premised on a somewhat curious and sometimes paradoxical mixture of pro-cartel and pro-competitive theories. Others may ask whether the compromise first struck by the 1916 Act continues to have any relevance as a viable regulatory scheme for the liner industry in a highly competitive global economy. Because some of the questions and issues that Section 18(a) directs be addressed go to the very heart of the traditional philosophy governing U.S. regulatory efforts over the past seventy years, this may be an appropriate time to objectively and, if possible, dispassionately reexamine the fundamental assumptions underlying that philosophy. Finally, against a background of the perennial carrier antitrust questions, certain related contemporary issues have also emerged regarding independent action, service contracts, and the possible need for antitrust immunity for shipper groups as a counterforce to the coordinated activity of conferences.

These are some of the questions that today's panelists will take up and explore. Their presentations should help to shape the discussion of these issues and to sharpen the focus of this debate as we approach the five-year review of the impact of the 1984 Act, and as these issues return to the legislative arena in the 1990s.

Antitrust Exemptions for Carriers and Shippers

Kenneth M. Kastner
Assistant General Counsel
Chemical Manufacturers Association

We have been asked to address the threshold maritime policy issue -- whether ocean carrier conferences should be exempt from the U.S. antitrust laws so that they can lawfully establish rates and restrict service. My response is that, from an economic and policy standpoint, the exemption should end; from a political standpoint, shippers are likely to push for the end of the antitrust exemption in reaction to attempts by conferences to weaken the market forces envisioned in the Shipping Act of 1984.

By market forces, I mean such things as mandatory independent action, service contracts, shippers' associations, and loyalty contracts between individual shippers and carriers. In the Shipping Act of 1984, conferences agreed to these market forces in exchange for a broader and more certain exemption from the antitrust laws. Conferences cannot expect to retain their part of the bargain -- antitrust immunity -- and at the same time urge Congress and the Commission to erode the shippers' part of the bargain -- the market forces.

Some troubling attempts at erosion include: refusals by some conferences to allow their individual carrier members to enter into loyalty contracts; unnecessary Commission restrictions on the use of service contracts; the filing and enforcement of tariffs on exempted bulk, paper and scrap commodities coupled with the lack of mandatory independent action on such commodity rates; and procedural hurdles placed before shippers' associations by some conferences. We are also concerned with suggestions that the current 10-day notice period for independent action should be lengthened to 30 or 45 days. Proponents of a substantially longer notice period forget that the 10-day period was central to the final shipper/carrier compromise that resolved the House and Senate Conference Committee stalemate and ultimately led to enactment of the Shipping Act of 1984. Carriers agreed to independent action on no more than 10-days notice, and in return, shippers agreed to no independent action on service contracts. More than a 10-day notice would mean that U.S. shippers would be less able to sell their products, because they cannot give their potential foreign customers a final price as quickly as foreign manufacturers who are not subject to tariff restraints on rates. This 10-day notice period and the other market forces were critical to shipper support of the 1984 compromise, and will be critical to their continued support when Congress soon re-examines whether conferences should continue to be exempt from the antitrust laws.

The shippers' antipathy for the antitrust exemption is not idle speculation. Last year my association, the Chemical Manufacturers Association, surveyed a number of its members regarding changes they would like to see to the 1984 Act. Twenty-six of twenty-eight responding companies said that conferences should no longer be exempt for the antitrust laws.

Indeed, in 1989 the political climate for ending antitrust immunity may be strong. Congress is confronting the largest trade deficits our country has ever known. A compelling argument can be made that if we eliminate antitrust immunity for conferences, shipper costs will decrease and U.S. exports, in turn, will increase. Couple this huge trade deficit with two other political facts of life: Congress is generally against antitrust exemptions; and, shippers are politically better organized today than they have been in many years. All of these factors spell a political environment that could present very real opportunities for doing away with antitrust immunity.

What arguments could be made in support of doing away with antitrust immunity? We could begin by examining the reasons that existed in 1916 for extending antitrust immunity to conferences. Many of those reasons are not compelling today.

First, in 1916, exports were 50 percent greater than imports. Today we have the opposite situation -- imports are 64 percent greater than exports. Whereas in 1916 U.S. exporters may have been able to afford higher conference rates, today they cannot afford them.

Second, in 1916, shippers supported antitrust immunity, in part, because they believed that the new federal maritime agency which the 1916 Act created would control the huge rate increases that were occurring. The first World War was raging, and between 1914 and 1916, and many rates had increased nearly 1000 percent. We do not have that rate situation today, nor, do I think, most shippers would be persuaded today that the FMC could effectively control huge rate increases, even if the FMC were empowered to do so.

Third, we do business differently today. Unlike in 1916, many companies today source their customers with products from different plants located throughout the world. This world-wide sourcing can often be handled best be establishing a partnership relationship, perhaps through a service contract, with one or a few carriers. Conferences are not well suited to meet these world-wide transportation needs because their service is limited to specific trades. Moreover, conference restrictions on service contracts make it difficult for individual carriers to enter into a service contract covering multiple trades.

Fourth, today more than ever, U.S. shippers need carriers that will be partners in meeting the needs of foreign customers. Long-term business relationships with individual carriers better ensures the safe handling of products, service to new markets, and port rotations and schedules that meet today's "just in time" production and distribution needs. Unfortunately, the conference often prevents the shipper and individual conference carrier from establishing that partnership. Restrictions on the use of service contracts are prime examples.

Chemical shippers really do believe in this partnership goal. Chemical shippers are in a somewhat unique position of shipping about half of their products and raw materials on liner vessels where conferences exist, and the other half on bulk chemical parcel tankers where conferences are not allowed. In the non-conference parcel tanker environment these partnerships have been established. They have enabled chemical shippers to be more competitive in world markets and more responsive to their customers needs than chemical shippers often are in the liner markets.

A fifth reason why it might be timely to end the antitrust exemption is that Congress has seen the result of deregulation in other transportation sectors and, by and large, supports the results. Bottom line -- there have been significant savings in transportation costs, and efficient carriers continue to exist and be profitable.

Sixth, Congress should question whether conferences should continue especially when the conference is the implementing mechanism for the pernicious effects of cargo reservation. As an example, look at the Inter-American Freight Conference between the U.S. and Brazil. No service contract has been entered into in that trade and only one independent action has been taken. Granted the source of the problem is that cargo is reserved to carriers by the foreign government. But when those carriers with reserved cargo can also form conferences and pool their revenues, virtually all incentive for competition among the carriers is removed.

Seventh, because conference decisions typically are made on the basis of the desires of the majority of carriers in the conference, the conference will typically operate at the efficiency and service level of the majority of carriers, not at the higher level that a few carrier members might provide. For example, until most members in a conference can provide services to inland points, a conference may not be inclined to provide efficient intermodal service. Today, "just in time" production and "total transportation" services require maximum efficiency in transportation services.

Eighth, another reason given in 1916 to support conference antitrust immunity was that the conference would control overcapacity, which, of course, is the root of the maritime industry's problems today. One has to first question whether controlling overcapacity is a legitimate policy objective today. But even if it were, history has shown that conferences cannot control overcapacity. This is probably because conferences cannot effectively control uneconomic maritime subsidy decisions by governments.

Finally, another reason given in 1916 to support conference antitrust immunity was that if U.S. carriers were subject to the antitrust laws, we would be out of step with how foreign carriers are treated under their laws. But today the foreign views of the antitrust laws are moving closer to the historical free market approach of the United States. Noteworthy examples are the 1987 European Community competition laws, and changes in the laws of Canada and New Zealand that closely reflect the Shipping Act of 1984.

In conclusion, a delicate compromise was struck in the Shipping Act of 1984. Conferences got an expanded and more certain antitrust exemption which was balanced by market forces to protect shippers. Conferences cannot expect to retain the antitrust exemption if those market protections are eroded by conference action or by FMC inaction.

Antitrust Issues for Carriers and Shippers

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1. Antitrust Immunity: Conferences and Carriers

The major force driving the Shipping Act of 1984 was the carriers' need to expand their antitrust immunity and plug loopholes in it, which had developed over the prior 15 years. The success story of the 1984 Act, if there is one, is in how it resolved the carrier antitrust issues.

The Act addressed the carriers' antitrust problems in four distinct ways. The Act: (i) provided virtually automatic antitrust exemptions for agreements filed with the Federal Maritime Commission (FMC) within 45 days; (ii) made it clear that intermodal activities in the United States were within the FMC's antitrust exemption authority; (iii) expanded the antitrust exemption to various peripheral activities such as those concerning foreign inland matters and foreign terminal operations; and (iv) eliminated treble damage actions against carriers. The results stemming from these changes have, with minor exceptions, been as Congress anticipated.

Virtually all carrier agreements filed with the FMC have gone into effect, the vast majority within 45 days, without the interminable delays and excessive costs of the prior system. Most conferences now offer intermodal services. And the treble damage actions against carriers have been sharply curtailed without any corresponding rise in comparable litigation before the FMC, the forum Congress substituted for such claims.

It is against this background that the first issue for this session of our panel should be viewed: "Is antitrust immunity still needed in the liner industry?" Given my background as a lawyer for a number of conferences and carriers, it surely comes as no surprise that my answer to this question is, yes. But, what is surprising, is how non-controversial this antitrust issue has become.

As anticipated, under the 1984 Act, broadly worded carrier agreements carrying equally broad antitrust exemptions have become commonplace. And, as also predicted, some smaller conferences have been consolidated into larger ones, three in the European and two in the trans-pacific trades. But what has not occurred, as opponents of this broadened antitrust exemption warned, is monopolistic pricing by conferences, even the so-called new "super-conferences". Indeed, despite the broadened antitrust exemption, conference rates have, if anything, decreased. A similar result has occurred with conference intermodal authority; it has become commonplace. Most conferences have now obtained this antitrust exemption, but it has not resulted in less competition among ocean carriers, nor has there been any adverse impact on U.S. surface carriers. Indeed, the surface carriers have benefited from innovations and increased intermodal traffic since passage of the Act.

Ironically, then, under the 1984 Act, despite greater carrier antitrust exemptions, the chief beneficiaries have been shippers, the users of the service. Shippers have not only enjoyed lower rates, but have experienced better and more specialized services. To a significant extent, the conferences have been leaders in developing these innovations.

Conferences and carriers have, of course, obtained some benefits, but they have been more limited and less commercial in nature, such as, reduced regulatory burdens, legal costs and litigation. The ultimate carrier goal, stable increased rates, has not materialized in most markets.

While the broadened authority to agree on rates has not achieved the classic revenue increases, the expedited regulatory processing has had some impact on the carriers' cost side. A number of slot charters and a few new joint service agreements have been achieved under the Act. So there have been some increases in carrier efficiency and cost savings, the degree of which is too difficult to quantify at this time. Generally, however, at least thus far, the overall cost efficiencies have been modest. This is particularly true when measured against the magnitude of the overcapacity plaguing the industry.

To me, therefore, on the basis of the first three-plus years of experience under the 1984 Act, the conclusion is inescapable that expanded antitrust exemption and the conference system on which it is based, has produced modest, essentially non-commercial benefits to conferences, and has had no negative impact whatsoever on commerce, shippers, or surface carriers. Given this, one may well ask of what benefit are conferences to the carriers? Although the answer may vary from trade to trade, overall I believe the chief benefit of the conference system to carriers (under present conditions) is the difference between continuing skirmishes and all-out war. Presently conferences permit carriers to agree where possible, provide a forum so that some disagreements can be controlled or, possibly compromised, and at least retain some overall rate structure, albeit at an unacceptable level. Absent a conference, carriers generally believe that rates would plunge ("it can get even worse") to a level where a number of carriers would be forced out of business. If preventing a disaster is a benefit, the conference system has been beneficial to carriers.

In light of the empirical data thus far, conferences are not only necessary, they are so benign that I fully anticipate that when the 1984 Act is reviewed, the conference system and its antitrust immunity will not be a major issue.

I suspect that the response of the classical economist to my point -- that conferences are still relevant, and not injurious -- is as follows: The last three years may bear this out, but the recent experience is with a down shipping market, and that conferences may well become an anathema when overtonnaging disappears; and, in any event, conferences have not exercised monopoly power because of the checks exercised by independent action and, to some extent, service contracts. What this argument suggests, I believe, is that a single cause and its effects are difficult to isolate and we may never be able to assess with absolute certainty one aspect of any system —here, conferences and their antitrust exemption -- without considering the others. Within that admitted limitation, I would reply to this point as follows.

There is no reason to believe that the conferences will be able to exercise monopoly control in an improved market. Putting aside the vexing question of when (or if) that will occur, there is no basis to conclude that significant independent competition will not continue to exist. Also, because of the structural changes which have and continue to take place in the industry -- e.g., larger containers, unit and double stack trains — geographic markets in the United States have become blurred, expanding existing competition. Apart from market forces, the Shipping Act contains legal authority to protect against such abuses (Sections 6(g), 10(c), etc.). Whether, in the absence of the mandatory independent action requirement, conferences would be in a position to raise rates to unreasonable levels is the subject of another session. Yet, I would like to offer this observation. The main deterrences to conferences abusing their power -- apart from enlightened self-restraint — are competition and legal remedies, both of which not only exist in abundance today, but will, as far as we can foresee, continue to do so. The ease of entry in the U.S. trades virtually assures this competition.

In the final analysis, perhaps it cannot be proven beyond a reasonable doubt that conferences with broad antitrust immunity will <u>never</u> act contrary to the public interest, but at least it can be said that has not been the experience in the U.S. trades since the 1984 Act.

2. <u>Conferences</u>: <u>Open or Closed</u>?

Whether an open or closed conference system is preferable is one of those issues which, like death and taxes, stays with us. At one time, most carriers favored closed conferences. Now, if the FMC's 1986 survey is representative, more than half of the carriers prefer an open system. It would be interesting to know the reasons for this shift, particularly if it were for reasons other than the recognition that a closed system may be politically unrealistic.

Of all issues, that of a closed conference is one that clearly cannot be treated in isolation. Closed conferences can only work as intended in a highly controlled legal environment. This, in turn, would require a significant rewrite of the Shipping Act. Historically, closed conferences arose and progressed where they had something to offer -- cargo. Then, membership was valuable and, because it was, the corollary followed: carriers were refused membership. Presently, and particularly in the U.S. trades, conferences do not control such quantities of cargo that membership is sought for that reason. The result is that most U.S. conferences' major objective is to obtain new members, not keep them out.

Closed conferences must, therefore, by definition, have a strong device for tying shippers to the conference. This would require a major change in U.S. law. I doubt whether Congress is prepared to grant conferences a strong tying device for cargo and, at the same time, the authority to preclude competing carriers from access to it. Without these legal changes, which would ensure a strong conference system, a closed conference cannot work as intended and, therefore, may well be politically unattainable.

3. Antitrust Immunity: U.S.-Based Shippers Councils

While the carrier antitrust immunity was the driving force behind the Shipping Act, immunity for Shippers Councils was given scarce attention. Although the subject has been discussed somewhat more since, the need is questionable.

Major shippers have little need for conferring with their competitors in a group when negotiating freight rates. Indeed, most do not do so for they believe it is not in their self-interest. Most have concluded that they do better by individual negotiations with carriers or conferences and do not want to share these advantages with their competitors. And on the basis of recent experience, they are quite correct. The FMC's 1986 survey shows significant rate reductions secured by major shippers through service contracts and independent action.

For those medium and smaller shippers who do decide to become part of a group which negotiates freight rates, the antitrust barriers are not significant. There are, of course, the Webb-Pomerene Act and Title III of the Export Trading Company Act of 1982 which offer antitrust exemptions for exporters. More important, however, are the liberal guidelines established by the Department of Justice over the past several years in issuing Business Review Letters to groups of shippers seeking to negotiate freight rates. The Department of Justice standard for such shipper groups is that they not be able to exercise market power ("monopsony power") over freight rates in the relevant market. Since the Department considers the market to be all container cargo imported or exported to the United States and that a shipper group's volume must be more than 35% of available transportation capacity to be a danger, it is quite unlikely that any shipper group will be deterred by the antitrust concerns of the Department of Justice. The Department has issued a number of favorable letters to shipper groups since the 1984 Act was passed and interestingly, has turned none down.

Absent a demonstrable need, an antitrust exemption for U.S.-based shippers councils is unnecessary and, therefore, quite unlikely. In fact, most shippers appear decidedly disinterested in the issue.

The Future of Competition in U.S. Ocean Trades — More, or Less?

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The chief question in the ocean shipping industry for 1990s, and a topic of this conference, is whether the U.S. goal of a strong and efficient merchant marine can be achieved under the current legislative regime. The question is a timely one, since at this time next year the FMC will be working furiously on its report to Congress on the effectiveness of the Shipping Act of 1984. The Justice Department, too, will be contributing to that report and, while we do not yet know what our recommendations will be, it is not too early to contemplate whether the balance struck by the 1984 Act can ensure long term stability and growth for U.S.-flag carriers and efficient, cost-effective service for U.S. shippers.

As everyone here knows, the 1984 Act preserved and enhanced much of the old and added some things that are new.

For example: the Act strengthened liner conferences by retaining tariff filing and expanding conference antitrust immunity. But it also added safety valves for shippers by codifying "bad acts," ensuring conference members' right of independent action, mandating negotiations with shippers associations and allowing service contracts and individual carrier loyalty contracts.

The result to date has been an awkward, but relatively successful (if temporary) balance. We know this because both carriers and shippers are alternately praising and complaining about the Act, depending largely on the available capacity in a given trade. When capacity is under-utilized for a period of time, rates are low and carriers complain. When it is fully utilized, rates are high and shippers complain. Thus, at present, the newly-available competitive opportunities under the 1984 Act are acting as a check on the impact of the conferences' increased antitrust immunity.

Whether this will continue to be the case remains to be seen, as forces for more and less competition vie for changes.

Inertia and history would seem to indicate that any changes recommended next year will be minor. To date, an important policy embodied not only in the 1984 Act but also in other, much more protectionist legislation, is promotion of U.S.-flag carriers and the U.S. merchant marine. The reasons for this are fairly clear -- shipping is an emotional topic tied in as it is to the nation's history, defense and foreign trade. And, so far, the answer has been to preserve the status quo through various types of subsidies, both direct, through the programs administered by the Maritime Administration, and indirect, through the Jones Act, cargo preference and, under the 1984 and 1916 Shipping Acts, the conference structure.

This answer, however, may not be the best solution. Today, after years of protection and subsidies, only two major international U.S. flag carriers remain, APL and Sealand, and it does not appear that new flag carriers will be founded in the near future. To the contrary, U.S. Lines is recently bankrupt, due largely to its inability to utilize fully the huge ships it acquired for its effort to provide around the world service. U.S. Lines' effort was doomed, in part, by declining (as opposed to predicted rising) fuel prices, and by restrictive practices in foreign trades -- restrictive practices that probably will not go away in the near future because they are often exaggerated imitations of restrictive practices in U.S. trades that themselves will remain in effect so long as U.S. maritime interests continue to support them. Whether U.S. importers and exporters are getting a good deal is also subject to question, since they are largely at the mercy of rates and services agreed upon by the conferences.

Under these circumstances, close examination of the laws affecting U.S. shipping is warranted and, since Congress has called for a review, the 1984 Shipping Act is a good place to start.

As I described earlier, the 1984 Act continues to allow antitrust immune conferences to operate in U.S. trades. By so doing, it subsidizes conference members in the short run because it allows them to set rates at supracompetitive levels. In the long run, however, conference members including, in particular, U.S.-flag carriers, may be hurt, since by participating in conferences they lose their competitive edge.

Why this is so is fairly self-evident. For a cartel to be successful, its members have to compromise and, to reach a compromise, rates have to be high enough to accommodate the high cost cartel members. If those rates remain effective over a period of time; i.e., if the cartel is successful, the low cost conference members may add unneeded capacity, allow labor costs to rise, acquire inefficient managements, or fail to take opportunities in a spirit of compromise. When there is enough business for everyone, this is not a problem. But, when business falls off, conference members are at a significant competitive disadvantage vis a vis independents because they cannot reduce their costs quickly enough to meet immediate competitive threats. Accordingly, they either have to forego competitive business, perhaps losing major customers forever, or they accept the business at rates below their costs.

Regardless of how the conference responds, its members may ultimately be the losers when they have to compete with low cost independents. This might be particularly true for U.S. carriers who, because of ship construction and crew cost subsidies, have even less incentive than many of their foreign counterparts to control their costs.

The shipping industry is not the first in which we have observed this phenomenon. It has also occurred in the domestic rail and trucking industries. But, ironically, the shipping industry, which is the last to retain broad antitrust immunity, may be the most vulnerable because ocean carriers are, for the most part, not protected from new entry onto their routes.

Before the Staggers Rail Act and the Motor Carrier Act of 1980, railroads and motor carriers were protected by strict entry and route restrictions. Rate bureau members were profitable (and rates were high) so long as they didn't have to worry about competition from other modes. That changed, however, when the interstate highway system was built. Once it became profitable for trucks to serve previously rail-exclusive long haul routes, railroads and trucks began to compete aggressively with one another. The big losers were the high cost incumbents, particularly the railroads, which have very high and intractible fixed costs and which had huge, inefficient labor forces. Ultimately, numerous major railroads went bankrupt and others looked like they would be soon.

As you know, in the late 1970s, Congress undertook to redress the problem in a quite different way than has been done in the shipping industry. Rather than increasing the land carriers' power to form and operate cartels, Congress reduced it by essentially deregulating the industries, allowing increased intermodal <u>and</u> intramodal competition. Railroads and motor carriers are today forbidden from agreeing on single-line rates, entry is open and, as before, they cannot agree on provision of service or capacity. Today, some problems remain, but it is obvious that each of the industries is characterized by more competition and many more strong carriers than the ocean shipping industry. And, it has been estimated that deregulation has saved shippers billions of dollars.

In sharp contrast to the rail and truck industries, the ocean shipping industry now faces the worst of both the competitive and regulatory worlds. High cost carriers try to avoid competing, but they cannot avoid it for long because, except in certain South

American trades, entry by independents is not restricted. In other trades, independents can and do use their mobile assets to introduce new capacity whenever the incumbent conference successfully raises its rates. Conference members then seek to meet the competition by taking independent action, and the conference structure begins to weaken, until new compromises entice conference members and independents into agreement, and the cycle begins again.

Obviously, there are a lot of transaction costs in this scenario, and someone has to pay for them. That someone is U.S. shippers, since conference members will not tolerate the transactions costs unless, on average, they can maintain their rates above competitive levels. Apparently carriers have been able to do this so far, since many of them, including the U.S. carriers, continue to participate actively in conferences notwithstanding the bankruptcies of some members, such as U.S. Lines.

These higher costs to U.S. shippers cannot be accurately measured, because competitive rates are not available as a comparison, but if the rail/truck experience is a guide, they are undoubtedly quite substantial. In addition, the justification for the costs is questionable. If the objective is to subsidize U.S.-flag carriers, a far cheaper way to do so would be with measurable, direct subsidies. This would also avoid providing subsidies for foreign carriers who, because they are guaranteed membership in our open conferences, benefit as much as U.S. carriers do from the higher rates.

If the objective is the long-term survival of conference members, the current system, which allows open entry into all trades, is not accomplishing that, either. Only by closing U.S. trades, as was the case in the rail and truck industries, can the long term survival of conference members be assured. But, as we know, the rail/truck experience was extraordinarily expensive, and adopting it in ocean shipping would turn on its head the relatively open ocean shipping system that has existed for over a hundred years. No one believes that will happen, particularly in U.S. trades where such an entry-restricted regime would be the antithesis of the economic system under which most of our industries operate.

In short, continuation of the current system may not be the way to go and, if it is not, more competition and less regulation, which has helped the rail and trucking industries, should be considered. That would not really be a dramatic change because, to some degree, the ocean shipping industry is already moving in that direction as intermodalism becomes more important. As a new subsidiary of CSX, Sealand and the CSX railroads and motor carriers are integrating their operations. APL also operates domestically under a number of long-term intermodal agreements. Because by law the inland rate divisions with railroads cannot be the subject of conference agreements, many shipping lines are entering into independent interline rates, and they are doing so as rapidly as possible to try to capture for themselves a share of the vast domestic import/export markets.

Of course, the independence fostered by intermodalism is creating tension between shipping lines' desire to better serve inland markets, and their obligation to compromise so long as they remain conference members. This is further destabilizing conferences, and it is leaving carriers with an unhappy choice. They can remain conference members and either continue to reach inefficient compromises that may jeopardize their ability to compete in the future or compete away the subsidies within the conference structure, or they can compete as independents and forego the indirect subsidies conference membership gives them. Over time the carriers may opt for competition anyway as economic forces move them in that direction. But they may also be required to compete more quickly if such changes are recommended by the FMC report next year which, I am sure, will consider additional industry competition among its options.

Antitrust in the Ocean Shipping Industry — Lessons of the Shipping Act of 1984

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The economic characteristics and international scope of ocean shipping prompted an historically unique American legal structure committed primarily to self-regulation and largely free of the competitive norms of the antitrust laws. Cooperative activities among liner firms may be more readily justified than would similar joint conduct among competitors in other sectors of the economy; some forms of rationalization may achieve efficiencies that benefit American shippers and consumers. As the FMC and Advisory Commission on Conferences in Ocean Shipping begin to analyze the industry's experience since passage of the 1984 Shipping Act, however, new realities suggest that the antitrust option merits renewed and serious consideration; not merely because antitrust law enjoys some preferred status in the hierarchy of economic policy choices, but, rather, because it may today best respond to the public interest in efficient, stable, and low-cost ocean carriage.

Having abandoned the position of an antitrust zealot, I ask for concessions that will perhaps make this discussion more temperate than is often the case when antitrust is raised as an alternative to regulation in the ocean shipping industry. Shipping conferences have not always been the benign institutions their advocates sometimes claim, and they have not been universally embraced by the world community outside of the United States. Conferences have at times seriously abused their concerted power and they have been viewed with suspicion by many of the world's trading nations.

United States' policy has always recognized that rationalization of liner services can produce efficient and stable systems of ocean carriage, but that the cooperation needed to rationalize services generates the incentive and ability to engage in monopolistic excesses. Since at least 1916, therefore, federal law has attempted to strike a balance that captures the efficiencies while minimizing the potential for abuse. The Shipping Act of 1984, this symposium, and the forthcoming Advisory Commission are all part of the continuing struggle to find that balance.

The Policy Issues

As the five year statutory review period of the 1984 Act nears completion, the basic policy issue remains the same as it was when the Federal government entered the arena in 1916: What combination of competition (antitrust), government regulation and self regulation will best protect the legitimate interests of the United States? The proper mix of these variables obviously depends on the definition of "legitimate interests of the United States." The primary economic interest of liner policy is certainly to insure the lowest possible rates for ocean shipping services, consistent with the maintenance of an adequate merchant fleet. The failure of American- or foreign-flag carriers is, by itself, not a matter of public moment. The loss of adequate capacity to meet the reasonably anticipated demands of American foreign commerce, however, does affect the public interest.

In addition to purely economic goals, maritime policy must accommodate political concerns, such as the possible dependence of American commerce on foreign-controlled carriers, sensitivities of the nation's trading partners, and requirements of the military in times of national emergency or war. Although these are legitimate, perhaps at times urgent, concerns, the conference system today seems, by and large, unresponsive to such matters. Conferences have been unable to save inefficient (perhaps even efficient) American-flag carriers, and there is no reason to believe that institutions made up of members from many nations will or should reflect the needs of the American military.

The legal control of American industry has traditionally been relegated to one of two basic regimes. The antitrust regime is committed to an industrial structure driven by market forces; the efficient survive, the less-efficient fail. If collusive monopoly can be prevented, firms will strive to achieve efficient production and marketing methods and industries will be driven by impersonal market transactions to ideal levels of concentration. To be sure, antitrust has at times been ambivalent about the destructive competitive impact of firms that reached market dominance, even through efficiency; opting occasionally to preserve a "way of life" made up of small businesses. Modern antitrust jurisprudence, however, has shown a striking commitment to efficiency.

The law has also recognized that competition will not work in certain industries, primarily those involving natural monopolies. It has, therefore, opted in such cases for a regulatory regime. The principal purpose of the economic regulator is to control entry and exit (to insure an efficient structural organization) and rates (to protect the consumer from monopolistic excesses). The preferred status of regulated industries generally carries with it an obligation of public service. Frequently characterized as "common carriers," regulated firms must provide service to all comers on a non-discriminatory basis.

The goals of regulation and antitrust are identical. Each seeks to deliver goods or services from efficiently organized providers at the lowest possible price; one relies on the market while the other attempts to simulate it. This goal should inform the policy debate about the appropriate legal strictures on the ocean shipping industry. From this perspective, the antitrust issue boils down to a single question: How much, and what kind of competition will foster an efficiently organized (rationalized) ocean liner system, one able to deliver adequate, reliable services at the best possible rates?

Antitrust and Ocean Shipping - Background.

Although the ocean shipping industry has been regulated since 1916, it has not been subject to the type of oversight characteristic of most regulated industries. The right to enter ocean trades has generally been protected and rates have been controlled only at the margin. Maritime regulators have been concerned with conduct rather than structure, and have been authorized to prohibit carrier determined rates only when found to be so unreasonably high or low as to be detrimental to U.S. commerce. The Federal Maritime Commission and its predecessors have lacked the authority to insure the shipping public efficiently rationalized liner services and cost-based rates.

Since ocean carriers have been only partially subject to traditional regulatory oversight, they have also been only partially free of antitrust restraints. Prior to the 1961 amendments to the Shipping Act, antitrust immunity was conditioned on prior approval by the FMC of agreements that would otherwise violate the antitrust laws. Following the 1961 amendments, however, antitrust played an increasingly important and, to conference carriers, problematic role in the regulation of the ocean shipping industry.

Antitrust intruded into ocean carriage in two significant ways. First, competition was fostered by the related requirements that conferences remain open and that members to inter-conference agreements retain a right of independent action. Open conferences exacting monopoly rents would presumably attract new members, increasing capacity and pressing rates down. Alternatively, parties to inter-conference agreements would be tempted to act independently, shaving rates to capture market share. Second, the FMC interpreted the new "public interest" standard for approval of carrier agreements to embody the principles of the antitrust laws--the so-called Svenska standard. Carriers had the burden of proving that their anticompetitive agreements met some essential regulatory or commercial goal. Those very basic purposes of conferences--market allocation and rate-making--became suspect. Moreover, the administrative process became extremely burdensome.

The 1984 Act essentially eliminated the antitrust laws as such from the regulatory environment of the ocean shipping industry. Carrier agreements are no longer measured against the "public interest" standard, and administrative burdens have been minimized. The continued impact of market forces, however, was ensured primarily by sanctioning service contract and establishing a mandatory right of independent action on ten days notice. The law established a balance of power between carriers and shippers, and preliminary evidence suggests that competition has thrived in the industry, with rates falling and inefficient lines failing.

The Case for Antitrust

If competition appears to be working well (although carriers clearly question that characterization) in ocean shipping, why should anyone consider more aggressive antitrust enforcement in the industry? The easy answer is fairly obvious: If the circumstances that have generated competition in the industry change, conferences will have extraordinary power to unfairly exploit ocean shippers. Since 1984 the major American trades have seen the creation of "super conferences." Failures have also continued to occur, leaving fewer firms to coordinate their activities. Economic theory, therefore, suggests that conferences should be able to function as contrived monopolies if either demand increases significantly or liner firms somehow get capacity under control. Evaluation of performance under the 1984 Act, and recommendations for future policy adjustments, must be sensitive to the structural changes that have occurred and the potential they create for abuse in the future.

A less obvious reason for careful reconsideration of the role of antitrust in the liner industry is the evolution of the economics of ocean shipping and of antitrust jurisprudence. The past decade or two have been marked by dramatic changes in both. The industry appears to be undergoing major structural changes that may make traditional geographically-oriented liner cartels anachronisms. Evergreen Line's success, for example, demonstrates that many shippers are interested in commitments that extend to many trades. The direction and volume of trade flows have also fluctuated so frequently that liner conferences have been unable to deliver stability at a profit. As bureaucratic institutions mediating the desires of diverse members, conferences have been unable to make the quick adjustments often dictated by changing markets. Finally, despite the generous authority granted carriers in 1984 to regulate themselves, conferences have been unable to prevent constant expansion of capacity. They have, in short, been unable to rationalize the industry.

In response to economic problems that have continued to plague the industry since 1984, conference carriers, which equate their profitability with the success or failure of the law, seek greater restraints on shippers' rights. The balance of power should be legislatively shifted in the direction of carriers. Service contracts, therefore, should be eliminated or modified and the right of independent action restricted. Shipper's rights should be limited to address problems created by competitive carriers and the inability of liner firms to prevent the constant expansion of cargo space beyond shippers' needs. There are two serious problems with this approach: First, regardless of the nature of any legal restrictions, competition seems determined to break out in this industry; and, second, it is simply unfair to place shippers at a greater disadvantage because carriers with significant power to regulate themselves have failed to exercise restraint.

Advocates and detractors of antitrust often make a common error. They assume that competition is a creation of government, a product of the antitrust laws. In fact, of course, competition is part of the natural economic order and will exist in the absence of government interference or unusual structural conditions. Evidence of recent years suggests the conditions that once supported stable shipping cartels no longer exist. New and diverse technology and services, as well as chronic overcapacity, create a naturally competitive environment. Policies that are built on the perceived benefits of stable conferences, therefore, require close scrutiny.

If conferences are unlikely to play a constructive role in the development of the new economic order of the ocean shipping industry, policy makers must once again seek the proper mix of competition, government regulation and self-regulation. Modern antitrust law may provide the answer. As the Advisory Committee pursues its task, it will be important that it understand the most significant developments of modern antitrust jurisprudence. Properly understood, the antitrust laws no longer pose the threat to cooperative activities that was once the case.

Modern antitrust law, driven by proponents of the "Chicago School," is loath to deny any business the benefits of enhanced efficiency. Dominant firms may aggressively employ the benefits derived from their size and structure to secure and maintain market share. Joint and cooperative ventures necessary to create or effectively market a product or service may now escape condemnation, even for agreements once considered per se illegal. Output enhancing coordination generally enjoys a favored status. Output restricting conduct, the classic evil of cartels, has come to represent the principal focus of antitrust enforcement and condemnation.

How would the ocean shipping industry fare in a strict antitrust regime? Traditional carrier conferences seeking to limit available capacity and raise rates in effected trades would certainly violate the law. Modern technology and economic realities, however, may already have condemned them. If so, antitrust would facilitate the transition to a contemporary structure, one providing the flexibility required to meet more complex trade patterns and relationships. The antitrust laws would not necessarily dictate unbridled competition among all firms. They would, however, require evidence that cooperative ventures enhance competition, rather than simply stifle it. Consortia, for example, that pool costs and risks to make new technology or expanded service possible, and which impose reasonably necessary constraints on the parties, should survive antitrust scrutiny.

The alternative to greater reliance on antitrust principles is continuing efforts to save a structure that perhaps cannot be saved. The result will be years of frustration and increased legislative efforts to eliminate competition by limiting the rights of American shippers to negotiate favorable rates. Moreover, it will put government in the business of constantly adjusting the balance of power between shippers and carriers as market forces change the status quo. Battles that should be waged in the marketplace will take place in the halls of Congress, with independent carriers and small shippers under-represented in the struggle.

Conclusion

Like all sound policy choices, the decision to allow a cartelized ocean shipping system in American trades was premised on the assumption that the benefits gained through reliable service and stable rates would exceed the costs imposed through monopolistic rate-making. If conferences cannot provide the perceived benefits without blocking the development of more efficient industrial structures and relationships, the assumption may no longer be valid. The costs of maintaining an archaic system, rather than permitting the growth of an industry characterized by more limited consortia, niche-seeking competitors and flexible shipper-carrier agreements, likely exceeds any benefits, at least when measured by the industry's ability to deliver reliable, low-cost service. Experience under the 1984 Act may establish that it is time for a significant commitment to market forces in the ocean shipping industry--without the cumbersome bureaucratic procedures following the 1961 amendments. It is certainly time to reconsider a policy that is failing.

Session 4
Antitrust Issues for Ports and Non-Port Terminal Operators

Chairman: Robert D. Bourgoin, General Counsel
Federal Maritime Commission

The Port Authorities' Perspective
Hugh H. Welsh
New Jersey Solicitor
The Port Authority of New York and New Jersey

Port and Marine Terminal Antitrust Immunity and Regulation — Views from the Private Marine Terminal Operator Sector
Thomas D. Wilcox
Executive Director and General Counsel
National Association of Stevedores

An Evaluation of Antitrust Issues for Ports and Non-Port Terminal Operators
A. Roy Lavik
Legal Advisor
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Introduction

Robert D. Bourgoin
General Counsel
Federal Maritime Commission

This session, like the one preceding it, also deals with the subject of antitrust immunity, but in a different context. In addition to more routine arrangements with ocean carriers such as terminal lease agreements, ports and marine terminals frequently form associations and conferences to provide a forum for discussion and agreement upon marine terminal rates, rules, regulations and practices, and for exchange of other information. The broad issue before this panel today is whether ports and marine terminal operators should continue to be granted antitrust immunity and thereby permit these activities. This issue will be addressed this afternoon by representatives of the Federal Trade Commission and of two distinct segments of the port and marine terminal industries, each with its own interests and perspective -- the public port authority, and the stevedore/marine terminal operator.

The arguments for and against extending antitrust immunity to agreements between carriers and carrier conferences, do not necessarily apply to ports and marine terminals. Former FMC Chairman Alan Green, Jr. acknowledged this to Chairman Rodino of the House Judiciary Committee in 1983 during the 1984 Act legislative process, when he stated that "a different rationale would have to be offered as a basis for extending such immunity to agreements solely among terminal operators."

In the formation of the Shipping Act of 1984, the center of opposition to immunity for ports and marine terminals was the House Judiciary Committee. In its report on the bill which eventually became the 1984 Act, the Judiciary Committee cited the testimony of witnesses, including those representing the Federal Trade Commission and the Department of Justice, and concluded that "the arguments against such immunity (for terminal operators and owners)" were "strong, if not compelling." Notwithstanding its stated concerns, the

Judiciary Committee did not remove the immunity provisions from the bill. It did, however, succeed in expressly including as a topic in the mandated Section 18(a) review the issue of the "need for antitrust immunity for ports and marine terminal operators in their commercial relations with one another, and with ocean common carriers." So while the 1984 Act maintained the status quo in continuing immunity for ports and terminals, it also flagged the issue in a most conspicuous manner for resolution in the next legislative round.

The need for port-terminal antitrust immunity was questioned by the Commission itself some four years ago in an inquiry initiated to broadly review its regulation of ports and marine terminal operators. That proceeding yielded a full range of opinion on the subject. The overwhelming majority of participants -- mostly port interests -- strongly favored immunity for marine terminal agreements. They claimed that such immunity helped to provide stability and predictability; simplified the pricing process; curtailed destructive rate practices; assisted port planning; put ports on par with others who exercise collective powers; and served to protect ports who are, after all, public entities functioning only to serve their communities, not to reap profits.

There were, however, a few forceful voices opposed to the concept of port-terminal immunity. These included a port director who found marine terminal associations to have limited impact and effectiveness, and the FTC, which argued that immunity for such associations had seriously damaging anti-competitive consequences. The Inquiry Officer, former Commissioner Robert Setrakian, remarked that the issue is an "open question" which will be

> . . .resolved favorably to those who best prepare their case during the interim period prescribed by the Act. Those who delay discussion of the subject in the meantime may find themselves irreparably ill-prepared for the scheduled analysis and dialogue.

With this thought in mind, we turn now to our panel members.

The Port Authorities' Perspective

Hugh H. Welsh
New Jersey Solicitor
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Whether antitrust immunity is needed for ports and marine terminal operators is a question which invites clarification. By now we all understand that the applicability or nonapplicability of antitrust law to the port industry is directly related to the regulation or deregulation of that same industry. Recently, discussion of deregulation with the concomitant application of the antitrust laws has been accompanied by hackneyed expressions passed off as truisms. Who hasn't heard, for example, that "the free market is the best regulator" or "the antitrust laws will assure that the market forces will apply" or "why not let the market work?"

The current debate is not unlike a similar inquiry that took place early in the century prior to the passage of the 1916 Shipping Act.

As many of you know, prior to 1916 it had long been almost universal practice for american and foreign steamship lines engaging in ocean commerce to operate under conference arrangements and agreements. By 1916, it was recognized that such agreements might run counter to the policy of the antitrust laws; several cases then being pending against foreign and domestic carriers for alleged violations of the Sherman Act. The House Committee on Merchant Marine and Fisheries under its Chairman, Representative J.W. Alexander, undertook an exhaustive inquiry into industry practices which brought to light predatory practices designed to give the conferences monopolies. The Committee recommended that the system be placed under government supervision and that an administrative agency be invested with the power to approve and disapprove agreements rather than banning the use of the system.

In passing the Shipping Act of 1916, Congress followed the basic recommendations of the Alexander Committee. Subject to certain limitations, the Federal Maritime Board, the predecessor of the FMC was empowered to approve agreements not found to be unjustly or unfairly discriminatory in violation of Secs. 16 and 17 or otherwise in violation of the Act. Approved agreements were exempted from the antitrust laws.

Congress by providing in Section 15 that an approved agreement will not be subject to the antitrust laws, made it apparent that it assigned to the Commission, not to the Courts the task of initially determining which anti-competitive restraints are to be approved and which are to be disapproved under the general statutory guidelines. As the Supreme Court noted in Federal Maritime Commission v. Pacific Maritime Ass'n., 435 U.S. 54, 98 S. Ct. 927 (1978) "It is equally apparent that as a substantive matter, Congress anticipated that various anti-competitive restraints, forbidden by the antitrust laws in other contexts, would be acceptable in the shipping industry." Essentially, since the 1916 Shipping Act made lawful those agreements approved by the Commission, its effect was to vest the Commission with the power to shield those agreements from antitrust attack. It must be noted, however, that if such agreements are not approved by the Commission, however, the antitrust laws are fully applicable to them.

Congress, under the Shipping Act of 1984, once again evidenced a desire to achieve an appropriate balance between the need to recognize established industry practices and the need to prevent abuses of monopoly power. Like the Shipping Act of 1916, regulation by the FMC under the Shipping Act of 1984 appears to recognize economic reality.

Some have observed, and I believe correctly, that Port Authorities have not so far displayed an extraordinary amount of interest or concern in the discussion taking place regarding antitrust immunity or the possible loss thereof. I've found that the lack of concern is based in some part on apathy existing because of years of regulatory control and in part because of a lack of understanding of the antitrust laws, their applicability to public ports and a clear analysis of the implications of possible future applicability. It is much like asking an eskimo about his concern with malaria. Never having been exposed to it, he will never have developed an interest.

Historically, the antitrust laws have not been of major importance or of particular concern to Ports in their operations. Because the approval of the Federal Maritime Commission was required prior to the effectiveness of many marine terminal and tariffs, antitrust immunity was afforded to ports and marine terminal operators thus, diminishing the need to focus on the significance of such legislation.

Over the years, the major objection by Ports to regulatory process has been not the fact of regulation itself but the fact that the procedure provided was cumbersome, time consuming and did not realistically consider the exigencies and economic realities of port operations. To a great extent these objections have been addressed legislatively in the Shipping Act of 1984; as an example by the exemptions provided in Section 8, Tariffs and Section 6, Action on Agreements. In addition, the Commission itself has done much to expedite the approval process of marine terminal agreements, see eg. Marine Terminal Agreements, Docket No. 85-10, 46 CFR Ports 516, 559 and 572.

The reaction of some Port officials to continued regulation has been more emotional than rational and abates upon reflection. As an example, I, like most port attorneys, have heard port officials remark that it's no one else's business what the terms of a transaction are or that the FMC should not meddle in our business. They eventually realize, however, that virtually all public port agencies are subject to some kind of freedom of information provision so nothing is truly confidential, those who seek confidentiality also want to discover what the competitor is doing, and if the FMC does not "meddle" competitors, various interest groups, the Justice Department or the Federal Trade Commission might and in a forum which provides a far more hostile environment.

During the discussions relating to the passage of the Shipping Act of 1984 and the Notice of Inquiry and Intent to Review Regulation of Ports and Marine Terminal Operators, Docket No. 83-38 comments of various ports were received which are germane to the issue now being discussed. Most commenting ports recognized a continuing need for regulation and the fact that regulation was linked to the antitrust laws. The Ports at that time identified certain activities which required antitrust immunity including but not limited to ratesetting, allocation of customers or markets, and reciprocal exchanges of information among competitors. It has been suggested that without antitrust immunity, rate wars would ensue driving terminal operators out of business and causing widespread instability in the industry. In addition, since steamship lines have legal sanction to set rates collectively, so then should marine terminal operators which the steamship lines utilize. The cumulative reasons it was felt provide a substantial basis for supporting the continuation of regulation and antitrust immunity.

An analysis of the comments made by public port agencies will, I believe, reveal a common thread running through all of them. One must realize that public ports are not trucking companies, telephone companies, or brokerage firms nor do the services they supply and their other characteristics make them akin to machine shops, hotels and repair facilities as some have suggested. Public ports are public agencies which carry out a legislative mandate imposed by the legislation to which they owe their authority to act. While the port industry is intensely competitive, the decisions of public port officials regarding their operation is directed not only by market considerations but by public policy. Port development is not an investment of private capital which would carry with it the inevitable application of market principles. Rather the development and operation of public port facilities are undertaken with public funds and quite often involve matters of public policy that transcend strictly economic considerations. In short, suggestions that we should let the market control simply are not relevant in matters where the market is but one factor and cannot by itself control.

The public port industry has identified a number of clear advantages to the retention of the current regime of regulation with antitrust immunity. All of these must be considered from the perspective of an industry that invests millions of dollars of public funds annually and whose members for the most part are carrying out the mandate of the States and Cities which created them.

Continued antitrust immunity permits public ports to better plan the allocation and investment of funds for the development and operation of public port facilities. Rates and service can be rationalized and customers and markets allocated thereby improving the efficiency of investment. Modern ports no longer rely on cargo captive to them but must fiercely compete with other ports. Rate wars within a port have the potential of destroying a port's ability to compete with neighboring ports hence, a system which permits a port to avoid destructive rate wars and plan for the efficient development and operation of its facilities will over the long term also foster inter port competition.

The current regulatory scheme has provided a comprehensive system applicable uniformly to all which also provides a broad information network accessable from a central source. This in a very real sense stimulates competition. The alternative would be to substitute a system requiring information gathered under a wide variety of public information statutes and regulations that are anything but uniform.

It has been suggested that public port agencies should, in weighing the advantages of continued regulation and antitrust immunity consider the possibility of deregulation with continued antitrust immunity, a regulatory nirvana of sorts. This inticing prospect has been held out to port authorities through a suggestion that the Local Government Antitrust Act, 15 U.S.C. 36 or the "state action" doctrine might provide the best of both worlds. A discussion of these possibilities reveals if nothing else, the uncertainty of immunities developed through judicial opinion.

In 1943, the Supreme Court in the Parker v. Brown, 317 U.S. 341 87 L. Ed. 315, 63 S. Ct. 307 held that the Sherman Antitrust Act was not intended to prohibit States from imposing restraints on competition. Contrary to common misconception, the Parker or state action doctrine is not founded upon a holding by the Court that Congress lacked the authority to apply the antitrust laws to the States. On the contrary, the Court recognized that the State's program was anti-competitive and it assumed that Congress "in the exercise of its commerce power, [could] prohibit a state from maintaining [such] a stabilization program ..." Id. at 350, 87 L. Ed. 315, 63 S. Ct. 307.

The Court, however, concluded that:

"The Sherman Act makes no mention of the State as such, and gives no hint that it was intended to restrain state action or official action directed by a State. The Act is applicable to 'persons' including corporations (Sec. 7), and it authorizes suits under it by persons and corporations (Sec. 15). . .

There is no suggestion of a purpose to restrain state action in the Act's legislative history."

The Supreme Court went on to develop what has become known as the state action doctrine based on its then existing concept of federalism stating:

"We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or its agents from activities directed by its legislature."

The state action doctrine is in fact not based upon an affirmative declaration of immunity but rather an implied exemption to the antitrust laws. The Court in refusing to find in the Sherman Act "an unexpressed purpose to nullify a State's control over its officers and agents" essentially relied on Congressional silence. An understanding of the state action doctrine I believe is necessary for Port Authorities to appreciate that a reliance on the doctrine, particularly during any legislative process amending the Shipping Act to deregulate the industry, has certain perils. A statement in an amendment to the Shipping Act explicitly setting forth the intention of Congress to subject port authorities to the antitrust laws could quickly dispel the implication on which Parker v. Brown and its progency are based.

For years "state action" was accepted as an available defense for a variety of governmental activities that might otherwise have created antitrust problems. Port Authorities as agents of the states or their subdivisions felt free to conduct their activities without concern that the anti-competitive effects of their conduct would give rise to antitrust liability. This, combined with the regulatory scheme in place pursuant to the Shipping Act of 1916, left port authorities with little concern with antitrust laws.

In 1978, the Court redefined its concept of federalism culminating a trend developing over a number of years, and in City of Lafayette v. Louisiana Power and Light Co., 435 U.S. 389, 98 S. Ct. 1123, 55 L. Ed. 2d 364 (1978) noted that:

> "In light of the serious economic dislocation which could result if cities were free to place their own parochial interests above the Nation's economic goals reflected in the antitrust laws, we are especially unwilling to exclude anti-competitive municipal action from their reach."

