

MARITIME LINER REFORM – A U.S. UPDATE

Background

The last major changes in U.S. international liner shipping took place in 1998 when Congress passed into law, the *Ocean Shipping Reform Act (OSRA)*. OSRA amended existing U.S. shipping laws. The most prominent change of law provided the opportunity for shippers and carriers to enter into confidential service contracts. This resulted in contract terms that would be known only to the commercial parties and the U.S. Federal Maritime Commission (FMC), a U.S. government agency which provides regulatory oversight of the liner carriers.

OSRA kept in place a limited antitrust exemption which was granted by the *1916 Shipping Act*. The introduction of private confidential contracts has largely been viewed by shippers, carriers and third parties as being beneficial. It led to the rapid demise of carrier “conferences” which had the ability to enforce the rates of member carriers through a conference tariff. Nevertheless, carriers today may still legally get together via what are known as “carrier discussion agreements” in which they can legally pool cargo, apportion and set rates through “voluntary guidelines.”

Current Developments

In early 2010 shippers faced severe market disruptions. In response to the global recession, carriers laid up large numbers of ships. When demand for space improved even marginally, the very tight capacity resulted in “bumped” and “rolled” cargo, missed sailings, imposition of new “emergency surcharges” and other across the board fees on shippers and brokers. Many shippers complained that their cargo was being held hostage. This experience reinforced shippers’ belief that the antitrust immunity enjoyed by the liner carriers in those discussion agreements may allow them to manipulate the supply of their services and their pricing, without regard to the consequences of their actions on customers who need efficient and fairly priced shipping services set by the marketplace interaction of supply and demand.

The liner carrier industry has argued that revocation of the pricing antitrust exemption would lead to rate volatility and less stable markets. However, the argument is totally unsubstantiated. There is no evidence to date supporting these assertions and the crisis that occurred in 2010 suggests the opposite. During that period shippers saw unprecedented swings in rates and surcharges, as well as pressure to accept what the carriers unilaterally believed were acceptable services.

Regulatory Action Taken By the Federal Maritime Commission

In response to the problems encountered by shippers from the carrier actions in 2010, the FMC launched Fact Finding Investigation No. 26, *Vessel Capacity and Equipment Availability in the United States Export and Import Liner Trades*. It took place over nine months and result in 170 interviews. Despite this time and effort the FMC released no formal report, or findings and only provided an outline of recommendations of actions to be taken.

This investigation resulted in the following recommendations:

- **Rapid Response Teams:** that the Commission establish Rapid Response Teams to provide prompt solutions for commercial disputes between shippers and carriers.
- **International Ocean Transportation Working Group:** that the Commission form a working group with ocean carriers, shippers, and ocean transportation intermediaries that will focus attention on the most pressing issues revealed during the investigation.

- **Service Contract Enhancement Outreach Project:** that the Commission would develop an educational outreach project focused on helping small U.S. exporters and importers to improve their service contracting practices.
- **Intermodal Container Availability Working Group:** that the Commission would continue its collaboration with intermodal businesses regarding container access and availability.
- **Transpacific Stabilization Agreement and Westbound Transpacific Stabilization Agreement Verified Transcripts; and Enhanced Monitoring of Global Alliances:** In addition to its various efforts to use the investigation as a vehicle to help shippers and carriers improve their business practices and commercial relationships, the Commission will continue its enhanced oversight of the Transpacific Stabilization Agreement (TSA) and Westbound Transpacific Stabilization Agreement (WTSA). Commission staff also will develop recommendations to enhance oversight of the three global alliances.

Need for Legislative Reforms

Despite the introduction in the last Congress of legislation (H.R. 6167) to eliminate the authority of liner carriers to collectively discuss and agree upon rates and charges, including carrier guidelines that form the basis of contract negotiations and tariff pricing, the bill was not progressed due to a lack of time in the congressional session. The chief sponsor of the bill lost his reelection bid and his political party was relegated to minority status.

In January, 2011 The National Industrial Transportation League (League) joined with 28 other organizations in urging the leadership of the transportation and judiciary committees in the House and Senate to advance legislation that repeals the rate exemption while maintaining the ability of carriers to enter into pro-competitive arrangements (like vessel sharing agreements) which help facilitate an efficient and effective market environment.

These pro-reform efforts have been favorably received by both House and Senate offices. Significant productive activity is currently underway to advance legislation in the current congressional session. However, one overriding concern among legislators has frozen action on any other matter, namely how to address the U.S. national budget and debt crisis. That singular issue has brought all other legislative activity to a grinding stop.

This unprecedented halt to legislative activity is a reality and is frustrating to anyone concerned with advancing any kind of legislation. The League believes that its efforts and arguments for reform in liner shipping will gain traction once this difficult and vexing problem is resolved. Efforts will be ongoing and will be updated regularly.