The Court observed that under our constitutional system only the federal government and the states are "sovereign" entities and that states' subdivisions generally have not been treated as "equivalents of the states themselves". The Court then concluded that "the Parker doctrine exempts only anti-competitive conduct engaged in as an act of government as sovereign, or, by its subdivisions pursuant to a state policy to displace competition with regulation or monopoly public service". 435 U.S. at 413

In 1978, a unanimous Court clarified City of Lafayette in California Retail Liquor Dealers Assoc. v. Midcal Aluminum, Inc., 445 U.S. 389 applying a two-pronged test to determine immunity in a state action case involving a state action exemption claim by a private party. First the displacement of competition with regulation must be "clearly articulated and affirmatively expressed as state policy" Second, the state must actively supervise any private conduct. It has been held, however, that the second prong of the Midcal test is inapplicable to municipalities. Although its anti-competitive conduct must be taken pursuant to a clearly articulated state policy, a municipality need not be supervised by the State in order to qualify for Parker immunity. Hallie v. Eau Claire, 471 U.S. 416, 85 L. Ed. 2d 24, 105 S. Ct. 1713. The Supreme Court relying on this line of cases found that collective ratemaking activities of rate bureaus, composed of motor common carriers operating in four southeastern states were immune from antitrust liability under the state action doctrine even though such activities were permitted but not compelled by the states. Southern Motor Carriers Rate Conference, Inc. v. United States, 471 U.S. 48, 85 L. Ed. 2d 36, 105 S. Ct. 1721 (1985). The Department of Justice argued to the contrary.

In sum, as the case law now stands for a municipal port authority to claim a state action exemption it must show that the anti-competitive activity complained of was undertaken pursuant to a clearly articulated state policy. Should the Court in renewing the agency's enabling legislation find anything less then the required clearly articulated state policy, the port authority may be subject to the antitrust laws.

Because of the uncertainty left in the wake of City of Lafayette, in 1984 as a result of strong lobbying by local governments, the Local Government Antitrust Law was enacted by Congress. The Act which was codified at 15 U.S.C. Sec. 36 provides in part

> "No damages, interest on damages, costs, or attorney's fees may be recovered under section 15, 15a or 15c of this title from any local government, or official or employee thereof acting in an official capacity."

The Act defines "local government" as a City, county, parish, town, township, village, school district, sanitary district, or any other general or special purpose political subdivision of one or more states." The definition does not include states or their agencies with state-wide jurisdiction the feeling being that such entities receive immunity directly from "state action" doctrine recognized by the Supreme Court in Parker v. Brown. Hence, municipal port authorities which may not be the beneficiaries of the "state action" doctrine may at least have some solace in knowing they may be subject only to injunctive relief.

Port Authorities, with good reason cannot be sanguine about continuing antitrust immunity if such immunity is eliminated from the Shipping Act. Assurances that port authorities need not worry about the loss of immunity because of the state action doctrine or Municipal Immunity Act must, despite what I am sure are sincere and accurate statements regarding the state of the law, be viewed with some skepticism. It is what has not been said that raises concerns. As we have seen such immunity could easily be lost by one sentence in an amended Shipping Act.

Even if the applicability of the state action doctrine and the statutory municipal immunity were guaranteed in any future legislation, a proposal we have not heard from anyone, the loss of a uniformly applicable antitrust immunity could lead to inequitable results. Consider the fact that marine terminal operators could very well find themselves subject to the antitrust laws to varying degrees. Port Authorities able to establish a clearly articulated state policy permitting the displacement of competition would be totally immune. Municipal port authorities may find themselves subject to the antitrust laws but with the plaintiff being limited to injunctive relief. Competing private marine terminal operators would of course be subject to the antitrust laws.

Some have expressed surprise that port authorities were not quick to accept or reject the possibility of eliminating antitrust immunity and deregulating the industry. It is not a lack of interest but a lack of experience with the antitrust laws that has caused uncertainty. Clearly, easy answers are not available and the public ports of this country will continue to enthusiastically participate in the continuing discussions but with a healthy skepticism.

Port and Marine Terminal Antitrust Immunity And Regulation — Views From the Private Marine Terminal Operator Sector

Thomas D. Wilcox
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National Association of Stevedores

When Congress enacted the Shipping Act of 1984 it established an Advisory Commission to gather data and report to Congress about various aspects of the new Act. One aspect is the "need for antitrust immunity for ports and marine terminals" (sec.18 (c)(3)(B)). However, that issue should be placed in proper context.

The purpose of ports, marine terminals, carriers, freight forwarders, and the Federal Maritime Commission itself is to ensure the efficient, economic and safe transportation by water of the foreign and domestic commerce of the United States. Thus, the issue before us is whether antitrust immunity for ports and marine terminals is necessary to ensure the efficient, economic and safe transportation by water of the nation's foreign and domestic commerce. Which takes precedence-efficient, economic and safe transportation of commerce or the theory of unregulated competition?

To understand fully what antitrust immunity means to marine terminal operators subject to the Shipping Act of 1984 and regulation by the Federal Maritime Commission, it is necessary first to explain the marine terminal industry in the U.S., especially the differences among types of terminal operators. These differences stem from a variety of causes, but primarily from (1) type of ownership, (2) nature of cargo handled, (3) and facility lease terms.

Ownership--There are three major types of ownership and each has different economic implications. Some marine terminals are privately owned by companies whose only business is operating a marine terminal and stevedoring company. Some are owned by public port authorities, some of which may operate the marine terminal, and some of which lease their facilities to private operators. The third type is a common carrier by water which may operate the terminal only in support of its carrier operations or it also may offer its services to other carriers. Of the three types only the private independent operator derives all of its revenue from marine terminal/stevedoring operations.

Nature of cargo handled--Excluding for this discussion bulk cargoes, a major factor in terminal differences and views about antitrust immunity is whether a terminal handles break bulk or intermodal container cargo. In a predominantly break bulk operation the terminal derives its revenue in two almost equal parts. One part comes from stevedoring charges assessed against the carrier pursuant to unregulated contracts, written or oral. The other comes from terminal service charges assessed by tariff against the shipper or consignee. The dividing line between the types of services and charges remains the traditional "point of rest", which has been defined by the Federal Maritime Commission as:

> "that area on the terminal facility which is assigned for the receipt of inbound cargo from the ship and from which inbound cargo may be delivered to the consignee, and that area which is assigned for the receipt of outbound cargo from shippers for vessel loading." (46 CFR Part 515.6(c)).

Intermodal container movements to a large extent have obfuscated the "point of rest", and carrier/terminal/stevedore contracts have transferred some terminal services to the carrier's account from the shipper/consignee account. Today, the terminal operator/stevedore for a container carrier or carriers derives the bulk of its revenue from the ocean carrier pursuant to contracts which, to date, are unregulated.

Lease terms--Since most marine terminal property in the U.S. is publicly owned and much of it leased to private operators (independent terminal operators or carriers), the terms of the leases often affect the amount of revenue the tenant terminal operator realizes. Some port authority-lessors prescribe the amount of wharfage and dockage that may be assessed and how much is to be paid to the landlord and how much may be retained by the tenant. Some publish a complete terminal tariff whose terms must be observed and enforced by the tenant terminal operator. It is not unusual for a marine terminal operator to have all or a major portion of its terminal service charges set by an outside party or parties -- the port authority landlord and/or its carrier customer.

We must look also at competitive pressures. Marine terminal operators compete not only with other marine terminal operators within a common port, but they must compete also with marine terminal operators in other nearby ports within and without the U.S.; of the latter, especially Canada, and, to a lesser degree, Mexico. Competition is affected greatly when one competitor is subsidized by public funding and tax exempt financing, or when terminal operations are simply a cost factor to the terminal operator's carrier parent and are not intended to be an independent profit center.

Whatever the form of ownership or type of cargo may be, competition among marine terminal operators and stevedores is fierce and has not been significantly reduced with the limited antitrust immunity afforded by the Shipping Acts. In a few ports private marine terminals have been able to establish joint terminal tariffs by which a limited number of terminal services are assessed the same rate to carriers, shippers and consignees. This has occurred mostly with respect to break bulk cargo. Except for truckloading/unloading there is no such arrangement for intermodal container movements at the marine terminal level although some carrier conferences do cover terminal services in carrier conference tariffs.

Let us now look at the marine terminal operators' antitrust immunity today. It is not the same for all types and comes from different sources.

(1) Private independent--the sole source of its antitrust immunity comes from sec. 4(b) of the Shipping Act of 1984 which permits marine terminal operators (if agreement filing procedures are followed) to (a) discuss, fix, or regulate rates or other conditions of service, and (b) engage in exclusive, preferential, or cooperative working arrangements.

(2) Carrier operators--the terminal operating subsidiary derives its antitrust immunity from the same sec. 4(b), but its parent carrier also derives antitrust immunity from sec 4(a) of the Act. It is that section of the Act which permits carriers to discuss, fix, and regulate rates or conditions of service to be observed and enforced by terminal operators at which the carrier parties call. However, carriers may not jointly

establish, operate, or maintain a marine terminal within the U.S. with antitrust immunity because of sec. 7(b)(3) of the Act. Federal Maritime Commission rules (46 FCR Part 572.202(d)) state that its rules pertaining to the filing of agreements under the Shipping Act of 1984 do not apply to "Any agreement among common carriers to establish, operate, or maintain a marine terminal in the United States."

(3) <u>Public port authorities</u>--derive antitrust immunity from two sources: sec. 4(b) of the Shipping Act, and the "state action" exclusion from the general antitrust laws as enunciated in <u>Parker vs. Brown</u>, 371 US 341 (1943) and subsequent cases. Not only does the public entity receive antitrust immunity under the "state action" doctrine but so too does anyone contracting with the public entity, <u>Wiggins V. Massachusetts Port Authority</u>, 362 F. 2d 52 (1st. Cir.) cert. den 385 US 947. The extent of the activities to which that antitrust immunity applies depends upon the state enabling statute, and whether that immunity attaches to rate setting or price fixing between or among competing public ports is doubtful.

So, deregulating marine terminal operators and removing their limited antitrust immunity afforded by the Shipping Act is not the simple task that was suggested by the Department of Justice back in 1983. Its suggestion merely to eliminate the term "marine terminal operator" from the Shipping Act does not reach public port authorities completely and would permit carriers to regulate terminal practices and rates through carrier agreements.

If the Department of Justice's proposal were to be adopted, terminal leases between public ports and private operators would be exempted from both FMC regulation and the antitrust laws. Terminal leases between private parties who are not carriers would be unregulated and subject to the antitrust laws. Terminal agreements between carriers would remain unregulated and subject to the antitrust laws. Terminal leases between carriers and public ports would remain regulated and exempt from the antitrust laws. Carriers through carrier conference agreements could set terminal rates with antitrust immunity; public ports in concert probably could not; and private terminal operators definitely could not.

Should marine terminal operators continue to have antitrust immunity for regulated operations?

In order to answer that question one must focus on what is meant by marine terminal operator and which of its operations, if any, are to be regulated and of those which are entitled to antitrust immunity. To be precise, are stevedoring operations of marine terminal operators included?

Since the Shipping Act of 1916 was enacted the Federal Maritime Commission and its predecessors have not exercised regulatory authority over stevedores or the stevedoring operations of marine terminal operators. The term "stevedore" or "stevedoring" does not appear in either the 1916 or the 1984 Act. To date, Congress has limited its interest to the providers of "facilities." Nothing in the current statutory definition of "marine terminal operator" pertains to services. However, part of the Federal Maritime Commission's pending Fact Finding Investigation No.17 is the question of its jurisdiction over activities which many believe to be stevedoring. What the Commission ultimately decides will be significant with respect to the question now before us.

Historically the dividing line between stevedoring and terminal operations has been the "point of rest" as mentioned earlier. Activities which take place between the "point of rest" and the vessel were and are stevedoring. They have not been subject to regulation nor granted any antitrust immunity. Activities which take place between the "point of rest" and any other place on the terminal were and are terminal operations over which the Commission has exercised its regulatory jurisdiction. One of the questions posed in Fact Finding No. 17 is whether that dividing line is still valid.

Perhaps the better dividing line today should be that between services rather than places. Stevedoring would be those services rendered and billed to the carrier by contract, written or oral. Terminal services would be those rendered and billed to the cargo, shipper or consignee. Stevedoring, as so defined, would remain unregulated and not entitled to any antitrust immunity. Marine terminal operations are another matter.

Let us look at what services are performed between the time cargo arrives at the terminal and the time it is positioned for the stevedoring move to and onto the ship, and what is done to or for the cargo between the time the stevedoring process of unloading is completed and the time the cargo leaves the terminal.

EXPORT CARGO--is received by the terminal. A terminal receipt is issued on behalf of the carrier. If it is a container, cargo is weighed as required by OSHA. The cargo is moved to a convenient place on the terminal to await the arrival of the ship. If the cargo requires adjustment of packaging (coopering) in preparation for the sea voyage, that is done by the terminal operator. Security must be provided during the time cargo is on the terminal. When the ship arrives and is ready to receive the cargo on board, the stevedoring begins.

IMPORT CARGO--is received from the stevedore after discharge and is held until the proper person comes to pick it up. Delivery of the cargo to the proper person is a terminal operation, and, except for cargo moving under a through or intermodal bill of lading, services are for the account of the cargo interest. The delivery process is complicated by government inspection, Customs clearances, checking the cargo for amount and physical condition, weighing if necessary, and temporary holding (free time or pier storage), the extent of which may be prescribed in the carrier tariff or by the terminal operator. In addition, cargo must be sorted by mark and count (breakbulk) and some may have to be removed from the container and separated for various consignees. Some charges are paid by the carrier and some by the cargo depending upon the ocean bill of lading or the agreement between the carrier and the terminal operator.

Whether it be import or export cargo, the shipper or consignee of maritime cargo, excluding intermodal shipments, may be faced with a wide variety of terminal charges, the nature of which depends to a great extent on the cargo itself and its packaging, the length of time it remains on the terminal, and the extent to which government agencies want to inspect it.

Current FMC regulations (46 CFR Par 515) require marine terminal operators to file tariffs which include rates for all services relating to the handling of cargo, except for services performed for water carriers pursuant to negotiated contracts and for the storage of cargo and related services by public warehousemen pursuant to storage agreements covered by an issued warehouse receipt.

Since 1916, services to the shipping public have been regulated and competing terminals have been permitted to agree upon and charge like charges for like services. In short, cargo interests know what they are expected to pay for which service regardless of which terminal in the port the carrier selects to load or unload the cargo. In common carriage, or liner carriage, the shipper or consignee usually does not have the option to select the terminal. He selects the carrier, and the carrier selects the terminal. In many cases the shipper or consignee doesn't know which terminal will handle its cargo when it makes the contract of carriage with the ship, and usually doesn't care. The only reason the cargo interest comes to a specific terminal is because the carrier has elected to service the cargo there. For breakbulk cargoes there is a more direct relationship between export shippers and terminal operators.

What must be kept in mind is that the competition for general cargo in the common carriage arena is primarily between ocean carriers. Terminal operators primarily compete for the services of the common carrier. That competition may be intra- or inter-port. It may be between coasts, or between countries. In most cases the shipper does not care who wins the competition so long as it gets the best transportation rate or shipment time.

We come then to the Department of Justice and its question "Will the markets for marine terminal services work without government regulation?" Will there be a "market failure", the classic example of which, says Justice, is a "natural monopoly" which, if unregulated may produce too little and charge too much. If regulation can mitigate those effects without adding too many other costs, then regulating is appropriate in the view of Justice.

If the port and marine terminal industry were deregulated the present competitive regime would continue in the short run. Public ports would still be subject to the same political and economic pressures; and private terminal operators, to their economic pressures. It is unlikely that deregulation would attract new competitors because of the high investment cost and geographic limitation on port development.

Deregulation, then, in the short term only would increase the intensity of the competition among present competitors. Unchecked, that competition in the long term could reduce the number of competitors and restrain port facility expansion and modernization. In the long term one could predict that the survivors of the competitive fallout will realize a better return on investment simply because of reduced competition.

But there is a caveat. The total volume of cargo available must increase, and carrier and port over-capacity must decrease before any competitor can enjoy a reasonable profit. Depressed ocean freight rates mean lower port and terminal revenues. That means increased competition and at times unreasonable practices by those who remain in the market.

With deregulation there would be a competitive marine terminal industry, but the competition most likely would be driven by politics - not economics.

An Evaluation of Antitrust Issues for Ports and Non-Port Terminal Operators

A. Roy Lavik
Legal Advisor
Federal Trade Commission

I must preface my comments with a, perhaps, tedious because repetitious but essential statement. I speak only for myself, not the Federal Trade Commission ("Commission") any individual Commissioner or the Bureau of Competition. Hopefully, even with this disclaimer, my views will be helpful to you.

I have been asked to discuss the question of whether ports and terminal operators should continue to have immunity from the antitrust laws. This is an issue that the Commission has a strong interest in for two reasons. The more general one is that the Commission is charged by Congress with implementing the antitrust laws. This leads it to evaluate the competitive implications of business practices both when engaged in by private parties and by state and local units. As you might surmise, this evaluation includes the examination of various immunities from the antitrust laws with a view to determining their continued need.

More specifically though, the Commission has a statutory role under the Shipping Act of 1984 ("Act") to play in this area. As you know, the Act mandates that the Federal Maritime Commission ("FMC") report in 1989 on, among other issues, "the need for antitrust immunity for ports and marine terminals."[1] The Act directs the FMC to consult the Commission, among others, regarding the report, and the Commission must furnish an analysis of the Act to Congress. To fulfill this obligation, Commission staff are presently reviewing relevant literature. The staff has not yet provided its final views but there are some tentative, personal observations that I can pass along.

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[1] 46 U.S.C. 1717.

Ports and terminal operators may be immune from the antitrust laws under certain circumstances, aside from the Act's exemption, due to the operation of the state action doctrine. The landmark decision of Parker v. Brown, 317 U.S. 341 (1943) declared that the state action doctrine exempted from antitrust attack "state action or official action directed by a state." at 351. The doctrine, as described in two recent Supreme Court cases,[2] and has been extended to local governmental units carrying out activities authorized by the state. Additionally, private parties, such as many terminal operators, may be immune if their challenged activities are both authorized and actively supervised by the state.

The Local Government Antitrust Act of 1984 ("Government Act")[3] affords additional protections to local government unitssuch as ports. Under it, no person may recover antitrust damages from any local government. Injunctive relief is still available in appropriate circumstances. However, the Government AT Act eliminates the specter of large damage awards. The point of all this is that there are traditional exemptions embedded in antitrust law that are available to ports and terminal operators aside from that provided by the Act. Congress was correct in raising the question of whether ports and terminal operators still need the specific exemption of the Act.

Many parties unfamiliar with the antitrust laws have expressed unease with the possible application of the antitrust laws to ports and terminal operators. They fear that these laws would place many of their practices in a procrustean bed ill suited to the appreciation of their potential benefits. These parties believe that antitrust tribunals would not permit them to show the efficiency enhancing attributes of their various business arrangements. This fear is overdrawn.

The antitrust laws do condemn certain practices as illegal per se without inquiry into their economic effect or justification. In recent years, however, the courts have tended to rely much more heavily on economic analysis in evaluating challenged practices. As a result, the courts have shown a tendency to circumscribe the scope of the per se rules to avoid condemning conduct that appeared to have significant efficiency benefits. Instead the Courts apply a rule of reason analysis which allows them to evaluate the economic implications of the conduct and to condemn it only if it is unreasonable. A former Director of the then Office of Policy Planning and Evaluation of the Federal Trade Commission characterized the current judicial approach as follows:

> Many courts are reluctant to strike down transactions that are obviously wealth producing. When confronted with efficiency creating arrangements they will often try to avoid holding them illegal per se.

(Liebeler, 1983 Economic Review of Antitrust Developments: The Distinction Between Price and Nonprice Distribution Restrictions, 31 UCLA L. Rev. 384, 386 (1983) (footnote omitted).)

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[2] United States v. Southern Motor Carriers Rate Conference, 417 U.S. 48 (1985) Hallie v. Eau Claire, 471 U.S. 34 (1985).

[3] 15 U.S.C. 35.

For example, in Continental T.V. Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977), the Supreme Court eliminated the per se condemnation of nonprice vertical restraints because the Court felt such restraints had substantial efficiency) creating potential. Two years later, the Supreme Court again emphasized efficiency considerations in Broadcast Music, Inc. v., Columbia Broadcasting Sys., Inc., 441 U.S. 1 (1979). The Court refused to apply the per se rule to condemn blanket nonexclusive copyright licenses even though those licenses necessarily fixed prices for individual copyrighted works. The Court indicated that potential efficiencies were important in determining whether to characterize the practices as per se illegal price fixing:

> More generally, in characterizing this conduct under the per se rule, our inquiry must focus on whether the effect and, here because it tends to show effect . . . the purpose of the practice is to threaten the proper operation of our predominantly free-market economy -- that is, whether the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output, and in what portion of the market, or instead one designed to "increase economic efficiency and render markets more, rather than less, competitive" . . . .
>
> The blanket license, as we see it, is not a "naked restrain[t] of trade with no purpose except stifling of competition," . . . but rather accompanies the integration of sales, monitoring, and enforcement against unauthorized copyright use.

(441 U.S. at 19-20 (citations omitted).)

The Court repeated this theme in two subsequent decisions. The first NCAA v. Board of Regents, 468 U.S. 85 (1984) involved an attack on the NCAA's plan for televising its members football games. The Court noted that the plan both limited the output of televised football games and affected the price charged for the games. Such effects had been thought to be a classic basis for the imposition of the per se rule. The Court declined to so rule. It stated:

> Nevertheless, we have decided that it would be inappropriate to apply a per se rule to this case. This decision is not based on a lack of judicial experience with this type of arrangement, on the fact that the NCAA is organized as a nonprofit entity, or on our respect for the NCAA's role in the preservation and encouragement of intercollegiate amateur athletics. Rather, what is critical is that this case involves an industry in which horizontal restraints on competition are essential if the product is to be available at all.

(at 100-01 (footnotes omitted).)

The second decision Northwest Wholesale Stationers, Inc. v. Pacific Stationary & Printing Co., 472 U.S. 284 (1985), challenged the expulsion of a member from a wholesale purchasing cooperative as a group boycott thought by many to merit per se treatment. The Court, though, reversed the Court of Appeals decision in deciding that the case should be tried under a rule of reason rubric. The Court observed that cooperative arrangements such as Northwest's were "not a form of concerted activity characteristically likely to result in predominately anticompetitive effects. Rather, such cooperative arrangements would seem to be 'designed to increase economic efficiency and render markets more, rather than less, competitive.'" at 295. Again, the Court resisted automatic condemnation of the challenged practice and instead evaluated its potential efficiencies.

The decisions illustrate the significant trend away from perfunctorily finding per se violations in cases involving substantial efficiencies. Ports and marine terminal operators should therefore not fear that the antitrust laws would automatically strike down any practice that dampened rivalry to any degree, regardless of its net benefits or procompetitive effects. To the contrary, practices that do not fall within the core prohibitions of the per se rules and may create significant efficiencies appear increasingly likely to be evaluated under the rule of reason.

In an important sense, the rule of reason is the fundamental test of antitrust illegality.[4] Under this test, conduct violates the antitrust laws only if its anticompetitive effects (e.g., reduced output) outweigh its procompetitive effects (e.g., increased productive efficiency). James C. Miller III, then Chairman of the Federal Trade Commission, described the role of the rule of reason test in antitrust law in the following way:

> In analyzing vertical restraints, as with any other antitrust problem, our primary inquiry is whether the arrangement seems likely to facilitate the restriction of output (and thus decrease consumer welfare) or whether it tends to increase efficiency (and increase consumer welfare). If the arrangement contributes to the restriction of output and has no efficiency creating potential, a per se rule should be applied. If it seems likely to increase efficiency and has no output-restricting potential, the arrangement should not be a matter of antitrust concern. If it has efficiency creating potential but also seems able to contribute to the restriction of output, we must judge which of those effects is preponderant. This, of course, is done under a rule of reason analysis.

(Liebeler supra at 394 n. 57.)

Under the rule of reason, therefore, ports and marine terminal operators could present the business justifications for their practices. Since most business conduct has traditionally been subject to this rule, and its reach seems to be expanding, most port and marine terminal conduct is likely to be evaluated under the rule of reason in the absence of antitrust immunity. The vast majority of American businesses manage to operate efficiently under this standard. Ports and marine terminal operators, therefore, have little to fear from this application.

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[4] See Standard Oil Co. v. United States, 221 U.S. 1 (1911); Chicago Board of Trade v. United States, 246 U.S 231 (1918).

To give greater concreteness to this somewhat abstract discussion, let me discuss two practices used by some ports and terminal operators and their probable evaluation under the antitrust laws. The first practice is the use of long term contracts.

Some ports and marine terminal operators have expressed concern about the antitrust laws' impact on their ability to enter into long term contracts with carriers. They believe that such contracts would increase earnings stability and thereby facilitate raising funds in the capital markets. In addition, there is evidence that such contracts can enhance the efficiency of port operations.

The antitrust laws would evaluate a long term contract between a port or terminal and a carrier under the rule of reason. This standard permits a proponent of a practice to show that the practice creates efficiencies that predominate over its anticompetitive effects. In addition, there is unlikely to be substantial antitrust risk in a long term contract that is not effectively or largely exclusive. The antitrust laws would not ordinarily prohibit, for example, a lengthy contract between a carrier and a marine terminal operator that does not involve a substantial portion of the terminal operator's capacity.

Even if the contract gives the carrier exclusive access to a terminal or port, it would still be analyzed under the rule of reason. See Jefferson Parish Hospital District No. 2 v. Hyde, 466 U.S. 2 (1984) at 30 n. 51. In evaluating long term, exclusive contracts under this standard, the Supreme Court has long recognized the efficiency)creating value of such contracts. For example, in Tampa Electric Co. v. Nashville Coal Co., 365 U.S. 320 (1961), the Court upheld a twenty year contract between a coal supplier and a utility involving $128 million in 1960 dollars. Conservatively, the contract represented $400 million in present dollars. Despite this large dollar amount and substantial contractual length, the Court dismissed an antitrust challenge to the contract.

Recently, a concurring opinion of four Justices again noted the value of long term exclusive contracts. The Justices observed that exclusive dealing arrangements "may be substantially procompetitive by ensuring stable markets and encouraging long term, mutually advantageous business relationships." Jefferson Parish Hospital District, No. 2 v. Hyde, (concurring opinion) supra at 45. Accordingly, ports and marine terminal operators would ordinarily have the opportunity under the antitrust laws to establish the efficiencies resulting from their long term, exclusive contracts.

Besides recognizing the potential value of long term, exclusive contracts, the courts have noted that such contracts raise competitive problems only under specified circumstances. The contracts must be of significant duration, and must foreclose a substantial portion of the relevant market to competitors.[5] Although the courts have not made clear how much foreclosure is substantial, an exclusive contract between a carrier and a terminal is unlikely to

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[5] For a good, recent survey of the law of exclusive dealing, see generally Beltone Electronics Corp. et al., 100 F.T.C. 68, 197-204 (1982).

involve substantial foreclosure if the terminal competes with many other terminals in the same port and numerous terminals in other ports. In these and other circumstances in which an exclusive contract does not significantly disadvantage rivals, the antitrust laws would not bar the arrangement.

The second practice to discuss is the exchange of information between ports and terminal operators. Some have asserted that the exchange of information such as present costs, current prices, and future demand between ports and marine terminal operators was beneficial in view of the swiftly evolving nature of the shipping industry. They believe that the antitrust laws would prevent all such information exchanges.

Many types of information exchanges, however, have been upheld by the antitrust courts. The decisions have recognized that the exchange of information may serve useful purposes. As a result, the courts have not applied a per se analysis even to the exchange of the most competitively sensitive data, current price information. The Supreme Court has stated:

> The exchange of price data and other information among competitors does not invariably have anticompetitive effects; indeed such practices can in certain circumstances increase economic efficiency and render markets more, rather than less, competitive. For this reason, we have held that such exchanges of information do not constitute a per se violation of the Sherman Act.

(United States v. United States Gypsum Co., 438 U.S. 422, 441 n. 16 (1978). Accordingly, antitrust tribunals would ordinarily consider the business justifications for information exchanges among port and marine terminal operators.

It should be noted, however, that not all information exchanges create the same antitrust risks. Many trade associations collect and disseminate general management information or aggregated historical data without significant antitrust risk. In contrast, a direct exchange among competitors of recent transaction prices would pose more substantial antitrust concerns, since such information exchanges can facilitate price fixing. Similarly, an information exchange is more likely to violate the antitrust laws in an industry whose structure and past conduct suggest a significant risk of price fixing or other collusion, than in an industry where effective collusion seems unlikely. See generally, United States v. United States Gypsum Co., supra; L. Sullivan, Handbook of the Law of Antitrust 265-75 (1977); Posner, Information and Antitrust: Reflections on the Gypsum and Engineers Decisions, 67 Geo. L.J. 1187 (1979). As a result, the court in Gypsum concluded "Exchanges of current price information, of course, have the greatest potential for generating anticompetitive effects and although not per se unlawful have consistently been held to violate the Sherman Act." United States v. United States Gypsum Co., supra at 441. Thus, the antitrust risk of an information exchange among ports or marine terminal operators would depend upon the magnitude of the likely efficiencies, the nature of the information exchanged and the vigor of competition in the market.

I conclude by reiterating my belief that the antitrust laws pose no danger to legitimate, efficient practices of ports and terminal operators. I hope that you also will reach that conclusion.

Session 5
State of the Liner Shipping Industry Four Years After Passage of the Shipping Act of 1984

Chairman: Edward J. Philbin, Commissioner
Federal Maritime Commission

State of the Liner Shipping Industry —
Instability and Opportunity
Robert L. Hintz
Chairman and Chief Executive Officer
Sea-Land Corporation

Impact of the Shipping Act of 1984 —
Experiences in the Pacific Trades
T. J. Rhein
President
American President Lines, Ltd.

One Carrier's View — The Shipping Act of 1984
Leo L. Collar
President
Crowley Maritime Corporation

State of the International Liner Shipping Industry —
Competition and Cooperation
Hans Jakob Kruse
Chairman, Hapag-Lloyd Ag, Hamburg, Germany
Chairman, Council of European and Japanese National Shipowners' Associations (CENSA)

Issues for Review of the Shipping Act of 1984
Bengt Koch
President
Atlantic Container Lines Services Ltd.

Changes in the Trans-Pacific Since 1984 — The Effects of
Mandatory Independent Action and Service Contracts
Keizo Muranaka
Senior Managing Director
Mitsui O.S.K. Lines, Ltd.

Effects of the Shipping Act on the Liner Shipping Industry —
Service Contracts
Captain S. Y. Kuo
President And Vice Chairman
Evergreen International (U.S.A.) Corporation

Introduction

Edward J. Philbin
Commissioner
Federal Maritime Commission

Twenty months ago at our first symposium we subtitled the program "Evaluating the Impact." This time we're calling it "A Debate of the Issues," because those who attended the Norfolk symposium know that evaluating the impact contained a fair amount of heated debate, so we decided to meet the inevitable head on and we weren't disappointed yesterday. Because of my roots I firmly believe in the old Irish proverb that to be quarreling is better than to be lonesome. But I also believe that after a few rounds of friendly quarreling it is even better to evaluate the merits of the arguments and the possibilities of reaching accord.

This morning's panel is designed, perhaps with unwarranted optimism, to begin such an evaluative process. Yesterday we had the microanalytic, concentrated look at some of the key and the most controversial aspects of the 1984 Act, including service contracts, mandatory independent action, tariff filing requirements and antitrust immunity. There are other less controversial aspects of the Act that went unexamined, such as expedited agreement approval and expanded intermodal authority. But since our aim was to encourage a focused debate, such benign neglect is, I think, probably allowable under the circumstances.

Both the controversial and the non-controversial are tiny glittering colorful pieces of a larger and a far more complex mosaic that really represents today's world of international liner shipping. The mosaic then includes improved transportation technologies, trade legislation, fluctuating foreign exchange rates, and a host of other factors which affect international trade. To visualize how the various provisions of the Shipping Act enhance, complicate or detract from the beauty of that total mosaic, we have to step back a pace or two and look not just at the individual pieces, however entrancing, but at the whole complicated work of art. With this morning's panel we begin trying to develop that holistic picture, one which undoubtedly will look very different to the various observers, depending on their perspectives: A kind of maritime relativistic vision.

The members of this panel have the benefit of a view from very lofty perches, the boardrooms and executive suites of a number of the world's largest and most dynamic carriers and conferences. The distinguished panelists that I will present to you today are as geographically diverse as they are eminent, representing some of the leading shipping lines of Asia, the United States and Europe. On behalf of the Federal Maritime Commission and the University of Southern California, I would like to express my sincere thanks and appreciation to each of them for taking the time to be with us today from what I am sure is a very hectic schedule.

With such an array of talent to introduce, I am in the proverbial good news, bad news position. The bad news is that time limitations forced us to allot only ten minutes to each of our speakers today for their prepared comments. The good news is that if we adhere to that schedule the rest of us will enjoy a very rare opportunity -- forty-five minutes to interrogate, eyeball to eyeball, the top officials of the world's major shipping firms. That is 36 minutes longer than Dan Rather got with George Bush -- or maybe it was the other way around, I don't remember.

In Norfolk the discussion aimed at assessing the gains, losses and uncertainties in what was then a relatively new regulatory regime. Recognizing that the chief causes of problems is solutions, we sought to identify the important problems that might be developing from the 1984 solutions embodied in the Shipping Act, and that is still our objective today. But additional time and experience may now have clarified many of the uncertainties created by the 1984 Act. The pluses and minuses may now be more clear. The organizations and industries affected by the Act have had more time to adjust to the new rules of the old game, and to pinpoint the opportunities and react to the new challenges.

This morning we hope to hear -- first from the carriers, and in the following panel from the shippers, shipper associations, NVOCCs, forwarders and ports -- what the Act hath wrought, what longer term gains and losses have now become evident, and what changes or revisions they now recommend to improve the overall ocean transportation system. But before I call upon the first of our distinguished panelists, I am going to step out of my role as neutral moderator to temporarily assume a more parochial identity as spokesman for the FMC.

Yesterday Jerry Seifert raised the very important question of why the FMC Section 18 study has not addressed the question of closed or open conferences and their utility or futility as you might observe it. The simplistic answer is, that the FMC has done so, even though it was not discussed in yesterdays briefing by Dr. Ellsworth. What the FMC has done, is in 1986 and 1987, we put out big surveys to shippers, carriers, ports, non-port marine terminal operators and freight forwarders, and then we asked if they preferred opened or closed conferences. All of them, including carriers, were overwhelming in favor of open conferences. And we will repeat that question in future surveys. We also approached Lloyds of London, who prepared a study for us on the level of conference and non-conference service in a closed conference trade. And that was the year of Far East trade, in 1984. A similar study is planned for 1988 to see how service levels have changed. And these results will be compared to similar studies Lloyds is preparing for selected U.S. open conference trades. We have also been attempting to obtain data from the carriers. And the staff has raised the issue of obtaining that data from members of the carrier study group on what has happened to freight rates and vessel utilization levels in closed conference trades. The carriers are now considering our requests for that specific assistance. These data will be compared to similar data collected for U.S. open conference trades.

Now resuming my role as neutral moderator, and in the spirit of equity and fairness and justice, I am denying Jerry any opportunity to respond to that. With sincere thanks once again to the panelists for their participation, I request that all of the questions be held until all of the speakers have completed their remarks. I would now like to turn over the floor to our first speaker, Mr. Bob Hintz, who is the Chairman of Sea-Land Corporation.

State of the Liner Shipping Industry — Instability and Opportunity

Robert L. Hintz
Chairman and Chief Executive Officer
Sea-Land Corporation

Well, in the unlikely event anyone has any lingering doubts about the "State of the Liner Shipping Industry Four Years After the Passage of the Shipping Act of 1984" -- I would like to set them to rest. The state of our industry is not wonderful. There is enormous room for improvement.

If you ask if the Act contributed to the unprecedented instability the industry has witnessed over the past couple of years, the answer is -- it probably did. The real questions are -- how much and why?

There is ample evidence to support the fact that the industry has seen unusually volatile and changing conditions. But, I think it would be naive and misleading to suggest the '84 Act was a primary or even a major cause of the instability.

Any truly accurate analysis of the impact of the Shipping Act would have to be conducted in an otherwise constant world. Just as a scientist tries to "control" all of the variables in an experiment, we would have to freeze everything that had an impact on us in order to isolate the effect of the Shipping Act on our industry over the last four years. Obviously, it is impossible to do this, even under the most ideal conditions.

Before we condemn the Act, therefore, we should take a look at some of the other factors that have contributed to the industry's instability and are likely to continue in the immediate future.

To begin with, there have been huge capacity increases. Virtually all of the major lines have increased the size and number of vessels in their fleets in all of the major trade lanes.

Two massive round-the-world services brought cut-rate type options to the industry. Even though one of these services failed, the impact lingers on, and, it has pushed the ocean portion of the business closer to an undifferentiated commodity status.

With aggressive competition on price, these lines managed to prompt at least a temporary de-emphasis on ocean service. Competition for service shifted inland as carriers made substantial investments and brought about a revolution in intermodal service offerings.

At the same time, investment barriers to the entry of new operators have been lowered dramatically. Laid-up capacity can be acquired or chartered inexpensively. Equipment can be leased. Terminals are available for common use, and, inland transportation can be purchased.

As a result, there has been a proliferation of small carriers, some finding niches in the markets, others running head-to-head with the major companies. There is very little evidence of market concentration, with the market share of most of the large carriers generally declining.

At the same time, the leverage brought to bear to squeeze carrier revenues has been formidable. A growing percentage of world GNP is represented by international trade. As the volume of trade increases for a given shipper, the importance to that shipper of the transportation and distribution function has grown proportionately. As a result, shippers are managing their transportation needs far more closely and efficiently.

In these circumstances, the pressure customers put on the ocean carriers to cut rates is enormous. Clearly, this pressure from customers and a basic perception of supply and demand imbalance have been the driving forces behind depressed rates in recent years. Between 1984 and 1987, the major Pacific and Atlantic trades, as predicted, experienced unprecedented growth in capacity. Imports, however, continued to grow at a pace dramatically greater and, in essence, the overcapacity that was anticipated for the industry never materialized. Yet, the dramatic growth in import volume was never accompanied by a commensurate upswing in rates. At the same time -- and probably the real story -- the outbound trades lagged to such an extent that some export trade lanes experienced capacity utilization well below 50 percent.

To say it another way -- pricing often reflects expectations of the near-term future. During this period, carriers expected overcapacity which did not fully materialize. But, in the absence of this overcapacity, rates continued to remain stable or fall because of the carriers' continuing expectations about severe supply and demand imbalances.

Service Contracts and Independent Action

In the context of these background comments on the shipping environment over the past several years, I would now like to focus on the two provisions of the 1984 Act that have probably borne the most criticism -- service contracts and independent action.

The experience of the past several years tells us service contracts have been far more prevalent in U.S. import trades, while independent action has been used more often in U.S. export trades. There is some logic to this pattern.

In the import trades, where capacity utilization has been high, rates have been stronger; customers undoubtedly have been attracted to service contracts as a means of locking in already low rates -- or receiving less than current tariff rates.

In the export trades, where capacity utilization has been lower, internal competition among conference members has been fierce. It has not been unusual, therefore, for carriers to take independent action to secure cargo at even lower rates.

Obviously, from a carrier's viewpoint, both service contracts and independent action have contributed to revenue erosion relative to adequate or compensatory levels. But, both have been ultimately used as devices in response to market conditions. When markets shift, as they now appear to be doing, it is logical to expect changes in the frequency with which these devices will be used in a given trade. For example, over the next year or so, it would be reasonable to expect more independent actions and fewer service contracts in the import trades while experiencing the reverse in the export trades.

What does this mean? Generally, it means that by having these options available, and using them, shippers can persuade carriers to keep rates low. Carrier pricing, on the other hand, will be influenced by and respond to shipper pressures vis-a-vis their perception of the cargo or volume available relative to capacity.

It appears, therefore, that service contracts and independent actions are not the causes of rate erosion, but vehicles for lowering rates according to the economic and trade conditions. In other words, service contracts and independent actions have facilitated, possibly accelerated, a rate decline that was inevitable.

The worst that can be said about service contracts and independent action is they have weakened the ability of a conference to resist rate erosion and dampen instability. Their impact, however, depends entirely on how they are used. If we, as carriers, are not willing to exercise "discipline" and good judgment in balancing our customers' needs with our own business needs, and if shippers are not realistic in their demands, there is no law that will protect us from ourselves . . . or keep us from falling on our own swords!

In view of what I have said, although in my opinion, it may be premature to call for modification to the service contract and independent action provisions of the '84 Act, the ultimate emphasis should be on modification by regulation, not repeal.

For example, properly crafted service contracts and wisely used independent actions can hold conferences together in competitive times. They also offer a tool for forging a commercial relationship with customers -- a relationship that reflects actual market conditions, allows carriers more accurate planning around predictable volumes and revenues and provides their customers with assured rates and services tailored to their needs.

Opportunities Created by the Act

If general economic conditions for the industry remain uninspiring for the foreseeable future, and if devices such as independent action and service contracts are used in a way that ensures continuing pressure on revenues, where can a shipping company look to improve its financial health and well being?

From Sea-Land's standpoint, two key provisions of the much-maligned 1984 Act create new, profitable opportunities.

First, clearing the path for antitrust immune agreements was -- in large part -- intended to encourage rationalization of vessel operations. It does not take a student of the industry to observe that U.S.-flag operators have rarely used this authority -- and, probably should be taken to task for not doing so!

Second, clear immunity for intermodal activity has permitted major carriers to dramatically expand the scope of services they offer the shipping public. It is clear shippers appreciate intermodal handling conveniences -- fast ocean to rail and/or truck links -- through bills of lading to handle their cargo door-to-door -- and, of course, reduced paperwork.

American-flag operators can and should be a driving force in convincing business people in this country of the opportunities that exist in exporting American-made goods -- and they can and should provide invaluable assistance in helping shippers meet their objectives through one-stop shipping, just-in-time inventory control and the next generation of intermodal services.

The biggest challenge to those of us in the transportation industry today is to provide high quality, differentiated services with marketing programs that support and communicate these services.

These are the areas where all of us should be focusing our attention.

In my opinion, the Shipping Act of 1984 -- while it may need some modification by regulation -- provides the opportunity for carriers with vision to find innovative ways to meet their own needs and the needs of the shipping public. For the good of our country and industry, I hope we all have this vision.

I am reminded about a true story involving George Bernard Shaw. Back in the days of UFO sightings and speculation about life on other planets, Shaw was asked by a reporter if he believed there was life on other planets. Shaw curtly replied -- in his crusty old man style -- it is obvious there are! And stopped talking. The reporter asked him to expound on his answer. Shaw replied -- "Obviously, there is life on other planets. You only have to look about you to see that they are using this one as an insane asylum!"

I hope Bernard Shaw's insights do not pertain to our industry -- and, when we next meet the liner shipping industry will be sane and -- in much better financial health!

Impact of the Shipping Act of 1984 — Experiences In The Pacific Trades

T. J. Rhein
President
American President Lines, Ltd.

My comments on the Shipping Act of 1984 are based on American President Lines' experiences in the Pacific trades -- the market in which we offer our international container transportation services. APL operates a fleet of 19 containerships and four multipurpose vessels in the Pacific and Indian oceans, and serves cities across North America through an extensive intermodal system of stacktrains and trucking services operated by our affiliates within the American President Cos. group. Our history of cargo transportation service in the Pacific Basin can be traced back 140 years.

I would like to begin by briefly summarizing some of the positive developments in the trade resulting from the Act's passage four years ago.

Positive Developments

Carrier Agreements and Antitrust Immunity

The most significant contributions of the Shipping Act of 1984, from a carrier's perspective, were to facilitate the creation of new types of agreements and to make the scope of carriers' antitrust immunity more certain and predictable. Under prior law, the formation of rationalization agreements, joint ventures and other carrier agreements required extensive justification and procedural review before approval could be obtained. The formation of new conferences or rate agreements was similarly restricted. By eliminating this process, the 1984 Act made possible the creation of these various types of agreements, including broader rate agreements and open conferences, such as ANERA and TWRA in the Pacific. These agreements encompass many countries and coasts -- as well as intermodal services -- under a single tariff. For a company like APL, with our broad market coverage in North America and Asia, the clear intermodal authority now held by these agreements is especially welcome.

Independent Action

One "counterbalance" provided by Congress against the broader antitrust immunity it granted carriers was mandatory independent action on 10 days' notice. In principle, we support a carrier's right to take I/A on rates and service items filed in tariffs. I/A can play a useful role in promoting the continuity and stability of an agreement, by allowing room for dissent among member lines within the structure of the agreement. Prior to I/A, the only recourse in a serious dispute among members was the ultimate "independent action" -- resigning from the conference. However, this stabilizing effect can only be realized if the notification time for I/A is of sufficient length for carriers to attempt to resolve the dispute. I will return to this point later.

Service Contracts

The other key "counterbalance" in the Act was to mandate the availability of service contracts. We feel the intent of Congress in this area was favorable to shippers and carriers alike. A service contract can provide ocean transportation customers with not only a competitive rate, but also protection from possible general rate increases, and guarantees of service and space availability during periods of high demand. Carriers in return can receive a guaranteed volume of cargo over a given time period. When they serve as mutually beneficial and mutually binding contracts, service contracts make sound commercial sense.

Tariff Filing and Enforcement

As the background paper for this conference noted, in an open conference system, there is a case to be made that carrier freight rates must be public. Shippers must have access to information on the rates their own competitors are paying. The requirement of filing tariffs with the

Federal Maritime Commission (FMC) also helps ensure that carriers are abiding by U.S. laws in their service of the U.S.-foreign trades. For these and other reasons, we feel the tariff filing and enforcement provisions of the Shipping Act of 1984 are a needed assurance of fairness and stability.

Policing

Malpractices such as rebating can pose a serious threat to U.S.-flag and foreign carriers that abide by the letter of U.S. law. We feel that, by continuing to allow conferences and agreements to establish policing and monitoring programs, the Shipping Act helps ensure adherence to U.S. shipping laws.

Unfair Trade Practices

The final major benefit of the Shipping Act that I would like to note is the strengthening of procedures available for the reduction of unfair trading practices faced by U.S. carriers in foreign trades. Foreign government policies affecting such key areas for our industry as inland transportation, telecommunications, equipment ownership and operation, office representation, funds remittance, etc. vary widely. We believe that Sections 13 and 15 of the Shipping Act, which provide the FMC with the power to impose sanctions against the national flag carriers of any country employing restrictive trade practices, are positive and necessary legal tools for dealing with the lack of reciprocity and the discriminatory regulations we must cope with in our day-to-day overseas business.

Problems and Proposed Amendments

Having summarized the key positive aspects of the Act, I would now like to turn to the major problem areas, from our company's point of view, and the specific amendments we would recommend.

Independent Action Notice Time

With regard to independent action, the present 10-day prescribed advance notice time for exercising independent action is too brief. In practice, more time is required for carriers to attempt to evaluate and resolve a rate dispute. The short advance notice time required of the initiating party, and a short reaction time alloted to other member lines once the I/A is filed, can undermine the very purpose of an agreement, which is to meet and discuss rate matters.

We would recommend extending the maximum notification time for implementation of an I/A from 10 days to 60 days. Also, we feel that the Act should permit conferences and agreements to determine their own procedures for handling I/A's; for example, granting them the ability to initiate non-binding or "at will" agreements among conference member lines to not exercise I/A, in order to support conference tariff or service contract activities.

Problem Aspects of Service Contracts

Despite the merits of many service contracts, the service contract concept has been severely tested in the trans-Pacific trades since the Act came into effect. In a highly competitive market environment, direct negotiation of individual service contracts between carriers and their customers can intensify rate wars and have a destabilizing effect on service. In particular, the availability of "bona fide offer" or "most favored shipper" clauses, which guarantee customers the lowest rate available in the trade over the entire life of the contract, have had this effect.

By exercising their right to cease offering that type of service contract, carrier agreements have succeeded in stemming much of this destabilizing effect. We would additionally recommend prohibition of the types of commercially non-viable "guarantee" clauses I mentioned. As in any contract, non-performance or penalty clauses should be made adequate. We also believe the Act should allow routine amendments of contracts, on matters other than the minimum volume commitment or term of the contract, when agreed by both parties. Finally, we support the continuation and enforcement of all present filing requirements for the essential terms of service contracts.

A clause in the section on service contracts, regarding treatment of "shippers similarly situated," is undefined. To avoid the possibility of litigation, carriers may feel compelled to offer an inappropriately low rate to shippers who were never intended to be covered by the terms of a particular service contract rate. We believe the Act should stipulate, or FMC regulations should make clear, that there be a specific competitive relationship between the original contracted shipper and subsequent "me too" shippers. Also, this clause should only apply to a non-vessel operating common carrier, or NVOCC, when the original party with which it claims to be similarly situated is another NVOCC.

Filing Requirements

The Shipping Act of 1984 expressly waives ocean tariff filing requirements for rates on a specific group of commodities: "bulk cargo, forest products, recycled metal scrap, wastepaper, and paper waste." These commodities represent a large share of the total volume of U.S. exports to Asia, and we believe they should be subject to the same filing requirements as other commodities.

Policing

We would advocate that self-policing by a neutral organization be made mandatory for all vessel operators -- conference members and independents alike -- as well as NVOCC's.

Loyalty Contracts

The definition of loyalty contracts in Section 3 (14) of the Act is unclear, and can lead to misinterpretations. For example, it is not clear whether mandatory independent action can be extended to loyalty contracts in the present version of the Act. We would recommend merging the definition of loyalty contracts into the definition of a service contract, in order to include shipper commitments of all or a fixed portion of cargo under the service contract "umbrella."

In conclusion, I would like to reaffirm APL's belief that the Shipping Act of 1984 represents a balance of shipper and carrier interests. It is the product of extensive debate and compromises. I have cited a number of adjustments and improvements which we believe would further promote the stability of liner service in the Pacific and in other U.S.-foreign trades. However, the focus of the review of the Act should not be to reexamine the principles on which the Act rests, but instead to make needed amendments which reflect the experience of all parties since it became effective in 1984.

Thank you very much.

One Carrier's View — The Shipping Act of 1984

Leo L. Collar
President
Crowley Maritime Corporation
San Francisco, California

My name is Leo Collar and I am President of Crowley Maritime Corporation. Before delving into an assessment of the impact of the Shipping Act of 1984, I'd like to tell you a little bit about Crowley Maritime and our ever increasing presence in the international marketplace. Some people still think of Crowley as a tug and barge operator, with all its assets deployed in the domestic trades. While Alaska, Hawaii and Puerto Rico are still vital to Crowley, we have greatly broadened our horizons. Over the past two years we have become deeply involved in international liner operations. We presently operate services to the Far East, Europe, South and Central America, Mexico and the Caribbean and are rapidly becoming a significant player in the carriage of goods in U.S. foreign commerce.

The services Crowley provides are diverse and we believe flexibility is the key to our success. We are not locked into any set way of operating, and two words -- "whatever works" -- concisely sums up our business philosophy. In some trades we are conference members, in others we operate as an independent. We mix unsubsidized U.S. flag and foreign flag liners in the same service and we deploy vessels varying greatly in size and configuration. We own some ships outright and are active in the charter market, both on a short and long term basis. We presently operate 25 vessels in the foreign commerce of the United States and try to tailor our services to the needs of the trades involved.

As a result of the wide international scope of our operations, we are no stranger to the Shipping Act of 1984. We have benefited from the restrictions it lifted, as well as felt the burdens it imposed. We have also learned that the Act must be evaluated on a trade by trade basis; general observations often prove false when specifically applied. What works well for us in one trade, would be a disaster in another.

The reforms incorporated in the 1984 Act were a long time in coming and to say they were overdue, is a gross understatement. However, the overall objectives of streamlining procedures, clarifying legal uncertainties, and updating an antiquated system of regulations were met. In fact, given the competing interests and the diametrically opposed positions taken by the various segments of the industry, it is a wonder that anything at all was achieved.

The most significant differences arose between carriers and shippers and the Act was intended to create a balance between these conflicting concerns. The changes the carriers considered necessary to stabilize trades and ensure a fair return on assets invested, the shippers fought and labeled "anti-competitive"; what the shippers considered counterbalancing "pro-competitive" elements, the carriers viewed as mere devices to drive prices down. Accordingly, the Act reflects the concessions and compromises that were forged in a legislative effort that lasted several years and nobody claims it's the perfect solution to all the problems it sought to address.

The legislators themselves recognized that further revisions would probably be required and the Act specifically directs the Federal Maritime Commission to prepare a detailed report evaluating the Act's impact for presentation to the Congress in 1989. Now that more than three and one half years have passed since the date of enactment and some clear patterns have developed, I believe this symposium provides us all with an excellent forum for a meaningful "half-time" review.

In general, Crowley views the Shipping Act of 1984 in a very favorable light. It had been sixty-eight years since the 1916 Act had been revamped and over that period the shipping industry -- and the world for that matter -- had changed dramatically. Doing business under the constraints of that outmoded system was like engaging in modern warfare with the weapons used during World War I, which, it is interesing to note, the old Act predated by a year. The 1916 Act was simply incapable of dealing with today's problems.

The new Act encompasses many significant reforms but among the various changes effected, Crowley feels that five provisions have had the most significant impact. The first three I will address -- expedited agreement processing, intermodal authority, and broadened antitrust immunity -- are non-controversial and have already yielded positive results. The other two -- independent action and service contracts -- continue to be the subject of much debate between shippers and carriers and need some fine tuning in our estimation.

1. The Agreement Approval Process. Under the 1984 Act, carriers have the ability to enter into cooperative working arrangements -- enabling them to, for example, rationalize their services and charter space on each others vessels -- with the knowledge that by simply filing the agreements with the Commission and waiting 45 days, the probability is that the agreement will become effective. Under the 1916 Act, delays were endemic and the approval process took months, if not years. The Department of Justice routinely protested all agreements it perceived as anti-competitive and competing carriers had the uncanny ability of tying each other up in procedural knots. No longer are exhaustive justifications and formal hearings required. While lawyers enjoyed the flow of work under the old Act, needed operational changes were frustrated and this resulted in higher costs and inefficiency. Under the 1984 Act, the only way for the Commission to prevent an agreement from taking effect in 45 days is to seek an injunction in Federal Court, where it must prove that the agreement will unreasonably raise costs or reduce service.

These simplified and expedited agreement approval procedures are consistent with the Act's Declaration of Policy -- "to establish a nondiscretionary regulatory process for the common carriage of goods by water...with a minimum of government intervention and regulatory costs." More importantly, by de-emphasizing the pre-approval process, more agreements are being filed, greater carrier efficiencies are being achieved and the shipping public is being better served.

2. Intermodal Ratemaking. Unquestionably, the development of containerization has changed the nature of modern transportation. By specifically authorizing conferences to set intermodal through rates, the 1984 Act officially recognized this development -- although decades after the fact -- and brought the shipping industry up to speed with the railroads and truck lines, whose regulatory schemes were completely revamped in 1980 by the Staggers Rail Act and Motor Carrier Act.

"Multi-modalism" is the latest industry catch phrase and through the utilization of trucks, trains and ships, shippers are being offered door to door service worldwide. Such totally integrated transportation systems are resulting in substantial cost savings and unprecedented speed of delivery. Ocean shipping has become merely a link in the international transportation chain. Thus, referring to ourselves as "shipping" companies may be a misnomer in today's environment. We are transportation companies, utilizing many modes of carriage and the recognition of that fact by the 1984 Act definitely will contribute to our survival.

3. Clarified Antitrust Immunity. Due to a number of court decisions questioning the antitrust immunity conferred by the 1916 Act, carriers became wary of just what activities were permitted under their Commission approved agreements. Violation of the antitrust laws cost conference carriers in the North Atlantic trades tens of millions of dollars as a result

of criminal and civil proceedings in the early 1980's, so this statutory change represents a lot more than some legal nicety. The 1984 Act provides carriers antitrust immunity not only for the activities literally spelled out in a filed agreement, but also for any activity which was carried out with the reasonable belief that it was pursuant to such an agreement.

Under the 1916 Act, carriers had become sitting targets for antitrust allegations whenever they acted collectively. They were forced to walk the fine line between a permissibe act and a violation without ever being sure of when they crossed the line. Due to ambiguous statutory language which was subject to varying interpretation, too much was left to judicial discretion. The Congress had to speak out. The 1984 Act restored certainty and clarified our antitrust immunity, so that we as businessmen can function without fear of prosecution.

4. Mandatory Independent Action. While independent action provisions were voluntarily included in some conference agreements filed pursuant to the 1916 Act, they became mandatory under the new Act. Now every conference member has the right to file rates differing from those collectively set by the conference on no more than 10 days notice. While the concept of independent action has always been supported by some carriers -- and provides rate flexibility within the conference structure as opposed to total independent status -- the short time period within which a conference must now consider a member's rate request has totally undermined the effectiveness and cohesiveness of conferences. Given the worldwide geographic dispersement of the corporate headquarters of carriers, an independent action notice requirement of not more than 30 days seems more reasonable. It would allow for shorter notice periods -- if that was the collective wish of the members of a particular conference -- but it would also allow up to 30 days for those conference desiring adequate time to assess a member's request. The opportunity would thus be provided for all the members to a conference to discuss the suggested rate action and collectively adopt it as their own, if they found it justified.

Uniformity of rate action is the principle upon which conferences are established. Unrealistic time constraints should not unnecessarily undermine the ability of member carriers to deal with their customers as a group. Ten days notice is simply not enough time for conferences to react and this provision has already led to abuses. Intra-conference rate wars have rendered certain agreements meaningless and totally destabilized the trades in which they operate. The suggested extension in the notice period from 10 to 30 days may not eliminate the destructive rate competition that presently exists but we believe it to be a positive step and not unduly restrictive.

5. Service Contracts. Under the 1984 Act, carriers were for

the first time given specific authority to enter into contracts and agree to rates differing from those published in their tariffs. A concept that had always been considered discriminatory and in violation of the principles of common carriage. Unfortunately, this change, more than any other, highlights the strains that have developed in the shipper/carrier relationship since the Act's passage. The carriers contend that service contracts have allowed shippers to play one carrier off against the other and forced freight rates down to levels that are barely compensatory. The shippers argue that service contracts are freely negotiated and that carriers are not obligated to enter into any contract not in their best interests.

Rhetoric aside, Crowley believes that when properly utilized, service contracts serve a useful purpose -- beneficial to both shipper and carrier alike. Abuses have arisen in the contracting process, however, and procedural guidelines should be established by the Commission to ensure that these contracts function as the Congress intended.

The Act defines a service contract as "a contract between a shipper and an ocean common carrier or conference in which the shipper makes a commitment to provide a certain minimum quantity of cargo over a fixed time period, and the ocean common carrier or conference commits to a certain rate or rate schedule, as well as a defined service level." Examples of a defined service level are: assured space, transit time, or port rotation. The Act goes on to state that "the contract may also specify provisions in the event of nonperformance on the part of either party."

On the surface, this appears to be no different than any other commercial contractual relationship. However, when applied in the context of international shipping -- where the normal market forces of supply and demand are totally out of balance, as they are today due to a severe overtonnaging problem -- chaos reigns. Carriers have no choice but to accept the terms offered by shippers.

As a member of the International Council of Containership Operators -- commonly referred to as the Box Club -- Crowley, along with 28 other U.S. and foreign flag ocean carriers, petitioned the Federal Maritime Commission early in 1987 to promulgate a rule prohibiting the use of certain clauses in service contracts, which we believe are at the root of the problem. Specifically at issue are the so-called "most favored shipper" and "de minimus liquidated damages" clauses.

The "most favored shipper" clauses ensure price reductions should a contracting shipper's competitor receive a lower rate from the contracting carrier -- or in some cases, any carrier, thus earning the name a "Crazy Eddie clause." "De minimus liquidated damages" clauses allow shippers to breach contracts with minimal penalty. The fact that such clauses are prevalent in service contracts, attests to the leverage shippers have in an overtonnaged market. Service contracts are being used as a device to drive prices down but without the reciprocal benefit to the carriers of being assured a guaranteed volume of freight at an agreed price. The required quid pro quo found in any contractual arrangement is missing.

With regard to service contracts in general, and specifically with respect to those that include "most favored shipper" and "de minimus liquidated damages" clauses, carriers have repeatedly proved to be their own worst enemy. Shippers clearly have the upper hand in contract negotiations and will continue to as long as supply exceeds demand. Prohibition of these clauses would restore some balance in shipper/carrier contract negotiations, and help eliminate the destructive competition that prevails.

I do take comfort in the fact that the Commission considered the Box Club's petition in November 1987 and will soon seek comments on a proposed rule dealing with the issues raised. The Commission is to be praised for addressing the concerns raised by the carriers and hopefully a solution can be found which is fair and equitable to all concerned.

To conclude, Crowley believes that the 1984 Act has had a very positive impact overall. We think it represents a major step forward but that it can and should be improved.

State of the International Liner Shipping Industry — Competition and Cooperation

Hans Jakob Kruse
Chairman, Hapag-Lloyd Ag,
Hamburg, Germany
Chairman, Council of European and
Japanese National Shipowners' Associations

The state of the Liner Shipping Industry during the second half of the present decade:
Ocean carriers difficulties with insufficient cargo and low rates stem from the simple fact that there are still too many ships on the world's oceans.
Unnecessary overcapacity created by subsidies, not by commercial demand: The central problem we face.
Although the volume of worldwide container trade has continued to expand, it has been more than matched by an expansion in ship capacity.
The overcapacity worldwide whether 20% or more, in certain trades much more, can hardly shrink to a normal dimension as long as subsidized shipyards continue to turn out new vessels for which there is no forseeable demand.
The result: The shipping industry is being ruined by political government subsidies, they create overexpansion, overinvestment, which is additionally furthered by ready availability of money on the run from taxation and by the poor or non existent evaluation of longterm market growth, not to speak of irresponsible speculation.
There is a growing presence of quasi commercial or non-commercial operators,
there are as in the past unilateral governmental activities to allocate cargo by various means for national flag carriers and there is still a lot of passive acknowledgement of foreign protectionism including excessive financing and subsidizing shipyards and shipping. On the other hand we observe unrealistic liberation tendencies in our countries.

In regard to the Shipping Act of 1984 I could list up at least three decisive major improvements as compared with the Act of 1916. The imperfections I expect to be listed by another speaker.

1. A long overdue, clear-cut and broadened antitrust immunity for conferences and carriers thus ending the unfair exposure of carriers to antitrust treble damage actions and significantly reducing exposure from the U.S. Department of Justice which, under the past regulatory regime, created unbearable and unfair risks to carriers and conferences.

2. It enabled the Federal Maritime Commission to permit conference agreements and cooperative agreements among carriers to become effective on 45 days notice, reversing the prior Svenska doctrine which placed the burden on the carriers, giving conferences and carriers the chance to fully rationalize their services.

3. For the first time granting conferences in the US trades full intermodal authority for joint multimodal house-house-tariff quotations as the conditio sine qua non of modern conference intermodal services.

To establish attractive, low cost, reliable services on a long-term basis at a quality standard matching shippers expectations, a legal framework permitting cooperation and coordination of activities (pricing, operating, investment) has been and will also in the future be a vital requirement for most, if not all, commercially operating carriers.

In this context the more liberal treatment of carriers' agreements, as provided in the Act of 1984, on price coordination and other possible elements of cooperation as for instance on sharing of vessels' space and/or revenues, is most welcome. It should be maintained as a corner stone of reasonable, adequate rationalization, a prerequisite for low cost - high quality long-term liner services in the mutual interest of carriers and shippers, and also to ensure adequate long-term investment.

It should be maintained as well as an indispensable basic element in the context of door-to-door-services (intermodal authority has its useful place right here) in combination with the full spectrum electronic data processing can offer to the mutual benefit of clients/shippers and carriers.

A few general remarks on the future of liner shipping and regulation.

To address in these few minutes all relevant micro and macro questions related to the Shipping Act would only confuse the issue.
I would wish, however, to underline two, as I feel, undeniable facts:

- There will always be competition in liner shipping, with or without governmental regulation which is more than welcome - and

- there will always be a need for cooperation in liner shipping.

Competition in liner shipping is nowadays no more restricted to price and service in a port-to-port-context.
The organization of the landleg on both sides of the trade, the inclusion of electronic data interchange, the integration of the house-house-transport chain into the distribution system of shippers, all these "possibilities" turn more and more into "requirements" or opportunities and widen the scope of competition considerably. Investment in liner shipping means more and more investment in other hard- and software then just in ships.

Again, except for a few giants, these investments can usually no longer be borne by individual companies.

Cooperation is essential, be it in modernised market oriented conferences, be it in joint ventures or in consortia. Cooperation requires a liberal progressive legal environment as outlined earlier. It ensures market participation by smaller companies and smaller countries' fleets, also for developing countries.

In this context conferences are certainly still relevant.

The question whether open or closed conferences are to be favoured can and should only be addressed commercially, on its own merits, and not by government decree. Whatever the basic philosophy of a conference, most of them would be today happy if the high quality independent lines would join their ranks - they do already copy the service conditions anyway.

The decisive question is not open or closed conferences, it is: Open or closed trades.
And here the answer is simple: If trades are open, and this is what all of us want, there will always be competition and there is then less need for regulation.

Probably the rules of the game will never be entirely harmonised and implemented fairly and with equal vigour worldwide. This is human and, therefore, government nature.

Reasonable sound rules of the game are, however, essential in the interest of stability and fair competition -
anti-cartel activists have a liking for artificial barriers against cooperative arrangements.
The United States, by adopting the Shipping Act of 1984, have gone a long way to establish a balanced system -
the EEC will hopefully not be tempted to go back to where U.S. have been in the Seventies.
Certain interpretations of newly established Common Market shipping legislation have already given room for concern.

States or groups of states like the European Economic Community, should, however, try to avoid substantial clashes of legislative systems in liner shipping. Liner trades cover a great variety of countries and to live up to a number of different legal systems is a burden that modern world transport systems should not unnecessarily be exposed to. I do believe that shippers and carriers in the free world would have no difficulty to agree on this petition as well.

Compatible regulatory systems appear to be, therefore, another essential requirement at least within the group of OECD member states.

Too many widely differing rules of the game destroy the efforts of commercially operating carriers to rationalize meaningfully, to cooperate and to organize service patterns on a long-term basis to the mutual benefit of shippers and carriers. The lack of internationally agreed rules of the game as experience has shown time and again promote waste of resources, subsidy races, irresponsible speculation, overcapacities and instability, lack of profitability weakens further and further the competitivity of commercially operating carriers versus state-owned or state-subsidised competition.

So may in future, possibly worldwide, a legal framework prevail that permits cooperation in liner shipping.
Cost consciousness is another field, where shipowners can do a lot to improve their competitivity.
There is always room to further cut down paper work, to speed up and to simplify documentation procedures, to increase in house data processing and international telecommunication capability.

The best organisational plans will, however, come to naught, if we do not provide for a well trained dedicated staff ashore and afloat. Service quality and reliability depend on the people who provide them. Human recources, that is therefore another field where continuous efforts have to be made to maintain and improve the qualities of liner shipping.

A final appeal to the US administration: Your country as the most important trading partner for international liner shipping should give other countries a lead towards a free unimpeded commercial environment which is so much in line with your basic philosophy as a nation.

Issues for Review of the Shipping Act of 1984

Bengt Koch
President
Atlantic Container Lines Services Ltd.

First of all I would like to spend a couple of minutes on the all important subject of service contracts. The service contract was a new element in the 1984 Shipping Act. Its history is a concept that goes back to the Staggers Rail Act of 1982.

Basically what the service contract in the 1984 Act constitutes is nothing other than a variant of the traditional Loyalty Agreement. The main difference is that the Service Contract gives big shippers an enormous advantage over smaller shippers who will not be able to negotiate with conferences or carriers with anywhere near the same clout as their big competitors.

One of the more important questions which will need to be addressed at the time of the review of the 1984 Act is whether the concept of the service contract should be retained. I am not suggesting that I know better than anyone else, but my own view is that provided service contracts will be real contracts, there is no reason why the concept should be thrown out.

With "real contracts" I mean that both carriers and shippers have narrowly defined obligations, which would - inter alia - prohibit breaking the contract through the incorporation of "crazy Eddy" clauses and ensure that there are fair liquidated damages provisions. Finally, the FMC should have every facility to supervise service contracts effectively.

One aspect of the service contract concept which will need further discussion is the question whether essential terms should remain available to the general public as under the present Act or the contract should be made confidential. I know that there are sharp differences of opinion on this issue and this is certainly one important aspect which should be given attention between now and the review of the Shipping Act. It is of more than passing interest that in the recently promulgated Canadian Conferences' Exemption Act the contents of service contracts have been made confidential, and I think personally that may be the way to go.

However, European and Japanese shipowners combined in CENSA feel that there should be room for more than one form of shippers' contract. We advocate a 3-tier approach, which basically would give the following options:

(1) General contracts with individual shippers for all their cargoes falling within the description of conference cargo. These contracts should set out the obligations of carriers and shippers and contain realistic terms and conditions for dispensation, review, notice of termination, etc.

    This is basically the dual rate contract as known in many of the world liner trades and which existed in the US trades under the 1916 Shipping Act.

(2) Particular contracts for individual shippers or shipper groups, modelled along the lines of an improved service contract as I outlined a little earlier.

(3) Non-contract tariff rates without commitments or discounts which enable a shipper to opt either to ship on a conference vessel or an independent for his cargo that is not under contract.

I believe that serious consideration should be given to reintroducing a dual rate system in a new US Shipping Act as an option.

Now I would like to say a few words on the position of middlemen, Shippers' Associations, NVO's, etc. These are extremely intricate and interrelated subjects and two or three minutes is really not enough to do more than indicate where the problems lie.

In the first place there is the FMC Fact-Finding Investigation No. 15, which deals with the definition of "shipper" under the 1984 Act. This is a long saga which originated from a petition filed by the North Atlantic Conferences which attempted to obtain a more clear definition of "shipper" by pin-pointing the position of middlemen. The FMC investigation is on-going, but I believe that it is absolutely essential that in the definition of "shipper" it should be made clear that if a person for whose account the ocean transportation of cargo is provided, without having a beneficial interest in the cargo, but who purchases transportation for his account and sells such transportation to others, such a person - who is in fact a middleman - has the obligation, like a common carrier or conference, to file his tariffs with the FMC.

Points of perhaps equal importance are the interpretation of "shippers' associations" and the interpretation of "shippers similarly situated".

Since 1984 there have been five separate cases before the Commission. One, a petition by the American Institute for Shippers' Associations, which asked the FMC to exclude from shippers' association activities in connection service contracts all middlemen who have no beneficial interest in the cargo. The second was a petition by a number of conferences serving the Latin American trades in which they asked the Commission to set forth procedures by which common carriers and conferences could determine whether the entity claiming to be a shippers' association actually did fall under the definition in the 1984 Shipping Act. The last three cases were dockets based on complaints by a Shippers' Association and two shippers against a carrier which touched on the vague concept of "shippers similarly situated".

The first two petitions at the time were denied. Unfortunately the last three cases dealing with "shippers similarly situated" came to an untimely end when the parties involved agreed to settle their differences. The end result of these five case histories is that there is still no clarification of any of the issues involved.

I would very much hope, therefore, that in the review of the Shipping Act, clarification of the position of:

- middlemen,
- shippers,
- shippers' associations and
- similarly situated shippers

will be given a high priority.

Now I would like to touch on the vital question of tariff filing and enforcement. Let me be very brief:

In all commercial arrangements, Government interference should be limited as much as possible. However, under the Shipping Act the FMC has an important role to play in ensuring that there is no discrimination in the treatment by carriers of shippers "similarly situated", which is an important aspect of the common carrier concept.

If we accept this premise then the requirements for filing with, and enforcement by, the FMC of freight rates should be upheld.

Finally, a few words on the position of excepted commodities under the '84 Act. As you know, tariffs for bulk cargo, forest products, recycled metal scrap, waste paper and paper waste, do not have to be filed with the Commission. There are differing opinions on whether it is, in fact, allowed to file tariffs for such products although the conferences involved are of the opinion that they are so permitted. There are no small volumes of paper products moving from US South Atlantic and Gulf ports to Europe, but the most important quantities are to be found in the Pacific trades, and I am leaving for the next panelist, Mr. Muranaka, to deal with this subject more extensively.

Changes in the Trans-Pacific Since 1984 — The Effects of Mandatory Independent Action and Service Contracts

Keizo Muranaka
Senior Managing Director
Mitsui O.S.K. Lines, Ltd.
Tokyo, Japan

Ladies and Gentlemen :

My name is K. Muranaka, Senior Managing Director of Mitsui O.S.K. Lines, Ltd., a Japanese flag company shipping in various world trades. My experience in the international liner business spans some 36 years. In the U.S. foreign trades, however, I have been involved in the so-called Trans-Pacific trades, which are the U.S. liner trades my company serves.

Today, I wish to address some of the changes in the Trans-Pacific trades since enactment of the Shipping Act of 1984 and explain how mandatory independent action, coupled with service contracts, have contributed, and continue to contribute, to a depressed and unstable rate structure. I will then express an opinion on whether the mandatory I/A provision in the Shipping Act of 1984 should be eliminated. I will also briefly touch upon some other deficiencies.

First, What Has Been Going on in The Trans-Pacific Trades?

Starting with 1980 when a large American carrier withdrew from virtually all Eastbound Trans-Pacific conferences, freight rates in both the Eastbound and Westbound trades dropped drastically and were not recovered until 1984 through a series of gradual recovery programs instituted by the conferences. From 1984, however, rates began again to drop and to this day (except for some brief recovery in 1986) they remain at below the 1984 level, which, incidentally, is almost equal to the level that prevailed way back in 1979! If the 1984 level (which, in reality, is the 1979 level) is indexed as 100, we estimate the average rate level in these trades at the end of 1987 to be at 80 to 85 for both legs. When converted into Yen, the index level for 1987 would be less than 50 when measured against the 1984 (1979) level. This, of course, makes it exceedingly difficult for Japanese carriers to remain financially sound in competing against other carriers who do not rely primarily upon the Yen.

What makes it worse is that we now see a very clear sign that the current Eastbound rates have again entered a downward trend. Something has to be done. While the currency situation has heightened the problem for Japanese carriers, it is my observation that the root cause for carriers which support conferences lies in the rate structure and I believe this has, and is having, a very adverse effect upon the industry, as a whole. Yes, we are all carrying a lot of cargo but, at the same time, we are all becoming poorer and poorer.

The business in the Trans-Pacific is becoming really expensive and carriers are fast becoming marginal businesses or are finding that they are unable to survive. Indeed, more recently, two major American carriers - Lykes and U.S. Lines - have been forced to leave the trade. In this context, stability in the rate structure is a key factor where the struggle depends upon being the fittest.

In my humble opinion, this situation has resulted, in large measure, from the absence of effective price-fixing machinery in conferences. Although, in passing the Shipping Act of 1984, Congress expressed a clear intention that conferences be preserved, the requirement of mandatory I/A coupled with machinery for legalizing service contracts has most decidedly crippled their ability to provide a supportive rate structure unlike the freedom experienced in other foreign non-American trades. I do not maintain that mandatory I/A and service contracts alone are responsible for the depressed rates. As we all know, there has been serious overtonnaging and rate cutting where the outside carriers differentially fix their rates under the conference umbrella. But, the latter factors have always existed and are "par for the course" in doing business. What I am referring to is the evil of <u>mandatory</u> I/A and especially its use in combination with service contracts.

I believe that mandatory I/A is an evil because it is inherently destructive. The fact alone of requiring it gives a carrier a preemptive strike over a conference's rate structure. It is, therefore, nothing more than an artificial, political contrivance which is designed to protect one side of the shipper-carrier equation.

If a conference desires to introduce an I/A provision in certain situations, as a few had under the 1916 Act, I suppose I would have no quarrel. That is, however, because the judgement to do so would have stemmed from commercial decision-making. Frankly speaking, except in the most exigent circumstances, I would find it difficult to support such a provision given a choice. That is because experience teaches that where once the action has been taken, it will invariably be followed by the other major carriers who are unable to withstand the enormity of shipper pressure. One may call this competition, but given the fact that the carrier side cannot exist on a marginal basis, I call it "destructive competition." This, coupled with the Act's service contract authority, has, in my considered opinion, resulted in an uneven, shipper-weighted regulatory environment.

Second, How Does Mandatory Independent Action Interact with Service Contracts?

There are important relationships between I/A's and service contracts which should not be overlooked. While conferences have the ability to ban I/A on service contracts, and most conferences currently do so, the unfettered ability to take I/A nonetheless exerts a significant influence on such contracts.

For example, prior to entering into a new service contract, and even while contracts are being actively negotiated, a disturbing practice has developed where the big shippers are targeting various of the conference carriers with threatening demands that they take I/A on the commodity or commodities that would be covered. This has had differing results. Faced with this shipper pressure, conference carriers have yielded and been forced to take the I/A, which has, in effect, pre-empted the conference. In other cases, the pressures have been so strong that the contracts which are ultimately negotiated are watered down so much that the members find themselves carrying cargo on a virtually non-sustainable basis. Thus, on the Eastbound leg, over 70 percent of the cargo volume is now moving under service contracts, and I would say that most of it carries the low contract rates which are so reflective of the shipper practices I have described. Aware of this situation at an early stage, the Japan Eastbound conferences once officially complained to the Federal Maritime Commission. I am told, however, that becasue the right of I/A had not been qualified by the Congress, the Commission was not disposed to interpreting the provision and that shippers could not be stopped from by-passing conference negotiating channels and undermining the equalibrium in the negotiating stage.

I fear that the dynamics of the big shipper-carrier relationship has not been fully appreciated. In reality, an individual carrier is the subservient party in the relationship, as it depends for its survival upon the shipper's support. Thus, when I speak of shipper pressure and threats, I mean that more than often a carrier (who has the option to break a conference's rate structure) is left without a realistic choice. Mandatory I/A thus promotes artificially volatile depressions in rates for the benefit of the big and powerful. In a real sense, conference carriers who strive for order in the trades and thus to be in a position to provide long-term quality service, are penalized. It is, therefore, fales to suggest that the new Act has introduced a new order of fair competition or that it is actually "in harmony with, and responsive to, international shipping practices." In point of fact, conferences domiciled abroad are being extraterritorially regulated even though they are permitted to operate under their own sovereign laws according to recognized international shipping practices.

There is also under the Act the rather startling reversal in the longstanding American policy to treat shippers substantially the same regardless of their size. As we all know, it is the small shipper (who nonetheless accounts for a sizable amount of cargo) which the 1984 Act has singled out to discriminate against. To remedy this situation, the Japan conferences vigorously sought to introduce a rule for tariff refunds (popularly referred to as "FCS") whereby the same percentage of refund would be allowed irrespective of shipper size, but, so far, the position of the U.S. government has been to stymie that effort.

I must conclude, therefore, that not only is I/A a destructive evil, in combination with service contracts it becomes a very destructive force.

<u>Third, Should There Be Changes in The Present Statute</u>?

If the balance of power which is decidedly in the large shipper's favor is to be evened-out, there must be changes in the present statute.

The first and most important step would be to abolish <u>mandatory</u> I/A. The American experience with conferences simply does not support their <u>de facto</u> demise under a law which seeks to preserve them yet which has disarmed them. Conferences in the U.S. foreign trades have always been open to joining and there has always been a sufficiency of outside competitors to monitor the rate level. I know of no convincing evidence that the freight rate structure in any trade was too high. If, instead, what came from the Congress was simply the idea that the cheapest rates were the best rates, I most fervently would have to disagree. I ask that the record since 1984 be impartially examined. Look at the carriers, both American and foreign, which have been forced out of the market. Look, especially, at the number of carriers whose financial positions have been substantially impaired. And, look at the alarming downward trend of freight rate levels since 1984.

I am aware of a suggestion which has circulated calling for a longer notice period (i.e., 30 days) for giving notice of an I/A. As I understand, the idea is that the other carriers would have more time to assess the impact of an I/A, and shippers may then loose their appetite for pursuing I/A's so extensively. While I see some merit in the idea, I am very doubtful this would meet our needs. If I/A is to be recognized in a new or revised law, I had much rather see conferences vested with the discretion to use or not to use it according to their internal voting rules. In this way, I/A could be banned, partially banned or adapted to the needs of a particular trade to meet a special trading environment.

Finally, I notice that the Advisory Commission is requested to address the issue of "whether independent action should be required on service contracts." This would cause an even widerscale deterioration in the rate structure with more abuse and threatening actions from the big shipper side. We already have the bitter experience when service contracts were opened up to individual carriers. The fact that virtually all of the conferences now prohibit such individual contracts should answer this question quite clearly.

Thank you for your patience and attention.

Effects of the Shipping Act on the Liner Shipping Industry — Service Contracts

Captain S. Y. Kuo
President and Vice Chairman
Evergreen International (U.S.A.) Corporation

Last June Evergreen received an invitation from Mr. Peter Sandlund, a member of the program committee for this conference, inviting our company to present its view on how the Shipping Act of 1984 has affected the liner shipping industry. Evergreen welcomes the opportunity to share the podium with such a distinguished group of carrier representatives and government officials.

Since each panelist has been asked to spend ten minutes addressing his subject, I would like to limit my comments to the issues of service contracts. I am sharing these experiences with you because our records show that Evergreen is one of the leading carriers signing service contracts.

Generally speaking, the "service contracts" have created a major impact under the Shipping Act of 1984. The Shipping Act affects two parties: the shipper and the carrier. Both are business entities existing under the principles of competitive environments and survival of the fittest under seemingly dreadful business conditions that change daily.

For a shipper, there are many advantages in signing service contracts. These can be delineated as: overall lower transportation costs; simplified adminstration; better planning and scheduling of shipments, and stability in the distribution system. On the other hand, the carrier also receives many advantages in signing service contracts. These can be described as: better allocation of ship space and expensive equipment; designation of a percentage of base cargoes; better accommodation of a customers' service need, and apportionment of freight and revenue.

Perhaps because of the advantages I have just mentioned, service contracts have also been abused. Some shippers and carriers so not respect the spirit and meaning of "contract".

To correct this situation, we, Evergreen, would like to ask the Federal Maritime Commission to give more specific rulings on the service contract with respect to the "me too" application, most-favored-merchant clause, and the liquidated damages.

The "me too" application is intended to open up the service with a "fair price" to all shippers in an indiscriminate manner. The consequences, however, makes it unfair to carriers. Over the years, a carrier diligently builds a good relationship with a good account, a trusted friend, so to speak, and then offers the service commitment toward this particular shipper, with a set of service modes under "the fair price". Both sides are happy with the commitment of service and friendship. A "me too" customer could be a total stranger who may not have the same background to substantiate the same volume commitment and probably not a "similarly situated shipper". He may or may not be a good customer. If he defaulted the service contract, the carrier then faces the problem of liquidated damages collection. If not, the carrier faces a violation, in compliance with FMC regulations.

In essence, the "me too" customer piggybacks a bona fide business relationship between a valuable customer and a carrier. Furthermore, there are a few unfavorable possible consequences to the carrier: the fear of inadequate space and equipment allocation, a few possible default cases, and the fear of "fly by night" business.

Another detrimental factor created by the side effects of service contracts is the "most-favored-merchant" clause". The logic says if a tariff goes below the merchant's contract rate, it is reasonable to apply the lower tariff rate. What good would it do under a contract of "commitment" if the contract rate is subject to further change. The fallacy is that the most-favored-merchant clause allows a rate to drop, but never to increase again to contract levels so a carrier can recoup under the compensatory rate level-- not to mention the fact that the rate structure was offered as a discounted "fair market price" at the time of negotiation by shipper and carrier. Above all, falling prices destabilize the shipping industry and shae the carriers' confidence in providing dependable liner service.

The last point, but certainly not least, is related to liquidated damages. The liquidated damages amount can be set at an extremeely low or meaningless level from which both parties can evade their contractual fulfilment obligations. Furthermore, the Shipping Act of 1984 places the responsibility to collect liquidated damage on the carrier, who is unwilling to offend or upset customers with whom they have established a good business relationship. Because of the fact that this provision is optional, and elusive, the provision should be provided with a set of standard pratices and procedures to enforce liquidated damages. Only then, will the liquidated damages provision become effective and meaningful.

I wish I could tell you that we have solutions to those problems. But I believe that all of you distinguished guests here will agree that the solutions must come not only from the lawmakers who must restructure some provisions of the Shipping Act of 1984 to make it more clear-cut and strict. The solutions must also some from both the carriers and shippers who must respect the true meaning of "contracts" -- rights come along with obligations.

In closing, I would like to say that the American Government and the laws governing this land are indeed the "fairest", compared to other nations around the world. Many of us appreciate, for the most part, the business climate and conditions under which we operate.

The issues I present today on behalf of Evergreen are in the hopes that one day under the Shipping Act, we can operate under the principle of "fairest to all".

Ladies and gentlemen, thank you.

Session 6
The Position of Shippers, Forwarders and Ports After Four Years of Experience With the Act

Chairman: Robert L. Friedheim, Director
Sea Grant Program,
University of Southern California

A Shipper's Perspective After Four Years of Experience With the Act
Richard Haupt
Director, Transportation and Traffic Office
Ford Motor Company

Effects of the Shipping Act After Four Years — A Shipper's View
Clifford M. Sayre
Director of Logistics
E. I. du Pont de Nemours and Company, Inc.
Wilmington, Delaware

The Experience of Shippers' Associations Over the Past Four Years
Richard A. Kulow
Director of Transportation
Streamline Shippers' Association

A European Shipper's View of the Shipping Act of 1984
Alexander H. McQuillan
Chairman, British Shipper's Council

The Shipping Act of 1984 — The Forwarder Position
Arthur J. Fritz, Jr.
Chairman, Fritz Companies, Inc.
President, National Customs Brokers and Forwarders
Association of America

The Shipping Act of 1984 — After Four Years' Experience
James J. O'Brien
Deputy Executive Director
Port of Oakland, California

Evaluation of the 1984 Act — A Carrier's View
Raymond P. deMember
Counsel, International Association of NVOCCs

Introduction

Robert L. Friedheim
Director
Sea Grant Program,
University of Southern California

For our next session, we have asked representatives of shippers, forwarders and ports to indicate what their experience has been after four years of experience with the Shipping Act of 1984. Most of you know me by now and know that I am an academic, and like everybody else at this meeting, I would like to make a dramatic impact. I think I will start off by announcing that I am not going to give an academic lecture. I will not task people of the industry with the fact that their behavior doesn't meet the requirements of theory. But I will give people in the industry the maximum opportunity to tell you what their experience has been. I would like to introduce our first panelist, Mr. Richard Haupt, who is the Director of Transportation in the Traffic Office of the Ford Motor Company.

A Shipper's Perspective After Four Years of Experience with the Act

Richard Haupt
Director, Transportation and Traffic Office
Ford Motor Company

Good Morning, Ladies and Gentlemen.

It is a special pleasure for me to be here in beautiful Southern California after experiencing what has so far been a cold Michigan winter. And it's also special for me to be able to share a shipper's perspective on our panel topic with my good friend, Cliff Sayre. Cliff and I may end up sounding somewhat like the Bobbsey Twins as our views on our topic usually are similar (that's because I'm smart enough to follow a knowledgeable person like Cliff). However, we purposely did not share our views or exchange texts, so here it goes. I also should note, although I'm sure it is known, that shippers are a heterogenous lot and thus, I can really only represent the position of one shipper, my company.

As one tries to assess a perspective on the Act after four years, it is helpful to go back to the inception of the Act in 1984 and subsequent events. As the U.S. currency gyrated and its influence turned the U.S. from a leading creditor nation to the world's largest debtor nation, historical trade patterns were reversed. The U.S. turned from a heavy exporter to an insatiable importer and the turmoil clearly affected worldwide shipping conditions. Vessels inbound to the U.S. were often chock full while outbound ships were often more than half empty. The situation was exacerbated by an oversupply of ships and containers which caused a severe decline in freight rates. I can recall that over a year before the Shipping Act became law, I asked my people for a forecast of container availability over the next five years. When I saw the results, it was clear to me that freight rates would be going down. The number of containers would exceed the demand for them. All of these factors make an assessment of the impact of the Shipping Act difficult. In a way, the situation reminds me of that which prevailed at the time the two major pieces of legislation, the Staggers Rail Act and the Motor Carrer Act became effective in 1980. The U.S. was promptly plunged into a severe recession, there were too many trucks and railcars chasing too little freight (shipowners: sound familiar?) and ever since, we have been trying to sort out the impact of the down economy versus the legislation to see which had the most significant impact on the carriers, in particular, the truckers (who also had a rash of new entrants which contributed to much excess capacity).

With this background in mind, how do I see the Shipping Act of 1984 after four years? Well, my opinion has not changed much from the grade I gave the Act a year ago when I spoke at the Containerization Institute Forum in New York City. At that time, I gave the Act a good solid "B" - the solid part is wavering somewhat as a result of recent Federal Maritime Commission actions, which I will discuss, but the "B" is still good.

We are pleased that the Commission decision in Docket 86-6 was not as bad as it could have been. Although, as I observed in a talk I gave on service contracts at the recent National Industrial Transportation League Annual Meeting, "The Federal Maritime Commission just finished with its Docket 86-6 in which it tightened the rules governing service contracts. As our counsel said in sending me an analysis of the Commission's findings against our filing in the Docket, "On almost every point, the Federal Maritime Commission took a position contrary to Ford's views, in most instances taking no notice of the arguments proferred"." I do feel that the FMC missed a golden opportunity to <u>reduce</u> rather than increase the regulation of service contracts, but my associate, Tom Kolakowski, already has commented on that, so you are familiar with the Ford position. Suffice for me to say that as a customer of the shipping companies, I feel that I have the right to expect them to work toward meeting my needs. If I operate (and like many shippers I do) in an uncertain market environment, governed by the needs and demands of <u>my</u> customers, I have to be flexible in responding to those needs. In turn, I need that flexibility from the carriers that serve me. Government regulations that inhibit flexibility to respond to market demand only will reduce my ability to compete and eventually, the amount of freight the shipping companies will haul.

Similarly, I have concerns over the final FMC rules in the so-called "Box Case". The announcement contained in the January issue of <u>American Shipper</u> stated that:

"Sometime in January, the Commission will issue a proposal calling for two things:

- Do away with the "Crazy Eddie" carrier-matching rate activities; and

- Mechanisms intended to correct cargo commitment shortfalls on the part of shippers."

I have no quarrel with the elimination of "Crazy Eddie" clauses and there are none in any Ford service contracts. I am concerned, however, about the second statement referring to "correcting cargo commitments" and will have to wait to see the final order. Again, I feel that shippers and carriers should have the freedom to negotiate a fair settlement if market conditions inhibit a shipper from completing his commitment. If for example, I can offer the shipping company equivalent cargo elsewhere so that the Company is whole in terms of the total dollars that the Company expected to earn, and that is acceptable to the carrier, then that settlement should be between the parties without the imprimatur of the regulators.

The Shipping Act has been good for Ford in that we have been able to negotiate service contracts in some trades that we feel have been mutually beneficial. Tom discussed the fact that we have achieved lower rates in return for long term cargo commitments (albeit that our commitments would have been stronger if the present FMC regulations were not so restrictive. Nevertheless, service contracts have strengthened the one-on-one negotiating position that we always have used and I think that is the appropriate way to conduct our business.

In addition, I am a strong proponent of Independent Action as an important balance to the power of conferences and their antitrust immunity. Our experience with IA has varied; some carriers are willing to exercise it and others are less willing to break away from the "club". On balance, we feel Independent Action has been beneficial and it is a must if shippers are to tolerate continued antitrust immunity for Conferences. I also should observe that we are satisfied with the current ten day notice period and do not feel that it should be changed.

Let me also state that personally, I do not favor Conferences. I view Conferences as I viewed rate bureaus when they were more powerful in domestic transportation. Bluntly, they were, as are Conferences, price fixing structures that inhibit the free market and obstruct natural negotiations between carrier and shipper. However, as a pragmatist, I recognize that Conferences are important to many of my carrier friends and so long as I am given some assists in maintaining a fair degree of competition, I will tolerate Conferences.

In conclusion, I am not proposing any major changes in the Shipping Act as I feel it is working fairly well. I recognize that if the market changes, that is, if exports from the U.S. rise significantly, that I may pay higher freight rates and I am prepared to accept that, so long as the carriers are free to compete. I might observe that I may appear sanguine about this possibility at least across the North Atlantic after reading an article in Container News that said, and I quote:

"Recent forecasts see exports from Europe to the United States growing by just 4 percent to 4.5 percent over the next four years, with container trade rising by 6 percent a year. Trade in the other direction is expected to show an increase of 8 percent or 8.5 percent this year, and to rise by 6 percent to 7 percent between 1988 and

1990. But meanwhile, slot capacity on the North Atlantic is estimated to have risen by 35 percent last year and is forecast to continue rising.

These shifts will cut westbound load factors from the 90 percent to 95 percent enjoyed over the past few years to 80 percent to 85 percent in 1988-90, while eastbound load factors should stabilize at around 55 percent after a slight rise this year. The gross imbalance between supply and demand seems certain to bring box rates under pressure and have unless there is much greater amalgamation of services that has been achieved so far."

Rather I urge the carriers and the regulators to experiment with less regulation and more market freedom. To the regulators; take a leaf from the much maligned Interstate Commerce Commission and move toward less regulation rather than more. The ICC has even been bold enough to suggest that it should go out of business. For example, the FMC should consider granting more exemptions from tariff filing (as allowed under the Act). This can work and can allow the Commission to focus on really important issues. And to the carriers, also experiment with new and innovative responses to your customers' needs to see how you can best serve them. You might discover, as did many U.S. rail and motor carriers, that less regulation is beneficial, that it does encourage innovation, that being forced to respond to markets rather than to regulators stimulates the marketing "juices" and that all in all, the new environment, while risky, is more fun. It also is interesting to note that the U.S. may be leading the world in this philosophy. As was stated in the Background Paper:

"The Shipping Act of 1984, notwithstanding some significant changes, continues to uphold certain principles of competition in its regulation of liner shipping as opposed to that practiced elsewhere. Nonetheless, there are clear signals that this same philosophy is in increasing favor abroad as evidenced by the recently adopted shipping regulations by the European Community and the OECD Common Principles of Shipping Policy. Moreover, several of the provisions of the 1984 Act are embodied in the new legislation to be implemented by Canada and in the shipping policy proposals under consideration in Australia."

And finally, to borrow a phrase (which I hope they will not mind) from CSX Corporation, I suggest that my carrier friends practice what that company terms "Partnershipping".

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Effects of the Shipping Act After Four Years — A Shipper's View

Clifford M. Sayre
Director of Logistics
E. I. du Pont de Nemours
and Company, Inc.
Wilmington, Delaware

Let me begin by once again complimenting the staff of the FMC on its excellent preparation for this meeting. In particular, the background paper which lays out the issues for the discussions is exemplary in its clearness and accuracy. I would hope that with another year and a half behind us under the '84 Act that we will make even greater progress toward illuminating the benefits and weaknesses of today's regime of ocean liner regulation in the U. S. trades than we made at Norfolk in June of 1986.

It is, however, appropriate to raise the caution that although we live in a crisis-ridden world where events have a way of overtaking our best intentions, we have had less than four years under the '84 Act compared with nearly 70 years under the '16 Act. Therefore, it may be well to resist the temptation to try to rewrite the rules again in 1989 or '90 until we are satisfied that legislation or a new regulatory environment is really the answer to our problems.

How Has the '84 Act Affected Us?

Du Pont is a global company. Forty percent of our revenue is generated outside the U. S. and that figure will be fifty percent before very long. Of that amount, nearly half of our international sales in chemicals and specialties represent products exported from the U. S. to our subsidiaries and customers abroad. The Shipping Act of 1984 has made Du Pont and, we believe, other U. S. exporters more effective international competitors. Intermodal rate authority for ocean carriers has made today's world a point-to-point world with more efficient shipping services which permit us to better meet our international customers' needs. Contracting for our liner needs has given us longer term relationships, simplified pricing, and specified service standards which have made it possible for us to reduce internal administrative costs. This has helped preserve for us and the U. S. chemical industry a positive balance of trade even through the period of the high dollar. Now confronted with a low dollar we are present in the marketplace with established products.

Being a global competitor or multinational, however, doesn't mean necessarily being good at exporting. It means being in the marketplace meeting customer needs. In many cases that means evolving from a period of exporting/importing to a maturity which may involve local manufacture. It also implies global sourcing of raw materials and semifinished products. My point is that it would be a tragic error for today's players to plant their feet in concrete and believe that today's trade patterns will remain unchanged. For example, today my company has promising opportunities in China and the current regulatory scheme is an impediment to an orderly development of the transportation aspects of that business. It may quite frankly be a factor in our decisions to source those markets from facilities outside the United States. We need maximum flexibility and sometimes our carriers and government regulators do not seem to understand that.

<u>What Changes Are Recommended</u>?

We are quite content, however, with the present rules of the game. Despite all the squeaking we hear from the carriers, who in the main are the victims of their own foolishness, we think the '84 Act is basically sound. If legislative action is forthcoming, we will have a list of wishes as will everyone else. Opening the Act could invite changes that result in great mischief. I am sure the carriers will seek an end to IA (independent action), but are they willing to trade that for a loss of antitrust immunity? For, while the carriers may be offended by the pressure that IA puts on prices, shippers are equally offended by carrier behavior that in some quarters continues to be irresponsible, unethical, and illegal.

<u>Are Shippers' Associations Meaningful</u>?

We have no good experience in this area. We do not belong to any shippers' association and have no present intention of forming or joining one. That does not mean that someday in some trade we would not see an advantage to such an organization. This may also be a way of addressing the concerns of small- to medium-sized shippers who are looking for improved circumstances for negotiating their rate and service needs. It could be particularly important in those industries where there are both large and small factors and where there is legitimate concern with unjust discrimination among shippers. The carriers could also find this a means of reducing their selling and administrative expense and stabilizing pricing. It would certainly eliminate the need for armies of agents or salesmen chasing one or two box shipments with wholesale and indiscriminate price-cutting.

<u>Is the Balance Struck in the Act in Need of Change</u>?

The balance is not too bad, we think. You cannot solve a worldwide overtonnaging problem with U. S. legislation. Imagine, if you would, the past three-plus years under the '16 Act: that is, without presumptive approval of agreements, clarified antitrust immunity, and no intermodal rate authority. I have to believe that without the reforms brought about under the '84 Act that this would have been an even more difficult period for liner carriers in the U. S. trades. We have seen speedy approval of carrier agreements. There have been no major assaults by the Justice Department. And carriers and their railroad partners have been able to put in place substantial investments in intermodal transportation without the threat of their being made obsolete by administrative whim. We must remember that it was the carriers and not shippers who initiated the '84 Act and I believe that despite their discontent with the present level of prices and profits that they have benefited greatly from it.

Shippers, too, have reaped the benefits that I mentioned earlier. We have seen expedited responses to our requests prompted by independent action, or at least, the threat of independent action. We have benefited from the trend toward simplified pricing and the institution of efficient intermodal systems. Many of us have also built more sturdy relationships with some of our carriers in the form of contractual understanding of our needs and commitment to meeting them.

Shippers Councils, Are They an Answer?

The introduction of fresh information may change our minds, but for the moment we have no faith in shippers' councils in the U. S. context. We believe that no one can speak for us better than we can speak for ourselves. We have absolutely no objection to the formation of shippers' councils, but we think that those who advocate them should look closely at the experience elsewhere in the world in its total context. In the past some have advocated for the U. S. the European system of closed conferences balanced by shippers' councils. They have ignored the secret contracts and rebating that is also practiced there. One does not work very well without the other, so if we do want to import another system, let's make sure we import all of it. It is interesting to note that as we speak others are starting to incorporate into their systems the U. S. notions of fairplay, openness, and antitrust.

Has the Act Encouraged the Creation of Port/Load Centers?

Load centers seem to be an idea whose time has come. Their creation is driven by the need of the U. S. to become more efficient. One thing that differentiates the U. S. from many of its international competitors is its geographical spread. While we have a marvelous coastline and an abundance of ports, the development of our domestic economy has made us a nation of inland manufacturers and consumers. As a consequence, we often compete in the international marketplace with nations that are all coastline and whose economies are largely export oriented. We simply must do everything we can to build efficient export systems to minimize that disadvantage. If anything, the Act may have facilitated an inevitable and very necessary development.

Summary

If we objectively examine the events that have characterized the U. S. liner trades since June of 1984, I think that we would conclude that much more good has flowed from the Shipping Act of '84 than bad. Prices are lower than they ought to be, you say? Oil producers feel the same way. Their cartel cannot maintain price stability or high levels of profitability in the face of a worldwide glut either. Legislation is unlikely to solve that problem.

The failing fortunes of some of the U. S. flag carriers worries us all. Would a different Shipping Act have saved U. S. Lines from the mismanagement that sank it? I don't think so. Will different legislation make the U. S. flag carriers better marketers than their European and Asian competitors? I don't think so.

All in all, American shippers are able to buy safe, efficient, and cost-competitive liner services in all the major trades except those where cargo reservation schemes prevail. In those trades, the service is poor and the prices are high and the American shipper is clearly disadvantaged vis-a-vis his Asian or European competitor. Our attention might be better turned to dismantling those agreements than in dreaming about getting a one-sided rewrite of the Shipping Act which will permit us to stay afloat without working for it. I, for one, do not believe that that will happen. If there is one thing that I think the experience to date under the Shipping Act of 1984 has shown, it is the wisdom of those who knew that to be successful it had to maintain a balance between the interests of the liner carriers and their customers. Future Congresses and any administration I can contemplate will not fail to acknowledge that fact.

The Experience of Shippers' Associations Over the Past Four Years

Richard A. Kulow
Director of Transportation
Streamline Shippers' Association

Introduction

The topic which we have been asked to address today is the position of shippers, forwarders, and ports after four years of experience with the Shipping Act of 1984. It is an honor to be asked to be on this panel for several reasons. First, my co-panelists are a distinguished lot, representing the major shippers, forwarding entities, and ports in the international ocean shipping industry. Their expertise and collective experience is something which I both admire and hope to learn from today.

Second, and of equal importance, are the interests that I represent today. These are interests which to a very large degree did not have an active voice in the international ocean transportation industry prior to enactment of the Shipping Act of 1984. Some of these interests are self-evident, others are perhaps not quite so evident. Most obvious is the fact that as Director of Transportation for Streamline Shippers Association, I am here representing the shippers' association industry, an industry which was not explicitly recognized in the international marketplace prior to enactment of the Shipping Act of 1984.

As a Director of a shipper's association, I am also up here representing shippers. This is, after all, a shipper's panel. However, unlike my distinguished colleagues from Ford and DuPont, shippers' associations represent on the whole small and medium sized shippers. While we certainly embrace and oftentimes do have as members large shippers, the reason for the inclusion of shippers' associations in the Shipping Act of 1984 was to help promote the ability of the small and medium sized shippers to obtain the benefits of volume transportation rates and services which in the past have been available primarily to the larger shipper. I therefore also speak for those entities who perhaps do not have the collective power to speak for themselves.

A less obvious interest that I am representing today, but in my opinion perhaps the most important one in the context of the Shipping Act of 1984, is that of the intermodal transportation shipper. If there is one single point which I would like the attendees leaving today's meeting to remember concerning shippers' associations, it is this: the shipper's association which was authorized to act in the international trades under the Shipping Act of 1984 is the same legal entity which was authorized and has been operating domestically since before the turn of the century. The benefits of shippers' associations to the small and medium sized shipper was recognized by the United States Supreme Court in 1911, five years before enactment of the first Shipping Act in 1916.

Shippers' associations therefore have well established domestic infrastructures, are recognized as legitimate and bona fide business entities that are both creditworthy and reputable, and are business enterprises which provide a substantial and profitable source of business and a harmonious working relationship with both rail and motor common and contract carriers. For the small and medium sized shipper, the most significant change brought by the shipping Act of 1984 is not only the fact that the Act recognized the legal status of shippers' associations to operate in the international trades, but that the Act also provided the legal foundation and the impetus for a through intermodal international transportation system which is now developing in this country. Without shippers' associations operating in both the domestic and international markets, the small and medium sized shipper would not be able to take advantage of the new international intermodal domestic transportation and distribution systems which have developed over the past four years.

As noted, shippers' associations have been in existence for over a hundred years. In Streamline's case, we were incorporated in 1969 and have been active domestically for almost 20 years. Shippers' associations have been legally defined in the Interstate Commerce Act since the 1940's. Prior to 1984, however, shippers' associations serving general commodities did not actively participate in the international market because the FMC refused to recognize us as being legal entities separate and distinct from NVOCCs. Through the efforts of the American Institute for Shippers Associations, Inc., Congress was persuaded to include in the Shipping Act of 1984 several provisions which are designed to encourage the introduction and use of shippers' associations in the international arena.

The Experience of Shippers' Associations Over the Past Four Years

I would now like to address the two questions that are foremost after four years of shippers' associations and the Shipping Act of 1984 recognized shippers' associations as being separate and distinct entities from NVOCCs and other intermediaries. It did so by adopting a definition for shippers' associations distinct from that of NVOCC's. Under the act, shippers' associations are a group of shippers that consolidate or distribute freight on a nonprofit basis for the members of the group in order to secure carload, truckload or other volume rates or service contracts. This definition is essentially the same as that previously contained in the Interstate Commerce Act. It has opened the door for shippers' associations operating domestically to expand into the international arena without being subjected to major regulatory burdens by the FMC. The Shipping Act of 1984 also benefited shippers' associations by recognizing a special legal status for them in their dealings with ocean common carriers. This status is most important in the context of service contracts and carrier shippers' association relations.

Under the Shipping Act of 1984, shippers' associations are specifically recognized as having a right to enter into service contracts with ocean common carriers. FMC regulations implementing the service contract provisions of the Shipping Act of 1984 are clear that shippers' associations may be contract parties to service contracts on behalf of all of their members. In addition, the Shipping Act of 1984 contains a good faith clause (Section 10 (b) (13)) which provides that no common carrier either alone or in conjunction with any other person, directly or indirectly, may refuse to negotiate with a shippers' association. While there are not yet any official agency or court decisions interpreting this obligation, it is our opinion that this requirement that common carriers negotiate in good faith with shippers' associations will be and is a very powerful tool for associations operating in the international arena.

While the statutory language of the Shipping Act of 1984 is thus very clear as to what is a shippers' association, experience over the past four years has proven otherwise. The statute clearly provides that associations consolidate and distribute shipments to obtain volume rate discounts. This is the same statutory language from the Interstate Commerce Act and it is how shippers' associations have historically operated since before the turn of the century in the domestic transportation market. That is, they have been groups of shippers which have actually engaged in the physical consolidation and distribution of their member's freight to obtain volume rate discounts. One would assume that a business entity which has been operating in the domestic transportation market for over 100 years and has been statutorily defined for over 40 years would be an easily recognizable entity. However, a series of events after the passage of the Shipping Act of 1984 unfortunately caused the waters to be muddied in this regard and has impeded the development of the shippers' associations in the international trades.

Simply stated, when the Shipping Act of 1984 was initially enacted, the FMC declined to issue any form of guidelines as to whether it would recognize international shippers' associations as being the same entities as those which have operated in the domestic transportation market. Instead, the FMC took the position it would issue no guidelines at all concerning what constituted a shippers' association under the Shipping Act of 1984. It has thus left it to the marketplace to determine what is and what is not a "bona fide" shippers' association. As a representative of a domestic shippers' association which undertook substantial efforts to enter the international markets since 1984, I must confess that I had much to learn about the international trades over the past few years. In the same manner, I believe most players in the international arena have not been as familiar with the domestic transportation market as they will need to be in the future and that some of the confusion concerning shippers' associations under the Shipping Act of 1984 is the result of this lack of familiarity with how the domestic transportation market operates.

In any event, over the past four years, shippers' associations operating in the international trades have taken two distinct forms. One is a "full service" shippers' association, which is essentially the domestic shippers' association which has existed for the past 100 years and which has now expanded its operations into the international arena. Streamline Shippers Association is such an association. We consolidate and distribute our member's freight, in facilities which are operated for the members and pursuant to contracts which are executed and signed by the association. We are named as the "shipper" on the carrier's bill of lading and issue our own shipping documentation for the use of our members. We perform all of those functions which are contained in the shippers' association definition under the Shipping Act of 1984.

Over the past four years, another form of shippers' associations has also developed under the Shipping Act. This is essentially a "rate negotiator" shippers' association. These associations, which are often affiliated with trade associations, merely negotiate volume rates on behalf of their members. The members then deal directly with the ocean common carrier for all other purposes. They are generally billed a lower rate under a service contract merely by cross-referencing that contract in the bill of lading which is issued to the shipper member. While technically not consolidating or distributing freight within the actual definition of the Shipping Act of 1984, these rate negotiator shippers' associations are within the parameters that the FMC has set concerning what constitutes a shippers' association. They certainly serve the underlying policy of the Shipping Act of 1984, which is to enable small and medium sized shippers to obtain volume rate discounts which would otherwise be available only to those large volume shippers.

Accordingly, while there should not be any question as to what constitutes a shippers' association under the Shipping Act of 1984, such questions have existed during the first four years of operation under the Act. After four years, however, the question is slowly but surely being resolved. There are a number of reasons for this. One is the mere fact that the marketplace is gaining familiarity with the concept of shippers' associations and beginning to accept them. Another is the fact that the Department of Justice assumed the de facto role of certifying a number of shippers' associations operations under the antitrust laws. While Streamline and domestic shippers' associations did not see this procedure as necessary due to years of experience in the domestic marketplace and familiarity with the applicable principles of antitrust law, rate negotiator shippers' associations which were newly formed under the Shipping Act of 1984 have felt it necessary to obtain some sort of "stamp of approval" from a federal agency.

Finally, the Federal Maritime Commission has decided to actively educate itself concerning the nature of the shippers' associations industry. Representatives of the FMC have met with the American Institute for Shippers' Associations, Inc., and individual shippers' associations in an effort to learn how associations operate and function. They have also sought their input into such public proceedings and forums as the one that we are all currently attending. A shippers' association study group has been formed to assist the FMC in its Section 18 study group proceedings.

Uncertainty as to what is a shippers' association certainly is one factor which accounts for why shippers' associations have not taken off as quickly as many predicted in the past four years. Because the international market has had to be educated concerning what is a shippers' association, it has been difficult to make an initial large splash in the marketplace. However, it must also be said that those who thought shippers' associations could make a major impact on the international arena in the first few years after passage of the Shipping Act of 1984 were unduly optimistic. They basically ignored certain fundamental business start-up times which are inherent in penetrating any new market or starting up any new business.

Simply stated, over the past four years, shipper's associations have been devoting much of their time in either establishing the framework for entering into the international marketplace or in waiting for market conditions to change to a more favorable climate. As we all know, over the past four years, the ocean transportation market, at least in the Pacific Rim, has been overtonnaged and suffering from depressed rates. There has also been a balance of trade deficit favoring imports over exports. With such market conditions, shippers' associations have not yet developed as great a market presence or importance that they eventually will for the small and medium sized shippers. While shippers' associations have already been able to obtain substantial savings for their members, especially in arranging for "one stop" through intermodal services, weak market conditions have minimized their current impact. This situation will change in the future as rate stability and a more balanced trade picture returns to the international trades and the shippers' association is looked to as providing a viable alternative for obtaining lower rates. In the interim, associations are establishing the framework for that day.

Streamline's experience in entering the international market provides an example of the lead time that shippers' associations have experienced in entering the international market. It was not until 1985 that Streamline decided to enter the international market. Like most shippers' associations, Streamline spent 1984 examining the perimeters of the new market and regulatory scheme to determine whether the new Act made entry into the international market feasible. Once the decision was made however, an infrastructure was needed which would facilitate Streamline's handling of international cargo movements. As a shippers' association established nearly 20 years ago, Streamline already had a well established infrastructure connecting carriers and physical plants and facilities to handle its domestic distribution and traffic. However, it has to adapt those facilities to the specific requirements for the international trades. Therefore, Streamline had to establish U.S. Customs approved facilities throughout the United States. This included the facility used by Streamline in Los Angeles. Manpower shortages in the U.S. Customs' service made this procedure time consuming and difficult. It took one year and a half before the Los Angeles facilities used by Streamline were approved for operation as a container freight station. In addition, Streamline assisted many of its distribution agents around the United States in securing their respective CFS certificates. Today, Streamline has LCL distribution capabilities through 32 U.S. Customs approved facilities.

At the same time, Streamline had to conduct extensive market research as to what international markets to penetrate. Although Streamline initially chose to concentrate on the Pacific Rim trades due to import patterns and Streamline's West Coast location, all world markets had to be examined in order for Streamline to determine what were the international needs of its members.

After its domestic distribution network had been modified to accommodate international operations, Streamline had to establish an overseas network. Prospective agents had to be interviewed in various Far Eastern countries. Service contracts also had to be negotiated.

As you can see, the lead time to penetrate the international markets is not short. As with any new market, it takes several years before operations can commence and results can be seen.

Changes to the Shipping Act of 1984

In conclusion, after four years experience with the Shipping Act of 1984, what is the position of shippers' associations and are they functioning meaningfully? Simply stated, the following conclusions can be made:

1. There has been some confusion in the international marketplace as to what constitutes a shippers' association but that confusion is slowly being reduced.

2. It has taken several years for shippers' associations to develop the infrastructure necessary to commence operations in the international marketplace.

3. Market and trade conditions have slowed shippers' associations' penetration of the international market. Such penetration will occur more quickly once ocean rates have stabilized and once trading patterns become more balanced.

As to possible changes needed to the Shipping Act of 1984, it is less clear that there needs to be a change in the law than a change in the attitude of the conferences in accepting the reality of shippers' associations.

Streamline has found that most independents were enthusiastic about signing service contracts with it. A significant advantage that Streamline has had in establishing itself in the international import market is the fact that Streamline has a well established domestic intermodal inland network. The ocean common carriers with which Streamline has dealt with have been impressed by the fact that Streamline has such a well established distribution network, largely because Streamline can accomodate the line by reloading or repositioning the steamship carriers' containers back to the designated port facilities. Prior to 1987, Streamline had service contracts with five ocean carriers constituting over 5,000 FEU 40 foot equivalent units. Streamline consistently loaded an excess of 125 units per week for import to the United States from Taiwan, Hong Kong, Korea, Thailand, Japan, and Singapore.

Streamline was surprised, however, that in its initial years of international operations only once were we solicited by a single member of the Asia/North American Eastbound Rate Agreement. A shippers' association which ships 5,000 trailers domestically generally has railroads and motor carriers knocking down its doors begging for its business. However, it has become very apparent that the steamship carrier industry is not going to be interested in shippers' associations business if shippers' associations are simply third parties in their head-haul traffic lane. Therefore, it is Streamline's opinion that shippers' associations must begin controlling a significant piece of the export market in order to get the steamship industry's attention.

Other shippers' associations have reported that conferences have imposed unreasonable burdens upon them as conditions precedent to contracting with them over the past four years. For example, bonding requirements have been imposed on shippers' associations as a condition to signing a service contract. Similarly, disclosure of corporate financial statements, operating statistics, or the names of individual members of the shippers' association have been required by the conferences. The conferences have also often requested proof that the association's operations are authorized by law, not only through disclosure of articles of incorporation and bylaws but also by requiring such documents as Department of Justice Business Review Letters. Finally, conferences have often sought to limit the number of shippers' association members who may participate in and utilize a service contract.

Such conditions precedent to negotiating and executing service contracts are burdensome and unreasonable. They are not required by FMC regulations or the Shipping Act of 1984. They are generally not required of other shippers. We recognize that shippers' association are the "new kids on the block" and that over the past four years there has been uncertainty as to what constitutes a shippers' association. Perhaps such negotiating requirements have been imposed out of a justifiable sense of business caution about shippers' associations. The first four years of the Shipping Act of 1984 have been, as I have said, about defining what is a shippers' association in the international markets.

However, if conference carriers still resist dealing with associations, and continue to raise unrealistic and unnecessary obstacles to dealing with shippers' associations, there are other provisions of the Shipping Act of 1984 governing shippers' associations which have not yet been tested. If the first four years of the Shipping Act have been confined to discussions of the definition of a shippers' association, it may be that the next four years will see a testing of Section 10 (b) (13) of the Act, that section making it illegal to refuse to negotiate with a shippers' association. In this context, we note that by imposing unreasonable negotiating burdens on shippers' associations, conferences may also be denying to the small and medium sized shipper the benefits of volume rate discounts in using through intermodal services. Such conduct is also prohibited by the Shipping Act of 1984, in Section 10 (c) (2).

Hopefully, testing of these Sections of the Shipping Act of 1984 will not come to pass. As I noted at the start of my presentation, the most important aspect of the Shipping Act of 1984 was the promotion of through international intermodalism. Just as shippers' associations over the past four years have been making forays into the international arena, ocean carriers have been expanding domestically. American President Lines and Sea-Land are but just two examples of ocean common carriers whose horizons have now encompassed the domestic market and "one-stop" shipping. Streamline finds it ironic that while the domestic operations of some major carriers are actively soliciting Streamline's freight, the ocean transport segment of those same companies have, to date, shunned our international freight. We are convinced that this will change over time, as the ocean transportation industry assumes a broader intermodal perspective, similar to the one that shippers' associations have taken since enactment of the Shipping Act of 1984, and that ocean carriers will actively solicit our freight in both the international and domestic markets.

A European Shipper's View of the Shipping Act of 1984

Alexander H. McQuillan
Chairman, British Shipper's Council

Mr Chairman,

Before I attempt to comment on the Shipping Act of 1984, I felt it might be helpful if I was to nail my colours to the mast and declare where I stand as a 'customer'. I not only have the privilege to be the current Chairman of the British Shippers'Council and one of its representatives on the Standing Committee of European Shippers' Council, but an active shipping manager. In 1986 my company achieved export sales of £900M ex the United Kingdom to some 150 plus deep sea markets, excluding those in Continental Western Europe which we now regard as our home market. These 'Rest of World' exports are essential to the health of the Company and whether by chartered tanker or container - 'shipping' is the vital link. We spend $95 M on liner shipping annually, representing some 10% of the value of the goods shipped. As we earn some 10% Profit on sales overall and frequently less on exports one can readily accept that our shipping costs can frequently decide whether or not an export sale is viable. As shipping manager it is my job to achieve basically two things - the required level of service at a competitive price.

What, as a shipper, do I see as the impact of the Shipping Act of 1984. This first question one has to ask is why do shippers believe the Act was necessary in the first place. The shipowning industry is a unique industry in today's world. Its role is truly international, its assets are inevitably mobile, it has no real 'home market', cross trading is an important part of its activities and it is an industry which generates considerable emotion, unlike mundane areas, such as electronics, chemicals or automobile manufacture. Much of this emotion derives from its historical and current strategic role as the fourth or fifth arm of defence etc etc.

You will note that I did not mention over-tonnaging or its difficulty in obtaining 'fair' prices or reasonable profits. In none of these factors is it at all unique and each of the other three industries just mentioned would claim to share these problems. Because of its unique features however the shipowning industry has developed another unique feature - it is probably the most highly legally cartelised industry in the world. As a result of its cartelised nature, however, it is probably also one of the most regulated industries in the world. I see the development of the UNCTAD code, of the new EEC maritime regulations, and indeed the Shipping Act of 1984 as an attempt to ensure that conferences did not exploit their immunities from anti-trust or competition legislation too far. Whilst as a shipper I may feel that these various regulations did not go far enough, nevertheless I welcome them on this basis. Indeed as far as European Shippers were concerned the 1984 Shipping Act was seen as the most significant piece of US Maritime Legislation this century, including a number of important new provisions which were viewed with considerable interest from the other side of the Big Pond.

What has been the impact of the 1984 act - let me concentrate on those four aspects which shippers consider to have been most helpful to them namely -

Service Contracts

Mandatory Independent Action

Intermodal Rates

Shipper Associations

Service Contracts

The concept of service contracts has been espoused by many European Shippers, both in the Westbound North Atlantic trades and elsewhere. It is generally believed that the principle of a shipper agreeing to provide a specified minimum quantity of cargo to a carrier over a certain period in exchange for a guaranteed rate and service level should be of benefit to both parties. This concept can encourage and improve long term relationships between customer and supplier, not least because the service contracts enable shippers to predict their shipping costs with more accuracy than was previously possible. They in fact provide a new basis for stability.

Various comments have been made about the imbalance between contracts Westbound relative to Eastbound on the North Atlantic ie 858 compared to 101. I do not find this surprising. In general the problem of capacity utilisation has been much greater Eastbound than Westbound. This has led to even greater competition and rate cutting - if I was shipping my products Eastbound at $1000 a box less than my Westbound competitor and hoping for an even lower rate next time, I doubt if I would be inclined to seek a service contract. It will be interesting to see if this imbalance corrects itself as US exports pick up and inbound cargoes disappear in part due to the demands of the Westbound conference and the exchange rate.

There has also been much comment about what I believe you call 'Crazy Eddie' clauses. I think Eddie must be a fairly astute negotiator and probably works for a chemical company. 'Most favoured nation' clauses or competition clauses are quite normal safeguards built into chemical supply contracts. As a Sales Manager committing my company to a customer on a significant slice of business I would be demanding a price variation clause including cover for currency fluctuation and equally would expect the customer to demand some form of cover against unexpected market fluctuations which could cause him hardship. These equate in my mind to GRI, CAF and, if you wish, a 'Crazy Eddie' clause, all of which seem eminently reasonable. I find it equally interesting that service contracts tend to be more favoured by independent shipping lines - I do not find this surprising as in general unfettered by the need to consult other conference members and the conference machinery they tend to be more ready to offer the customer what he wants.

Most major shippers would wish to see the advantages of 'service contracts' reinforced in any new legislation and also an extension of independent action to conference members to give them the right to offer individual service contracts tailored to meet the needs of the shipper. The ability to deal with a chosen line in this way would clearly be of benefit to both parties. The question of confidentiality of service contracts is a difficult one. I personally believe that agreements between supplier and customer should be confidential. This is a common view between most professional shipping managers. I was not surprised to learn that carriers favoured publicity on this matter - my perception is that rate cutting has been at least as much the result of internecine warfare between conference members than the activity of independent operators. In such circumstances I too would wish to ensure that my friends were behaving properly.

None of these debates should prevent us recognising that service contracts have been welcomed by shippers and many carriers and were one of the more positive benefits of the 1984 Shipping Act.

Mandatory Independent Action

I think all shippers would agree that this has been of particular benefit to them. The fact that this has been effective also suggests that those shipowners who have exploited the flexibility this has offered them would agree in practice if not in public. Under most circumstances I would accept that the need to give ten days' notice is realistic although if this could be reduced it would be welcomed. Any suggestion that it should be extended to thirty or forty five days would be unacceptable. Normally in such a situation the shipper has a potential customer pressing for an answer - he is certainly not prepared to wait for thirty days.

Independent action has been recognised as a useful means of maintaining the conference share of a more competitive market. Most shippers historical acceptance of and support for the conference system has been replaced by a more market orientated philosophy linked to the acceptance that today's reputable and efficient independent operators have a valuable role in the market place. The concept of independent action is seen not only as a device to help to ensure competition, but also as a means of assisting individual conference members to protect their position.

Intermodal Rates

During the last twenty years or so the whole field of logistics has been revolutionised. The development of the liner shipping industry as a result of the container has been only one part of this development. The exploitation of computers not only in navigating and loading ships but in surface route planning and truck management systems has also had a major impact. The rate of change shows little sign of slackening - 'Just in Time' scheduling, electronic data exchange between customer/shipper/forwarder/customs services in conjuction with the new Harmonised tariff structures and in Europe of the Community's Single Administrative document will have a enormous impact on shippers and shipowners alike. As a company and a founder member of DISH, Data Interchange in Shipping, we are already communicating a growing part of our business electronically with the shipowner and Her Majesty's Customs.

This has been reflected in the standards which I as a distribution manager expect from truckers, rail operators and shipping lines. I want to ship my products in the most cost effective way from my works' gate to my customer. I have to provide a quality product and a quality service - frequently this has to be Quality Accredited. If I want to compete in an international market I have to offer the product to the customer delivered cleared of all duties and taxes and in the appropriate currency. No longer can British Industry export, for example, on an ex works basis in good old British Pounds Sterling!

This means that I want service and rates point to point from my carriers. I also want to deal with one contracting party who accepts the responsibility for the total journey. Incidentally I also support the Hamburg Rules for marine insurance which I believe at least help to remove some of the loopholes exploited in the past by less responsible carriers. Intermodal rates are an absolute necessity to an efficient exporter and are another way of capitalising on the technological revolution we have been witnessing in transport.

Shipper Associations

The granting of recognition to shippers' associations by the 1984 Shipping Act was an innovative step which aroused considerable interest in the shipper fraternity. Whilst we understand that this idea has in practice been relatively slow to get off the ground, we believe the concept could in principle provide an important safeguard for small shippers by allowing them to co-operate and negotiate from a position of greater commercial strength and a counterbalance to the negotiating strength of the cartels. I look forward with interest to learning what progress is being made currently at Long Beach.

Whether in the form of shippers' associations or shipper councils or in the form of an organisation as SCOT, I am convinced that shippers do need a platform to express their views. No industry can survive without customers and they have a legitimate interest in ensuring that their needs and concerns are recognised. This does require that their voice is an independent one. I was interested to note the demise of the National Maritime Council. I appreciate that this organisation represented the interests not only of the shipper but also of the carriers and other interested parties.

I was delighted to note however that a majority of shippers were seeking to form a new organisation exclusively for shippers and representing their interests. This will not be easy. Unfortunately in too many companies the shipping department's activities are frequently ignored or misunderstood by Senior Management. A Department of Transport report in the UK a couple of years ago laid the blame as much on the exporter as the carrier for uncompetitive ocean freight rates. Shipping Departments were seen as under resourced, poorly managed and too subservient to the perceived needs of the business. This is a view which I can understand. Nevertheless there are signs that things are improving. I met with some of the members of SCOT in Washington last fall - their objectives mirrored those of Shippers' Councils worldwide and they were obviously a group of dedicated and professional managers. I hope that whatever organisation evolves in this country will be successful and will receive whatever degree of immunity required under the review of the Shipping Act to allow it to discharge its duty in the furtherance of shippers legitimate interests.

Let me add one further comment before I finish. Little of what I have said may be of much comfort to shipowners present. For this I am sorry. Shipping is of vital interest to international trade. This trade itself is of much greater importance however to any nation whether developed or in the third world than its more narrow shipping interests. We must ensure in trying to sort out the problems of the shipping sector we do not impede the development of this international trade. The major problem is clearly overtonnaging. How can this problem be solved when in order to support ailing shipbuilding industries Governments continue to promote unnecessary new buildings. Equally by insisting on maintaining adequacy of existing national fleets when developing nations are determined to develop their own. I am not competent to comment on the need for individual nations to maintain national fleets for strategic reasons - this is a matter for Governments to decide and pay for. What I am convinced is that this problem cannot be solved by bilateral cargo sharing arrangements, freight bureaus or other unilateral moves to restrict freedom of access to cargoes whether this be imposed by a third world country , or the US Government for military cargoes. Equally it will not be solved by reinforcing the immunity given to shipping cartels and to few other industries.

Overtonnaging must be tackled and this will require determined action supported by Governments. In the meantime I have a job to do. This means that I have to ensure that my company is not disadvantaged opposite its international competitors. I am not allowed the luxury of worrying about what is fair - or what cost increases a shipowner has had to absorb in the last 6 months. What is fair about current relativities in Eastbound and Westbound rates on the North Atlantic? These reflect market conditions and that must be the yardstick against which I operate and am judged.

The Shipping Act Of 1984 — The Forwarder Position

Arthur J. Fritz, Jr.
Chairman, Fritz Companies, Inc.
President, National Association of Customs Brokers and Forwarders Association of America

A few months ago right here in Long Beach, I participated in a Shipping Act Review Conference. Having no official position, I spoke on behalf of our industry as the President of the National Association of Customs Brokers and Freight Forwarders using my own perception of our general industry position which was no doubt influenced to some extent by my own personal beliefs and those of my company. In summary, I proposed that as a general principle I felt our industry favored deregulation. I think I would now modify that position to say as little regulation as possible.

This opinion evoked a lot of press with one industry magazine doing an article under the title "Fritz Says Scrap the '84 Act". While some of the reporting was not completely accurate, the result may have had the beneficial impact of heightening interest in the Congressionally mandated review of the Act.

Many shippers called and wrote me expressing opinions or asking for more explanation of my remarks. Most viewed the Act of 1984 as an improvement. They feared return to the former situation if they pushed for too much change.

In each case after further discussion they came away with a better understanding of the issues and with a resolve to become more involved. Most of them also came to realize that they had not considered deregulation because they hadn't realized it was a possible alternative. I told all of them about the poor shipper response to the 1986 survey. Shippers have a unique opportunity to participate in this review process. I emphasized the importance of doing so. Our company went further by writing all our customers urging them to make their comments. A similar effort was made by our National Association to have all members do the same thing with their clients.

I mention these items because the forwarding industry is not the main participant in the review. The shippers and carriers each have far more at stake than the forwarding industry. However, our unique position in the middle gives us an insight as to what may be the best points on each side. Our daily involvement with all aspects of shipping often allows us to be the catalyst to a successful solution to problems.

Before addressing the Forwarder aspect of the act, it is of paramount importance to consider the philosophy of the Shipping Act and what best meets the ability of the United States to participate effectively in international trade. As an individual businessman I both embrace and abhor regulation. I embrace it selfishly because it makes running a business and making excellent profits almost a guarantee once you are a participant in the regulated industry because the real result of regulation is to set rules and rates which virtually insure that even the weakest member of the industry can survive.

What one abhors is the monumental waste and featherbedding it engenders and then builds into the system. Even worse it completely stiffles creativity. How can you be innovative when there is a rule or regulation every way you turn.

For decades the U.S was able to survive under such a transportation system because of its sheer economic strength and growth. However, the U.S. is no longer 50% of the world's GNP. The world has become smaller and the U.S. position in international trade has shrunk as we have become less competitive and innovative. Part of this inability to compete was due to our regulatory system in all levels of transportation.

Finally, things began to change. First the airlines and then the motor carriers were virtually deregulated. What happened? In general, competition forced rates down. Poor competitors fell by the wayside. New and more innovative ones took their place. A whole new industry, commonly known as "couriers", was spawned. International air freight rates for the first time in history were set by the market place - by the old tried and true method of supply and demand. In today's market the U. S. exporter by air is working under the same conditions as his foreign counterpart.

Concern over rebates and unfair practices is a thing of the past. If what we call a service contract under the 1984 Act is entered into by an air shipper or forwarder and a carrier, they resolve their own differences if conditions change and commitments can't be met.

Even some of the improvements in the Shipping Act of 1984 have been blunted by an enforcement minded Federal Maritime Commission which has implemented an anti-rebate investigation in the North Atlantic trade and has taken an inflexible position regarding service contracts.

Regarding our industry specifically, there are a number of items which we would like in the 1984 Act and many which we feel should be changed or improved. It is axiomatic that none of the latter would be worth mentioning or even exist if we didn't have the continuing frustration of regulation.

In general, we strongly favor that part of the legislation that recognizes the professionalism of our industry. A forwarder now must establish his competency, financial responsibility and good moral character. Shippers and carriers have benefited substantially from these licensing requirements. Forwarder compensation has been clarified. The status of the NVOCC was recognized and defined. Unfortunately, both of these benefits are somewhat illusory.

The compensation issue evoked national notoriety when the Freight Forwarder Amendment was included in the Tax Reform Act of 1986. Why should the compensation of Freight Forwarders be part of tax legislation? This is a legitmate question which epitomizes the problem with regulation.

The Freight Forwarder Amendment is very pro-competitive and instills an element of fairness in an industry dominated by cartels. The Shipping Act of 1984 provided antitrust immunity for steamship lines to form "Conferences" in order to jointly fix transportation rates, including the compensation they pay freight forwarders. However, recognizing that such rate fixing ability can lead to abuses, Congress required that individual members of such Conferences must have the freedom to take "independent action" in order to attract more cargo and compete with the other carriers. The question of whether this independent action extended to freight forwarder compensation was unclear in the law, and the Federal Maritime Commission later ruled that it did not. Hence, we sought, and Congress last year enacted, a provision extending that ability of a Conference member to compete, to freight forwarder compensation. This allows individual carriers to offer more or less than the Conference fixed freight forwarder compensation. In addition, last year's law codified what has been accepted practice that when a Conference (as opposed to an individual carrier) sets a freight forwarder rate, that rate must not be less than 1 1/4%. This percentage must now cover all freight charges. Again, these provisions <u>only</u> apply when carriers utilize their antitrust immunity to <u>jointly</u> fix the rates. They place a limit on the power of the Conference, while boosting the ability of individual steamship lines to compete. The concept of independent action is one which is strongly endorsed by the Department of Justice and the Senate and House Judiciary Committees, which were largely responsible for its inclusion in the Shipping Act.

One of the ironies of this legislation is that since it originated in the Senate Finance Committee it only covers freight forwarders who are also Custom House Brokers. The pure freight forwarder was not included. Therefore, our National Association has had to introduce new legislation to have coverage extended to all freight forwarders. At the same time some carriers are still fighting to have the Forwarders Amendment repealed even though most carriers privately admit, and at our last convention two major carriers publicly stated, that this legislation really has very little effect on them. In fact, as stated above, carriers can use this provision of independent action to lower compensation which is exactly what Zim Lines has done.

Similarly, while the Act recognizes and defines the NVOCC, it places the NVOCC in an untenable position. As we noted above, the vessel carriers can contract for binding service contracts with shippers. The NVOCC as a shipper can also contract with the vessel carrier. However, the NVOCC is not permitted to have legally binding agreements with its shippers. At any time NVOCC shippers can abandon the relationship if prices drop or a vessel carrier gives a shipper a better rate by taking the initiative of independent action. The NVOCC is left holding the bag. The NVOCC has no recourse with either the shipper or the vessel carrier. Why shouldn't the NVOCC be able to enter binding agreements with its customers? Why should regulation even be necessary? There are centuries of legal precedents governing contractual relationships.

In addition to these two major items, our industry constantly has many smaller items before the FMC. An example is our effort to improve our ability to collect from the carriers the legally due brokerage fees in a timely manner. Our industry lost over $2,000,000 in uncollectible brokerage last year not to mention probably as much or more than that in interest and collection costs due to chronic delays in payment.

Just a few weeks ago the Federal Maritime Commission denied our latest proposal to rectify this situation with the response that this was not a regulatory problem and that it should be resolved in the open market place. While the answer sounds reasonable and in line with my general position of reduced regulation, it doesn't address the fact that it is archaic FMC regulations which are the cause of the problem.

To explain, I will use air freight as an example. When a forwarder pays an airline, he deducts his commission when he pays his bill. Quite a simple procedure and both parties are satisfied with a minimum of paper work. What about ocean shipments? Regulations require the forwarder to pay the full amount of the freight and then issue an invoice to the carrier or its agent for his brokerage. The average invoice is for less than $20. Between the artificial regulation requiring extra bookkeeping plus an additional invoice, net income is already reduced significantly. When you add the costs of collection and slow payment, the forwarder often has to walk away from the invoice. The problem has been aggravated by the dramatic number of carriers and agents that have gone out of business. How does the FMC expect us to work a solution in the open market when they have regulated us into a hole?

There are five similar matters which we are petitioning for relief at this time. Rather than dwell in the minuscule, I can state that they would not exist without meaningless regulations.

In summary, while regulation is a very positive and attractive concept for certain participants in international trade, I believe on behalf of the Freight Forwarding infustry that the best long term interested of all parties involved in international trade, including the welfare of the United States, will be best served by as little regulation as possible.

The Shipping Act of 1984 — After Four Years' Experience

James J. O'Brien
Deputy Executive Director
Port of Oakland, California

My comments on this subject reflect specifically the views and experience of the Port of Oakland. However, I trust our thoughts also generally represent the experience of the port industry. In order to put my comments in context, please note that my perspective is that of a financially self-supporting public port authority involved primarily in the regularly scheduled liner trades whose general cargo traffic is approximately 90% containerized.

Oakland is a non-operating port and all our facilities, both container and breakbulk, are assigned to private operators. Those agreements, all of which are subject to Federal Maritime Commission jurisdiction, presently total 30. That reflects the same number of agreements in place at the time of the first FMC conference on the Shipping Act approximately two years ago, although during that period some agreements were renegotiated and some new shipping lines entered service while others dropped out. The agreements take basically two forms: first, preferential assignment agreements directly with shipping lines for container terminals with the Port retaining rights of secondary assignment, and second, management agreements with terminal operating companies who provide stevedoring and terminal services to multi-users at public container terminals and at breakbulk handling facilities. The former tend to be long term in nature while the management agreements are of medium term.

In addition, it is quite customary for the Port to enter into user agreements directly with container shipping companies for the use of our public container terminals which agreements provide reductions from the Port's tariff charges in exchange for commitments to use that facility on a regularly scheduled basis. Such agreements represent 18 of the 30 noted above.

Within that context, we have found the 1984 Act to have positive, but also some negative impacts. On balance, however, the changes have been for the better in our view. On the positive side, the degree of predictability that a marine terminal agreement will be permitted to become effective in a timely manner has increased significantly. This has been a benefit to both parties to the agreement. In the period initially following enactment, we filed a number of new agreements and supplements to existing agreements and in every case those agreements were permitted to go into effect by the 45th day after filing. More recently, further procedural changes have permitted the type of agreements we normally file to become effective on filing, a further improvement when viewed from the limited perspective of expediting the effectiveness of terminal agreements.

While that process has proven to be an asset, from our perspective it also carries with it a negative element. As a port with many competitors, we would prefer to review all agreements filed by competitor ports and non-port terminal operators prior to their becoming effective, but that is no longer possible in most cases.

Because virtually all of our preferential assignment, management agreements and user agreements are cross-referenced to our port tariff as to both their economics and operating regulations, we, as a public port authority, differ with the views of some private terminal operators as expressed in the background paper prepared for this conference. Their position, as we understand it, is that if private marine terminal operators are independent (i.e., not a port authority or a water carrier subsidiary), they should not be required to file tariffs with the FMC, nor have them regulated by the Commission.

Further confusion over what agreements should be filed with the FMC by terminal operators quoting throughput, all inclusive charges for stevedoring, terminal services and facility use has resulted in the FMC's currently ongoing "Fact Finding Investigation No. 17". Without attempting to discuss those specific issues before this conference, let me simply commend the Commission for the approach taken to investigate that subject in a forum freely permitting the parties to thoroughly air their views on those issues.

We have also found that the ability of shipping lines to more readily enter into rationalized services under the new Act confronted us with new challenges. Rationalized services lend themselves to the use of common terminal facilities and in those cases, multiple lines effectively speak with one voice in negotiating the terms and conditions of terminal agreements taking advantage of the rationalized services' aggregate volume. From the ports' perspective, rationalization has reduced the number of shipping line clients with increased negotiating leverage and we see this trend toward rationalization continuing. We are not opposed to the concept because it has the potential to provide competitive, more frequent service to the shipping public, but we must recognize it as a trend in an ever-changing competitive environment.

Regarding the impact of service contracts on the port industry, let me first reassure our shipping line clients that "Crazy Eddie" is not a phenomenon limited to their component of the transportation industry. A close examination of some port terminal agreements, present company excluded I trust, suggests that if not "Crazy Eddie" himself, some of his relatives are alive in the port industry as well. We have not found service contracts to have a negative impact on the port industry. Our review of the essential terms of service contracts available to us through a data base to which we subscribe appears to provide us with adequate information to determine our degree of participation in such contracts as an origin, destination or "gateway" port. We have found the availability of this information to be considerably improved over our experience at the predecessor to this conference in Norfolk.

With almost 11,000 service contracts filed over the past four years, as reported in this Conference's background paper, we believe that ports must make every reasonable effort to keep themselves aware as to whether they are being specifically included or excluded from these contracts and how port arbitraries are being applied. As stated in the background paper, "Service contracts have had a profound impact upon the common tariffs. For a number of commodities in certain trades, virtually all the cargo moves under service contract rates, and the common tariff rate becomes a 'paper rate' with very little tonnage moving under the rate". Ongoing review of service contract essential elements can be a time consuming and therefore, a relatively expensive, but clearly, a necessary process.

Our composite view on the impact of the 1984 Act after four years' experience is that the Act, on balance, has produced positive results for the port industry. We believe the process which the Federal Maritime Commission has followed in obtaining input from the industry as to how best the provisions of the Act could be implemented has been most beneficial, with the possible exception of the inability to review and comment on port agreements prior to their effectiveness.

However, I would be remiss if I did not comment on an ongoing concern that we have regarding the longer term effects of the new Act for the port industry. These comments echo those we made two years ago at the first FMC symposium. A history of depressed ocean freight rates in many liner shipping trade routes has resulted in the carriers' placing increasing emphasis on cost control and cost reduction. The rationalization of shipping line services and the termination of service by some shipping lines is resulting in a fewer number of port clients, each with a greater marketshare and leverage in the marketplace.

Intermodal systems also provide those lines or groupings of lines with control over the port routing on an increasing percentage of the cargo that they carry. As a result of these factors, they are in a position to exert extreme pressure on port pricing.

Against that backdrop we find that the pricing decisions of some ports appear to be driven more by short term political considerations than long term sound business practices. We have seen instances where the philosophy of certain ports seems to be to attract the business at any price. Given the virtual impossibility of preventing such agreements from going into effect under a regulatory scheme which does not seem to be particularly adapted to review possible non- compensatory pricing of port facilities, the Port industry needs to be concerned about its long term ability to upgrade its facilities and provide expansion capability to accommodate forecasted trade growth.

The "marketplace view" would simply be that if ports choose to price themselves at unrealistically low levels, then they deserve what they ultimately get. However, I suggest that such practices are not in the national interest for both international economic goals and national defense considerations. We must continue to have a healthy port industry. In order to accommodate the requirements of containerships, from the mid-1960's on all major United States ports invested heavily in new facilities financed at a greater frequency by Port Revenue bonds, rather than by general obligation bonds of a municipality, county or state. This was consistent with a trend in the port industry toward a greater degree of financial self-sufficiency.

We now are on the threshold of the need to further upgrade those existing facilities to keep pace with rapidly advancing technology. Larger vessels in service or under construction demand larger and faster container cranes, deeper and wider channels and superior infrastructure to permit the rapid transfer of containers between vessel and inland rail or highway transportation. At the same time, the Federal government has shifted cost burdens from historical areas of Federal responsibility to the local ports.

We believe the legal mechanism for ports to meet in a forum where they can discuss their pricing philosophies in an effort to insure that pricing levels can generate adequate funds for future upgrading of facilities needs to be continued. Quite frankly, we have a serious concern that the combination of excess port capacity in some geographic areas and the high political profile that most ports have in their local regions, may prevent satisfactory solutions being reached voluntarily. We believe it would be most unfortunate if the industry needs to rely on a tightening of regulation as it relates to terminal pricing to protect itself from itself. However, we also believe the subject deserves close scrutiny from the perspective of our national interest during this period when the Federal Maritime Commission is gathering and analyzing the impacts of the Shipping Act in preparation for its report to the Presidential Commission and the Congress.

In closing, we appreciate the opportunity of participating in this conference and we can assure the Federal Maritime Commission of our full cooperation and participation during the remainder of their fact-gathering analysis period.

Evaluation of the 1984 Act — A Carrier's View

Raymond P. deMember
Counsel, International Association of NVOCCs

In discussing the impact of the 1984 Shipping Act during the last three and a half years, I believe we must remember the original concerns and the primary aims or goals of the efforts to rewrite the Shipping Act of 1916.

Proponents of Shipping Act reform, primarily ocean carriers and conferences, stressed two urgent, identifiable problems:

1. Procedures by which agreements among competing carriers were determined to be eligible for antitrust immunity;

2. FMC authority to grant antitrust immunity to conferences offering through intermodal services.

Former FMC General Counsel Jonathan Benner has stated his belief that both of these problems could have been resolved with very limited amendments. However, instead of amending the 1916 Act briefly to correct the problems in these areas, the carriers pressed for an entirely new approach to maritime regulation.

Whereas under the 1916 Act exemption from the antitrust laws attached only upon an affirmative act of approval by the FMC, the 1984 Act provides exemption for agreements from the antitrust laws effective 45 days after filing unless the FMC obtains injunctive relief from a federal court.

A price was paid for this new approach to agreements, primarily the 1984 Act's provisions relating to mandatory independent action, service contracts and shipper associations. This price was paid because of the clear sailing given carrier agreements and the almost certain antitrust exemption for carrier agreements filed with the FMC. The burden, and not a light one, under the 1916 Act was on the carriers or conferences to prove the agreement was entitled to antitrust exemption, whereas under the 1984 Act the burden is clearly on the FMC to establish that an agreement is not entitled to antitrust exemption; further, under the 1984 Act, third parties adversely affected by the carriers agreements are expressly forbidden to intervene and assist the FMC in the court injunction proceeding provided for in Section 6(g) of the Act.

I would like to point out that as of January 1988, with three-and-a-half years experience under the Act, not a single carrier or conferences agreement has been subjected to the injunction proceeding to prevent an agreement from going into effect with its concomitant antitrust immunity. Further, the antitrust exemption in the 1984 Act was broadened and extended to include any activity or agreement within the scope of this Act, undertaken under a reasonable belief that the activity was within the scope of an effective agreement -- this would hold true even if the actual belief of the parties at the time of the formation of the agreement is or was contrary.

As I have said, the express quid pro quo or price for this broadened antitrust immunity were the provisions relating to service contract rates and mandatory independent action and shipper associations.

Also, in evaluating the impact of the 1984 Shipping Act, we need to distinguish between effects caused by economic factors beyond the control of the legislation and those effects attributable to the Shipping Act itself. Rate instability on many trade routes should not be attributable to the effects of the Shipping Act when in fact, rate stability suffers wholly or in part from the severe drop in exports from the United States because of currency exchange rates and other factors and because of carrier over capacity on many trade routes.

Many, in evaluating the impact of the 1984 Act, may have erroneously attributed rate instability in some trades to the proliferation of service contracts and mandatory independent action. NVOs believe that these provisions have helped make the industry somewhat more competitive. NVOs believe these provisions should not be weakened but rather need strengthening if anything. Many NVOs have received no response to their requests of carriers and conferences for negotiations on service contracts. Many NVOs have complained that they do not receive adequate notice of general container rate increases.

NVOs complain that many carrier, and conference, container rate increases are excessive and unreasonable and are made effective without adequate notice to permit adjustment or to account for cargo that had already been contracted for or was in the pipeline based on the lower rates. Attempts to discuss or achieve an accommodation on the timing and amount of the increase are not responded to, as indeed are there no responses to NVO requests to negotiate service contracts to protect themselves from such abrupt and unreasonable rate increases.

The 1984 Act provides that no carrier or conference of carriers may refuse to negotiate a service contract with a shippers association. NVOs would submit that this prohibition should be extended to include all shippers.

Conferences have the ability to limit or prohibit independent action on service contracts. They should not also have the right to refuse to negotiate a conference service contract with shippers.

NVOs believe also that as common carriers NVOs should have the right to offer service contracts and time/volume contracts to their shipper customers.

Finally, NVO members of the International Association of NVOCCs comply with a self-imposed code of ethics and a bonding requirement. NVO members do this to assure to the shipping public a reasonable degree of service and financial responsibility. We believe there are NVOs in the industry who do not comply with any such standards and create problems for shippers and ocean carriers, and burden the FMC regulatory and investigation divisions with expensive and time consuming use of FMC limited resources.

We are therefore proposing an amendment to the 1984 Act to require licensing and bonding of NVOs to assure this reasonable degree of service and financial responsibility. Legitimate and responsible NVOs are dedicated to maintaining their own high standards and improving the reputation and performance of the NVO industry as a whole.

We ask the support of all segments of the ocean transportation industry -- shippers, ocean carriers, ports and terminals, brokers and forwarders and the FMC.

Session 7
The Future of Liner Shipping And Regulation: A Reading of the Tea Leaves

Chairman: Russell T. Weil
Kirlin, Campbell and Keating, Washington, D.C.

Liner Regulations — Diverse Trends
Jeffrey N. Shane
Deputy Assistant Secretary for
International Transportation Affairs
U.S. Department Of State

Efforts to Remove Regulations Impeding the U.S.-Flag Liner Fleet
John Gaughan
Maritime Administrator, Maritime Administration
U.S. Department of Transportation

Should Conference Regulation Have a Future?
Gunnar K. Sletmo
Professor, Ecole des Hautes Etudes Commerciales
Montreal, Canada

Next Moves in the Regulation Game
Russell Sunderland
Director of Shipping Policy and Emergency Planning
United Kingdom Department of Transport

Development of Shipping Policy in the EEC
John R. Steele
Prisma Transport Consultants
(Former Director General for Transportation,
European Economic Community)

Forecasts of Shipping Supply and Demand to 1990
John Zerby
Professor, Department of Econometrics
University of New South Wales
New South Wales, Australia

Some Thoughts on Trends and Policy Issues
Bernard M. Gardner
Department of Maritime Studies,
University of Wales Institute of Science and Technology
United Kingdom

Introduction

Russell T. Weil
Kirlin, Campbell and Keating, Washington, D.C.

My name is Russell T. Weil and I have the honor to preside over the final session, entitled "The Future of Liner Shipping and Regulation: A Reading of the Tea Leaves."

The background paper attempted to add clarity and definition to this subject by posing five questions:

(1) Is regulation the wave of the future?

(2) What is the state of shipping policy/regulation in the EEC, UNCTAD and Canada (and, I might add, Australia)?

(3) Is the national-flag concept obsolete?

(4) What would be the consequences of total deregulation to all interests in this industry and to U.S. foreign trade?

(5) What are the chances of an international consensus on these matters?

Tea leaf readers are not a commodity easily assembled. They are a rare species. We have, however, found to forecast certain government officials and, lastly, economists.

And to insure that the tea leaves will be read from the widest perspectives, we have looked to different governments and backgrounds. Two of them are from the United States, one from Great Britain and one formerly directly involved in the development of the (EEC) shipping regulations. Our economists are similarly diverse, coming from Wales, Canada and Australia.

As may be expected from any group who forecast the future, you will find that the questions posed by the program committee will often be given delphic answers, allowing the listener to form his or her own opinion. You will also find that the predictions are sometimes contradictory and may even suggest that they drink far different kinds of tea.

There is, however, one overall point which becomes clear in these predictions as it has become evident in prior sessions. It is that the Shipping Act of 1984 and U.S. policy cannot and do not exist as islands sufficient unto themselves but must and can only function in an exceedingly complex world.

In the few short months since the symposium at Norfolk new regulations have come to fruition in Europe, a new shipping law has been enacted in Canada and new shipping regulation impends in Australia. Great Britain has in train a revision of its domestic Merchant Marine Act and the revision conference for the UNCTAD Code begins in the fall -- a new U.S. Merchant Marine policy is in preparation.

Change makes the tea leaf reading a courageous act indeed.

Liner Regulations — Diverse Trends

Jeffrey N. Shane
Deputy Assistant Secretary for International Transportation Affairs
U.S. Department of State

Reading the regulatory tea leaves is a chancy business at best and when you have such a diverse mixture--Chinese Jasmine, Russian Black, Asian Darjeeling, and good old Lipton instant, not to mention those peculiar international blends, European Community English Breakfast and Liner Code Gunpowder--your predictions can easily go astray. Let me illustrate by a quick tour of what we see as trends in the areas of international enforcement and anti-trust policy.

The U.S.

Here at home the Congress has come up with some tough alternatives for maritime retaliatory authority in the Trade Bill. We have yet to see what the Conference Committee will produce, but the Administration has serious problems with both the Senate and House versions. The quantitative test of discrimination that is a central feature of the House bill strikes us as an inherently flawed concept that fails to distinguish an unfair practice from competitive advantage. On the other hand, the Senate bill, with its lock-step, mirror-image reciprocity, lacks any injury test in the statutory language and offers inadequate Presidential flexibility.

Moreover, both bills seem to be based on the faulty premise that Section 19 and Section 13(b)(5) don't work. We believe that recent experience demonstrates that when both the Administration and the FMC are on parallel courses--and they usually are--our existing legislation can be a potent response to foreign discrimination. The sterling efforts of my fellow panelist and colleague, John Gaughan--supported by a united Executive Branch, our determined shipping lines and the FMC's own staunch stand--have produced a remarkable improvement in the conditions faced by our carriers in Taiwan. We are in the midst of a similar campaign in Korea, which we are committed to see through to a successful resolution. Thus far the authorities on Taiwan and the Koreans are adhering to what has been agreed, and we have every expectation that our carriers will have substantially greater freedom of operation by mid-1988.

Objectively, therefore, I don't think there is much of a case to be made for a major overhaul of Section 19, let alone the untested Section 13(b)(5). There might be some utility in a limited refinement of Section 19 to make it unambiguous that shore-side activities come within the scope of that provision. Indeed, the Administration is on record as favoring legislation of this type already introduced in the House.

The EC

It's now slightly over a year since the European Community unveiled its common shipping policy. In the Eurocorde and Hyundai proceedings, the Commission case in the European Court against the Italian-Algerian bilateral, and the intra-EC discussion with the Portuguese on cargo reservation we are starting to see how the regulations will be applied. So far these still undecided issues point to the EC upholding the principles of free and fair competition and maximum access to cargoes.

I submit, however, that the evidence is far from conclusive. We have yet to see whether the liberal north or the more conservative south will ultimately control the helm of the world's largest shipping bloc. A key test of the prevailing winds will be what the EC does with the extensive array of cargo sharing bilaterals negotiated by slightly more than half of its member states.

We are also going to have to monitor closely how EC competition policy develops. We have had a number of useful, informal exchanges with the Commission and will seek to continue these contacts on as regular a basis as conditions warrant. Since competition policy is frequently enforced out of the limelight--indeed, EC activities in general appear to be conducted in a less transparent manner than the FMC operates--it may in time prove desirable to initiate a more structured exchange of views.

The U.S.-CSG Forum

Our most recent discussions with the Consultative Shipping Group have produced two joint statements -- one agreed in Copenhagen in April 1986 and the other in Washington last November. While not intended as binding agreements, these joint statements are clear affirmations of our policies to safeguard and promote competition. Reflecting our mutual interest in preventing the spread of protectionism, we have applied the Copenhagen and Washington statements practically and pragmatically to real world problems, and have agreed on a number of acts of coordinated resistance against the restrictive practices of third countries.

The results of these ventures in joint diplomacy have been heartening. We have had productive exchanges with four countries to date. Although no one would claim that the results are solely attributable to U.S.-CSG efforts, there can be no doubt that those efforts clearly made a difference: one of the countries concerned has altered its restrictive legislation, a second has withdrawn its proposal, and the other two have at least agreed to meet with us face-to-face to hear the problems we have encountered with their shipping policies.

The OECD

In contrast to the operational focus of the U.S.-CSG talks, the principal developed country club, the OECD, is deeply enmeshed in updating its 1961 services code. We are committed at Cabinet level to seek maximum liberalization in this Code revision. Logically this exercise should flow naturally from the OECD's liberal and fairly detailed Recommendation on Common Principles of Shipping Policy adopted last year. In the maritime area, however, liberalization of the Code, known by its acronym CLIO, poses peculiar challenges since the United States is uniquely blessed by a stipulation that excepts us from the most explicit obligations in the Code's somewhat obscure maritime provisions.

Every other country evidently regards the primary objective of the updating as the achievement of equal obligations--a euphemism for the surrender by the United States of its exception. Quite naturally, we don't see it that way. We have argued that a politically viable solution requires a balanced package. On another level, we have pointed out that there is little point in assuming new obligations--whether it be in the form of a standstill or rollback--until we are satisfied that countries are complying with the obligations they've had for the past 27 years. With the members of the European Community, who constitute a majority of the OECD, still working out the real content of their common shipping policy, perhaps what is needed is a pause for reevaluation. In any event, barring a major breakthrough, I don't foresee a rapid conclusion to this undertaking.

The GATT

As we have in the OECD, the U.S. has championed the liberalization of trade in services in the GATT context. Last November the U.S. delegation to the GATT Group of Negotiations on Services presented a concept paper to develop a framework agreement during the Uruguay Round. That framework would provide for a standstill regarding the introduction of new restrictive measures and, to the greatest extent possible, a rollback of existing restrictions. Among the concepts we proposed were the familiar ones: (1) national treatment, applicable also to doing business concerns; (2) non-discrimination, by which all signatories would receive the benefits of the agreement unconditionally; (3) transparency regarding governmental measures; (4) disciplines on state sanctioned monopolies; and (5) groundrules governing subsidies.

Our trade negotiators hope that the coverage of the framework agreement will be "broad but flexible". The framework agreement itself would apply to a wide range of sectors, but more detailed agreements governing individual sectors might then be negotiated to permit both "greater precision and flexibility in attaining appropriate degrees of liberalization".

The big question is, of course, what applicability any of this has to shipping. Every Administration official who was involved in the Canadian FTA negotiations is certainly keenly aware of the exceptional sensitivity of the maritime sector in the U.S., and I can't imagine any of us are anxious to repeat the FTA drill. At the same time, broader acceptance of the U.S. concepts could be of inestimable benefit in getting our shippers and carriers the level playing field that has become the battle cry of the industry.

If you accept that persuading countries, especially developing countries, to adopt liberal groundrules could potentially be useful, then it's important to gauge how these countries would respond. If their response is to insist upon the Liner Code as a model, then the exercise would be of no interest to us. We already have the OECD's Recommendation. Why move backward from that? If on the other hand the negotiators produced a liberal sectoral code on shipping, how many countries apart from the developed countries would actually sign on? These are valid questions -- ones we have to address.

The U.N. Liner Code

Some of the answers to our questions are becoming clearer in the run-up to the Liner Code Review Conference in November. We can infer from the UNCTAD Secretariat papers that the Group of 77 will be interested in expanding the scope of the Code to regulate non-conference carriers. We can also foresee that developing country signatories are contemplating a variety of Governmental measures to ensure that they somehow preserve their 40% shares of their conference trades or trades generally.

Group B, in which we expect to play a full and constructive role, should, I think, be able to maintain a united front on issues of this kind. There is no support in Group B for any initiative that would impair the access of non-conference lines to their trades. Consistent with their philosophy of conference self-management, Group B countries are also unified in opposing increased governmental intervention, such as the recent proliferations of unilateral cargo reservation schemes. At the same time Group B is prepared to clarify those parts of the Convention that may be ambiguous and to consider possible improvements, where necessary.

In brief, it is difficult to see how consensus -- UNCTAD's procedural modus operandi -- can be achieved for any major new expansions of the Code. Convincing the Group of 77 of that will, of course, be another matter.

Summary

What destiny do the tea leaves foretell for the regulation of international shipping? Certainly, we anticipate perceptible near-term activity in Western Europe as the European Community strives to give greater definition to its common policy and an increasing number of countries sort out their approaches to the new, inadequately-studied international registries. Hopefully, we in the United States can reach some sort of agreement on our promotional legislation but will not tinker significantly with our enforcement mechanism. In the international arena, the immensity of the tasks facing the negotiators in the OECD, the GATT, and the Liner Code Review Conference suggest slow sailing. Overall, therefore, it doesn't appear that there are many major new initiatives in the offing. In an industry still burdened by serious overcapacity, perhaps a period of regulatory restraint might not be a bad idea.

Efforts to Remove Regulations Impeding the U.S.-Flag Liner Fleet

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It is a great pleasure to participate in this important conference which assesses the Shipping Act of 1984 four years after its enactment.

I am saddened that the late-Chairman of the Federal Maritime Commission, Ed Hickey, is not with us to contribute his considerable knowledge, and even-handed objectivity to these proceedings. He took the helm of the FMC at a time when implementation of the new law introduced dynamic changes in the long-standing practices and ground rules governing the carriage of liner cargoes in U.S. foreign trade. Additional responsibilities were placed on his agency to expedite its regulatory actions, and, by congressional mandate, to compile information on the impact of the law on all affected parties. Despite the heavy demands on the agency, under Ed's chairmanship the FMC has been diligent in fulfilling its responsibilities.

This well-balanced conference program, which Ed had a key role in organizing, will surely help to advance the objectives of the 1984 Act. He will be sorely missed.

Now, let us turn to this panel's assigned topic, "The Future of Liner Shipping and Regulation." The composition of this panel provides a broad international perspective to our discussions here this afternoon. As the head of the federal agency whose mission is to promote the development of a strong American merchant marine for commerce and defense, I will focus on the U.S.

maritime scene.

Accordingly, I will examine the U.S.-flag liner industry, its status and the need to reform restrictive U.S. regulations that impede our subsidized liner companies. Our on-going efforts to eliminate discriminatory regulations and practices that some trading partners impose on our liner operators also will be noted.

As a final point, I will call your attention to the recent, rather grave assessment of our nation's maritime resources and capabilities to meet national defense requirements, by the President's Commission on Merchant Marine and Defense.

But first, let us examine the outlook for the U.S. liner trades.

U.S. Foreign Trade Liner Cargoes To Double

According to a Maritime Administration-sponsored study, performed by Data Resources and Temple, Barker and Stone, U.S. foreign trade liner cargoes are projected to more than double by the year 2000.

In 1984, the year the Shipping Act went on the books, 62.5 million tons of liner cargo moved in U.S. foreign trade. The study forecasts this tonnage to grow to nearly 130 million tons as we cross the threshold into the 21st century.

I wish I could report that the U.S.-flag liner fleet is in a position to garner a significant share of this cargo growth. However, the U.S.-flag market share of our nation's liner trade has been on a downward slant since 1976. In that year, 30.9 percent of the U.S. waterborne import and export tonnage of liner cargoes were carried in U.S. bottoms. This share eroded with each successive year, falling to 19 percent in 1986. And, first-half tonnage figures for 1987 indicate that U.S.-flag carriage for the full year will show a further drop to 15 percent.

Overtonnaging in our liner trades, and the attendant fierce competition and depressed freight rates, are among the factors impacting U.S.-flag operations.

The Shipping Act of 1984 removed major U.S. government constraints on liner operations of all flags serving U.S. foreign trade. However, subsidized U.S.-flag liner operators in this trade are still shackled by other U.S. government regulations which impair their ability to compete. These regulations emanate from the sections in the Merchant Marine Act of 1936, which govern carriers receiving Operating-Differential Subsidy (ODS).

Need For ODS Reform

The Administration, during the past several years, has urged enactment of legislation to reform the ODS program to provide U.S.-flag liner operators with greater freedom and flexibility in competing with their foreign counterparts. A number of differing ODS reform bills also were introduced in the Congress, including several on behalf of industry, to restructure the program. However, none received sufficient industry or congressional support needed for enactment.

Last October, the Administration submitted a new bill on ODS reform. The bill, H.R. 3356, retains two key, previously sought Administration measures. Several new elements also are included to make it more relevant to the collective liner industry, while keeping program costs within acceptable limits.

The bill renews previous Administration efforts to provide ODS operators with authority to construct their vessels on a worldwide basis. It also would make these ships immediately eligible to carry government preference cargoes, by eliminating the existing three-year delay for such carriage if they are procured overseas.

The new elements in H.R. 3356 would:

- Provide presently subsidized and unsubsidized liner companies with a one-year opportunity to enter the new ODS program of 10-year contracts or grant agreements.

- Eliminate virtually all trade route restrictions to provide the operators with the flexibility to adjust to shifting trade patterns and cargo opportunities.

- Limit ODS paid to each liner operator to the lesser number of ships operated during the previous two-year period, or a maximum of 20 ship-years of operation annually.

- Permit ODS companies to own and operate foreign-flag feeder vessels in their overseas operations.

- Limit ODS paid for seafaring wage costs to the most economical collective-bargaining agreement for the minimum crew required by U.S. Coast Guard regulations.

In constant dollars, the cost of H.R. 3356 would range between \$1.9 and \$2.1 billion in ODS obligations over the 10-year period, as compared to current program obligations of approximately \$1.6 billion.

The imperative need to enable the liner industry to upgrade their fleets with modern, efficient vessels at competitive world prices is underscored by several financial facts of life.

The huge gap between U.S. shipbuilding prices and those charged by low-cost yards in the Far East, and the magnitude of recent and projected federal budget deficits are not conducive to a revival of the subsidized shipbuilding program.

Our ODS operators, presently unable to build ships in domestic or overseas yards, are in an untenable position. They are compelled to compete against their foreign counterparts with fleets comprised of substantial numbers of obsolete or inefficient ships.

Of the 128 privately owned U.S.-flag, foreign trade liner vessels, active and inactive, 70 are powered by inefficient, uneconomical steam turbine plants. Diesel powered plants, which predominate in the foreign-flag fleets, have fuel-consumption rates 25 to 30 percent below those of steam-turbine ships.

Diesel-powered ships have another competitive advantage. Their propulsion plants are easily automated for bridge control of the engines. Steam plants are more complex, with a multitude of auxiliary machinery, which preclude bridge control and require larger crews. Some of our steam-powered containerships have crews of 40 or more seafarers. The comparatively few diesel-powered containerships which joined our fleet in recent years have crews of 21.

Crew costs are the highest component of U.S.flag operating costs. Fuel cost is the second highest. Surely, the U.S.-flag liner fleet will continue to lose market share if it is unable to replace inefficient fleet units with modern, fuel-efficient vessels which can be operated by small crew complements.

That is why we hope that in the remaining months of the 100th Congress, an ODS reform bill can be enacted. In addition to the Administration's bill, several industry-sponsored measures are currently pending in the Congress.

At this stage, it would be difficult to predict the structure of any ODS reform bill which might be reported out by Congress in this session. In general terms, however, we would expect such a bill to reflect a good number of the Administration's proposals, such as operating flexibility and foreign vessels acquisition. We also believe that the bill would reflect some level of compromise in the area of ODS cost reduction. The balance will have to be carefully struck, however, in view of the Administration's, as well as the Congress', concerns about the budgetary impact.

Foreign Impediments To U.S. Liner Operators

Now, let me turn to another source of government regulations which also impede the efficiency of U.S.-flag liner companies. These impediments "were not made in the U.S.A." They are the product of a number of our nation's trading partners -- particularly in the Far East.

The aggregate constraints on U.S.-flag operations in that region include the inability of our carriers to set up their own full-service agencies, own or operate dockside or inland container terminals, container-handling equipment, or trucking firms. Our liner companies also are disadvantaged by preferential treatment accorded national carriers, such as cargo-reservation policies and berthing access.

In November of 1986, then-Deputy Secretary of Transportation Jim Burnley and I led a mission to that region to protest the restrictions imposed on our liner operators by Japan, South Korea and China. I also dispatched some of my senior staff to Taiwan to lodge our strong objections to the obstacles imposed on our liner operators serving in that trade.

In our discussions with government officials in the Far East, and subsequent follow-up meetings and exchanges last year, we stressed that their carriers encounter no constraints on their operations in our country. We advised them that if they want their carriers to retain the full freedoms they enjoy in the United States, they should ensure that U.S.-flag carriers receive reciprocal latitude to conduct unfettered operations in their countries.

The productivity of the total intermodal transportation system is determined by the efficiency of each of its compo-nent parts: ship, truck, rail and the container-transfer interfaces of the system. The impediments imposed on our carriers in the Far East adversely affect the total system.

Our efforts to have foreign restraints lifted have made progress, but not as rapidly as we would like to see. However, the Federal Maritime Commission's recent Section 19 activity in regard to Taiwan's discriminatory practices, has sent a very stern message to that country and others in the Far East. It is clear that the FMC is ready to "play hard ball." Transportation Secretary Jim Burnley also has made it known that he will continue to be actively involved in removing foreign restrictions on U.S.-flag carriers.

I believe we are going to see some very positive developments which not only will benefit the liner companies, but also the shippers who are affected by those constraints.

To close out this section, let me mention another restriction, which impacts the interests of shippers and liner operators of all flags. This is the "never on Sunday" work rule in Japan which closes down longshore operations. That rule suspends cargo-handling operations 52 days a year, and surely affects shippers, particularly those whose operations are geared to "just in time" deliveries.

Intermodal Productivity Continues To Post New Gains

Since the advent of containerization, pioneered 32 years ago, when Malcolm McLean transported 58 20-foot containers on the tanker IDEAL X from Newark, N.J., to Houston, Tex., we have seen an enormous growth in intermodalism. That innovative voyage marked the beginning of the end of break-bulk general cargo operations.

Successive generations of ever-larger container ships, and concurrent growth in the size of containers, have greatly increased the efficiency of intermodal shipments. Terminal productivity also has grown with the introduction of high-speed container cranes and intermodal container transfer facilities which expedite transfers between modes. Computer-controlled terminal and cargo-tracking systems and electronic data interchange permit carriers and shippers to quickly pinpoint the location and status of their shipments.

The introduction of the low-bed, double-stack container train by American President Lines in 1984 spurred an enormous expansion of landbridge shipments. These trains provide 40 percent cost savings over conventional flatcar rail shipments At last count, more than 60 double-stack trains per week were departing the West Coast for Midwest, East Coast, and Gulf Coast destinations.

American-flag liner companies have been in the forefront of many of these innovative advances. Today, two of our carriers, American President and Sea-Land are part of total transportation companies which offer shippers point-of-origin to point-of-destination service and accountability on a single bill of lading.

Commission on Merchant Marine and Defense

As a final point, I would like to underscore the importance of peacetime commercial maritime operations and resources to meet our nation's military support requirements in wartime.

The contraction of the American-flag merchant fleet and shipbuilding industry during the past decade has generated mounting concerns about our maritime posture within our defense establishment. It also led to the creation, in December 1986, of a seven-member Commission on Merchant Marine and Defense. It was appointed by the President to examine the status of these industries and evaluate their current and projected capabilities to support military operations to the year 2000.

As a member of the Commission, I can assure you that this assessment of our maritime resources and capabilities to meet wartime military sealift and support requirements was the most comprehensive undertaken since the dark days of World War II. Between January and September 1987, the Commission held 12 multi-day meetings. It also conducted six public hearings in which officials representing the U.S. liner companies, bulk cargo carriers, shippers, seafaring labor, shipyards and allied suppliers, and Federal and state maritime academies testified on the problems and needs of their individual sectors.

Commission Findings

The Commission completed its report of preliminary findings and transmitted it to the President and the Congress on September 30, 1987.

The report points up alarming contractions in the size of the oceangoing merchant fleet, seafaring work force, and the shipbuilding and ship repair industry, which have major national defense implications.

Without going into its 24 principal findings, let me read just two excerpts which succinctly point up the gravity of the inadequacies of our maritime resources to meet military requirements:

"The Commission has found clear and growing danger to the national security in the deteriorating condition of America's maritime industries. The United States cannot consider its own interests or freedom secure, much less retain a position of leadership in the Free World, without reversing the decline of the maritime industries of the nation. . .

"There is today insufficient strategic sealift, both ships and trained personnel, for the United States, using only its own resources as required by defense planning assumptions, to execute a major deployment in a contingency operation in a single distant theater such as Southwest Asia. Without decisive action, the situation will worsen substantially by the year 2000."

Recommendations

As a follow up to its findings, the Commission, on January 25, transmitted a second report to the President and the Congress. This contained its recommendations of actions to be taken by the executive and legislative branches, and the private sector to halt and reverse the deterioration of the shipping and shipyard industries.

The report contained seven principal recommendations. The first urged the President to issue an executive order stating a national maritime policy which reaffirms that a strong American merchant marine and shipbuilding and repair industry are essential to national security and defense requirements. As part of this recommendation, it called for the President to also transmit a National Security Decision Directive to all relevant Federal departments and agencies to take all steps within their authority to foster the rebuilding of the U.S.-flag merchant marine and the domestic shipyard industrial base.

The second recommendation urged enactment of legislation to reform the Operating Differential Subsidy program in this second session of the 100th Congress.

The Commission supports ODS reform legislation.

The third recommendation is intended to generate ship construction contracts for U.S. yards. A principal component is a "Procure and Charter" program. This calls for the construction of an average of 12 ships per year over a 10-year period, with government funding, for charter or sale to U.S.-flag operators. The ships could be of any principal type of oceangoing, militarily useful,commercial ships.

Another initiative recommended by the Commission is revival of previously used build-and-charter arrangements to replace nine Military Sealift Command clean-product tankers. This would entail long-term MSC charters which would be the basis for loans for the private construction of the tankers. To be viable, the existing five-year limitation on such charters would have to be extended.

In its other recommendations, the Commission:

* Urged that the Congress and Administration act to eliminate discriminatory practices which impede U.S.-flag shipping operations.

* Stressed the need to reinforce and improve the existing cabotage laws restricting U.S. waterborne domestic trades to U.S.-owned, U.S.-built, and U.S.-registered vessels.

* Called upon the Department of Defense and the Navy to overhaul the method of solicitation for the procurement of ocean shipping services for carriage of defense cargoes.

  The Commission wants to replace the present system, which encourages bids that do not cover fully distributed costs, with a stable rate system based on established tariff rates charged to commercial shippers.

And, as a final point,

* Proposed that the Federal government undertake a joint effort with the maritime industry to improve its efficiency and productivity by the creation of three task forces on Maritime Efficiency, on American Shipyard Efficiency, and Intermodal Transportation and Efficiency.

As one who wears two hats -- as head of the Maritime Administration and a member of the Commission on Merchant Marine and Defense -- I recognize and strongly believe that a strong American-flag merchant marine and supporting industrial base are vital to the economic welfare and security of our nation.

The United States, as the leader in world trade, must have a fleet that provides it with effective leverage over the freight rates and services that govern the carriage of its trade. And, as the dominant military power of the Free World, it must have a merchant fleet and supporting maritime resources to provide logistic support of armed services in event of war.

I realize that there are no quick fixes to correct our shortcomings. But, I believe that the Commission's preliminary findings and recommendations have made it clear that our maritime industry is a vital national defense asset that deserves priority attention to halt and reverse its decline.

The maritime history of the United States reveals that popular support of the merchant marine reached its highest plateaus in wartime, but quickly waned after peace was restored.

The lack of public awareness of the merchant marine's essential wartime role, makes it difficult to obtain federal financial assistance to support its commercial operations in peacetime. That is particularly true today with the on-going thrust to reduce federal budget deficits.

Nevertheless, the Commission reports clearly and emphatically document that strengthening our merchant fleet and shipyard industry is imperative to our national defense. Since it establishes our military dependence on these maritime resources, it provides a sound case for evaluating federal support of these industries against budget requests and priorities for other military requirements.

That could be a major step in charting a new course in remedying our maritime deficiencies.

In summary, 1988 could be an important year for reshaping federal maritime policies and strengthening the U.S. maritime industry. We are confident that the momentum in removing foreign restrictions on U.S. liner carriers will pick up during the year. We are also hopeful that it will be the year in which the long deadlock on the proper shape of ODS reform will be broken, and enabling legislation enacted.

I also believe that the findings and recommendations of the Commission on Merchant Marine and Defense will be instrumental in setting higher priorities for the restoration of our merchant marine and shipyard industries to levels commensurate with our national defense requirements.

Should Conference Regulation Have a Future?

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Introduction

The background paper prepared for this conference (FMC, November 1987, Session 8) refers to several questions to ask of the tea leaves. One way to summarize those questions may be to query whether liner services and conferences should continue to be regulated or are best left to their own devices. In order to answer this question, it may be useful to first look at three related questions:

1. What is to be regulated?
2. Who should do the regulating?
3. For whom should regulation be done?

Unless we consider the political and economic realities of conference regulation, we risk being caught in a philosophical cobweb. We are often reminded of the danger of seeing only the trees, forgetting the forest. Is it possible we in shipping do the same? That we only see conferences and forget world trade? I firmly believe we are guilty of such myopia. Interestingly, the closer one gets towards an apparent consensus on these matters, the greater the risk that conclusions may be seriously wrong. In order to illustrate the ideas just expressed, it may be useful to take as an examplé elements from the deregulation of air transportation in the United States.

Airline deregulation and economic rationality

When the House of Representatives passed the US Airline Deregulation Act on September 21, 1978, it did so with 363 to 8 votes. This near unanimity reflected an almost hypnotic belief in arguments presented by academic economists who had long seen commercial transport and regulation by the Civil Aeronautics Board as a self-evident case against the evils of competition among the few and the inefficiency of sector-specific regulation. A «consensus» emerged and air transport was freed from specific regulation and became subject to antitrust laws.

The view that full deregulation represented an unconditional good was essentially based on economic arguments applied to a limited problem, namely that of the economic characteristics of air transport for any given set of markets of city pairs. Little attention was given to factors such as airport and gate capacity, long term financial stability of airlines, economies of scale in large marketing systems, etc.

The economic rationality underlying the ex ante analysis of airline deregulation was not necessarily wrong, but it gave misleading results because it was basically limited to the operation of aircraft. This form of bounded rationality, limiting our analytical horizon to what we can see and control, may yield interesting results but risks giving rise to grave error in the long run.

Today not everyone agrees on the merits of airline deregulation, and it is already abundantly clear that many of its effects are contrary to the hopes of its proponents.

The passage of the US Shipping Act of 1984 was more judiciously carried out than airline deregulation. In particular, the provision for an extensive review of the effects of the new regulations pertaining to conferences represents a sign of wisdom that must be welcomed by all concerned. I also think it appropriate to congratulate the Federal Maritime Commission for the way in which it is carrying out the review process. Let us hope this will make it possible to significantly enlarge the scope of the analysis, compared to the more narrowly defined sectoral approach often seen in antitrust and regulatory literature.

What is to be regulated?

This question serves as a reminder that there may be little agreement even among close neighbors on the appropriate scope of conference regulation. In the United States common carriage of goods by water in the foreign commerce of that country is regulated. That is a wide definition, presumably covering all forms of liner transport, whether it is provided by conference lines or independents. This is a far cry from the Canadian situation where «certain shipping conference practices» are exempted from that country's Competition Act.

Thus, the United States and Canada start out from rather different premises - one reserving a right to regulate all common carriage, the other limiting itself to dealing with certain conferences practices. In either case, however, it is clear that the underlying consideration is that of the market power of few sellers.

The question of what to regulate in fact has many dimensions. One is the scope of conventional conference legislation. Should it cover also non-conference operators? Inland services at home and abroad (as in the case of US legislation)? Should it cover the world or only direct services to and from our shores? Another dimension is that of regulating markets versus regulating only the sellers.

Governments frequently intervene in shipping markets in ways which manifestly make the markets less, not more competitive. Examples are well known: cargo reservations or preferences, subsidies and preferential tax treatment for national lines, bilateral agreements, etc. Some countries have introduced «defensive legislation» in an attempt to offset protectionist measures by other countries. Such defensive legislation is often more aimed at protecting national flag shipping than the interests of the exporters and importers who depend on competitive shipping services.

Yet another form of regulation relates to the treatment of shippers who form organisations to deal with liner conferences or individual lines. While some countries have actively encouraged the creation of shippers' councils in the belief that individual shippers have little bargaining power in shipping markets, others have doubts about their effectiveness or even legality.

It appears then that it should not be seen as evident that regulation should be limited to the sellers of shipping services. In some cases, it may be argued that some buyers, i.e., shippers, may also be in a position to exert market power to an extent such that regulation could be considered. Finally, in a world of sovereign states, some would suggest it could be necessary to regulate the regulators, i.e., the governments.

The background paper for today's session gives considerably more attention to the liner industry than to the other players in the liner market. It is therefore appropriate to look specifically at the question of trends in regard to conference market power. However, in so doing it should not be forgotten that regulation of sellers only in any given market cannot be assumed to give rise to efficient market conditions except under rather special circumstances. The case of conference monopoly power must not be allowed to be taken as self-evident. It is not, as the following review attempts to illustrate.

Weakening conferences?

The long term decline of conference market power was documented in considerable detail in our book on liner conferences published in 1981 (Sletmo and Williams, 1981). The FMC background paper provides some more recent information on the subject. In its notes for Session 8 (pp. 47-57) it is pointed out that the liner industry, «despite being cartelized», earns low profits, but that there also is continued high investment.

The combination of cartelization, low profits and high investment is reminiscent of the domestic US airline industry of the regulated era, and could be construed as an argument in favor of further «deregulation» in the form of removal of antitrust exemption from liner conferences. However, the analogy between domestic air transport and liner services is misleading. Excess investment in the airline industry before deregulation was undertaken by carriers already dominant in the market and protected by legislated barriers to entry. Their reasons for investment was to protect market shares and to further increase barriers to entry, removing any temptation outsiders might have to attempt to gain access to the small club of trunk carriers. Furthermore, CAB pricing formulaes allowed carriers to recoup a significant part of investment errors.

The excess capacity in liner shipping - and resultant low profits - does not exist behind a protective legislated barrier to entry. Rather, it is due to weak barriers to entry. New investment is frequently undertaken not to protect the market share of existing carriers but by newcomers wishing to gain access to liner markets. Many of these new investors are outsiders, operating without conference membership.

Other indications of competitive pressures in world liner markets are the number of newcomers as well as the failure of some well established carriers. Indeed, the FMC background paper notes that «These fairly radical changes in rankings over such a short period of time testify to the dynamic, competitive and rivalrous nature of the industry» (p. 51, FMC, 1987).

The present competitive conditions in liner markets are not new. They have always been present although to varying degree in different markets. However, since the advent of containerization in the 1960s, competition has become a structural phenomenon in world liner shipping. The emergence of land and minibridges, the disappearance of conventional port hinterlands and the globalization of markets and production have eroded old trade route monopolies and traditional customer loyalty.

The question of whether liner conferences may some day regain monopoly power and acquire a stanglehold on world trade has become irrelevant. Liner technology and the economic interdependence between the different regions of the world make long term liner monopolies impossible. This situation is not unique to liner shipping. Basically all mature industries find that the globalization of world markets has given rise to permanent competitive pressures. It suffices to think of crude oil, aluminium, automobiles and even some younger industries such as electronics.

The weakening of conferences does not mean they will simply disappear. Instead, conferences may be the only alternative to concentration of liner shipping in the hands of a few global shipping companies. Possibly established as some form of marketing franchise systems, combining the resources of many smaller companies. The historical transition of conferences from exclusive clubs monopolizing specific trades to a form of trade organizations facilitating cooperation and rationalization goes back to the beginnings of this country but was greatly accelerated by containerization. The pricing and coordinating functions now fulfilled by conferences will always be needed, whether the conference institution survives or not.

At this point we can conclude that regulation of conference power should no longer be seen as a priority in shipping policy.

Technological and changing market characteristics are already doing the job. Instead, governments should be concerned with the continued ability of conferences to fulfill their self-regulatory functions in areas of pricing and rationalization. This brings us to the next question:

Who should do the regulating?

If we limit ourselves to the case for regulating the liner industry, leaving aside questions pertaining to regulating governments (defensive legislation against unilateral protectionist measures) and the control of buyers (regulating monopsony power), we are faced with a fundamental question: Should governments regulate the liner industry or should the industry regulate itself through conferences?

The answer in the United States has tended to be a bit of both. Conferences are allowed to regulate certain aspects fo liner shipping, provided the conferences themselves are regulated by governments. Generally speaking, other OECD nations have tended to rely more on self-regulation with governments intervening only as a last resort or not at all.

An interesting question therefore is whether the future will take us towards more or less government involvement in liner markets and conference. Some seem to think that the trend is to more rather than less regulation by government. Indeed, the FMC background paper (p. 56) suggests that US (competition) «philosophy is in increasing favor abroad as evidenced by the recently adopted shipping regulations by the European Community and the OECD Common Principles of Shipping Policy. Moreover, several of the provisions of the 1984 Act are embodied in the new legislation to be implemented by Canada and in the shipping policy proposals under consideration in Australia».

This presumed convergence of regulatory philosophy may turn out to be illusory, and certainly in the case of Canada. To demonstrate this, we need to take a closer look at the recently adopted Canadian conference legislation. For a while it indeed looked like Canada would throw out its traditional pragmatism and join the United States in its vigilant scepticism of conferences. At some point, Canada appeared determined to go even further than the United States (Sletmo, 1987a, b). However, the final result is quite different.

A Canadian government document (Abbott, Transport Canada, September 1987, p. 3) concludes that «The American and Canadian legislation regulating liner shipping is based on greatly differing premises». In fact, the apparent similarity between the US Shipping Act of 1984 and Canada's Shipping Conferences Exemption Act, 1987 may be more motivated by expendiency than by philosophical harmony. (Box 1 provides a comparative summary of US and Canadian conference legislation.)

BOX 1: SOME DIFFERENCES CANADIAN-US CONFERENCE LEGISLATION

ISSUE	CANADA	UNITED STATES
Purpose	To exempt certain shipping conference pratices from the Competition Act	(1) Establish...regulatory process for common common carriage of goods by water... in foreign commerce. (2) Provide an efficient and economic transportation system... in so far as possible in harmony with...international shipping practices. (3) Encourage the development of an economically sound and efficient US flag liner fleet capable of meeting national security needs.
Membership	Closed conferences permitted	Open conferences only.
Shipper groups	Minister of Transport may approve any association of shippers he feels reflects the interests of those shippers	DOJ concerns regarding monopsony power - possible criteria for acceptability: (1) projected volume to be covered less than 35 percent of available transport capacity.

ISSUE	CANADA	UNITED STATES
		(2) transportation costs of less than 20 percent of final product price.
Small shippers	Access to loyalty contracts (and rebates)	If too small to achieve service contracts, may need shippers' associations as bargaining agents.
Intermodal rates	Have always been available	Clearly permitted by 1984 Act.
	Must be negociated one-on-one (not by conference)	Ditto.
Filing	No obligation for independent carriers to file	All carriers (conference and non-conference) must file.
	For service contracts: confidential filing	Essential terms are to be filed in tariff format and made available to general public.
Independent action	On rate and service items, expressly forbidden in regard to service contracts	On tariff items including time-volume rates, but not on service contracts.
Exemption	From Competition Act	From antitrust legislation.

ISSUE	CANADA	UNITED STATES
Loyalty contracts	Permitted, but conference may not require shippers to commit all of their goods to the conference	May be used only in conformity with antitrust laws, severely limiting their use.
Service contracts	Permitted, limited experience to date, total confidentiality in filing	Apparently very successful in the eyes of large shippers, of limited or no use to small shippers; partial confidentiality only: *similarly situated shippers* will have access to essential terms of contract.
Review	New legislation has no defined termination date; provisions for annual reviews as well as a comprehensive review to be undertaken in 1992 are found in the National Transportation Act, 1986	No predetermined expiration date; an on-going indepth 5 years review to be submitted to Congress in 1989.

Source: Summarized from Ruth Abbott, November 1987.

Briefly stated, the US and Canadian legislation displays important differences with respect to objectives, coverage and the powers of the regulatory agencies. While the United States Act serves several specific purposes, namely to regulate liner shipping, promote an efficient and economic transportation system and to develop a US flag liner fleet for national security needs, the Canadian conference legislation basically limits itself «to exempt certain shipping conference practices from the provisions of the Competition Act». It is clear that the Canadian approach is neither interventionist nor promotional with respect to liner shipping and shipping conferences.

This policy, if a tradition of political neglect can be described as «policy», is consistent with Canada's preoccupation with free access for her exporters to competitive shipping markets rather than with maintaining or developing a national flag liner fleet. An elaboration of Canadian views of international shipping policy can be found in the Report of the Federal Task Force on Deep Sea Shipping (Sletmo, 1985). Interestingly, that Task Force largely ignored questions of liner shipping emphasizing instead the importance of efficient bulk markets. That is where Canada's real concerns lie rather than in liner shipping.

Whereas the history of US policy with respect to liner conferences includes power struggles between maritime agencies (including the Federal Maritime Commission and the Maritime Administration) on the one hand and the Justice Department's Antitrust Division of the other, similar struggles are largely unknown in Canada except for local skirmishes at the level of interdepartmental committees.

It is therefore no surprise that Canadian conference legislation allows the existence of «closed conferences», giving conferences the right to regulate their membership whereas in US trades conferences must be of the «open» variety.

Several provisions of Canadian draft legislation would have seriously limited the ability of conferences to maintain a realistic rate structure. For instance, severely limiting or even prohibiting the use of loyalty contracts was considered. It was proposed to allow independent action for service contracts as well as removing confidentiality from such contracts. Finally, it was also suggested to maintain a so-called «sunset clause», or a definite expiration date for the bill, thereby maintaining the threat of even stricter control of conferences in the future. The cumulative effect of all the proposed changes in the previous legislation would have been to eliminate conferences in their present form in Canadian trade.

The final version of the bill adopted by the Canadian House of Commons on June 29, 1987 recognized that a restrictive bill would not serve Canadian shippers. In fact, it might potentially harm them by reducing the availability of conference services in Canadian ports. As a result of such considerations, present Canadian legislation continues to allow the use of loyalty contracts subject to certain conditions, and expressly forbids independent action in the case of service contracts which may be kept entirely confidential. The old sunset clause which was part of Canada's 1979 conference legislation has been removed in favor of a review process.

Canada's conference legislation reflects two considerations: first, to assure the continued presence of conference services in Canada ports by providing conferences with a regulatory environment equal to or more favorable than that provided in the United States; and second, to avoid unnecessary conflict with US conference regulation. It would be a misconception, however, to view Canadian legislation as reflecting US regulatory philosophies. A powerful illustration of this is the relative absence of a specifically maritime regulatory apparatus in Canada. In general, it would be reasonable to conclude that Canada would gladly leave the regulation of liner markets to the conference members as long as the government has some means of intervening in extreme (and unlikely) situations. It is not possible here to undertake a similar analysis of conference legislation in the EEC and Australia. Even so, it is quite plausible to argue that philosophically a great distance remains between the United States and its main trade partners when it comes to conference legislation. However, it appears that the US 1984 Act has gone a long way towards reducing costly and frustrating interference with conferences. If correct, this is a welcome development, even if fundamental differences remain.

Nevertheless, it would appear that the question of self-regulation versus government regulation essentially remains to be resolved. The greatest problem with government regulation is that it tends to breed similar or retaliatory legislation in other countries. Liner markets are truly international. Government legislation is not. It is therefore not unreasonable to argue that liner conferences are better able to adjust to the realities of international shipping than national regulatory schemes. Canadian conference legislation would appear consistent with this view when its origin and spirit is carefully considered. In conclusion, it would be most unfortunate if the hypothesis of the development of an international consensus based on American regulatory philosophy should be accepted without further analysis. The case for private or self-regulation remains strong and is perhaps stronger now than ever before.

For whom should regulation be done?

The last of our three questions brings us to what should logically have been the starting point: What is the objective of liner services and the regulation thereof? American regulation specifically refers to a «non-discriminatory regulatory process... within a minimum of governement intervention and regulatory costs», «an efficient and economic transportation system...» and «the development of an economically sound and efficient U.S. flag liner fleet capable of meeting national security needs.»

These objectives clearly center on the supply side of ocean liner markets and on national interests. This preoccupation with the ship operating industry is paradoxical in an age where shippers are increasingly active in the political process that underlies the formulation and execution of regulatory policies.

Given the deeply seated suspicions directed at the conference institution from many quarters and the assumed evil of cartelization, there is a tendency for the public debate to cast conferences as exploiters and shippers as exploited. Economic analysis has often been used to argue a priori that rationally it has to be true that conferences distort market mechanisms at the expense of shippers specifically and society at large.

Yet, economists also argue that sectorial or industrial policies aimed at protecting or promoting a given industry or sector are not only futile but costly (Norton, 1987). Thus, on purely academic grounds those who would accept the first and second objectives of the US Shipping Act, should reject the third objective (fleet promotion).

Maybe it is time to recognize that regulation is not simply a question of rational economic analysis. Even with the best of intentions on the part of all, it could not be. Rationality is bounded by our reach and understanding. Institutions, politics and power are all part of the reality of regulation and markets. (Stern and Reve, 1980). It is time to recognize it explicitly. To do so is to bring a healthy scepticism to the review of seemingly rational arguments and analysis.

Political power is at least as important as economic power in shaping markets and regulation. An analysis of the political power of conferences relative to shippers might very likely conclude that conferences have even less power than what has been observed in terms of changing market structures. It is also quite likely that the political power of large shippers has increased significantly over the past decade.

The question then is who needs the protection of regulation? If we believe that globalization is the basis of future would trade (Levitt, 1983), the objective of liner regulation must be to allow liner markets to serve international trade through rational, worldwide liner markets.

Shipping, seen in this context, must be seen as part of general international trade policy. Nationalistic policies with respect to specific sectors can only detract from the overriding objective of freer world trade.

Liner shipping has become a highly price sensitive commodity. Experience has shown that national policies aimed at promoting, stabilizing or otherwise controlling commodity markets are doomed to failure. Now that liner shipping due to technology and market factors has reached a mature stage is an industry, it can only be hoped it will be allowed more, not less freedom to develop market mechanisms consistent with its fundamental characteristics. In mature industries markets are better regulators than governments. This is doubly true in the case of global, footloose industries such as ocean shipping.

In the international liner industry conferences can never again expect to control markets. A more likely scenario is that their role will become more limited, largely related to questions of operational efficiency. Let markets, not philosophy, determine the future of liner shipping and conferences. This, then, is the answer to the question we set out to answer.

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Next Moves in the Regulation Game

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We are asked to speculate on the future degree of involvement of governments in the regulation of liner shipping. It may be useful to distinguish three types of governmental activity. The kind of regulation with which we are most familiar is that which is designed to safeguard user interests directly. Essentially, this will be legislation to control conference practices but in some countries it may take the form of intervention in the market to try to secure "reasonable" freight rates. The second type is aimed at protecting or promoting carrier interests - commonly, but by no means necessarily, national carriers. Much of this is of very recent origin and very little of it has actually been used. I would distinguish a third form of governmental activity and that is the process of agreeing internationally on the ways in which regulations of the first two types should be developed and implemented.

Nobody should be surprised if over the next few years we see more activity of the second and third kinds than of the first. There are two good reasons for this. First, the laws governing competition between liner shipping companies have been exhaustively reviewed in most of the industrialised countries in recent years. We are now entering a period of seeing how the coat fits. The second of course is that the competition provided by independents to the conferences has greatly altered most governments' perceptions about the need for close regulation of conference activities. The positive side of this shift in the balance of power has been innovation by the conference lines, lower freight rates generally and a wider range of service on offer to the shipper.

But the same process by which conference shares of trade have been whittled down will inevitably encourage governmental activity of the second kind. Even where conferences hold on to something like their traditional market share, the increased tendency in the liner world to operate ships on registers where lower costs can be found or to charter in vessels according to opportunities in the market, will increasingly focus the minds of governments on ways of helping to safeguard a national presence in liner shipping, if for no other reason, then to maintain a reliable fleet for use in crisis or war. I assume in all this that the OECD countries will continue to maintain the right for outsiders to compete freely with the conferences and for liner companies to charter vessels from wherever they will, and that such constraints as exist on the right to flag out are at any rate not intensified.

What form will this attention to national interests take? I would be surprised if, before the end of 1988, the new powers of the EEC to act in a co-ordinated way against cargo reservation in our countries had not been used, or at least, secured tangible results in the way that Section 19 of the 1920 Act has done in the past in the USA. But I do not see this as necessarily the central issue of the next few years. A simple enumeration of the obstacles to free competition around the world may well yield the conclusion that cargo reservation is the most prevalent mischief but it is one that is susceptible to being dealt with through negotiation between governments, and for all the undisciplined follow-up by the developing countries to the UN Liner Code Convention, it is encouraging to note that in those countries which account for the overwhelming proportion of world liner trade, liberal policies remain very much in the ascendant. What we can be less sure of is how we will all respond to problems of non-commercial competition. The glut of tonnage has spawned new liner companies and established lines have grown enormously with help of various kinds. These lines have attacked the conferences' pricing structure and taken away business on a considerable scale. There are no easy criteria by which to judge those operations which are in accordance with market principles and those which are not. Neither the US Controlled Carriers Act nor the EEC regulation on unfair pricing practices look like the last word on this subject. But it is vital that governments should apply themselves to the task of defining unfair operations and finding workable ways of controlling them if the liberal principles to which I have referred are to remain the cornerstone of the industrialised countries' shipping policies.

Those who are familiar with the story of the regulation of international steel trade over the last ten years will recognise the dangers of an indiscriminate approach to the dumping problem. In that case, regulators had the advantage of an international agreement - the GATT Anti-Dumping Code - and well-tried national procedures for implementing it. But over the course of five years occasional selective use of anti-dumping action degenerated into universal floor-price systems and quotas both in the USA and in the EEC. History may show that the world economy benefited in the long run from almost total government control over steel trade in the main user countries of the western hemisphere but I cannot believe that anybody would advocate the same solution for liner shipping. In any event, the developing countries will have views on some of the things which we do for our industries to help them compensate for higher crew costs in particular, so there will be a real debate over what is permitted by way of assistance and what is not.

An optimist might suggest that in the wake of the failure of the United States Lines round-the-world services the chances of container shipping finding itself engaged in further massive rate-cutting battles was much reduced. I would suggest, on the contrary, that the risk is now greater. Lines from the Far East who may enjoy a different sort of relationship with government and the builders of their ships, may take heart from this demonstration of the industrialised world's devotion to market principles. If a government is prepared to see an operation of that magnitude by one of its leading flag-carriers fail, and if it remains devoted to keeping its market open for all comers, might this not be an encouragement to those with access to government funds to chance their arm that bit further? The shipyards are still there but the elbow room in the liner shipping market is not. As the papers prepared for the symposium correctly point out, it has been possible to accommodate so many new container operators during the last fifteen years or so because the container market itself was growing at the expense of general cargo. But that process is now at an end.

The conclusion I draw from all this is that the area which the US/CSG Dialogue did <u>not</u> explore - that of unfair pricing practices - may soon be ripe for inter-governmental discussion. But it should not be the only item on our mutual agenda. The original objective of the Dialogue was ambitious. It required of the parties two far-reaching commitments:

(i) to introduce no new obstacles to open competition in international liner trades, and

(ii) to join in taking countermeasures to secure open trades when a line of any party was threatened.

These are comfortable concepts in the context of an <u>understanding</u> - and the recent OECD shipping policy decisions and recommendations are testimony to that - but a legally binding agreement is another matter.

Looking back on three and a half years with the CSG and on the formidable amount of work that went into the Dialogue in the two years preceding that, I am struck by how far we have all come since the time - less than ten years ago - when the two sides had little else to talk about except their disagreement over the Liner Code Convention and the conflict of jurisdiction inherent in mutual attitudes to liner conferences.

Today we meet in an atmosphere of mutual trust and we are learning to work together in a strictly pragmatic way on particular problems as they arise around the world. Our relationship is underpinned by a useful memorandum signed in Copenhagen in 1986. It is now time to build on these successes. The UN conference called to review the Liner Code Convention in October presents us with the perfect opportunity.

The UN Liner Code is now deeply embedded in the policy of the EEC and I believe that lingering attempts by other countries to have things otherwise will be detrimental to us all. It should be recognised that only by embracing the Convention - however platonically - have the EEC member states been able to summon up the collective political will to enact a package of shipping policy regulations that can have enormously beneficial effects for other countries that believe in maintaining a liberal shipping regime. Practices that plainly flout the Convention through the formal reservation by governments of shares of cargo or by other means are to be resisted. The means of resistance will vary - the regulations describe diplomatic representations as a form of co-ordinated action - but obviously the remedy should be proportionate to the degree of protection applied.

The US Administration, never having subscribed to the Convention, has naturally seen difficulty over agreeing with the CSG that the way in which the Code is applied should be one of the principal criteria for determining whether co-ordinated resistance should be set in train. Despite the Brussels package, which guarantees equal access for US and CSG lines in CSG codist trades, they maintain that the Code has at least a protectionist flavour by introducing the concept of a specific share of conference traffic to developing country national lines.

I hope we can set that argument on one side and, quite without prejudice to the US position of principle, agree between ourselves an approach to the Code Review Conference that identifies some positive negotiating goals. Separately from this, the time has probably come for us to define forms of protectionism which we can both in good conscience deplore, (without the need for any reference to the Code), and which should be subject to more formal joint resistance procedures than we have agreed so far. The list may be quite restricted at first and the candidates few. Other cases may fall to be dealt with by national procedures of any of the parties.

Finally, I see a rather urgent need for an agreement between the EEC and the US authorities on how to settle disputes arising from difficulties in differences in competition legislation. Differences are of themselves not necessarily to be deplored. None of us can ignore our historical origins, and a common regulatory regime for the North Atlantic must be far in the future. Perhaps differences may even in some cases be a good thing. They may enable legislators to compare and contrast, and in due course to imitate. We have seen that process at work in Canada recently. What we must avoid is the attitude that no differences really matter, that the other side can get on with its own affairs while we get on with ours.

So if I can try to answer the question posed to this session, I think we shall see little new law-making in the near future, but there will be a good deal of activity by governments in using existing laws aimed at removing distortions to competition. And I hope that we shall see much more co-ordination of governmental activity - in an extension of the US/CSG Dialogue agreement, in some form of international consensus on what constitutes unfair pricing and, at least between EEC and the USA, on the rules of competition for liner shipping.

Development of Shipping Policy In the EEC

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Until 1984 the dichotomy between US policy towards shipping and that of the European countries stemmed from the proclivity to regulation of the US and the conscious avoidance of it in Europe. Thus, in Europe, not only was there no equivalent of the FMC; but in almost every - perhaps every - European country international shipping was excluded from the operation of the anti-trust laws. This attitude derived partly from an unwillingness of Governments to get involved in regulating an activity that seemed to get on quite well without it; a recognition of the jurisdictional disputes that arose if Governments were involved and which led to major rows between Europe and the US; and on the part of the industry an unwillingness to be regulated and the political power to avoid it.

In economic terms, the policy was based on closed conferences and open trades. Those Governments that gave thought to the competition policy aspects of shipping policy - and not all did - took the view that the closed conference allowed the rationalised capacity and operation that produced effective use of the assets; and that the mobility of the assets and the openness of the trade prevented the closed conference from abusing its position.

The 1984 Shipping Act and the set of regulations adopted by the European Community in 1986 meant that whilst the US was moving away from detailed regulation from one end of the spectrum, Europe was moving into a sort of regulation from the other. They did this not as a result of any major change of heart. It was because in matters of policy the European Community is constrained by the Treaty of Rome and by the interpretations of the Treaty by the European Court of Justice. It is a constraint that takes some getting used to, especially for those brought up on the supremacy of Parliament.

The 1986 measures were essentially based on the philosphy of maintaining a commercially-oriented merchant marine; and on the assumption that if commercial freedom existed, both shipowners and shippers would benefit. The Community was in fact criticised for that assumption; by politicians who believed that European shipping could not survive without protection; and by some shipowners on the grounds that it did nothing to remove some of the fiscal and social disadvantages that, in their view, they suffered from. The Community countries either avoided, deliberately, the question of what to do if the assumption proved wrong or believed that in fact it was, for the time being, right.

The package of measures included powers to take action against discriminatory measures by third states, including a power to do so in alliance with a non-Community country (a measure designed to facilitate the US/CSG dialogue), a power to act against predatory pricing which is aimed at shipowners benefitting from non-commercial advantages and which is, I think, rather more flexible and sophisticated in its approach than the relevant US legislation; and a measure applying the competition rules of the Treaty to shipping, but exempting conferences from them so long as certain conditions and obligations were observed. It is this aspect which is at the heart of this seminar and to which I shall devote the rest of this paper.

The regulation is based on an approach to competition that differs somewhat from that of the US.

(i) As I understand it, under the general US approach price concertation may be permitted; but such other measures as rationalisation of capacity, pooling arrangements and so on are regarded as additional anti-competitive measures, and the approval of such measures, as in the 1984 Act, is regarded as an additional concession. In Europe such measures as pooling of cargo or revenue, the coordination of timetables, the agreement of frequencies and the allocation of calls are regarded as benefits which justify the price fixing. This applies to open trades; a tighter regime is envisaged where the trade is closed since the self-regulator would be absent.

(ii) The closed conference is accepted (indeed in the eyes of some in the Competition Directorate-General insisted on). The grounds that one will be given range from the rather reluctant view that if one is going to legitimise a cartel there is no point in encouraging it to be bigger than it need be; to the more sophisticated defence that the freedom of shipowners inside a conference to deny entry to others actually stimulates non-conference competition but not to the extent of undermining the basic structure, provided that

(a) the trade is open

(b) the competition is commercial in nature and not facilitated by non-commercial advantages.

Indeed there are those who believe - and I am one - that in competition policy terms the open conference achieves the worst of both worlds: it stimulates over-capacity within the conference, and hence high unit costs, whilst providing the cartel structure to facilitate the passing on of those costs to the user. In this respect the 1984 Act was a disappointment and it is welcome news that it will be re-examined.

(iii) The detailed obligations imposed on conferences by the regulation are basically designed to help the shipper. The undertakings of the conference members towards each other (eg the observance of the agreed freight rates) are regarded as matters of contract to be settled by the usual commercial means and not by Governmental intervention.

The package of measures adopted in 1986 is, however, deficient in one important respect. Just as the capital and operational imperatives involved in the introduction of container operations led to a concentration of the industry into fewer and larger units, so the need to cut costs to meet competition from operators from lower-cost countries has led to an increasing use of the consortium as a tool of the liner trades. European container ship operators are involved in some 40 consortia covering all the major trades to and from Europe; and some 60 consortia world-wide. These consortia are essentially trans-national; the national industries are already largely concentrated. The competition regulation does not explicitly exempt consortia from the operation of the competition rules and the European Commission gave an undertaking that it would consider what should be done about them. It must be said that it is making something of a meal of it. Until consortia are legitimised, either by way of a special group exemption or by the acceptance that the present regulation does in fact cover them, one of the liner industry's essential tools of the trade will be at risk.

The consortia comprise as partners very largely European, Japanese and to some extent developing country shipowners. I can think of no consortium which involves European and US shipowners together, or if they exist they must be very few. I do not know why this is. I was told years ago that it was because of the restrictions of ODS or of Title XI but no-one has ever explained it satisfactorily. It is a pity because just as nationalism between European countries has, in liner shipping, been blurred by the trans-national consortia, it would contribute to a greater proximity of Governmental policies if the same blurring of nationalist edges took place between Europe and the US. To answer a point made by the Bureau of Economic Analysis, it cannot be said that the flag is becoming less important; but it can be said that the nationalism which the flag often represents is.

The Bureau of Economic Analysis asks in its paper what would be the consequences of total deregulation. By this I take them to mean that all Governments should adopt a hands-off policy towards international liner shipping. One must beware of the word "deregulation" since it carries undertones of US deregulation of domestic aviation, which involved a move from a highly regulated regime to a totally free one. International shipping is not regulated to anything like the extent that US domestic aviation was; and a totally free regime is probably politically unrealistic. Having said that, if it were politically possible for Governments not to involve themselves in the economic regulation of international shipping (I am not speaking at all of safety regulation) I do not believe that anyone would come to harm since, so long as entry to the trade is open, the system is more or less self-regulating. Even where Governments do regulate, I think it is desirable that the regulation should be light and operate on the exceptions rather than the norm. I do not think Governments should encourage or discourage Conferences; they should allow them. Governments should not involve themselves in the detail of either the shipowner-shipowner relationship or, subject to some safeguards, in that of the shipowner-shipper relationship, except where there is a case of abuse. But this is theorising; the best one can hope for is that Governments realise, and observe, the practical limitations of what regulation can achieve.

The paper by the Bureau of Economic Analysis speculates whether there is a chance of a greater international consensus in shipping policy. I believe there is, at least among the traditional maritime developed countries, because by and large their shipowners face the same problems and in those circumstances the reactions of Governments will tend to be similar. The fact that after 4 years the US is prepared to review the workings of the 1984 Act; the fact that Community shipping policy will now develop from its present base provides the opportunity for the two policies to align. If they do, and if the basis of that alignment is the maintainance of a commercially-oriented approach it can do nothing but benefit the maritime industry of the west.

Forecasts of Shipping Supply and Demand To 1990

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The Chinese new year - the Year of the Dragon - began the day before this conference was opened. A similar coincidence occurred with this session's topic, based upon recent reports from Hong Kong that Chinese astrologers have found a lucrative business in reading the tea leaves of the world economy. Not wishing to be outdone by fortune-tellers, I have prepared a few non-astrological forecasts of the supply and demand for international shipping to the end of 1990. It is obviously an important topic and will convey a number of implications for liner shipping policy.

World Fleet and Tons Carried

From 1970 to 1978 international trade failed to expand as rapidly as the net addition to vessel tonnage. The disparity in the rates of growth is shown in Fig. 1, which is placed at the end of this paper. The world fleet in deadweight tons grew 70 percentage points faster than tons carried during that period. In 1978 the capacity of the world fleet began to increase more slowly, but tonnage carried *fell* between 1979 and 1983, thus maintaining the disparity. My estimate of tons carried in 1987 is at a rate of change which is slightly higher than any year since 1983, but I expect 1988 to be a very cautious one. The following year should bring a more rapid growth rate, and that may lead to another decline. From now until 1990, the oversupply is likely to be reduced, but with a greater contribution from a net reduction in vessel tonnage than from the growth in world trade.

Consider now some of the economic factors which influenced the pattern since 1970, and those which I expect to be relevant to 1990. The basis of many of the problems we are currently facing began in the early 1970s when a gradual shift occurred in the source of manufactured exports. Shipments from the U.S. and the EC (generally) declined relative to those from Japan, the newly industrializing countries and Northern Europe, especially West Germany. The nations which began to experience a relative decline in production and exports did not wish to reduce their material wealth and imported more in proportion to their falling exports. Those which gained in exports did not wish to change their prudent nature or their long-standing preference for domestic products, and imported less in proportion to their rising exports. Those decisions, or more accurately, the *absence* of decisions to change consumption patterns, became "set in concrete" for the next 15 years and created the conditions for a number of economic tremors.

After the second oil crises it became clear that global economic activity would remain sluggish. West Germany and Japan were among the first nations to realize and to do something about the problems associated with government deficits which had accumulated during the slow-growth period, but they were also the countries for which the cost of reducing the deficits was least. In the U.S. and in many other countries, the government deficit was superimposed on a trade deficit which, as mentioned before, was driven by the desire to import more. The U.S., in particular, became the "locomotive" to the world economy during 1983-84, not because of a strong desire to aid the rest of the world, but in order to obtain the best value from the tax reductions which were instituted early in the Reagan Administration.

By 1987, most economies moved out of a recessionary phase but were still unable to adjust to the structural changes which began in the 1970s. Each nation now blames others for causing the problem, and each pursues an independent policy, the net effect of which has been described as a "phony war" where we are not quite sure what the central banks will do next. All this uncertainty during 1986 and 1987 motivated pronouncements from economic think-tanks, such as Holtham (1986), that we need a greater amount of international coordination. But needing it and getting it are quite different things. "Competing" rather than "coordinating" will continue to be the key word in 1988, but in my view it is likely to produce greater stability for the next 18 months or so than efforts to revive the recently failed accord among the group of seven large nations.

The international adjustment which is needed is much like the movement in the continental plates. Small tremors remind us that adjustment is necessary and many small tremors may act as a substitute for major quakes. Hence, my prediction for a modest growth in total tonnage shipped this year: national selfishness will prevent a global recession, but will achieve no more than a very slow rate of economic growth. If we manage to get through 1988 without a major "quake", trade will pick up more rapidly in 1989 with the shedding of caution, but that will only add to complacency and press home the need for greater coordination. Perhaps by 1991, progress in that task will be noticed.

Tankers, Bulkships and Containerships

Since tankers comprise nearly 40 percent of the world's deadweight tonnage, and tanker cargo contributes 45 percent of total international seaborne trade, it is not surprising that the growth rates in that market have a pattern which is similar to the world fleet and to all goods traded (refer to Fig. 2). The rate of growth in tons carried in 1988 is predicted to be about 4 percent, with a 13 percent growth rate to the end of 1989. Oil prices have fallen by about one-third since last July, but consumption until the beginning of winter has not changed substantially. A further price decline is expected at least until the currently large inventories are run down, but I do not expect a large increase in demand until it is clear that (1) prices have bottomed-out at something near $10 per barrel and (2) economic activity shows definite signs of further expansion. Those conditions are not likely to be met until the end of this year.

The pattern of growth for bulk/ore vessels and main bulk cargo, as shown in Fig. 3, is quite different from those of Figs. 1 and 2. While the rate of growth in the size of the fleet has slowed, it has not yet declined. Several factors account for this difference. First, the trend toward larger ships, particularly with ore carriers, began several years after a similar trend occurred for supertankers. Second, smaller bulkships continue to be used for the grain trade, so that bulk carriers sold for demolition have generally been older than tankers sold for that purpose. As a result, the growth pattern of the bulkship fleet will probably continue to lag behind the tanker pattern by four or five years. The average annual rate of growth in main bulk cargo from 1970 to 1990 (est.) is about 9.5 percent. Hence, demand for bulk/ore vessels is expected to catch up with supply without substantial net reductions in fleet capacity.

The disparity in growth rates for containerships and for tons carried is overstated in Fig. 4 due to a mismatch of cargo. Since a series for containerized cargo is unavailable for the entire period, "other" dry cargo was plotted. The diagram nevertheless shows the sharp increases in fleet capacity during the early 1970s, when the transfer to containership operations was most rapid, and again between 1982 and 1984 when the larger, second-generation vessels were put into service. The latest UNCTAD figures for 1986 indicate that no change occurred in that year relative to the long-term trend in vessel tonnage. I expect, however, that net additions to the containership fleet in 1987 were less than the previous annual average, but a flat growth rate may not be noticed until 1990. Shortly after the most recent high-growth period for vessel tonnage, but well after the latest large increase in tons carried, the freight rate index compiled by the West German Ministry of Transport reached a peak. The index continued to decline through 1986 (to about 26 percent of the highest level) and there is reason to believe that the bottom was reached early in 1987.

Causes and Effects of Oversupply

The greatest single contribution to shipbuilding activity during the period was technological change, that is, the proved superiority of supertankers, bulkships in the 80,000-dwt-and-above class, and containerships. But we would normally expect large purchases of new equipment to be accompanied by an increase in the rate at which the obsolete equipment is scrapped, so that supply can remain in balance with demand. There were, however, several factors which prevented the normal adjustment. First, developing countries, which were unwilling or unable to adopt the new technology, purchased ships which might otherwise have been scrapped. Second, competition among the shipbuilding nations led to government subsidies which encouraged new orders that might otherwise have been postponed. Third, the banking system continued to view ships as durable income-earning assets which, even if less than fully productive, could nevertheless yield a return which is just enough to sustain operations. Credit was therefore extended for vessels and equipment which might otherwise have been taken out of service. *All* of these factors are necessary to account for the 20-year period of overtonnaging.

The long-term effects of the excess supply are substantially greater than the short-term collapse in freight rates which gave a temporary and probably inconsequential advantage to shippers. A significant portion of the cost of the excess tonnage must eventually be carried by those who use the shipping services. Shippers argue that overtonnaging was not their responsibility; conferences argue that shipper support of independent shipping lines, and independence among the lines, created the pressures which drove up the level of vessel capacity. As with nations, each blames another for the problem. Similarly, "competing" is more descriptive of the present environment than "coordinating".

The most important task at the moment is to find a way of ensuring that the overtonnaging cycle does not repeat itself. Let us consider some possibilities. First, I regard an increase in the concentration of ship ownership as almost inevitable. With fewer decision-makers there will be fewer decisions which are made without regard to the effect on the industry as a whole. There may also be a greater separation between ownership and operation, with a small number of "owning" companies leasing ships to a larger number of subsidiary or affiliated operating firms. Such arrangements will improve the ability of the carriers (i.e., the actual operators) to adjust the fleet to changing needs of the trade. It may also provide some of the advantages of an integrated, round-the-world service with much less risk.

Second, conferences are likely to act as shipping-capacity coordinators and devote less time to the *structure* of freight rates. By influencing the supply of vessels they can exert more control over the *level* of freight rates than was possible through the consultation/negotiation process. In addition, greater flexibility in the structure of rates will be necessary in the future, and that seems to be more easily managed through shipper/carrier dialogue.

Third, bankers will be forced to take a more active role in shipping activities. Cash reserves of most carriers are now at a relatively low level, and may not be restored sufficiently by 1996 to finance the third-generation containerships. Banks will therefore be invited to contribute a substantial amount of the necessary capital. In addition, the banking system has a financial interest in the entire door-to-door transport system, and that interest can be protected only by monitoring developments more closely than they have in the past.

My greatest concern is that shippers may attempt to swing the pendulum too far in their favor, so that it will subsequently swing too far in the other direction. By exploiting present advantages, they may unknowingly encourage alliances with bankers, owners and operators which can probably provide technically efficient services, but may also have substantial market power. Despite feasible interpretations of similarity, such alliances are not likely to occur in this the Year of the Dragon. Nevertheless, the discussions about liner policy in the next several years would certainly benefit from occasional reflections as to what *might* occur if important issues are once again swept under the carpet.

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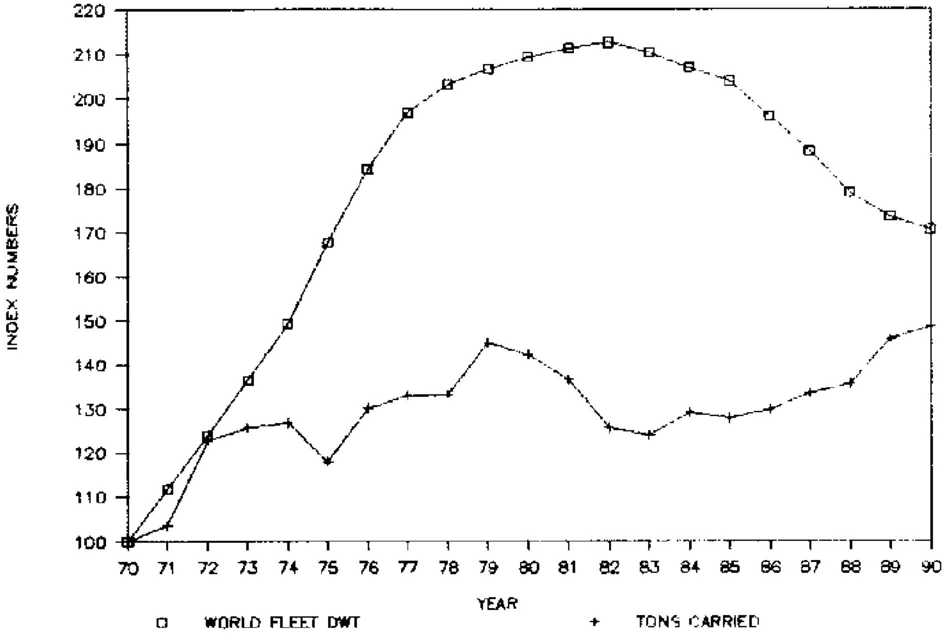
NOTES

Data for Fig. 1 to Fig. 4 are from UNCTAD (1987 and previous issues) Tables 1 and Annex II. Index numbers: 1970 = 100 except for tanker grt and bulk/ore grt where 1970 = 110 in order to separate the curves. The distance between curves is not a measure of oversupply.

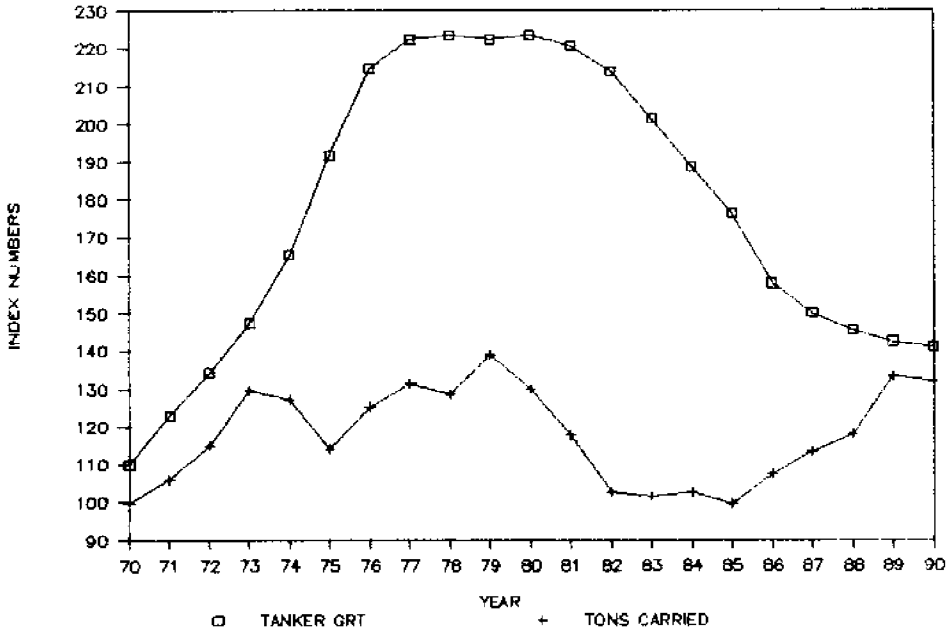
WORLD FLEET DWT AND TONS CARRIED

FIG. 1



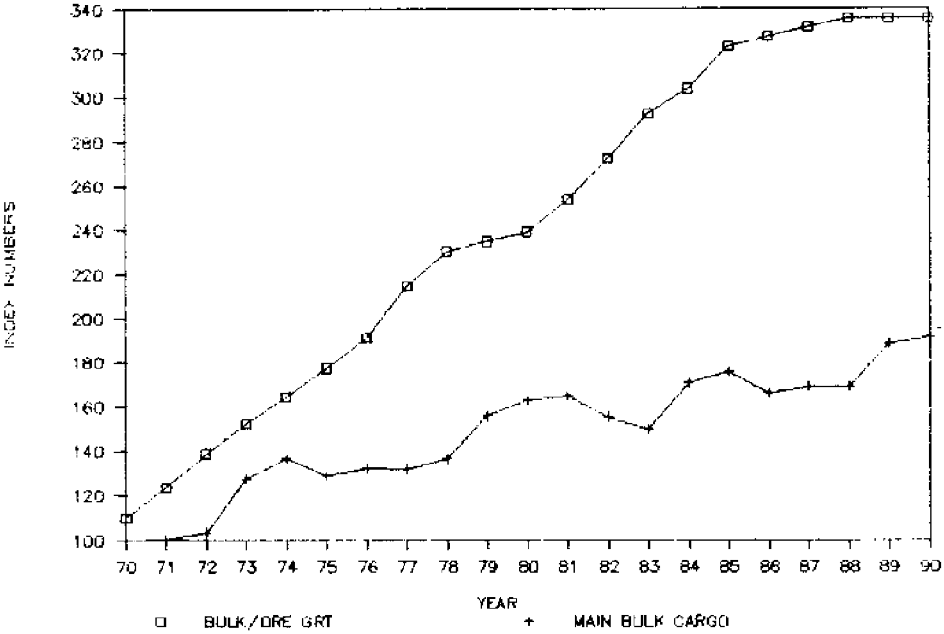
TANKER VESSELS AND TONS CARRIED

FIG. 2



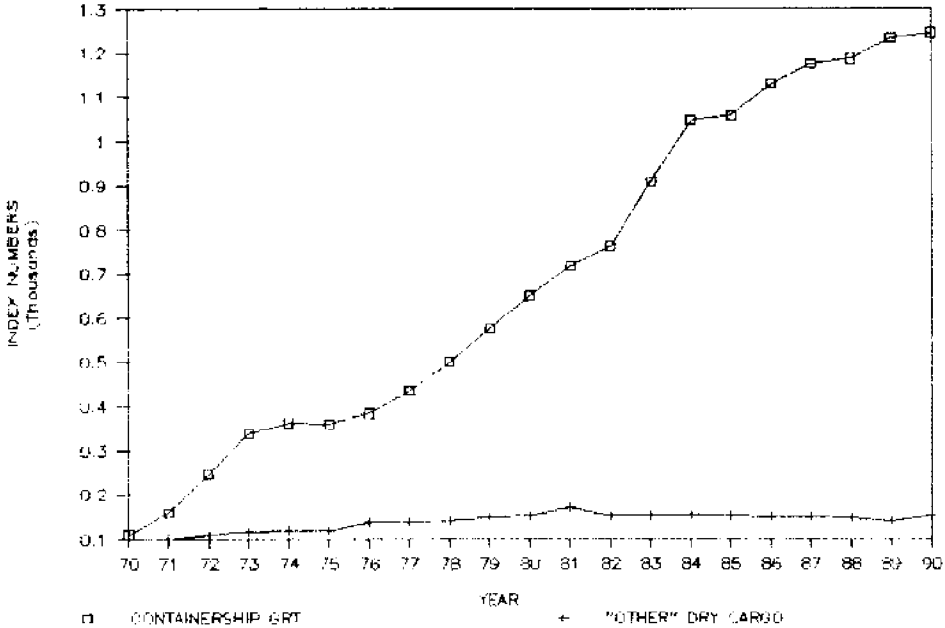
BULK/ORE VESSELS & MAIN BULK CARGO

FIG. 3



CONTAINERSHIPS & "OTHER" DRY CARGO

FIG. 4



Some Thoughts on Trends and Policy Issues

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The Market Situation

As pointed out in the background paper prepared by the Commission's Bureau of Economic Analysis (FMC, 1987), the liner shipping industry is currently facing a situation of excess supply and volatile trade imbalances. If recent OECD predictions (OECD, 1987) are correct, the problem of oversupply is likely to become worse in 1988, particularly in the world's two largest liner trades, namely, the trans-Pacific and the trans-Atlantic, although the weakness of the dollar may help to correct the trade imbalances in these trades. By the end of 1988, on the former trade route the OECD expects the eastbound trade will show an overcapacity of 50 percent while in the westbound trade it expects overcapacity to be in excess of 60 percent; on the latter trade route it expects there to be a total overcapacity of 35 percent with shipments westbound still exceeding those eastbound despite the weakness of the dollar.

Even if no further orders for new tonnage were placed, most observers would agree that the problem of oversupply in the liner shipping industry is presently so bad that it is unlikely to be solved quickly. This is because even if agreement could be reached among carriers on an accelerated scrapping programme, demand for liner shipping space could not grow fast enough to absorb the remaining surplus tonnage in the immediate future. So, when the Administration and Congress eventually consider whether the Shipping Act of 1984 should be amended or not, after the Advisory Commission has presented its report and recommendations in 1990, it will probably be against a background of continuing crisis in the industry. In the longer term, of course, economic forces will work to correct the imbalance between supply and demand but the intervening period will be a difficult time for carriers.

The Prospects for Deregulation and Its Consequences

While, in my opinion, the present crisis in the industry has little to do with the regulatory framework, I am also of the opinion that all interested parties would benefit if the industry were left to regulate itself. However, this is not going to happen. On the other hand, recent events indicate, for instance, the liner shipping reforms announced by the Australian government (Lloyd's List, 1987) that there will be no move to deregulate the industry universally either. Moreover, even if agreement could be reached eventually among the developed nations of the world not to provide the industry with exemption from their anti-trust laws, there is little prospect of getting the Third World countries to agree to deregulation as they would fear the consequences would be detrimental to the survival of their liner fleets.

Total deregulation would, of course, not change the oligopolistic structure of the industry; it would merely result in formal collusion among carriers being replaced by tacit collusion, probably in the form of a system of price leadership. Inevitably, this would mean a simplification of tariffs structures and, therefore, a loss of market opportunity for carriers and some shippers. A narrowing of the current highly differentiated commodity tariffs would favour shippers of high value commodities at the expense of shippers of low value commodities who might find themselves excluded from liner shipping services if their commodities could not bear the additional cost of carriage. Shippers of low value US exports would consequently suffer. Also, deregulation would be likely to result in greater concentration in the industry and exacerbate the problem of matching tonnage with demand, particularly if subjecting carriers to the anti-trust laws meant they were forced to break-up the consortia they have formed as well as abandon other multi-carrier agreements which currently serve to rationalise services in the industry.

Are Major Policy Differences Real or Cosmetic?

The fact that only open conferences are permitted in US trades is one of the features of US regulatory policy concerning liner shipping which sets it apart from regulatory policy concerning the industry elsewhere in the world. In my view, the practical consequences of this difference are nowadays minimal. Provided ways are open for carriers to co-operate in rationalising services, it does not matter whether conferences are open or closed, so the debate over whether conferences should be open or closed in US trades is, in fact, a sterile one. What really matters if shippers interests are to be protected is whether trades are open or not. Under the open conference system while it is true that any newcomer to a trade has the right to join the conference immediately, it will not pay him to do so until he has carved out an acceptable market share because the usual way to achieve this is by undercutting the conference carriers on price. On the other hand, under the closed conference system while it is true that a newcomer will not normally, at first, be permitted to join the conference, he is likely to be able to do so once he has sufficient market share - leaving aside, of course, the problem posed in trades where the UN Liner Code is operative. Again, the usual way of achieving this is by undercutting the conference carriers on price.

Turning now to the problem apparently posed by the UN Liner Code: although it would appear that the Code could be used to prevent newcomers to a trade from eventually joining the conferences covering that trade, should they wish to do so, through the operation of the 40-40-20 Rule, it would, in fact, be unwise to try to frustrate nowadays the ambitions of a well established outsider capable of providing a dedicated container service in this direction, given the degree to which container services have now penetrated the liner trades of developing countries - a recent estimate put container penetration at 65 percent for trades between developing and developed countries in 1984 and at 51 percent for trades between developing countries (Graham and Hughes, 1985) - and inability of all but the largest trades to support more than one such service, except as part of a more complex network of services. This is because failure to accommodate such an independent operation would probably lead to the break-up of the conferences covering the trade as some, if not all, of the conferences' members would wish to reach accommodation with such an outsider in order to prevent, if possible, the overtonnaging of the trade. It follows, therefore, that acceptance of the Code is unlikely to affect significantly how market shares within a trade will be distributed between flag carriers of the trading nations and cross-traders as long as the trade remains open. Consequently, there is no reason for me to qualify my previously expressed view on the open versus closed conference issue, at least from an economic standpoint.

Although the provisions of the Shipping Act of 1984 concerning multi-carrier agreements have largely removed any economic substance from the debate over whether conferences in US trades should be open or closed, it could be argued that acceptance of closed conferences would be advantageous to the US from a political standpoint. Clearly, the US regulatory stance on open conferences is incompatible with the Liner Code, since it prevents any cargo sharing provision for commercial cargo, whereas the European Community's acceptance of closed conferences has allowed the member countries to adopt the Code subject to the Brussels Package reservations and apply it to their trades with codist Third World countries. Acceptance of closed conferences by the US would, consequently, remove one of the major obstacles to arriving at an international concensus on the Code. Such a consensus, however, would not be a genuine one. Despite the different positions that the US and the member countries of the Community take on the Code, they and the other OECD countries do not differ fundamentally in their desire to retain a largely open market in the provision of liner shipping services free from the worse forms of flag discrimination. The codist Third World countries, on the other hand, appear to wish to use the Code as a means of protection, thereby ensuring at least 40 percent of their trade is reserved to their own national flag carriers. As long as any attempts by developing countries to turn closed conferences into closed trades are firmly resisted, their wish to use the Code as a means of protection will be frustrated. One of the objectives of the US/CSG dialogue, besides dispelling any misunderstanding that may have arisen over the different positions that the participants have taken over the Code,has, of course, been to formulate a joint policy for such resistance. It would appear, therefore, that the Code is doomed to failure as a vehicle for reconciling the aspirations of the codist Third World countries with the desire of the developed countries for a largely open market in liner shipping services. The only way out of the political impasse perhaps lies in commercial initiatives such as joint ventures, which will hopefully raise the ability of Third World carriers to compete effectively in an open market as carriers from the so-called Newly Industrialised countries with the necessary commercial acumen are currently doing.

Is the National Flag Concept Obsolete?

Initially, the development of container services allowed carriers from the developed countries to maintain their traditional dominance over the provision of liner shipping services. However, the development of such services by the pioneers gave them no monopoly over the new technology and during the latter part of the 1970s a number of other carriers, including some operators from the Newly Industrialised countries, began to provide such services. Such carriers were not handicapped by the need to re-engine vessels in mid-life as many of the established operators were forced to do owing to the oil crisis of 1973-74 which quadrupled bunker prices and made steam turbine vessels financially a less attractive proposition than motorships, particularly with the development of the slow speed diesel engine which was capable of powering large containerships (Graham and Hughes, 1985). Moreover, the operators from the Newly Industrialised countries, such as Evergreen, had the advantage of lower labour costs and the commercial ability to make the most of this advantage. Many of the carriers that began to offer container services in the latter half of the 1970s are now a force to reckon with, including, of course, Evergreen which is currently the largest operator of such services.

Given the open nature of the market for liner Shipping services in the most important deep sea trades, it is clear that if carriers from the developed countries are to maintain their competitive edge they must either have the same access to lower labour costs that operators from the Newly Industrialised countries enjoy or be compensated for this disadvantage. Specific measures designed to support their shipping industries, of course, open the developed countries to the charge of discrimination in favour of their flag carriers. Moreover, fiscal incentives, such as accelerated depreciation allowances are costly to the Exchequer as they promote conglomeration and the development of financial leasing which allows commercial banks and other financial institutions to find tax shelter for their profits through the owning of physical assets such as ships. This latter development is undoubtedly a factor that has led to the overtonnaging of shipping markets generally.

Recent evidence suggests that governments in developed countries are becoming less inclined to use fiscal incentives to support industry in general and shipping in particular - note, for instance, the changes that have taken place in the UK's corporate tax regime as a consequence of the 1984 Finance Act - so it seems inevitable that the trend towards flagging out will continue as more and more vessels beneficially owned in developed countries are placed in open registries. The national flag concept appears to be in the process of dying, except among Eastern Bloc countries and those Third World countries that wish to protect their shipping industries through flag discriminatory measures. The need to retain a core of national merchant seamen capable of manning vessels in the event of a national emergency may eventually cause some developed countries to adopt measures to halt this trend, but on economic grounds alone such intervention is undesirable.

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A Legacy Of Leadership — The Paul Hall Memorial Lecture

Herbert Brand
Chairman
The Transportation Institute

It is a special honor to have been chosen to give the first Paul Hall Memorial Lecture, because I was fortunate enough to spend virtually all my working life in the personal and professional company of this unique man.

There is a strong temptation to speak of Paul Hall as one of the legendary figures of our times. Many of us regard him that way. But I know Paul would be uncomfortable with being labeled a legend. And he'd be uncomfortable being tagged as he so often was, with such gaudy words as "labor giant" or "statesman" or Presidential advisor" -- even though he was all these things, and much more.

I have searched through memories of Paul that span almost four turbulent decades. If I were to attempt to capture him in a single phrase, it would be "pragmatic idealist." He was a man who had a vision without being a visionary...a man who had a dream without being an idle dreamer...a man who would never abandon his ideals or compromise his principles, but who still knew how to trim his sails to the realities of the world in which he lived, through which he moved, and on which he has so deep an impact.

I look around today, and I realize how much of an ally Paul Hall was to each segment of society represented here.

To those from the labor movement, this allegiance is hardly surprising. In any battle, on any front, he stood shoulder to shoulder with working men and women because he subscribed to that simplest of all trade union philosophies -- that "an injury to one is the concern of all."

To those from management, Paul had the capacity -- at one and the same time -- to be an adversary across the bargaining table and an ally in preserving the industry on which both the union and the companies depend for their survival. Paul was an advocate of the principle of " interdependence." He was wise enough to know that it's no more possible to operate a merchant marine without ships than it is to operate it without manpower. And so he and his union stood side by side with shipowners and shipbuilders in the unending struggle to preserve this industry.

Paul Hall was an ally of the government, too. He recognized the unique nature of the merchant marine as the nation's fourth arm of defense. It was often an uneasy alliance, compounded by the fact that the government's performance in protecting and promoting this industry so often fell far short of its promises.

And while those of you from the halls of academe may not realize it, Paul Hall was your ally, too. Because of economic circumstances, he was a man of little formal education. In spite of his background -- or, indeed, because of it -- he had an unquenchable thirst for knowledge. Paul was one of those truly self-educated men. During the years he spent as a crewmember aboard ship he absorbed knowledge from any and every source imaginable. Paul never lost that thirst -- he never stopped reading, never stopped listening, never stopped learning. His mind was a treasure trove of things he had learned and had never forgotten.

His personal experience taught Paul that education is a lifelong process. And out of that knowledge grew his special alliance with the educational community. More than two decades ago, he established the Harry Lundeberg School of Seamanship at Piney Point, Maryland.

Piney Point, as some of you may know, had been used by the Navy during World Way II, and Paul's plan included removing the massive concrete torpedo bunkers, dredging the channel, enlarging the docking area, acquiring a fleet of vessels that could be used for training and as floating classrooms, refurbishing the barracks and building a library -- in short, converting the facility into a full-time school.

Some of us who heard him talk of his plans and hopes and dreams for this school wondered if, perhaps, Paul's reach had finally exceeded his grasp. Happily, we were wrong and Paul was right.

The original concept was to help young men acquire the basic skills they needed to pursue seagoing careers. But that was only the beginning. Paul learned, early on, that many of these youngsters who dreamed of going down to the seas in ships were sorely in need of basic education. So to the curriculum he added programs in remedial reading and writing.

Because Paul erected the Lundeberg School on the firm foundation that life is a continuing education, he expanded the school's courses still further, making it possible for these young men to come back again and again, upgrading their skills, helping them climb the career ladder so that, over time, they can move from ordinary seamen to better-paying positions as engineers, mates and masters.

Today, the vocational education curriculum is complemented by a variety of opportunities for academic advancement. In addition to the reading skills program, the school offers an Adult Basic Education program, a high school equivalency program, an English as a Second Language program and a college level program leading to associate in arts degrees.

Over the last two decades, thousands of young men have passed through the school at Piney Point, acquiring education free of charge -- and at no cost to the Government -- emerging from its classes to make their own contributions not only to the maritime industry, but to society as a whole.

This series of annual lectures is our way of the reminding world that Paul Hall passed this way -- and it is a fitting tribute to the man. If he is in need of a living memorial, surely it can be found in the Lundeberg School -- testimony to his vision, his determination and his sense of the common thread that unites labor, management, government and education, and to his qualities of leadership.

I have chosen to emphasize these unique characteristics about Paul Hall because, in my mind, they provide a far more illuminating portrait of the man than would the dry and predictable recitation of his achievements as President of the Seafarers International Union of North America...as Senior Vice President of the American Federation of Labor and Congress of Industrial Organizations...as President of the AFL-CIO Maritime Trades Department...and as a working partner with industry and government in pursuit of a strong merchant marine.

These were tasks that he undertook with his customary vigor and they helped produce a high degree of labor unity -- from seagoing unions to shoreside unions -- in support of this maritime industry of ours. Paul Hall had an unyielding dedication to the future of maritime -- and his is sorely missed now, as we engage in the continuing search for ways to keep this industry alive -- not merely for its own sake, but to preserve the national security, as well.

Perhaps it is coincidence -- perhaps it is fate -- that we should be meeting here this week to discuss problems of concern to the merchant marine, because we seem to have come full circle in the past half century.

Fifty years ago, almost to the day, the United States Maritime Commission completed its economic survey of the industry and sent its first report to Congress as required by the Merchant Marine Act of 1936. That report detailed what Chairman Joseph P. Kennedy and the other Commission members called "the many perplexing problems affecting the ocean-going shipping industry." And it proposed practical, achievable ways to keep American-flag vessels plying the sealanes of the world.

And as we gather here, another Presidential body -- the Commission on Merchant Marine and Defense -- has recently issued its second report of similar magnitude.

Now many of us have a right to a certain cynicism about Presidential commissions. They have become the fashion in Washington over the years. When government finds itself confronted with a seemingly intractable problem, it appoints a commission...the commission members engage in exhaustive study...and they make recommendations to the President and the Congress. Often that's as far as it goes.

The ultimate tragedy is that the commission approach is oftimes little more than an exercise in futility...a form of window dressing...a calculated ploy that makes it possible for government to create the illusion that it's doing something about a problem when it is actually doing nothing.

The 1937 report was a horse of a different color. It grew out of a sincerely shared concern by Franklin Roosevelt, the Maritime Commission and the Congress that something had to be done to develop an adequate and well-balanced merchant marine. It wanted to end the feast-and-famine approach to maritime policy.

The Maritime Commission in 1937 concluded that the history of the United States with respect to its merchant marine had been, as it put it with almost calculated understatement, "most unfortunate." Here's what its report said:

> We have generally acted under the lash of necessity which precluded the planning necessary to a sound commercial policy. Our present attempt to compete in the international carrying trades was born of the World War.
>
> Previous to the war we were a negligible factor in the overseas trade. Then, goaded by necessity, we requisitioned, bought, seized and built vessels at a rate never equaled in the history of the world. We blanketed the oceans with ship services in a frenzied effort to make up for our negligence of the preceding half century.

The 1937 study emphasized that, in the period following the first World War, "we have gone back a long way from the ambitious program of the early 1920s. We are about to start again, not in a riot of enthusiasm, not with an expenditure of billions, but with a carefully planned program that gives due regard to the factors of need, method and cost. Therein, we believe, lies our hope for the future of the American merchant fleet."

Parenthetically, let me remind you that at the time of the 1937 study there were 426 vessels in nearby and overseas foreign trade. And they carried 35.7 percent of our waterborne foreign commerce -- without cargo preference. Today we have some 360 ships carrying 4.2 percent -- with cargo preference.

Even by the standards of that day, the $200 million that the Commission proposed be spent on construction and operating subsidies was a modest amount. But, the Commission emphasized, it would make a good beginning on replacing a fleet that the government had allowed to grow old and obsolete in the years following World War I.

But the Commission felt it was vital to make such an outlay, because, it said, a viable merchant marine "must be viewed as an instrument of national policy." The report made the case, as few studies have ever done either before or since, that an ocean-going fleet was vital to both the nation's commerce and its military strength.

Because of the combined determination of the Maritime Commission, the Roosevelt Administration and Congress, we were far better positioned by the time World War II erupted. Because of their foresight, we were able to produce the largest merchant fleet on the face of the globe in order to provide the necessary sinews of war that were so essential in defeating the Axis powers.

On two occasions since the end of World War II -- during the conflicts in Korea and Vietnam -- the merchant marine demonstrated the obvious need for American-flag vessels and American seamen to carry the weapons of war to far-flung battlefields. We discharged our missions in Korea and Vietnam despite the fact that government had once again lost either its nerve or its senses...that it hadn't learned anything from past history, and had repeated the same mistake of allowing that maritime industry to fall into disarray.

And now we've rounded the circle. I don't have to recite a litany of the gloomy statistics about our merchant marine, because they're all too familiar to everyone here. It is enough to say that, fifty years after the historic 1937 study, we're still trying to find the key to unlock the door to maritime's future -- a door that someone keeps slamming shut despite the obvious necessity to maintain a maritme industry in peacetime so that we'll be prepared to meet our obligations should war ever break out again, anywhere around this troubled world of ours.

And now we have a new Presidential commission weighing the consequences of that neglect or indifference, and trying to come up with sensible solutions to set us back on course once again.

In its first two reports, this Commission has taken a no-nonsense position on what it clearly perceives as the "clear and growing danger to the national security in the deteriorating condition of America's maritime industries."

The Commission emphasized that the time has come to replace the haphazard, on-again-off-again approach to a maritime industry that -- whether you count the dwindling number of ships or the shrinkage of the the seagoing workforce, whether you examine the decline of shipbuilding, ship repair facilities or shipyard suppliers -- displays all the symptoms of massive, almost terminal neglect.

The most encouraging part of the Commission's seven-point program is its clarion call on the federal government to enunciate a clear and workable national maritime policy...one that mobilizes the resources of every federal department and agency to begin the massive task of rebuilding the merchant fleet and its supporting shipyard industrial base.

The Commission's seven principal recommendations throw down the gauntlet to the White House and Congress. In essence, it has told the Executive and Legislative branches of government to buckle down to the task...to work in harmony with each other and to come up with whatever is necessary to end the alarming situation in which a deteriorating maritime industry poses a clear and present danger to the national defense.

The Commission didn't say, "Think about it." The Commission didn't say, "Do something some day." Instead, it laid down a blueprint for action by the Administration and this second session of the 100th Congress. And it sounded an unambiguous signal for "full steam ahead" -- right now -- on a workable program. And it made clear that, whatever it costs, the burden should be borne by the nation as a whole because of maritime's role as an indispensable part of our national defense system.

Yet, I have a certain amount of cynicism about what will happen next. After all, during seven years in office, the Administration has demonstrated precious little inclination to reverse the declining fortunes of our merchant marine.

The promises it made when it came to office have long since been forgotten. Instead, the White House has paid lip service to our industry, uttering pious platitudes and little else. The leadership it promised in the wake of the Carter experience was never demonstrated.

In recent years, it has been the Congress who has been our one sure and constant ally. As a matter of fact, the present Commission came about, not because of anything that the President did, but because Congress mandated its creation to deal with the problems confronting this industry.

But it would be a mistake to believe that, just because Congress in on our side, we can sit back, relax and assume that we're home free.

It's an ancient Washington axiom -- but a true one -- that the President proposes and Congress disposes. And so, while the word "leadership" has probably been done to death in the nation's capital, it is nevertheless true that without White House backing -- deeds, not words -- we could end up with our rudder jammed, turning in circles, always hoping for the best but never getting it.

We find ourselves in the twilight of the Reagan presidency. Because time is running out on this Administration, the report of the Commission on Merchant Marine and Defense could conceivably go the way of so many other Washington reports...published with a certain amount of fanfare, and then stuck away on some shelf to gather dust.

It doesn't have to be that way -- and if Paul Hall were here today, I know what he'd say. He'd remind all of us that, as old Andy Furuseth, one of the great giants of maritime labor, used to say: "Tomorrow is also a day." And Paul would be planning tomorrow's strategy right now.

Assuming that this Administration remains on its present tack and allows both time and the so-called "free-market forces" to drive the U.S. flag from the high seas. it is of paramount importance that the Commission's report serve as a means of educating a new Administration, a new Congress and the American people of the depths and urgency of the problem.

The realities of the world today dictate that American self interest must be served. The pure "free-market" arguments don't answer the question of how we provide for the merchant marine part of the national security equation -- and by security I refer to both physical and the economic viability of America.

Incidentally, we see no "free-market" in OPEC's activities -- an operation in which state-owned vessels are an integral part of the cartel. Isn't it likely that, if we drift into a zero shipping and zero shipbuilding capability, a maritime cartel unfriendly to the United States could also emerge?

If you think we have problems now, just try to imagine what our plight would be if we had to face that kind of scenario.

Fifty years ago today, the leadership of this country -- the Administration, the Congress and the industry -- took a hard look at the need for a vital merchant marine. Working in harmony, they set in motion steps to assure a viable shipping capability so fundamental to our nation's security and economic needs.

Now, fifty years later, let us hope that the report of the Denton Commission will be the first step toward restoring America's visibility on the high seas in a manner consistent with our position as a world power.

The man we memorialize here today -- Paul Hall -- was well aware that problems can be either stumbling blocks or stepping stones. And I know where his heart and energies would be concentrated. He would be battling with everything he had to make certain that the American people understand maritime's role in terms of its contributions both to national defense and to a sound American economy.

It is appropriate, then, that in this place and at this time, we dedicate ourselves to achieving that goal -- for we are, all of us, inheritors of a maritime legacy that reaches back to the founding of this country...and we are custodians of the dream of regaining and retaining our rightful place on the world's sealanes.

Closing Remarks

Edward J. Philbin
Commissioner
Federal Maritime Commission

At the first symposium, we said that the carriers were looking into the hell. Today we heard Mr. Muranaka say that the carriers were getting poorer and poorer. On balance, it appears that things are improving in the maritime industry. Whatever one concludes about the health of the maritime industry, I think that you all share my view that this maritime symposium has been a very great success.

That success was in great measure to be attributed to the vision and enthusiastic support of the man who was originally scheduled to make these closing remarks, our late Chairman Edward B. Hickey Jr., who was suddenly and shockingly taken from us last month. Ed was instrumental in making this symposium a reality, just as he was instrumental in enhancing the stature of the Federal Maritime Commission within the industry, and also within the federal government, during his all-too-short tenure. We all knew Ed as a great Chairman, a great booster of the industry and a great patriot. He was devoted to his wife and his impressive sons, devoted to his church, his country and to his President. If one can find anything positive in this tragedy, it can only be that Ed would have loved the state funeral that was arranged by his many grieving friends in the administration, inlcuding the President and Mrs. Reagan.

Some of us who were closest to Ed also knew him as earthy Irishman who loved a good joke. I think that had he been here to listen to the wildly divergent views expressed on identical issues, he might have summarized the symposium results by telling the story of Winston Churchill, who as Prime Minister was traveling by private railroad car. As he sat there working on his usual bottle of brandy, he was musing into the night and he suddenly turned to the colonel who was traveling with him. He said, for every day of my adult life I have had at least one or two bottles of brandy -- I wonder how much brandy I have consumed over a lifetime. So the colonel took out a pad of paper and pencil and started making calculations and in a few minutes he turned to the Prime Minister and said, Mr. Prime Minister, in your lifetime you have consumed enough brandy to fill up about two-thirds of this railroad car. Mr. Churchill looked at the ceiling for a moment and puffed on his cigar and he said, so much to do and so little time.

I think the FMC and the Section 18 study is in pretty much the same situation after the Symposium. I would like to end up by thanking all of you for your participation, especially the panelists and those that have come great distances. And I would like to congratulate the staff of the FMC and the University of Southern California for doing a superb job of putting on this Symposium. I thank you all sincerely.

Biographical Information On Conference Participants

ANTHONY BARONE is manager of international transportation for the Warner Lambert Company, a worldwide manufacturer and marketer of health care and consumer products. Prior to joining Warner Lambert in 1977, Mr. Barone held positions with Cosmos Shipping Company, a foreign freight forwarder in New York, and Borden Inc. International, a multinational company. He is currently president of the National Export Traffic League and Vice Chairman of the International Traffic Committee of the New York Chamber of Commerce and Industry. For the last seven years he has instructed courses in international transportation at the World Trade Institute. Mr. Barone is a graduate of Columbia University and holds a Masters degree in business from Fairleigh Dickenson University.

ROBERT D. BOURGOIN is the General Counsel of the Federal Maritime Commission. Mr. Bourgoin joined the Commission in 1964 as an attorney advisor and was named Deputy General Counsel in 1975 and General Counsel in January 1984. He holds an engineering degree from Catholic University of America and earned his law degree in 1964. A native of Fort Kent, Maine, Mr. Bourgoin is a member of the State of Maine Bar and the United States Court of Appeals for the District of Columbia.

HERBERT BRAND is Chairman of The Transportation Institution, a Washington-based organization engaged in maritime industry research and promotion. The Institute directs its major efforts toward the preservation and promotion of a strong maritime capability in the United States. Mr. Brand has been involved with the maritime industry for over forty years. He served as Director of Public Relations of the Seafarers International Union, leaving that position in 1967 to join The Transportation Institute. He became Chairman of The Transportation Institute upon retiring as its President in 1980. A graduate of the

University of Alabama, Mr. Brand served in the U.S. Navy during World War II. He has been involved with a number of maritime organizations, including the Board of Directors of the Florida Alliance, Advisory Committee of the National Waterways Conference, the Board of Governors of the National Maritime Council, the Advisory Board of the U.S. Merchant Marine Academy, the Propellor Club, the Maritime Preservation Task Force of the National Trust for Historic Preservation, the Maritime Affairs Committee of the Navy League, and the Marine Petroleum and Minerals Advisory Committee of the Department of Commerce.

JOHN P. CLANCEY is Group Vice President, Pacific, of Sea-Land Service Inc. Based at Pacific Division headquarters in Seattle, he oversees the U.S.-flag containership carrier's operations, marketing and administration in its largest trade area, the trans-Pacific. Mr. Clancey was previously Pacific Division Vice President/General Manager, North America. During his 17-year tenure with Sea-Land, he has held numerous management positions, including Vice President, Americas Division, Vice President, Atlantic, and Vice President, Japan. He spent seven years in Japan and Taiwan. Mr. Clancey is a graduate of Emporia, Kansas State College, where he earned a B.A. degree in Political Science and Economics, and the Harvard University Advanced Management Program. He served as a captain in the U.S. Marine Corps.

LEO L. COLLAR is the President and Chief Operating Officer of Crowley Maritime Corporation. Before his appointment on August 10, 1987, he served Crowley Maritime as Executive Vice President, overseeing the activities of the company's Atlantic and Pacific Divisions in areas such as ocean towing, domestic and foreign common carrier services, passenger services, offshore support, marine salvage, construction and environmental services. Mr. Collar is a member of the Board of Directors of the United Shipowners of America, the American Waterways Operators, the National Ocean Industries Association and the Offshore Marine Services Association. He is active in the National Defense Transportation Association, National Freight Transportation, The Transportation Institute, Propeller Club and Navy League.

RICHARD V. COLLINS is President of Draco Marine, Ltd., which is responsible for the shipment of Perrier mineral water throughout the Atlantic and Pacific trade lanes. Previously, he served as Director of International Transportation for Perrier/Great Waters of France, and as Vice President/Assistant to the President for Delta Steamship Lines. A graduate of the U.S. Merchant Marine Academy and Northwestern University, he served nearly seven years at sea with Lykes Lines in the U.S. Merchant Marine and holds a valid unlimited Masters License issued by the U.S. Guard and an M.B.A. degree in Finance and Marketing. Mr. Collins is a former chairman of the Steering Committee of Shippers for Competitive Ocean Transportation, and a member of the executive committee of the Shipper Advisors to the National Maritime Council.

THOMAS W. CRAIG is currently Corporate Contracting Agent, in Corporate Sourcing and Trading for General Electric. He is responsible for corporate contracts and programs for international transportation --both ocean and air. Mr. Craig was formerly Corporate Traffic Manager for international and domestic transportation with RCA.

In addition, he has been invovled in distribution for Air Products and Chemicals, Rockwell International, Abbott Laboratories, and 3M. He holds an undergraduate degree in Business Administration and an M.B.A. from Penn State.

RAYMOND P. DEMEMBER is Executive Vice President and Counsel for the International Association of NVOCCs (Non-Vessel Operating Common Carriers). He is an attorney in private practice in Washington, D.C., concentrating mainly in transportation, labor and corporate law. He has been Counsel to the International Association of NVOCCs since its founding in 1972. Mr. deMember earned an AB Degree in Economics from Harvard and graduated from Harvard Law School in 1951. After practicing in Boston for a few years, he became Legislative Counsel for the Civil Aeronautics Administration. He returned to private practice after one year, and has remained in private practice in Washington, D.C., except for a brief period when he served as Administrative Assistant to a Congressman.

MANUEL DIAZ is presently Executive Director of the U.S. Atlantic-North Europe Conference, the North Europe-U.S. Atlantic Conference and Trans Atlantic Conferences. A graduate of Dartmouth College, he previously served as Vice President of Grace Lines, President of West Coast Lines, President of American Export Lines, Executive Director of the Association of North Atlantic Freight Conferences and Chairman of The Adherence Group of Companies.

ROBERT ELLSWORTH is Director of the Federal Maritime Commission's Bureau of Economic Analysis. Under his direction, the Bureau provides economic analysis of the liner industry, monitors trends in domestic and international economic conditions and develops strategic plans for the Commission. One of his major responsibilities at the Commission is collecting and analyzing data for the five-year study of the impact of the Shipping Act of 1984 as mandated by section 18 of the Act. Dr. Ellsworth received his Ph.D. from the University of Utah and is a specialist in international and transportation economics. Prior to joining the Federal Maritime Commission, he served on the faculty of the Department of Economics at the University of Utah. Beyond fulfilling his duties at the FMC, he is an Assistant Professor of Economics at George Mason University in Fairfax, Virginia.

ROBERT L. FRIEDHEIM is the Director of the Sea Grant Program at the University of Southern California and a Professor of International Relations at USC. He received his B.A. and M.A. from Columbia University, and his Ph.D. from the University of Washington. As the Director of the Law of the Sea Project, Center for Naval Analyses from 1969 to 1975, he produced fifty studies and briefings for the U.S. Government on the United Nations Law of the Sea Negotiations. Dr. Friedheim has written more than thirty articles or book chapters on bargaining over ocean and polar resources. He is also the author or author/editor of: <u>Japan and the New Ocean Regime</u>, <u>Making Ocean Policy</u>, <u>Managing Ocean Resources: A Primer</u>. <u>The Navy and the Common Sea</u>, and <u>The Seattle General Strike</u>.

ARTHUR J. FRITZ, JR. is President and Chairman of the Board of Fritz Companies, Inc. Mr. Fritz graduated from Dartmouth College and Stanford University Law School. After a brief law career, he joined the company in the Air Export Division, and was named President of that Division in 1968. Mr. Fritz is currently President of the National Customs Brokers and Forwarders Association of America. In that capacity, he has testified before many congressional committees and written numerous articles on trade groups throughout the United States.

BERNARD M. GARDNER is a Senior Lecturer in the Department of Maritime Studies at the University of Wales Institute of Science and Technology. An industrial economist, his interests include the theory of the firm, the fiscal treatment of industry and competition policy, particularly in relation to shipping. He has received research funding from the Science and Engineering Research Council, the Department of Industry, and the General Council of British Shipping, and has worked on a consultancy basis for the Council of European and Japanese National Shipowners' Associations, the Commission of the European Communities, the Organisation for Economic Co-operation and Development and the Canadian Transport Commission. He was educated at the University of Lancaster, from which he earned an Honours degree in Economics. Recently, he spent a year with the Federal Maritime Commission while on sabbatical leave, working as an expert adviser in the Bureau of Economic Analysis.

GEORGE E. GARVEY is Professor of Law at the Catholic University of America Columbus School of Law. In 1986-87 he served as Fulbright Scholar in residence at the Max Planck Institute for Foreign and International Private Law in Hamburg, West Germany. He has served as Counsel to the Subcommittee on Monopolies and Commercial Law on the U.S. House of Representatives Committee on the Judiciary, Consultant to the Committee on the Judiciary for the Study of the Antitrust Private Treble Damage Action, and as a member of the Advisory Board, Georgetown Study of Private Antitrust Litigation. Educated at the University of Wisconsin School of Law and the University of Illinois, he has published a number of studies on antitrust issues and testified before Congress during hearings on the Shipping Act and on antitrust issues. Recent publications include an edited volume on The Private Antitrust Action: History, Development, Current Status.

JOHN ANTHONY GAUGHAN has been the Administrator of the Maritime Administration in the Department of Transportation since November 1985. In this position, he is responsible for the overall management of the agency, and for the establishment of Administration policy on U.S. maritime issues. Prior to becoming Maritime Administrator, Mr. Gaughan was Deputy Assistant Secretary for Governmental Affairs in the Office of the Secretary of Transportation. Since joining the Administration in 1981, he has held a number of positions in the Secretary's office. Before joining DOT, Mr. Gaughan was an attorney-advisor with the Federal Maritime Commission, and served as Counsel to the Chairman of the FMC. He also served as a Congressional Relations Officer on the staff of the Commandant of the United States Coast Guard. Mr. Gaughan holds a B.S. degree from the U.S. Coast Guard Academy and a law degree from the University of Maryland School of Law. He is a member of the American Bureau of Shipping, the American Society of Naval Engineers, the Maritime Law Association, the American Legion, the D.C. Bar Association, and the American Bar Association. He is also a member of the Advisory Board for the Transportation Law Section of the Federal Bar Association.

RONALD GOTTSHALL is Managing Director of the Transpacific Westbound Rate Agreement.

JOHN D. HARDY presently serves as the Senior Merchant Marine Counsel on the Committee on Commerce, Science and Transportation of the U.S. Senate. From 1980 to 1986, he was the Democratic Merchant Marine Counsel for the same body, having served as Senior Counsel from 1978 to 1980. He holds a law degree from Columbia University Law School and a B.A. from St. Bonaventure University.

RICHARD HAUPT has been director of Ford Motor Company's Transportation and Traffic Office, Purchasing and Supply Staff since February 1964. He joined Ford in June 1950 and served in various capacities until his appointment as manager of the International Traffic Department in March 1963. Mr. Haupt is a graduate of Syracuse University, and holds a Master's degree in Business Administration from Wayne State University. He received Syracuse University's 1987 Harry E. Salzberg Memorial Medallion for excellence in the field of transportation and distribution management. In 1986, he was presented with the "World Trader of the Year" award by the World Trade Club of Detroit, and was the 1984 recipient of the National Industrial Transportation League and Distribution Magazine's "Award of Excellence." Mr. Haupt is a member of the Business Advisory Committee, Transportation Center, Northwestern University; the National Freight Traffic Association, and the Board of Directors of the American Society of Transportation and Logistics, in addition to memberships in a number of trade councils. He was chosen "Man of the Year" in 1979 and 1976 by the Traffic Club of Detroit and Traffic Clubs International, respectively.

ROBERT L. HINTZ is the Executive Vice President, CSX Corporation, Chairman and Chief Executive Officer of Sea-Land Corporation, President and Chief Executive Officer of CSX Energy Corporation, and President and Chief Executive Officer, CSX Properties Group. He has been with CSX Corporation since 1963. Mr. Hintz earned his B.S. and B.A. degrees Magna Cum Laude from Northwestern University and holds an M.B.A. from Northwestern. He is a member of the American Management Association; Finance Council; Financial Executives Institute; Advisory Board of the Virginia Commonwealth University School of Business; Executive Advisory Council of the University of Richmond-E. Claiborne Robins School of Business; Virginia Polytechnic Institute Advisory Council; Director, Third National Corp., St. Joseph's Villa, Reynolds Metals, Chesapeake Corp. and various internal boards of directors.

KENNETH M. KASTNER is the Assistant General Counsel of the Chemical Manufacturer's Association (CMA), a trade association in Washington, D.C. Mr. Kastner is the senior environmental attorney at CMA, responsible for hazardous waste disposal issues.

Previously Mr. Kastner was CMA's transportation counsel, responsible for all maritime, rail, and hazardous materials transportation issues. In this maritime post, Mr. Kastner was actively involved in CMA's advocacy on the Shipping Act of 1984, most Shipping Act rulemakings, and challenges to the cargo reservation laws of several South American nations and the Philippines. Mr. Kastner recently obtained a Business Review clearance from the Department of Justice, allowing CMA members to enter into loyalty contracts with individual carriers. Prior to joining CMA, Mr. Kastner represented carriers for the Washington, D.C. law firm of Galland, Kharasch, Calkins & Short. He received his law and undergraduate degrees from the University of Virginia and attended the London School of Economics.

BENGT HENNING KOCH was appointed President of Atlantic Container Line Services, Ltd. in 1984, and became Chairman of the U.S. Affairs Section of the Council of European & Japanese National Shipowners Associations (CENSA) in 1987. Previously, he directed operations of ACL Services, Ltd., Pegasus Air Cargo Systems in Sweden, and the British and Northern Shipping Agency London, a company sponsored by leading Scandinavian shipping interests. He served as Owner's Representative for Swedish Lloyd at MacAndrews of the Andrew Weir Group, London and as Manager of the Legal and Research Departments for Swedish Lloyd Gothenburg following his civil service in Sweden. He is a graduate of Stanford University's Senior Executive Program, the Centre d'Etude Industrielle Geneva International Advanced Management Program, and obtained his law degree at the University of Uppsala in 1965.

THOMAS J. KOLAKOWSKI has been manager of International Transportation Planning for Ford Motor Company since April 1983. He joined Ford in 1971 as a Transportation and Traffic Office Trainee on the company's Purchasing and Supply Staff, and served in several operational and analytical traffic assignments before being appointed supervisor of Transportation Planning and Analysis for the Automotive Assembly Division in 1976. In 1978, he transferred to production planning, where he served in supervisory positions until appointment to his present position in international transportation. Mr. Kolakowski graduated magna cum laude from the University of Miami and received a Master's degree in Business Administration from the University of Maryland in 1971. He is a member of the American Society of Transportation and Logistics, the National Industrial Transportation League and the International Traffic Committee of the Motor Vehicle Manufacturers Association.

HANS JAKOB KRUSE was elected Chairman of the Board of Hapag-Lloyd AG, Germany's largest shipping line, in July 1973. Mr. Kruse began his career as a commercial trainee at the age of 21 and worked as Sales Representative for a shipping agency in southern Germany. He managed a shipping agency and stevedoring company in Spain, and upon his return became head of the inland agency of a shipping line in Nuremberg. In 1964 he worked for Hamburg-Amerika Linie and North German Lloyd in Australia, and in 1967 was appointed Board Secretary and granted proxy of Hapag in Hamburg. Six months later, he became a deputy member of the Board, responsible for Hapag-Lloyd's world wide freight services.

He served as a member of the Board of Hapag-Lloyd before his election as Chairman. He is on the advisory boards of several German associations, Chairman of the "Box Club" (International Council of Containerships' Operators), and CENSA.

RICHARD KULOW is Director of Transportation for Streamline Shippers Association, Inc. of Los Angeles. He began his career with Gateway Transportation of La Crosse, Wisconsin, where he became experienced with most motor carrier tariffs. In 1975, he moved to southern California to work in the traffic department of Trans Cons Lines. In 1976, Mr. Kulow started with Streamline, where he has held various positions. He is well versed in negotiating rail and motor carrier contracts and has recently been involved in negotiating service contracts with steamship carriers. A graduate of Humboldt Institute in Minneapolis, he obtained his degree in transportation management. He has been active with the Pacific Coast Shipper Advisory Board and with DNA San Fernando Chapter.

CAPTAIN SHIUAUN-YU KUO is President and Vice Chairman of Evergreen International (U.S.A.) Corporation. He has over 32 years' experience in the shipping business. A graduate of the Taiwan Maritime College, he taught navigation and seamanship at the Keelung Fishing School. Captain Kuo joined China Union Line as a deck officer in 1959 and sailed for eight years in the Far East/U.S. East Coast trade. He joined Evergreen in 1968 as a master and in 1974 came ashore to assist with the planning of the container service at the headquarters in Taiwan, where he became chief equipment controller and submanager of the container department. In 1975, Captain Kuo moved to New York to assist in the establishment of the office for Evergreen Marine. He was named Executive Vice President in 1976. In 1978 he was headquartered in London, where he was instrumental in establishing Evergreen Far East/Europe service. He returned to New York and was named President in 1981 and Vice Chairman in January 1988.

SANDRA KUSUMOTO is an economist at the Federal Maritime Commission's Bureau of Economic Analysis. She graduated from Purdue University with a B.S. in Biology and served as a Peace Corps volunteer in Malaysia from 1976 through 1978. Ms. Kusumoto received an M.A. in International Economics from Johns Hopkins University School of Advanced International Studies. Prior to joining the FMC, she worked for the United States Trade Representative and the Bureau of Economic Analysis in the U.S. Department of Commerce.

A. ROY LAVIK is Legal Advisor to the Executive Director's Office of the Federal Trade Commission. A graduate of both the Law School and the Business School of the University of Chicago, Mr. Lavik has served in the General Counsel's Office of the Federal Reserve Board, and in private practice in Chattanooga, Tennessee. During his career, Mr. Lavik has been particularly interested in the interplay of law and economics in different institutional settings.

HOWARD A. LEVY is an Attorney at Law representing various conferences and associations of ocean common carriers including the U.S. Atlantic-North Europe Conference, Gulf-European Freight Association, North Europe-U.S. Atlantic Conference, North Europe-U.S. Gulf Freight Association, Trans-Atlantic American Flag Liner Operators, Eurocorde Discussion Agreement, Eurocorde-I Agreement, and Trans Atlantic Conferences, Eurospan, Amercord, Gulfway and Europact Agreements. Previously, he served as Vice President for Pricing and Conference Affairs for American Export Isbrandtsen Lines, Mediterranean Marine Lines and Container Marine Lines. He was a partner with the Washington, D.C. law firm of Kurrus & Jacobi, specializing in maritime law, and served in the U.S. Department of the Navy and the Federal Maritime Commission. He holds a B.S. degree in Nautical Science from the U.S. Merchant Marine Academy and received his law degree from Columbia University Law School.

ALEXANDER H. McQUILLAN is Chairman of the British Shippers' Council, Shipping Manager of ICI PLC Ltd., and a Member of the Standing Committee of the European Shippers' Council. After receiving his doctorate in Chemistry at Edinburgh University, he joined ICI PLC in 1961. He served in the Research and Technical Divisions and spent 18 years in Sales and Marketing Management. He was appointed Distribution Manager of the former Mond Division of ICI and Chief Executive Officer of ICI (Overseas Freight) Ltd. in 1983.

KEIZO MURANAKA is Senior Managing Director of Mitsui O.S.K. Lines, Ltd. He joined Mitsui Steamship Company in 1952, when he graduated from Kyoto University, and served as Los Angeles representative of that company until Mitsui O.S.K. Lines, Ltd. was established by the merger of O.S.K. Lines and Mitsui Steamship Company in 1964. Since then, he has served as General Manager of the New York Branch of Mitsui, and as General Manager of the Liner Department in the head office in Tokyo. He was appointed Managing Director in 1982 and Senior Managing Director in June 1985.

JAMES J. O'BRIEN is Deputy Executive Director for the Port of Oakland, California. He joined the Port of Oakland on June 1, 1978, to supervise the maritime activities of the containerport. Mr. O'Brien became Deputy Executive Director in 1980 and is now involved in all of the port's activities, including Oakland's airports, and industrial, commercial and recreational properties, in addition to the administration and supervision of the major seaport facilities. Previously, Mr. O'Brien served as General Manager for Trade Development for the Port Authority of New York and New Jersey, and was involved for many years in shipping and port activities in the Port of New York. He has served as a licensed deck officer in the U.S. Merchant Marine and is a registered practitioner before the Interstate Commerce Commission and the Federal Maritime Commission. He graduated with honors from the U.S. Merchant Marine Academy at Kings Point and holds a Master's degree in International Business from New York University Graduate School of Business Administration.

JACK L. PELUSO, JR. has been International Transportation Manager of Union Camp Corporation since February 1, 1987. Prior to that, he was Manager of Marine Transportation, a position he had held since 1980. Mr. Peluso joined Union Camp in 1967 and has held numerous transportation posts with the company, devoting the past 11 years exclusively to International Transportation. Mr. Peluso is an active member of the Chemical Manufacturers Association Ocean and International Work Group, the Water Transportation Subcommittee of the American Paper Institute, the International Transportation Committee of the National Industrial Transportation League, and the Federal Maritime Commission Shipper Study Group. He was a former Regional and National Chairman of Shipper Advisors to the National Maritime Council and a past president of the International Commerce Club of New Jersey.

EDWARD J. PHILBIN, Commissioner of the Federal Maritime Commission, was nominated for that position by President Reagan on September 12, 1984, and appointed during the congressional recess on November 18, 1984. Subsequently, he was renominated for the position on January 3, 1985 and confirmed by the full Senate on March 19, 1985. Commissioner Philbin holds a Bachelor of Science in Mechanical Engineering from San Diego State University and a Juris Doctorate, summa cum laude, from the University of San Diego School of Law. He entered the practice of law in 1966 from a career in engineering and physics in the fields of aircraft and space systems design and weapons research and became a partner in a law firm in San Diego, specializing in civil litigation. He joined the University of San Diego School of Law faculty in 1970, served as an Assistant Dean, and became a tenured Professor of Law in 1973. Prior to his latest appointment, Commissioner Philbin served as Deputy Assistant Secretary of Defense for Reserve Affairs from 1981 to 1984. He has authored over two dozen articles and studies in the fields of engineering, physics, law and military affairs. The recipient of numerous academic, civic, professional and military awards, he received the National Geographic Society's General Orvil A. Anderson Award for excellence in political-military thought for his research study at the Air War College in 1978 and in June 1984 was named to the Minute Man Hall of Fame by the Reserve Officers Association of the United States.

JAMES REMDEIRO is Vice President for Regulatory Affairs, The Meyers Group, Inc.

TIMOTHY J. RHEIN is President and Chief Operating Officer of American President Lines, an international container-shipping firm focusing its activities exclusively within the Pacific Basin, Indian Ocean and Arabian Gulf regions. APL is a wholly owned subsidiary of Oakland-based American President Companies, Ltd., which also operates the largest double-stacked rail network in North America and provides both domestic and international cargo transport and distribution services. Mr. Rhein, who was named President and COO in January 1987, joined the company in 1967. He served from 1983-87 as Senior Vice President, Marketing and Logistics, with system-wide responsibility for marketing, logistics, pricing and government cargo services. Other key position in which Mr. Rhein has served include Vice President, North America; Vice President, Logistics, and Vice President, Marketing.

CLIFFORD M. SAYRE, JR. is Director of Logistics for the DuPont Company's Materials and Logistics Department. He joined the company in 1952 and held a variety of engineering and supervisory positions before becoming Division Manager for the Transportation and Distribution Department in 1977. He was appointed Manager of the Planning and Business Analysis Division in 1982, and was appointed to his present position in 1983. Mr. Sayre received a degree in chemical engineering from Massachusetts Institute of Technology and was a research assistant with Standard Oil Development Company prior to joining DuPont. A holder of several chemical process patents, Mr. Sayre is a registered professional engineer, a Fellow in the American Association for Advancement of Science, a member of the American Chemical Society and the American Institute of Chemical Engineers. Mr. Sayre is currently an ex-officio member of the Marine Board of the National Research Council and Chairman of the National Committee on Marine Terminal Productivity. Mr. Sayre is an active member of several trade councils and helped prepare the National Research Council's reports on dredging coastal ports and improving terminal productivity. He was in the forefront of successful efforts to rewrite transportation law in the U.S., including the Staggers Rail Act, the Motor Carrier Act of 1980 and the Shipping Act of 1984. The author of numerous articles and a frequent speaker on transportation issues, Mr. Sayre was a recipient of Transportation Management Magazine's professional achievement award. He serves on the advisory committee to M.I.T.'s Center for Transportation Studies and is a member of the planning committee for annual global logistics symposia sponsored by CUNY and Princeton University.

GERALD SEIFERT serves as General Counsel for Maritime Policy on the U.S. House of Representatives Committee on Merchant Marine and Fisheries. He first served as the Committee's economist, then as Counsel to the Subcommittee on Merchant Marine. He is also Adjunct Professor of Marine Affairs, University of Rhode Island. Mr. Seifert has a background in regulated industries, having served as Chief Deputy Commissioner of the Indiana Public Service Commission and practiced utility and regulated health care law for over a decade before concentrating on the effects of regulation on the maritime industry and its effect on international trade. He has lectured widely and is the author of many articles and books dealing with the effect of government regulation on the operation and management of commercial business activity. He was educated at Rutgers University, the University of Chicago, Indiana University Law School and the University of Rhode Island.

JEFFREY SHANE was appointed Deputy Assistant Secretary for Transportation Affairs at the Department of State in October 1985. He is a principal participant in the formulation of U.S. government policy with respect to international transportation issues, including aviation, shipping and trans-border land transport, and serves as the chief U.S. aviation negotiator. Mr. Shane came to the State Department from the Department of Transportation, where he served first as Assistant General Counsel for International Law and later as Deputy Assistant Secretary for Policy and International Affairs. In an earlier assignment with DOT, between 1968 and 1972, he served as a trial attorney and as Special Assistant to the General Counsel. Mr. Shane is a graduate of Princeton University and Columbia University Law School. He came to Washington in 1966 and joined the legal staff of the Federal Power Commission. He has been a consultant to the Environmental Law Institute in Washington, D.C., where he participated in a number of major studies of federal and state environmental legislation.

STANLEY O. SHER is a partner and a member of the Executive Committee of the Washington, D.C. law firm of Dow, Lohnes & Albertson. He was educated at the University of Wisconsin and Harvard Law School, and was admitted to the Bar in 1959. He was President of the Maritime Administrative Bar Association in 1977-78. Mr. Sher has practiced law in Washington since 1960, representing carriers and conferences before the Federal Maritime Commission, Department of Justice and the courts. He also represented an industry coalition of foreign flag and U.S. liner carriers and conferences in negotiating and drafting the Shipping Act of 1984. Mr. Sher represents conferences in the European, Far East, Australia and Middle East trades.

GUNNAR K. SLETMO is Professor of Marketing at Ecole des Hautes Etudes Commercialies in Montreal, Canada's oldest and largest business school. He obtained academic degrees from the University of Oslo, the Norwegian Schools of Economics and Business Administration and a Ph.D. in Business Economics and Transport from the Graduate School of Business, Columbia University. Professor Sletmo has held academic appointments in economics and transportation at the the latter institutions, as well as at the London School of Economics, Maritime College (SUNY), the University of Cape Town, and the University of Tianjin People's Republic of China. He was Chairman of the Federal Task Force on Deep-Sea Shipping (Canada), and has been consultant to business and governments in North America and Europe, including Transport Canada (the Canadian Ministry of Transport), National Ports Council (Ottawa), Chemical Bank (New York), U.S. Maritime Administration, ICAO (Montreal), Scandinavian Airlines (New York and Stockholm), and CP Ships (London). He is the author of many books, articles, papers and government reports, including <u>Conferences in the Container Age - U.S. Policy at Sea</u>.

THOMAS SPENCE is Vice President for Exports of Pacific Lumber and Shipping Company, a position he has held for 15 years. He has been active in the lumber industry for over 15 years. Mr. Spence is a graduate of the University of Washington.

RUSSELL SUNDERLAND served as Director of Shipping Policy and Emergency Planning at the Department of Transport in the United Kingdon from 1984 until his recent appointment in March 1988 as Deputy Secretary at the Department of Transport, where he will be responsible for all international transport matters. He is currently Chairman of the Consultative Shipping Group and

Co-chairman of NATO's Planning Board for Ocean Shipping. From 1979 to 1984, he served as Under Secretary in charge of commercial relations with North America and the Far East, and from 1977 to 1979 was head of the Anti-Dumping and import licensing branch at the Department of Trade and Industry. A graduate of Oxford University, he entered the British Civil Service in 1962, and has held a number of assignments in the international arena, including U.K. Civil Aviation Representative in the Middle East, and participation in the UNCTAD III Conference in Santiago, Chile.

JOHN R. STEELE has had thirty years experience in United Kingdom Government Service in the areas of shipping and civil aviation, having held a number of posts concerning all forms of transport, foreign trade relations and economic and commercial policy issues. He spent four years as Counsellor for shipping in the British Embassy in Washington and from 1977 to 1980 as Deputy Secretary responsible for all aspects of shipping and civil and aviation policy. At various times he was responsible for trade aspects of general economic policy, bilateral trade relations and commodities policy. Mr. Steele has led UK delegations in major bilateral and multilateral negotiations and has experience of intergovernmental organizations, in particular IMO, ICAO and UNCTAD. He served as Vice-President of ECAC. From 1981 to 1986 Mr. Steele was Director General for Transport of the European Economic Community Commission and was responsible for Commission policy towards all modes of transport, and for formulating major Commission proposals for aviation, shipping and inland transport.

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Appendix I

Background Paper — The Shipping Act of 1984: A Debate of the Issues

INTRODUCTION

The Shipping Act of 1984, in some respects, puts a more modern face on U.S. shipping legislation and, in other respects, represents a return to original principles. The modern face is seen in concepts such as the authorization of service contracts between shippers and carriers; the requirement for mandatory independent action on no more than 10 days' notice; recognition of NVOCCs; and the encouragement of shippers' associations. The return to the past can be seen in the more liberal treatment of carrier agreements which permit price coordination, sharing of vessel space and revenues and other mutually agreed upon arrangements. The clarifications of antitrust immunity and the requirement that the FMC permit agreements to go into effect in 45 days or less (except under specific, limited conditions) represent in many respects a return to the principles of 1916.

The sweeping revisions to the Shipping Act which occurred in 1984 represented a fundamental change in the "rules of the game" and affected existing practices as new concepts and ideas battled with vested ways of doing business. Unfortunately, as the rules of the shipping game were undergoing this significant revision, world-wide trade conditions were being rocked by continual, sometimes chaotic, fluctuations.

Historical trade patterns and currency levels were turned on their head as the U.S. swiftly went from a leading creditor nation to the world's largest debtor nation. The dollar, the world's leading international reserve currency, experienced gyrations that were unsettling to established trade patterns.

This turmoil in the international trade arena obviously had an effect on worldwide shipping conditions. The U.S. trade imbalance resulted in much higher vessel utilization rates on inbound voyages, and with vessels departing the U.S. often only half filled. As a consequence of the excess supply of vessel space, freight rates came under great pressure, and in some cases collapsed. For numerous reasons, often having more to do with political and military rather than economic factors, vessel supply did not decline as much as would be expected if ship construction decisions had been purely the product of the free market.

The identification of cause and effect in a complex market setting such as international shipping is always hazardous, even if market conditions are placid. The existence of numerous outside or exogenous events makes the determination of the impact of the Act all the more difficult.

One of the purposes of this symposium is to gather ideas and information on how the Act is affecting the various players of the game. It is also expected that participants will offer their views on how the Act can be improved, if necessary, to help create a more efficient ocean transportation system.

SESSION 1

FMC Findings on the Impact of the Shipping Act of 1984, Four Years After Enactment

Results of industry surveys -- views on service contracts, independent action, antitrust immunity and tariff filing. Findings thus far on the impact of the Act on rates, service and competition.

The staff of the Federal Maritime Commission has used various methods to obtain data on the impact of the Act and to gather views as to what is working and what may require modification. One important device used in this process was the survey technique.

In 1986, questionnaires were sent to approximately 2,000 shippers, 150 carriers and over 100 ports and non-port marine terminal operators. The respondents were asked to express their views on a series of questions and to provide data for the year 1985. The responses to these surveys provide insightful information on how the Shipping Act of 1984 is affecting these industry participants. In addition, valuable information was obtained about changes to the Act that are desired by the participants in the ocean shipping industry. Some of the more interesting results of these surveys are discussed below.

Service Contracts

The direct authorization of service contracts represented a fundamental revision of the philosophy underlying the regulation of liner operators. Historically, the regulatory structure which evolved in the United States stressed the common carrier notion which required that carriers fulfill certain obligations, including abstaining from price discrimination. Service contracts as authorized by the 1984 Act, however, permit discrimination between shippers. Since service contracts were relatively new for international shipping, there was interest in discovering how they affected the conference system. Shippers and carriers were asked several questions about the impact of service contracts and what revisions they would recommend for this provision of the Act.

When asked how much service contract rates differed from comparable tariff rates, the most frequent response (almost 50 percent) of both carriers and shippers was that service contract rates were between 11 and 25 percent lower than tariff rates. Clearly the initial impact of service contracts, based on 1985 data, was to reduce rate levels. It is interesting to note that during 1985 several major conferences did not control member lines' service contracts. By mid-1986, however, virtually all conferences asserted control over service contracts and this may have some effect on the level of service contract rates in the future.

When asked whether service contracts should continue to be filed with the FMC, the overwhelming majority of both shippers and carriers that had an opinion on this issue voted for retention of this requirement. Shippers and carriers were divided, however, over the issue of whether the essential terms of the contract should continue to be made available to the general public. A slight majority of the shippers voted against the publication of the essential terms while carriers voted three to one to maintain the status quo. Shippers and carriers also differed on the issue of whether independent action should be required on service contracts. Eighty-one percent of the shippers voted in favor of requiring independent action on conference service contracts while 85 percent of the carriers were opposed to this idea. Of all issues presented to both groups, this was one of the most divisive.

Mandatory Independent Action

The subject of independent action on tariff rates also evoked a strong and somewhat disparate response from shippers and carriers. The 1984 Act requires that conferences permit members to take independent action on tariff rates on no more than ten days' notice to the conference.

Carriers and shippers were asked what notice period they preferred. The vast majority of shippers preferred ten days or less while carriers opted for more than ten days. Carriers and shippers agreed, however, that IA rates were between 11-25 percent lower than comparable conference tariff rates. Views on whether IA weakens or strengthens the conference system diverged with shippers divided on the issue and 80 percent of the carriers stating that independent action weakens conferences.

Conferences and Tariffs

Carriers, shippers and ports were asked to comment on whether conferences should be prohibited and, if conferences are to be permitted, should they be open or closed. Those carriers and ports that voted on this issue were overwhelmingly in favor of not prohibiting conferences. Shippers who responded on this issue, on the other hand, were evenly divided. All three groups were unanimous in their preference for open versus closed conferences.

The issue of tariff filing and enforcement also revealed a dissimilarity of views. Whereas the overwhelming majority of carriers and ports voted in favor of retaining the current system, shippers had mixed feelings. The majority of shippers voted for the status quo, but a significant proportion voted in favor of abolishing the tariff filing and/or enforcement requirements.

On the issue of the advisability of adopting a system of tariffs based on "volume and mass", the carriers and ports favored retention of the current tariff system. Shippers, however, seemed to prefer a lump sum container rate system. One problem with interpreting these results is that the question may not have been phrased properly to indicate that the current system is permissive and, therefore, permits lump sum rates. This question has been modified for the 1987 survey and it will be interesting to see if the response of shippers remains the same.

Freight Rates

The staff has also collected significant amounts of information on what has happened to the level of liner freight rates since the Act. The staff is studying the behavior of freight rates in six trades. The U.S. foreign trades being examined are Germany, Japan, Italy, Taiwan, Brazil and Australia. Data are being collected for both the inbound and outbound trades and for various U.S. coasts. While the data collection process is not completed, a few general observations can be made.

For most outbound trades, tariff rates appear to have entered a downward trend in 1981. While there was some recovery in 1984, rates plunged again in 1985. In a number of cases, in fact, tariff rates in 1986, unadjusted for inflation, were below levels in effect in 1978. A modest recovery occurred in 1987 but rates were still significantly below the peaks recorded in 1981. Since freight rates have been depressed in the outbound trades since 1981, it is clear that the Act itself could not be the only factor at work depressing freight rates since the initial collapse occurred several years prior to the passage of the Act.

Another important piece of information which can be obtained from the data on rates is that service contract rates are, in many cases, producing significantly less revenue than comparable tariff rates. For example, for a selected number of major moving commodities in the outbound U.S. Atlantic/North Europe trade, service contracts produced 20-25 percent less revenue per ton than comparable tariff rates. Even more surprising is that in some cases, even intermodal service contracts produced less revenue than port-to-port tariff rates. Thus, once the inland transportation costs to the carriers were netted out, the revenue earned would be even lower.

The staff has been working with various conferences to obtain data on service contracts, intermodal and independent action rates. Conferences have been requested to provide information on these items for each of the commodities being studied. This information will be useful for determining how much of the cargo moves under these various deviations from the conference port-to-port tariff. The data received thus far are revealing in that they show a significant portion of many major moving commodities are moving under service contracts.

Service

The staff is also collecting information on what has happened to the level of service at U.S. ports and the number and strength of independents. While not enough data have been collected to arrive at any conclusions, a brief discussion of sources and methodology may be in order.

The data on port service levels are being obtained from Lloyd's of London. Thus far, data for the years 1984 and 1985 have been finalized. These data will show number of vessel calls by size and type of vessel at U.S. and foreign ports. Data on transit times are also being collected to assist in determining the quality or frequency of service. This information is also shown by conference and non-conference carrier aggregations.

Number and Strength of Independents

The information on number and strength of independents will come from Bureau of Census information. These data will show the number and market share of conference and non-conference operators. The market share data will be on a value of cargo and weight ton basis. This information is to be supplemented by the Lloyd's data discussed above.

SESSION 2

Tariffs and Independent Action

Should tariffs continue to be filed with the FMC? Is enforcement of tariff provisions a necessary function of government? Should they be based on volume and mass of shipment instead of other considerations? Does mandatory independent action on tariff rates and service matters ultimately weaken or strengthen the ability of conferences to work effectively? Would a longer notice period lessen criticism of independent action? Should conference loyalty contracts or other tying devices be granted antitrust immunity? Should any changes be made to the treatment of excepted commodities?

There are three tariff issues which have generated a storm of controversy in the shipping community. All three issues are scheduled to receive considerable attention during the review of the 1984 Act, particularly since the FMC is specifically required to prepare reports on two of these issues. The Shipping Act of 1984 requires the Federal Maritime Commission to prepare reports on, among other things: (1) the continuing need for the statutory requirement that tariffs be filed with and enforced by the Commission and, (2) the advisability of adopting a system of tariffs based on volume and mass of shipment. In addition, the provision of mandatory independent action on no more than ten days' notice has been extremely controversial and merits considerable attention.

Tariff Filing and Enforcement

The Shipping Act, 1916 introduced for the first time the requirement that carriers file tariffs with the government. The tariff filing requirement was limited, however, to the domestic trades. Subsequently, a number of significant administrative and legal decisions acted to strengthen government surveillance over conference rate activities. In 1961, Congress amended the 1916 Act to vest the Federal Maritime Commission with the authority to require tariff filing in the foreign trades. After much debate of the issue during the drafting of the 1984 Act, Congress decided that this function of the Commission should be retained, but reviewed by the Advisory Commission on Conferences in Ocean Shipping (Advisory Commission). The Advisory Commission will receive the reports of the four agencies (Federal Maritime Commission, Departments of Justice and Transportation, and the Federal Trade Commission) and render its judgment on the issue to Congress sometime in the 1990s.

The Shipping Act of 1984 mandates that common carriers and conferences file their tariffs with the FMC. Excepted from the filing requirement are rates for "bulk cargo, forest products, recycled metal scrap, waste paper, and paper waste." The issue of excepted commodities has created a sea of controversy since some conferences have filed these rates even though they are not required to do so, and have denied the right of independent action on such rates.

From the surveys conducted thus far, the opinion of carriers and ports is overwhelmingly in favor of retaining tariff filing and enforcement by the FMC. Although a majority of the shippers opted for retention of the status quo, a significant proportion supported abolishing one or both of the current requirements.

The dominant theme of those who support tariff filing and enforcement is that these requirements are an integral part of the Shipping Act and their removal would impair the competitive balance between shippers and carriers sought in the Act.

One argument in favor of the current system is that the nature of the shipping industry results in a natural tendency towards oligopoly and a cartel or conference solution. It is alleged that the closed conference, which is dominant in the non- U.S. trades, is able to maintain the discipline required to make this strategy effective. However, because the Shipping Act requires that conferences be open, some conferences complain that they lack the ability to influence their members. An integral part of the open conference system is that information about freight rates also be "open" to all so that competitors can be aware of what others are charging and shippers can also be aware of what rate their competitors are paying.

Thus, under the U.S. tariff system the FMC is expected to ensure that all carriers, both foreign and domestic, compete equitably and fairly in the U.S. trades and that shippers are treated in a nondiscriminatory manner. One of the major purposes of the Act is to ensure that American companies engaged in international commerce are subject to the same ground rules as their foreign competition. It is argued, therefore, that unless tariffs are filed and enforced, the enforcement mechanisms requiring foreign carriers to obey U.S. laws are meaningless. The Act also prohibits secret rebating. Again, without tariff filing and enforcement the ability to hold the line against such malpractices would be severely curtailed.

Another argument in favor of the current system is that filing and enforcement provides valuable market information to the shipping community. For markets to work efficiently both buyers and sellers must possess reliable knowledge about the prices of goods and services they wish to purchase. By requiring that tariffs be filed with a government agency, a central repository for tariff information is created. Enforcement of the filed tariffs by the agency ensures that this information is not only up-to-date but also comprehensive, complete, and accurate. According to this argument, having tariffs filed with and enforced by the FMC reduces search costs and makes the market more efficient.

For the most part, those opposed to the tariff filing and enforcement requirements believe that they encourage certain perceived anti-competitive aspects of conferences. The assertion is that tariff filing and enforcement perpetuate the legitimacy of carrier cartels, protecting them from price erosion by requiring filing with the government and by levying fines for tariff violations. In their view, the conference rate structure is being supported by the government.

Those opposed to the requirements maintain that their objective is to increase competition and encourage greater price and service flexibility within the conference system and to reduce government intrusion in the marketplace. They argue that the government has no business policing cartel agreements which, in their view, encourage substantial market inefficiencies and perpetuate the problem of overcapacity. In their opinion, tariff enforcement by the federal government supports an antiquated rate structure which bears little relationship to true costs while failing to protect small shippers from discrimination.

Clearly there is a wide divergency between these two schools of thought on the tariff filing and enforcement question. The evolution of the debate between these two schools of thought will have an important influence on the direction the review of the 1984 Act takes and any consideration of further change to the Act.

Adopting a System of Tariffs Based on Volume and Mass of Shipments

Traditionally, liner shipping companies operating in the U.S. trades have adopted a tariff system in which rates are based on commodity description and the weight or measurement of a shipment. Typically this results in a very complex rate structure with shipping tariffs comprising many hundreds of tariff items. An often used simplifying technique is to define a lump sum commodity box rate based on either weight or measure factors, depending upon stowage considerations. A critical question is whether the complexity of the tariffs stems from the collusive behavior of conferences or the complexities of the market. The market process is, after all, a "complex phenomenon", which recognizes the distinct differences between each market transaction.

During the hearings on the Shipping Act of 1984, Congress received testimony from a number of expert witnesses that characterized the current rate structure as discriminatory since rates are based on commodity value as well as their volume (measurement) and mass (weight). Many of these witnesses argued that it is legitimate to treat all shipboard container cargo space as homogeneous, implying that a given size and weight container should have a similar rate. The only differentiation this system would permit would be based on whether the cargo was rated on a weight or measurement basis.

In requiring that the FMC evaluate the desirability of mandating a system of tariffs based upon volume and mass (measurement and weight), Congress appears to have in mind a system of tariffs in which a single tariff is established for all cargo shipped in units of comparable size and weight with comparable handling characteristics. Conclusive empirical evidence supporting this system has not been developed. It is claimed by some that the benefits of requiring a system of tariffs based on volume and mass are reduced filing costs and better planning information for shippers. On the other hand, others believe that the above benefits would be outweighed by the cost to shippers of lower valued products who would be unable to afford the higher average cost of transport and/or reduced frequency of service implicit in such a system. They conclude that it would be better to retain the status quo.

Independent Action

The Shipping Act of 1984 has been aptly described as an attempt to create a workable balance between the market power of shippers and carriers. This balance, however, rests on the nature of the compromise struck by the major interested parties: carriers and shippers. The strategy was that the enhanced freedom of the carriers to collectively set rates in the conferences without excessive concern of antitrust prosecution would be offset with new provisions to strengthen the hands of the shippers in negotiating rates. With market power thereby balanced between shippers and carriers, the government could reduce its regulatory role. Competitive pressures would be the dominant force in setting tariff rates and sailing schedules, allowing shippers and carriers to adapt quickly and efficiently to the rapid changes experienced in the industry. One provision, mandatory independent action on ten days' notice on rates and service items published in the conference tariffs, has become one of the most controversial issues in the shipping community.

There are two facts regarding the current state of the shipping industry about which all segments of the industry are in agreement. First, there has been a steady erosion of tariff rates in the liner industry over the last four years. Second, the industry is seriously overtonnaged, which pushes tariff rates down. The subsidization by foreign governments of commercial ship construction is seen as a major cause of this overtonnaging. However, the effect of this overtonnaging on the shipping industry and how to deal with it is a matter of debate.

Some carriers maintain that in the current overtonnaged environment mandatory independent action has turned the rate setting process into an "auction" on rates which has accentuated their drastic decline. One of the basic functions of a conference is to provide a forum for the carriers to collectively discuss and set tariff rates and capacity in the trade. It was acknowledged in the 1984 Act that the conference played a useful role in stabilizing the shipping industry. Some allege, however, that the introduction of mandatory independent action into the conference rules has crippled its ability to maintain cohesion among conference members. These conferences argue that the market's inability to control capacity brought on by government subsidies for shipbuilding combined with the damage to their ability to control tariff rates, due in large part to the independent action provision, has hobbled their capacity to function as a conference. The commitment to an effective conference system has been abandoned in their view. The result has been to tip the balance of power in the shipper's favor. They conclude that the carefully sculpted balance of market power has not been realized as envisioned thus far and will no doubt be reexamined by the Advisory Commission.

Some carriers suggest that one way to deal with mandatory independent action is to increase the number of days before the independent action takes effect. The rationale is that ten days does not give the other conference carriers an adequate chance to assess the effect the rate change will have on their firm and then arrive at a consensus within the conference.

In addition, according to one conference chairman, increasing the time within which the rate change comes into effect will take rate decisions out of the "booking cycle." The time period between the date shippers make their plans for shipping and the date the vessel sails is called the booking cycle. With the ten day waiting period being within the booking cycle, the shipper is able to pressure carriers to reduce the tariff rate before the shipment is due to be sent. He contends that it is within this booking cycle that carriers are vulnerable and the "rate auction" occurs. Arguing that the shipper probably contracted to produce or acquire anywhere from 30 days to a year before, he concludes that IA is not necessary to move the cargo. The argument is, therefore, that increasing the minimum time within which independent action can take effect to 30 days or more would take rate change decisions out of this booking cycle and reduce the pressure shippers are able to exert on carriers. While the carriers are unhappy with independent action, some feel that rescinding mandatory independent action will upset the political balance upon which the Shipping Act was founded. A satisfactory compromise for some would be to increase the time period within which independent action would become effective.

Many shippers, on the other hand, do not feel that the balance in market power has in fact been undermined since 1984. In their view the essential underpinning of the balance, including the mandatory independent action provision, should not be changed. Shippers argue that in the present overtonnaged environment, tariff rates will naturally decline. They believe the fundamental idea behind the 1984 Act was to let market forces direct the industry, and to change the basic structure of the balance would be contrary to the whole spirit of the 1984 Shipping Act, i.e., let market competition determine rates and service.

Although shippers are smiling now, some contend that if the present overtonnaging abates and carriers are able to exercise more control over rates, the balance will swing back in the direction of the carriers. They believe conferences still possess a degree of market power, however blunted at the moment, which may grow with greater capacity utilization. At that time the shippers contend that they may more than ever require the protection made available to them through the mandatory independent action provision.

The debate between the shippers and carriers over mandatory independent action revolves around two differing visions of how the shipping industry should function. Most carriers believe that the commitment to a well functioning conference system is of fundamental importance to maintain a healthy shipping industry. It is their view that because the independent action provision of the Shipping Act undermines the conference, it should be modified or eliminated. Shippers, on the other hand, generally believe that the mandatory independent action provision remains a vital ingredient for maintaining a competitive market process.

SESSION 3

Service Contracts

Are service contracts meeting the objectives of both carriers and shippers? What changes should be made to FMC rules and/or provisions of the Act? Should service contracts be confidential? Have the principles of common carriage been slightly disturbed or totally eroded? Should mandatory independent action be required on conference service contracts?

Between July 1984 and November 6, 1987, there have been 10,900 service contracts filed with the Commission; of the total, 81 percent for the transport of inbound cargo, and only 18 percent for shipment of outbound cargo. The remaining 1 percent were contracts to transport both inbound and outbound goods. These percentages clearly indicate that importers and foreign consignors utilized service contracts more frequently than exporters.

The disparity in inbound versus outbound contracts is also reflected in conference filings in certain trades. Since the 1984 Act became effective, the inbound North Europe-U.S. Atlantic Conference has entered into more than eight times as many service contracts as the outbound U.S. Atlantic-North Europe Conference: 858 versus 101.

One major explanation given for the imbalance in service contracts has been the U.S. trade situation. Some explain that exporters are unwilling to commit their firm to long-term contract rates which could very well be higher than tariff rates a few months later. To partially protect themselves from this result, shippers who have signed service contracts for their exports often sign contracts that contain "Crazy Eddie" or "most favored shipper" clauses which guarantee that the shipper will be assessed the common tariff rate if that rate should fall below the rate agreed upon in the service contract.

The number of service contracts filed with the Commission has been rapidly increasing since they were sanctioned by the Act, as is shown annually below:

1984	460
1985	3,188
1986	3,920
1987	3,332*
Total	10,900*

*As of November 6, 1987.

Despite all the controversy surrounding service contracts, they have remained a highly popular means of buying and selling ship space.

Evergreen Lines has been one carrier that has taken full advantage of the new service contract provision found in the Shipping Act of 1984. As of early November 1987, Evergreen has filed 1,562 of the 10,900 service contracts filed with the FMC. Stated differently, this carrier accounted for 14 percent of the total number of service contracts filed with the Commission.

Service contracts have had a profound impact upon the common tariffs. For a number of commodities in certain trades, virtually all the cargo moves under service contract rates, and the common tariff rate becomes a "paper rate" with very little tonnage moving under the rate. For example, 70 percent of all frozen beef moved by the Transpacific Westbound Rate Agreement from the Pacific Coast to Japan in 1985 was shipped under service contract arrangements. Likewise, 80 percent of the Conference's total 1985 tonnage for lemons moved under service contracts from the Pacific Coast to Japan. In 1985, the U.S. Atlantic-North Europe Conference (ANEC) shipped 90 percent of its total tonnage of roadmaking equipment parts under service contracts. During the same year, 76 percent of ANEC's total tonnage for engines moved under intermodal service contracts. The intermodal, point-to-point rate was actually lower than the Conference's port-to-port common tariff rate.

Another interesting trend is that conferences have not filed as many service contracts in 1987 compared to previous years. For example, the North Europe-U.S. Atlantic Conference (NEAC) filed 368 service contracts with the Commission during 1986. However, as of November 6, 1987, NEAC has filed only 180 service contracts with the Commission. To date, the Transpacific Westbound Rate Agreement has not filed any service contracts in 1987. Other conferences, such as the Inter-American Freight Conference, have not filed any service contracts with the Commission since they were sanctioned two and one-half years ago.

While conferences have not been filing as many service contracts in 1987 as they did in 1986, independent carriers have taken up the slack. In the North Europe-U.S. Atlantic trade, for example, Polish Ocean Lines has filed twice as many contracts in 1987 as it did in 1986. Evergreen Lines is very well-known for its reliance on service contracts. Evergreen has filed with the Commission contracts for its round-the-world service which allows the shipper to commit an agreed upon amount of cargo to any geographical area Evergreen serves to or from the U.S. This development may have an impact on conferences since they are limited in geographical scope by their agreements. Given Evergreen's action, the maritime industry no doubt will be watching with interest to see what innovative responses conferences will take in order to maintain their market share.

The statistics above indicate the importance of service contracts in the maritime industry today. However, despite their popularity, they have generated an enormous amount of controversy. Larger shippers, in general, view service contracts as having a positive impact upon their firms. These shippers have been able to predict the cost of ocean transportation, to avoid the risk of future rate increases, and to obtain guaranteed space for their cargo. One large chemical manufacturer, for example, acknowledged publicly that it has been able to reduce its administrative costs within its transportation department as the result of service contracts.

Some carriers, on the other hand, have indicated that service contracts have had a negative impact on their operations. They believe that these agreements have exacerbated the downward pressure on rates. According to these carriers, the chief culprits for this downward spiral on rates have been the "most favored shipper" and "Crazy Eddie" clauses, which they claim shippers have been able to use as rate-cutting devices and to play-off one carrier against another.

There are a number of issues surrounding service contracts which most probably will be discussed and debated by the Advisory Commission on Conferences in Ocean Shipping: (1) legislatively mandated independent action on service contracts; (2) whether essential terms of service contracts should be made publicly available; (3) whether the "minimum quantity of cargo" should be more broadly interpreted; and (4) whether the parties to a service contract should have the ability to make amendments to existing service contracts.

Whether essential terms should be made available to the general public is another controversial issue that generates much public debate. Shippers appear to be divided on this issue. Some shippers believe that a service contract is an agreement between the shipper and carrier or conference, and should remain private between the two parties. On the other side of the coin, some shippers support the public availability of the essential terms of service contracts in order to keep everyone honest; to ensure that negotiations are conducted on a more equitable basis; and to allow the shipping community equal access to the advantages that some service contracts may offer.

The majority of carriers, however, have indicated that they are satisfied with the present statutory arrangements, and would like to see service contracts continued to be filed with the Commission and essential terms being made publicly available.

Most carriers and many shippers favor the present definition of "minimum quantity" which requires a shipper to reserve a fixed amount of its firm's cargo for a specified period of time. Apparently a fixed number of containers is an easy method to administer and verify. A fixed amount of cargo also clearly establishes the size of the commitment by the shipper and assists the carrier in determining similarly situated shippers.

However, some shippers prefer a fixed percentage of their firm's total cargo because it would insulate their firm from unexpected events such as crop failures, unforeseen economic events, and trade restrictions. Other shippers believe that the term should not be defined by the FMC. Instead, the amount of cargo to be shipped under a service contract should be a matter of negotiation between the shipper and carrier or conference.

Generally, shippers and carriers would like to see changes to the Shipping Act that specifically allow for amendments to existing service contracts, especially if the changes are minor. In allowing amendments, they argue, both parties would greatly benefit.

There are other issues pertaining to service contracts. A few carriers would like to prevent middlemen from signing service contracts. Some carriers would like to statutorily ban clauses such as the "Crazy Eddie" and the "most favored shipper" clauses. A complaint from some shippers' associations has been that conferences refuse to seriously negotiate service contracts with them. Finally, some shippers would like to see carriers negotiate longer service contracts that extend beyond the usual one year contract.

Yet, despite all the numerous controversial issues surrounding service contracts, they still remain an extremely popular method to buy and sell ship space as the statistics shown earlier clearly indicate. In fact, in response to surveys recently sent by the FMC, both shippers and carriers indicated that they prefer service contracts over loyalty contracts. Although both shippers and carriers have certain concerns about service contracts, this provision of the 1984 Shipping Act has also provided some positive benefits for each of these maritime groups.

SESSION 4

Antitrust Issues for Carriers and Shippers

Is antitrust immunity still needed in the liner industry? If continued, must conferences be open to all lines or would a closed structure permit efficiencies not otherwise obtainable? Are conferences still relevant in light of modern shipping practices? Should U.S.-based shippers' councils receive antitrust immunity?

Carriers

Proponents of antitrust immunity for carriers argue that the ability to form shipping conferences (geographically-defined carrier cartels) is essential to (1) creating and maintaining rationalized, and therefore less costly, transportation services; (2) preventing "destructive competition" that can lead to serious periodic disruptions in transportation services; (3) preserving international harmony in what is, after all, a multinational industry; and (4) retarding the continuing decline of our national merchant marine.

Opponents of antitrust immunity for carriers have generally conceded that the international nature of the shipping industry may require some leeway for the authorization of conferences and some degree of immunity from U.S. antitrust laws. But beyond that minimal and vague concession, they have been extremely skeptical of economic arguments which claim that the benefits of rationalization and service stability or the consequences of so-called destructive competition provide valid rationales for allowing the formation of conferences and for government regulation of carrier tariffs.

These critics insist that any cooperative effort which gives carriers the ability to jointly reduce costs and guarantee service levels necessarily gives them the ability to raise prices (and profits) by reducing capacity or by engaging in price discrimination unrelated to carrier costs. From the perspective of the antitrust activists, including some shippers, the key question is how to modify the rules governing carrier conferences in ways that will preclude conferences from engaging in excessive oligopolistic pricing practices.

As indicated earlier, some of the questions raised in the debates over mandatory independent action requirements and service contract provisions have been:

- Should independent action on rates be mandatory?
- Should the independent action notice period be longer or shorter than the current ten day requirement?
- Should mandatory independent action requirements be extended to service contracts?
- Should a service contract's essential terms be confidential?
- Should the rules governing service contracts be modified with respect to minimum volume, most favored shipper clauses, non-performance and damages, etc.?

If critics of antitrust immunity for carriers focus their attention on micro-questions like the ones above, the macro-question that Congress has required the Advisory Commission to address regarding overall conference structure (Would the nation be best served by prohibiting conferences, or if permitted, should conferences be closed or open?) cannot be viewed in isolation. A "closed" membership conference system with tariff filing requirements and mandatory independent action on rates and service contracts might, after all, prove less able to maintain rate and service stability (and raise prices) than an "open" membership conference with no mandatory independent action on rates or service contracts and with tightly circumscribed service contract regulations.

In trying to decide what, if any, carrier antitrust immunities are necessary to meet our varied national shipping, international trade, and national security goals, it is important to determine (to the extent possible) what the direct and indirect consequences of the various major policy options are likely to be. To do that, commenters must address the key micro-and macro-questions jointly and, if at all possible, within a workable consensus about the basic economics of international liner shipping.

Shippers

Antitrust immunity for concerted action by domestic shippers in obtaining shipping service was omitted from the Senate version of what eventually became the Shipping Act of 1984. The Conference

Committee apparently felt such countervailing immunity was not necessary because, in the absence of demonstrable market power on the part of the cooperating shippers, cooperative activities would not be proscribed by antitrust laws. Additionally, Title III of the Export Trading Company Act of 1982 had already provided significant protection from antitrust exposure for exporters who qualified for antitrust certification from the Secretary of Commerce. Shippers also had the option of applying for Business Review Letters from the Department of Justice and Advisory Opinions from the Federal Trade Commission to ascertain their potential antitrust liability.

Nevertheless, an evaluation of the Act should include a review of whether broader antitrust immunity for shipper groups (along the lines of shippers' councils found in many foreign countries) is, after all, desirable. Mandatory independent action, service contracts, and shippers' associations currently strengthen the shippers' hand in negotiations with the carriers. Any evaluation of the need for broad antitrust immunity for shippers in future maritime legislation would, presumably, be made in light of the effectiveness of those three elements.

SESSION 5

Antitrust Issues for Ports and Non-Port Terminal Operators Is antitrust immunity needed for ports and marine terminal operators? What would be the consequences of ending antitrust immunity for ports and marine terminal operators?

There are two parts to an evaluation of whether marine terminal operators, including port authorities that operate terminals, should be granted continued antitrust immunity of the sort presently available under the Shipping Act of 1984. Part One is the question of whether or not marine terminal operators should be allowed to form agreements to discuss and coordinate prices and service issues. Part Two is the question of whether, or under what conditions, marine terminal operators should be required to file tariffs and have the charges listed in those tariffs enforced by the federal government.

While the agreements question can be logically severed from the tariff regulation question, an adequate investigation of the pros and cons of granting antitrust immunities to marine terminal operators requires consideration of the relationship between agreement activities and tariff regulation.

During the crafting of the Shipping Act of 1984, spokesmen for antitrust agencies and their congressional supporters tended to take the view that the proposed immunities were, at best, "too broad" but more frequently "that there [were] no valid reasons for marine terminal operators to have antitrust immunity."

More recently, officials critical of current antitrust immunities have raised a question as to whether antitrust immunities available to port authorities under the Local Government Antitrust Act of 1984 and "the state action doctrine" as applied in U.S. v. Southern Motor Carriers Rate Conference (471 U.S. 48, 1985) do not render the Shipping Act immunities redundant. Opponents of immunity believe that port authorities (and, through them, possibly private marine terminal operators as well) do not need their agreements protected by Shipping Act antitrust immunities and that "continued regulation" was economically unjustified and an "impediment" to the operation of market forces.

Defenders of the Shipping Act immunities have supported the propriety of immunities for agreements and for tariff enforcement by (1) pointing to the immunity enjoyed by members of carrier conferences with whom they must bargain; (2) claiming such protection is necessary to obtain "stable and predictable terminal rate structures" that are beneficial to all parties; (3) raising the spectre of "predatory rates and practices" in the absence of such immunities; and, (4) arguing that current immunities and tariff enforcement have not led to harmful reductions in competition among terminal operators.

Among some private marine terminal operators, there are signs of support for modifications of current antitrust immunities. Tariff filing, from their perspective, can be seen as the quid pro quo the government demands in return for relaxation of the usual antitrust liabilities. Their position is that if marine terminal operators are independent (i.e., not a port authority operation or a subsidiary of a carrier) and are not members of an agreement, they should not be required to file tariffs with, and have those tariffs regulated by, the FMC. Terminal operators who have access to governmental subsidies or carrier assistance (and might therefore be able to charge below market prices) should be required to file tariffs, as should independent terminal operators who decide to take advantage of the opportunity to form agreements to jointly set rates and charges.

This proposed modification is particularly interesting because it raises the question of the relationship between antitrust immunity and tariff filing. It suggests that the only valid economic reason that marine terminal operators should be required to file tariffs with the federal government and have those tariffs regulated by the government is as a trade-off for accepting federal protection from the usual antitrust liabilities to which other domestic industries remain subject. If a particular terminal operator has no wish to accept special antitrust immunity, he should not be required to "pay for" something he does not want.

The traditional pro- and anti-immunity rationales see antitrust protection for marine terminal agreements and tariff filing requirements as two regulatory elements that, in practice, reinforce each other in achieving the same end. Depending on one's point of view, they are tools that allow terminal operators to achieve "stable and predictable terminal rate structures" or linked mechanisms that could be used by terminal operators to impede competition and support above-market prices. Both friends and foes of antitrust immunities agree tariff regulation does not operate as a trade-off for antitrust protection but as a complement to it. Perhaps it is an essential complement.

The first step in an evaluation of the need for continued antitrust immunity for marine terminal operators is to determine the relationship between antitrust protection for port and marine terminal agreements and tariff filing and enforcement, if any.

That done, one can move on to examine whether the antitrust immunities provided for in the Shipping Act have in fact led to "stable and predictable" rate structures at levels beneficial to all parties as proponents assert, or to obstacles to competition that result in unnecessarily inflated rates as critics charge, or to neither. Such an examination would have to take into consideration the existence of (1) the current tariff filing and enforcement regime, (2) the quasi-public utility nature of ports, and (3) market forces affecting marine terminal pricing policies.

Depending on the results of such an evaluation, various alternatives, modifications, or reforms could be considered for future legislative action if such changes offered serious prospects for improving the economic efficiency and productivity of U.S. domestic terminal operations.

SESSION 6

State of the Liner Shipping Industry Four Years After the Passage of the Shipping Act of 1984

How is the Act affecting the liner industry? What changes are recommended? How are changes in intermodal practice, management and ownership affecting the structure and operation of the industry? Is the industry undergoing rationalization or are the smaller companies being sacrificed on the altar of competition?

Except for 1984, the decade of the 1980s can thus far be categorized as disappointing for shipowners. If shipping were purely the function of market driven supply and demand functions, then certainly one would not expect to see continual creation of new vessels in light of extreme overcapacity. But it must be noted that government interventionism in the shipbuilding industry distorts the supply and demand relationship in the liner market. A recent UNCTAD study reports that total worldwide surplus tonnage in mid-1985 was 24.3 percent of the world merchant fleet. Some of the excess tonnage stems from the unstabilizing conditions that existed in the 1970s, such as inflation and wild currency fluctuations which disrupted established trading patterns. But much of the excess shipbuilding stems from factors other than profit seeking in liner transport.

Government subsidized shipbuilding distorts the shipping market such that one cannot rely on "pure market forces" to equilibrate supply and demand. Clearly, since the Shipping Act of 1984 focuses on the demand side of the equation it cannot be expected to rectify the damage done to the market process by government intervention on the supply side. But expecting nations to forsake shipbuilding, which in their view provides jobs, a ready market for steel output, national pride, and military wherewithall is naive.

As discussed previously, carriers assert that the increased shipper bargaining strength which is the result of independent action and service contracts has driven down rates. The extent of the decline in rates that can be attributed to these factors when most trades are overtonnaged, is unclear. However, carriers have achieved lower agreement processing costs due to the 1984 Act (in the parlance of economists, they now face lower transactions costs for achieving, among other things, space rationalization and rate stability agreements). Carriers may also now file agreements which fix or regulate intermodal rates with the FMC. The growth of 'super-conferences' and the willingness of conference carriers to utilize their ability to expand their intermodal capabilities are seen by some as a direct result of these provisions.

Intermodalism

The growth during 1987 of intermodal transportation services provides highly visible evidence that ocean liner shipping is changing. Several carriers have added rail networks to their operations and now offer through rates to many inland and port load centers. Coordination of inland transport schedules and rates allows major shipping lines to better ensure scheduled point-to-point deliveries and stable rates. Their customers, in turn, take advantage of these services when establishing 'just in time' production methods that utilize these transportation improvements to offset inventory requirements. Such shippers time the movement of their cargo so that the goods are in the 'pipeline', moving toward the factory or retail outlet, rather than taking up warehouse space and incurring additional costs.

Rationalization

Intermodalism is only one of the ways the market is changing. In the North Atlantic trade, for example, some carriers have concluded that rationalization of their maritime activities is a workable strategy that should enable them to achieve short run financial improvements and, in the long run, prosper. "Rationalization will spark a return to profitability such as we have enjoyed on our 17 other worldwide routings," according to a shipping company official. U.S.-flag carriers have not been very active in this area. Thus far, European and Japanese lines have been much more agressive in forming rationalization compacts. This may be due, in part, to the fact that in their trade with each other, rationalization on an individual line and conference-wide basis has a long history. Until 1984, rationalization in U.S. trades, while not illegal, was much more difficult to achieve. Perhaps with the passage of time, U.S. carriers will modify their behavior patterns.

Clearly, if rationalization works the way it should, then both large and small carriers should benefit from this cooperative way of competing. Furthermore, the unfortunate demise of U.S. Lines, then the largest container operator in the world, is vivid proof that the "survival of the largest" is not necessarily the rule in the maritime industry. In fact, many small operators can coexist with their larger brethren as the former seek out niches in the market and discover, or create, new markets which were untapped by the larger operators.

SESSION 7

The Position of Shippers, Forwarders and Ports After Four Years of Experience with the Act

How is the Act affecting shippers, forwarders and ports? What changes are recommended? Are shippers' associations functioning meaningfully? Is the balance between shipper/forwarder and carrier interests in need of change? Are shippers' councils an answer? Has the Act encouraged port load centers?

Shippers

Shippers are a very heterogeneous group, and as a result, there exists a wide range of views among them about the 1984 Act. Small shippers, large shippers, exporters, importers, chemical manufacturers, automobile manufacturers, forest products shippers, agricultural producers as well as others, all have their individual transportation needs, and therefore, their views about the Act will be different. Thus, it is important to realize that shippers may not always speak with a single voice about specific issues regarding the Act.

Generally, shippers believe that the 1984 Act has had some positive impact on their firm. According to the results of the 1986 shipper survey, the provisions of the Act which they find most beneficial are mandatory independent action; service contracts; granting conferences clear authority to offer intermodal rates; and the exemption of tariff filing requirements on forest products, recycled metal scrap, and waste paper. Nonetheless, many shippers favor some legislative modifications to these provisions of the Shipping Act.

Independent action has been one provision of the Act about which shippers fully agree as having a positive impact on their firm. Independent action is perceived by shippers as a method to offset the power of conferences. Given the fact that conferences have not been very successful recently in sustaining general rate increases, it appears that this provision is an effective tool for shippers. However, overcapacity still plagues the maritime industry, and this may also help explain why conferences have been unable to increase tariff rates as much as they desired.

Some shippers would prefer that independent action become effective immediately rather than on ten calendar days' notice as the Act requires. On the other hand, many shippers are satisfied with the present ten days' notice period required to be provided to the conference. There are few shippers that would like to extend the notice period to thirty or forty-five days' notice.

Service contracts are viewed quite differently among various groups of shippers. Large shippers have been staunch advocates of service contracts, and have publicly stated that their firms have greatly benefited from this provision of the Act. Some smaller shippers, however, have taken an ambivalent view about service contracts since they do not have the volume of cargo necessary to enter into a service contract. In general, a majority of shippers favor revising the Act to require independent action on service contracts.

There are a number of issues that shippers would like the Advisory Commission to address regarding service contracts: (1) confidential filing of the essential terms of service contracts; (2) ability to make amendments to service contracts; (3) whether the term "minimum quantity of cargo" should be defined as a fixed amount of cargo or a fixed percentage of cargo or both; and (4) independent action on service contracts.

There are a number of other changes that different groups of shippers advocate. Some would like to eliminate antitrust immunity for carriers; whereas others support the expansion of antitrust immunities for shippers' councils. Most shippers support the tariff filing and enforcement requirement. However, there are a number of shippers that strongly advocate the elimination of tariff filing and enforcement.

Freight Forwarders and Customs Brokers

The freight forwarding industry has the distinction of being the only segment of the industry which has been successful, thus far, in having the Shipping Act of 1984 revised. This revision came about via the Tax Reform Act of 1986 and provides that conferences must make mandatory independent action available to members with respect to freight forwarder compensation paid to ocean freight forwarders who are also licensed customs brokers in the event the conference tariff does not provide for compensation of at least one and one-quarter percent of tariff charges.

The regulatory scheme of the 1984 Act, the revision mentioned above notwithstanding, did not change to a great degree the regulations applicable under the Shipping Act, 1916. Perhaps the biggest change was re-defining what a forwarder is for the purpose of FMC regulations. The definition was modified to follow more closely those functions for which a forwarder receives compensation from common carriers. In addition, the modified definition allows forwarders to have an interest in the cargo they handle. This is to ensure that export trading companies could operate as licensed freight forwarders. The new statute continues the prohibition against forwarder receipt of compensation for shipments in which the forwarder has a beneficial interest.

One important issue currently under discussion among freight forwarders concerns calculating the base on which their compensation is figured. Most would seem to favor basing this compensation on the total charges, including all surcharges, listed on the bill of lading. Many allege that carriers and conferences have published surcharges in their tariffs which are exempt from the commission base in an attempt to reduce the forwarder's commission. This question of compensation will surely be an important topic for study.

NVOCCs

Unlike its predecessor, the 1984 Act specifically recognized the existence of NVOCCs. Many NVOCCs feel the Act has confirmed their legitimacy and recognized that they have become part of the mainstream of the shipping industry. Thus, the NVOCCs see the 1984 Act as being a very important step in their growth in the shipping industry.

The NVOCC industry has its roots in the 1960s when, with the advent of containerization, carriers introduced rates that made consolidators possible by giving discounts to full container loads. Many in the industry feel that the NVOCCs' future growth will be driven by expanding exports from American companies. The NVOCCs also look to establish inland consolidation hubs to facilitate intermodal transportation.

Many NVOCCs are anxious to improve the NVOCC image in the shipping community. The NVOCC business is relatively easy to enter, which may allow some poorly capitalized NVOCCs to get into the NVOCC business. There have been cases where an NVOCC has failed and left shippers with stranded cargo. There have also been allegations that a few dishonest operators have entered the NVOCC business. Some feel that one way to enhance the reputation of the NVOCC community would be to require licensing and/or bonding of NVOCC operations, to ensure that NVOCCs have adequate experience and capital backing to provide acceptable service to customers.

Some NVOCCs would also like to see the 1984 Act modified to allow them not only to accept service contracts from carriers but also to offer service contracts in their capacity as common carriers. They feel that this change would permit them to offer a wider range of services to their customers and allow them to compete on a more equitable basis with vessel operating common carriers.

Shippers' Associations

During the debate over the 1984 Act there was criticism by some that the Act was favoring large shippers over smaller shippers. These parties claimed that protection provided to shippers through service contracts and independent action would be primarily effective only if a shipper commands a large volume of cargo. To partially remedy this situation, the 1984 Act granted recognition to shippers' associations in international trade. By definition, a shippers' association is "a group of shippers that consolidates or distributes freight on a non-profit basis for the members of the group in order to secure carload, truckload, or other volume rates or service contracts." Shippers' associations were meant to be vehicles for small- and medium-sized shippers to take advantage of the service contract and independent action provisions of the 1984 Act.

Shippers' associations got off to a slow start in 1985. A great deal of confusion existed as to what exactly constituted a shippers' association, so many shippers were hesitant to join. Moreover, market conditions were not favorable to their formation. Because of overcapacity and depressed rates, shippers had been able to obtain favorable rates through other means.

Another issue which some shippers' associations claimed hampered their growth was the alleged unwillingness of some conferences to conduct meaningful negotiations. The 1984 Act mandates, in section 10(b)(13), that carriers and conferences are prohibited from refusing to negotiate with a shippers' association. Some shippers' associations claim that carriers and conferences may be living up to the letter but not the spirit of the law.

Since 1985, it appears that the number of shippers' associations has grown steadily. There has also been interest expressed by foreign shippers' councils in forming shippers' associations. Additionally, some large service contracts have been signed with conferences. As carriers and shippers gain more experience with shippers' associations, the obstacles encountered in the past by shippers' associations should be reduced. However, the growth of shippers' associations is influenced to a large degree by the level of tariff rates. Until rates begin to increase, shippers' associations' impact in the industry may be limited.

Ports and Marine Terminal Operators

The 1984 Act did not provide any new provisions for ports and marine terminal operators. However, the statute does continue to grant antitrust immunities to the two groups which they feel is extremely important to their operations.

Based upon responses to the 1986 section 18 surveys, port authorities and non-port marine terminal operators, as a group, seem to feel that the 1984 Act has had little or no significant impact on their operations. The major positive effect noted was a reduction in the costly delay that had sometimes been involved in establishing agreements. The major negative effect, in their collective judgment, was an indirect one: an inability of ocean carriers to halt the decline in rates and profitability because mandatory independent action and the heavy use of service contracts facilitated competitive price-cutting. These reductions in carriers' revenues, a number of private terminal operators and port authorities complained, translated into reductions in revenues available to ports and terminal service providers.

On balance, port authorities appear to be generally satisfied with the major provisions of the Act that affect them. Their main concern seems to be assuring a continuation of the current antitrust immunities provided under the Act in any future legislation.

Non-port marine terminal operators also take a mildly favorable view of the workings of the 1984 Act, but at least a segment of that industry expresses an interest in revising certain tariff filing requirements.

SESSION 8

The Future of Liner Shipping and Regulation: A Reading of the Tea Leaves

Is regulation the wave of the future or of the past? What is the state of shipping policy/regulation in the EC, UNCTAD, and Canada? Is the national-flag concept obsolete? What would be the consequences of total deregulation to all interests in this industry and to U.S. foreign trade? What are the chances of an international consensus on these matters?

*N.B.: The remarks in this section attempt to apply basic economic principles to the various factors facing the liner shipping industry. They are theoretical in nature and are intended to provoke discussion of these important issues. They do not reflect the views of the Federal Maritime Commission.

Market Trends

Any observer considering the future of liner shipping could very easily become perplexed. Since the 1980s it has experienced comparatively vigorous growth in demand, yet the profitability of the sector continues to decline. The short explanation of this condition is there exists too much capacity. A similar phenomenon occurred in the 1960s which gave rise to two views of the industry that are still in currency today, viz:

- Despite being cartelized, the industry earns low profits.
- Despite a poor profits record, there is continued high investment.

Both views are somewhat paradoxical. The poor profit returns of the 1960s and 1980s are atypical and have unique but different explanations. The existing evidence suggests the 1940s and 1950s were relatively prosperous for liner shipping. However, the rapid expansion of international trade coupled with substantial wage inflation, particularly in developed countries, led by the 1960s to increasing port congestion, low ship productivity, and escalating shipping costs. Eventually, the industry adroitly invested its way out of this particular problem by switching to new, highly productive methods of cargo handling such as containerization and other methods of unitization. These investments were vindicated by the evidence which, albeit limited, shows a recovery of profitability throughout most of the 1970s.

The low profitability of liner shipping in the 1980s can be ascribed to a quite different cause than that of the 1960s. In the 1960s the industry was able to put its own house in order. Today's problem may not readily lend itself to an internal solution. The current low profitability of the industry has probably two main causes - excess supply and volatile trade imbalances. If these conditions persist and become exacerbated in the future, the resulting "disequilibrium" may lead to calls for more government action to inject "order" into the market.

Although in recent years the cargo base has grown impressively it is not clear such growth can be sustained. The problem for individual lines is one of diminishing market shares as the market gets more and more competitive. A diminishing share of a growing market is not too worrisome. The real problems begin with diminishing shares of a static or languid market. Changes in the liner cargo base are very responsive to changes in world output with a change in world GDP producing a greater than proportional change in liner cargoes. Some estimates put the "elasticity" of this responsiveness at between 1.25 and 1.5. An annual rate of increase in world GDP of say 4 percent would thus invoke an increase in the liner cargo base of 5 to 6 percent. However, the container sector has always secured additional expansion of its cargo base by penetrating further into the general cargo sector. This penetration has taken place at an average annual increment of 3 percentage points. Some estimates put the current penetration level at well over 80 percent for the world's deep-sea trades, indicating that the container revolution has entered, or is about to enter, the final phase in which further penetration of the remaining containerizable cargo base decelerates very sharply. At this point the sector will expand at only the secular rate of growth for the liner cargo base. Although world GDP can usually be relied upon to increase (usually within a range of 1 and 6 percent annually), it tends to be volatile from year to year. If a period of little or no further container penetration corresponded with a couple of years of stagnant world growth one could envision the industry in a far more depressed state than that which presently exists.

Currency instability has contributed to the industry's problems by exacerbating trade imbalances. The stronger leg of an imbalanced trade is usually apportioned the larger share of the costs of the operation so that when the main cargo flow switches to the other direction, because of radical exchange rate movements, so does the cost apportionment and rates are re-adjusted accordingly. The problem here, oddly enough, is lines are not particularly adept in raising rates sufficiently fast enough to counteract the revenue diluting effect of falling rates on the new weak leg of the trade. Since the 1980s one operational response to the problem of trade imbalances has been the development of round-the-world services. The future may call for more responses, perhaps by more innovative pricing. Otherwise an external solution may have to be relied upon, such as currency accords between the major trading nations.

It has been claimed that the liner industry of today is a game of strategies, the main thrusts of which appear to be a long-standing reliance on the exploitation of economies of ship size, a more recent proclivity for series ship purchase, the optimum timing of new ship acquisitions, selection of the most appropriate ship type, and the crafting of a market niche. Confusion is added to the game, however, by the huge number of players attempting to compete. By the mid 1980s over 400 owners were operating 1,700 or so container ships. Nevertheless, most of the players in the game are dwarfed by a small number of giants. There are only 14 owners in the world with fleets in excess of 20 container ships. The top ten owners account for 35 percent of the fleet's total TEU capacity, while just over 20 owners contribute half the fleet. Evergreen Lines alone provides about one-fifteenth of the container ship fleet's capacity and now ranks number one in the ranking, up from sixth place in 1980. Maersk has consolidated its position from fourth to second and, until its recent bankruptcy, U.S. Lines had risen from tenth place to third. These fairly radical changes in rankings over such a short period of time testify to the dynamic, competitive and rivalrous nature of the industry. Further testament to the rivalry is added by the fact that the market dominance of the top lines appears to be diminishing. When Sea-Land occupied the number one spot in 1980 it did so with nine percent of the fleet's capacity. Evergreen now occupies this spot, but with only a six or seven percent share. Similarly, whereas the top ten lines in 1980 had 45 percent of the fleet, this had diminished to 35 percent by 1986. These trends may be expected to continue.

Ownership by flag is concentrated in fewer hands. Three flags account for one-third of the fleet and just six flags for over half. Moreover, there have been few radical changes in the rankings by flag although a general leveling out process is slowly taking shape. For instance, over the past decade, although the traditional flag leaders in container shipping (the US, UK and West Germany) have maintained their rankings they have done so with a diminishing share of the fleet.

The current container ship order book provides some good pointers as to what to expect in the short to medium term at least. It reveals four notable features:

- A high proportion of orders from eastern bloc countries.
- A high proportion of very large container ships.
- A composition of ship types quite different from the current fleet (with an emphasis on container/trailer ships reflecting the proclivity of the eastern bloc for this type of ship).
- A substantial element of replacement demand.

Over the past 20 years the average size of container ships delivered annually has varied little, until recently. It has seldom gone above 950 TEU and rarely below 750 TEU. It is noteworthy, therefore, that in each year since 1983 the average size of container ship newbuildings has been over 1,250 TEU. In 1986 the container ship newbuildings had an average size of 1,688 TEU. In 1980, ships of over 2,000 TEU accounted for only 10 percent of fleet capacity but by 1986 the percentage share had exceeded 25 percent, their numbers having increased from 43 to 224. The current order book suggests an undiminished trend in the future. Where medium to large sized container ships are concerned the 2,500-2,750 TEU size range appears the most popular, yet there were only ten ships in this category in 1980.

The speed characteristics of the container ship fleet have remained comparatively stable during the 1980s. Most ships of 2,000 TEU have speeds heavily concentrated in the 21-23 knots speed range. Speeds much above 23 knots or below 20 knots will not become commonplace given all the uncertainty that surrounds the future price of oil in the case of higher speeds or the operational problems that have been encountered when lower speeds have been adopted. Ship speed is most unlikely to become a significant variable in the strategy game.

In the history of containerization there have been three periods when large capacity influxes to the container ship fleet have taken place: 1971-1973; 1977-1980; 1983-1986. The first two of these periods were followed by a corrective period of a couple of years in which annual capacity additions to the fleet reached only half the levels of the large influx years. If this pattern is repeated the period up to 1990 might see some redressing of the overtonnaging that has developed in the mid 1980s.

The decade of the 1960s was a highly distinctive watershed for the liner shipping industry. Many seeds were sown then which industry of the 1980s is having to reap. The end product of these seeds is greatly enhanced rivalry and the substantial presence of non-commercial elements of one form or another. Perhaps the most ominous aspect of today's market environment is not the existence of excess tonnage (which has always been around in differing degrees) but rather the apparent reluctance of this excess to leave the market even when rates fall substantially. The market appears loath to clear. The problem of rivalrous overcapacity has begun to affect not only rate levels (and hence profitability) but also rate structures (and thus potentially the future configuration of the industry). For instance, since the 1980s there has been a distinct movement towards commodity box rates. Under this trend, if gross excess capacity remains unchecked, a danger exists that the rate structure could collapse into a FAK system. This has obvious consequences for the carriage of low value commodities (the staple diet of U.S. exports) and the survival of financially independent lines operating on a fully commercial basis. Hopefully, the "rules of the game" would have been changed well before this spectre is even approached. It is to these rules that we now turn.

Liner Regulation Trends

The regulation of liner shipping in the U.S. trades has been shaped by two opposing philosophies: free and open competition vs. self-regulation by the industry with little government control. The proponents of free trade would abolish the conference system altogether while the adherents of self-regulation favor closed conferences and would strengthen their powers over the liner trades. U.S. regulatory policy, since 1916, has tended to fall between these two extremes and this approach toward the middle ground is clearly reflected in the Shipping Act of 1984. Under the Act, the carrier industry benefits from a new general standard of review, an expedited approval process of agreements by the FMC, expanded antitrust immunity, freedom to set intermodal rates, and retention of the controlled carrier provisions. These measures serve to promote rationalization and lessen competition by facilitating the conclusion of multicarrier arrangements. At the same time, the 1984 Act mandates the right of independent action for conference carriers, authorizes service contracts, abolishes most loyalty contracts, provides for shippers' associations, and retains open conferences which are prohibited from discriminatory, retaliatory, or predatory activities. Clearly, the new Shipping Act reflects the U.S. objective to preserve free and open competition in its liner trades with limited government regulation; a factor which has, at least until recently, distinguished its policies from those of its trading partners.

Notwithstanding the U.S. rejection of the UNCTAD Code, its implementation in many of the world's liner trades, along with a trend toward bilateral arrangements and cargo preference regimes of developing countries, are developments of increasing concern to the liner shipping industry. The provisions of the Shipping Act of 1984 oppose the regulatory system under the UNCTAD Code which sanctions closed conferences, dual-rate loyalty contracts, deferred rebates, and shippers' councils. Moreover, section 13(b)(5) of the Act imposes specific penalties against foreign carriers and governments for unduly impairing the access of U.S.-flag vessels in the foreign crosstrades. Since the Liner Code was adopted by the European Community and certain OECD countries -- under the Brussels Package reservations -- discussions between the U.S. and the Consultative Shipping Group (CSG) countries have centered on ensuring access for U.S. carriers to their trades in return for equal access for CSG shipping lines in the U.S. crosstrades. In the absence of such guaranteed access for U.S. vessels to the Codist CSG trades with the less-developed countries (LDCs), the U.S. could enter into bilateral agreements with the developing countries, thus restricting CSG carriers in its own crosstrades. Under the 1984 Act, the U.S. can adequately respond to ensure that its carriers are allowed to compete in the trades wherever the UNCTAD Code will be implemented. These new powers, added to the section 19 authority contained in the Merchant Marine Act of 1920, should permit the U.S. to safeguard its liner shipping industry.

The Shipping Act of 1984, notwithstanding some significant changes, continues to uphold certain principles of competition in its regulation of liner shipping as opposed to that practiced elsewhere. Nonetheless, there are clear signals that this same philosophy is in increasing favor abroad as evidenced by the recently adopted shipping regulations by the European Community and the OECD Common Principles of Shipping Policy. Moreover, several of the provisions of the 1984 Act are embodied in the new legislation to be implemented by Canada and in the shipping policy proposals under consideration in Australia. While conference authority to enter into multicarrier agreements to rationalize services has been enhanced by the 1984 Act, the basic structure of the 1916 Act -- free access for all vessels in the U.S. liner trades and open conferences regulated by the FMC -- has been preserved. A recent FMC survey of foreign government practices with regard to the regulation of ocean freight rates and liner services indicates a marked trend toward greater governmental regulatory control over liner shipping abroad. It now appears that the views of the Alexander Committee -- which served as the basis for the Shipping Act, 1916 -- toward the conference system are still considered valid today and that many of the same problems of the liner shipping industry perceived by Congress in 1916 are being recognized by the rest of the world. Whether or not this will prove to be a positive development for liner operators will have to be for the future to reveal.

APPENDIX

SHIPPING ACT OF 1984 - SIGNIFICANT PROVISIONS SYNOPSIZED

1. DECLARATION OF POLICY (SECTION 2)

1). To establish a nondiscriminatory regulatory process for the common carriage of goods by water in the foreign commerce of the United States with a minimum of government intervention and regulatory costs;

2). To provide an efficient and economic transportation system in the ocean commerce of the United States that is, insofar as possible, in harmony with and responsive to international shipping practices; and

3). To encourage the development of an economically sound and efficient U.S.-flag liner fleet capable of meeting national security needs.

2. AGREEMENTS SUBJECT (SECTION 4)

A. By or Among Ocean Common Carriers -- to engage in seven specified activities: 1) fix rates (including through rates); 2) pool traffic, revenues, earnings; 3) allot ports, regulate sailings; 4) regulate volume or character of cargo; 5) engage in exclusive, preferential or cooperative working arrangements among themselves or one or more marine terminal operators or NVOCCs; 6) control, regulate, or prevent competition; and 7) regulate or prohibit use of service contracts. (First and last, only difference from 1916 Act.)

B. Among marine terminal operators (MTOs) and among one or more MTOs and one or more ocean common carriers to 1) fix rates, regulate service; and 2) engage in exclusive, preferential, or cooperative working arrangements.

C. Agreements among NVOCCs and Freight Forwarders no longer subject and, therefore, to the extent they enter into such arrangements, not immune from antitrust laws.

3. CONFERENCE INTERMODAL AUTHORITY

Conference authority to set intermodal rates clarified (Section 4(a)(1)). Inland divisions of through rates can only be negotiated by individual conference members and land carriers (Section 10(c)(4)). Conference can agree on inland portion of through rate, however.

4. CONTENT REQUIREMENTS FOR CONFERENCE AGREEMENTS (SECTION 5(b))

1) purpose; 2) reasonable terms for admission; 3) withdrawal without penalty; 4) self-policing, at request of one member; 5) prohibit boycotts or predatory practices; 6) provide consultation process; 7) procedures for shippers' requests; and 8) independent action on no more than 10 days' notice.

5. CONFERENCE PROVISION RE: INDEPENDENT ACTION

All conference agreements must provide for independent action on up to 10 days' notice (Section 5(b)(8)) for new rate or service items.

No independent action on conference service contracts, unless conference so provides (Section 5(b)(8) and 8(c)).

6. CONFERENCE MEMBERSHIP

Conferences must continue to be open to any qualified ocean common carrier willing to serve the trade. (Section 5(b)(2)).

7. PROCESSING OF AGREEMENTS (SECTION 6)

No pre-implementation approval process under public interest standard, with burden on proponents of anticompetitive agreements. Completely revises the procedural requirements governing clearance provisions (15 U.S.C. Section 18a) as a model. Except for assessment agreements, which become effective upon filing (Section 5(d)), all agreements covered by the Act become effective 45 days after filing unless:

1) agreement fails to meet format/content requirements of Section 5(b) and is rejected;

2) the time period is stayed while Commission seeks more information; or

3) the Commission gets an injunction pursuant to Section 6(h).

Commission has 7 days after receipt of an agreement to transmit a notice of its filing to the Federal Register.

Commission cannot limit term of an agreement (Section 6(f)).

Section 6(d) -- Commission has authority to request additional information. If response unsatisfactory, Commission can go to district court to compel compliance (Section 6(i)).

8. SUBSTANTIALLY ANTICOMPETITIVE AGREEMENTS (SECTION 6(g))

New general standard -- replaces public interest standard of Section 15. Injunctive relief may be sought by the FMC in district court, if the agreement is likely, by a reduction in competition, to result in an unreasonable increase in costs or an unreasonable reduction in service.

Burden of proof on FMC.

Third parties cannot intervene.

9. SCOPE OF ANTITRUST IMMUNITY (SECTION 7)

Antitrust laws do not apply to: 1) specific categories of agreements that have been filed with the FMC and become effective, or are exempt under Section 6; or 2) any activity or agreement undertaken or entered into with reasonable basis to conclude that it is pursuant to an agreement filed and in effect or exempt.

Also exempt: 1) any agreement or activity re: transportation within or between foreign countries (unless agreement or activity has a direct, substantial, and reasonably foreseeable effect on U.S. commerce); 2) any agreement or activity re: foreign inland segment; 3) any agreement or activity re: terminal facilities outside U.S.; and 4) agreements previously approved.

Antitrust immunity specifically not extended to:

1. agreements among air, rail, motor carriers, or common carriers by water not subject to Act re: transportation within the U.S.; or

2. agreements among common carriers concerning inland divisions or the establishment of marine terminals (7(b)(2) and (3)).

   Private suits for damages under antitrust laws not permitted for injury resulting from conduct prohibited by Act -- 7(c)(2).

10. TARIFFS (SECTION 8)

Still required of all common carriers and conferences. Exceptions for bulk cargo, forest products (replaces "softwood lumber"), recycled metal scrap, waste paper and paper waste.

Carriers not required to state separately the inland division of a through rate.

Time/volume rates specifically authorized (Section 8(b)).

If Commission continues terminal tariff requirement, rates on forest products, bulk cargo, and recycled metal scrap, waste paper and paper waste, need not be filed.

11. SERVICE CONTRACTS

Section 8(c) authorizes service contracts between carriers or conferences and shippers or shippers' associations. Reciprocal rights and obligations. Shipper commits a minimum quantity of cargo over stated time period and carrier a rate or rate schedule and defined service level -- e.g., assured space, transit time, port rotation, or similar service features. Copy of the service contract must be filed confidentially with the Commission. Essential terms of the contract shall be made available to the general public in "tariff format" and those essential terms shall be available to all shippers similarly situated.

No independent action on conference service contracts, unless conference so provides (Section 4(a)(7)). Independent action on conference time/volume rates, however.

12. SHIPPERS' ASSOCIATIONS

Group of shippers which, on a non-profit basis, consolidates freight or secures carload, truckload, or volume rates or service contracts (Section 3(24)).

Carriers or conferences cannot refuse to negotiate with shippers' associations (Section 10(b)(13)).

No specific antitrust immunity granted, but not thought necessary, unless group possesses "threatening market power". Business Review Letters from DOJ and Advisory Opinions from FTC available. Also, Title III of Export Trading Co. Act allows groups of exporters to apply to Secretary of Commerce for antitrust certification, which carries with it antitrust immunity.

13. CONTROLLED CARRIERS

No change from prior law.

14. PROHIBITED ACTS (SECTION 10)

Section 10 lists specific prohibited acts, essentially follows prior law and precedent.

Loyalty contracts are prohibited, except in conformity with antitrust laws (Section 10(b)(9)). Presumably means that individual carriers could offer them, but not group of carriers together (House Compromise Statement).

Joint ventures operated as a single entity are considered a single common carrier, for purposes of this section (Section 10(e)).

15. COMPLAINTS AND INVESTIGATIONS (SECTION 11)

Any person may file complaint alleging violation of Act, except Section 6(g)(11)(a).

Commission may on own motion investigate any conduct.

Commission may disapprove, cancel or modify any agreement in violation (Section 11(c)).

Commission or complainant can seek injunction in district court against activity thought to be in violation of Act. If complainant loses -- reasonable attorneys' fees shall be awarded to respondent.

Reparations to complainant -- must be filed within three years of accrual of cause of action. Can receive payment for actual injury plus attorneys' fees (Section 11(g)). Interest at commercial rates. Potential for double amount of injury if caused by violation of Section 10(b)(5) or (7) or 10(c)(1) or (4) or 10(a)(2) or (3).

16. PENALTIES (SECTION 13)

Violations of Act, regulations, or Commission order can result in a civil penalty not to exceed $5,000/violation. If willful and knowing, $25,000/violation. Each day of a continuing violation is a separate offense. Commission may suspend tariffs for 1) failure to respond to subpoena; or 2) violations of Section 10(b)(1), (2), (3), (4), or (8).

17. ACCESS TO CROSSTRADES (SECTION 13(b)(5)

FMC can take appropriate action, including suspension of a carrier's tariff, in response to action of a carrier or foreign government which has unduly impaired access of a U.S.-flag carrier to foreign crosstrades. President may veto such action for reasons of national defense or U.S. foreign policy (Section 13(b)(6)).

Appendix II

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Index to Conference Participants