AUTHENTICATED
U.S. GOVERNMENT
INFORMATION
GPO

FEDERAL MARITIME COMMISSION MANAGEMENT AND REGULATION OF INTERNATIONAL SHIPPING

(110–144)

HEARING

BEFORE THE

SUBCOMMITTEE ON
COAST GUARD AND MARITIME TRANSPORTATION

OF THE

COMMITTEE ON
TRANSPORTATION AND
INFRASTRUCTURE
HOUSE OF REPRESENTATIVES

ONE HUNDRED TENTH CONGRESS

SECOND SESSION

JUNE 19, 2008

Printed for the use of the
Committee on Transportation and Infrastructure

U.S. GOVERNMENT PRINTING OFFICE

43–117 PDF WASHINGTON : 2008

For sale by the Superintendent of Documents, U.S. Government Printing Office
Internet: bookstore.gpo.gov Phone: toll free (866) 512–1800; DC area (202) 512–1800
Fax: (202) 512–2104 Mail: Stop IDCC, Washington, DC 20402–0001

COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE

JAMES L. OBERSTAR, Minnesota, *Chairman*

NICK J. RAHALL, II, West Virginia, *Vice Chair*
PETER A. DEFAZIO, Oregon
JERRY F. COSTELLO, Illinois
ELEANOR HOLMES NORTON, District of Columbia
JERROLD NADLER, New York
CORRINE BROWN, Florida
BOB FILNER, California
EDDIE BERNICE JOHNSON, Texas
GENE TAYLOR, Mississippi
ELIJAH E. CUMMINGS, Maryland
ELLEN O. TAUSCHER, California
LEONARD L. BOSWELL, Iowa
TIM HOLDEN, Pennsylvania
BRIAN BAIRD, Washington
RICK LARSEN, Washington
MICHAEL E. CAPUANO, Massachusetts
TIMOTHY H. BISHOP, New York
MICHAEL H. MICHAUD, Maine
BRIAN HIGGINS, New York
RUSS CARNAHAN, Missouri
JOHN T. SALAZAR, Colorado
GRACE F. NAPOLITANO, California
DANIEL LIPINSKI, Illinois
NICK LAMPSON, Texas
ZACHARY T. SPACE, Ohio
MAZIE K. HIRONO, Hawaii
BRUCE L. BRALEY, Iowa
JASON ALTMIRE, Pennsylvania
TIMOTHY J. WALZ, Minnesota
HEATH SHULER, North Carolina
MICHAEL A. ACURI, New York
HARRY E. MITCHELL, Arizona
CHRISTOPHER P. CARNEY, Pennsylvania
JOHN J. HALL, New York
STEVE KAGEN, Wisconsin
STEVE COHEN, Tennessee
JERRY MCNERNEY, California
LAURA A. RICHARDSON, California
ALBIO SIRES, New Jersey
VACANCY

JOHN L. MICA, Florida
DON YOUNG, Alaska
THOMAS E. PETRI, Wisconsin
HOWARD COBLE, North Carolina
JOHN J. DUNCAN, JR., Tennessee
WAYNE T. GILCHREST, Maryland
VERNON J. EHLERS, Michigan
STEVEN C. LATOURETTE, Ohio
FRANK A. LOBIONDO, New Jersey
JERRY MORAN, Kansas
GARY G. MILLER, California
ROBIN HAYES, North Carolina
HENRY E. BROWN, JR., South Carolina
TIMOTHY V. JOHNSON, Illinois
TODD RUSSELL PLATTS, Pennsylvania
SAM GRAVES, Missouri
BILL SHUSTER, Pennsylvania
JOHN BOOZMAN, Arkansas
SHELLEY MOORE CAPITO, West Virginia
JIM GERLACH, Pennsylvania
MARIO DIAZ-BALART, Florida
CHARLES W. DENT, Pennsylvania
TED POE, Texas
DAVID G. REICHERT, Washington
CONNIE MACK, Florida
JOHN R. 'RANDY' KUHL, JR., New York
LYNN A WESTMORELAND, Georgia
CHARLES W. BOUSTANY, JR., Louisiana
JEAN SCHMIDT, Ohio
CANDICE S. MILLER, Michigan
THELMA D. DRAKE, Virginia
MARY FALLIN, Oklahoma
VERN BUCHANAN, Florida
ROBERT E. LATTA, Ohio

SUBCOMMITTEE ON COAST GUARD AND MARITIME TRANSPORTATION

ELIJAH E. CUMMINGS, Maryland, *Chairman*

GENE TAYLOR, Mississippi
RICK LARSEN, Washington
CORRINE BROWN, Florida
BRIAN HIGGINS, New York
BRIAN BAIRD, Washington
TIMOTHY H. BISHOP, New York, *Vice Chair*
LAURA A. RICHARDSON, California
JAMES L. OBERSTAR, Minnesota
(Ex Officio)

STEVEN C. LATOURETTE, Ohio
DON YOUNG, Alaska
HOWARD COBLE, North Carolina
WAYNE T. GILCHREST, Maryland
FRANK A. LOBIONDO, New Jersey
TED POE, Texas
JOHN L. MICA, Florida
(Ex Officio)

CONTENTS

U.S. House of Representatives
Committee on Transportation and Infrastructure
Washington, DC 20515

James L. Oberstar
Chairman

John L. Mica
Ranking Republican Member

David Heymsfeld, Chief of Staff
Ward W. McCarragher, Chief Counsel

James W. Coon II, Republican Chief of Staff

June 18, 2008

SUMMARY OF SUBJECT MATTER

TO: Members of the Subcommittee on Coast Guard and Maritime Transportation

FROM: Subcommittee on Coast Guard and Maritime Transportation Staff

SUBJECT: Hearing on "Federal Maritime Commission Management and Regulation of International Shipping"

PURPOSE OF THE HEARING

The Subcommittee on Coast Guard and Maritime Transportation will convene at 2:00 p.m., on Thursday, June 19, 2008, in Room 2167 of the Rayburn House Office Building to receive testimony regarding the management of the Federal Maritime Commission ("FMC") on the FMC's regulation of international shipping. The Subcommittee will also receive testimony from a management consultant who reviewed the performance of the agency as well as testimony from industry associations representing vessel owners, shippers, and transportation intermediaries regarding the current regulation of international shipping and its impact on U.S. imports and exports.

BACKGROUND

History

The FMC was established August 12, 1961, as an independent regulatory agency by Reorganization Plan No. 7. Prior to that date, the Federal Maritime Board had responsibility for the regulation of ocean commerce and the promotion of the United States Merchant Marine. Under Reorganization Plan No. 7, U.S. shipping laws were separated into two categories: regulatory and promotional. Responsibility for promoting an adequate and efficient U.S. Merchant Marine was assigned to the United States Maritime Administration ("MARAD"), now located within the

Department of Transportation. The newly formed FMC was charged with the administration of the regulatory provisions of U.S. shipping laws.

When the Shipping Act was enacted in 1984, major deregulatory changes were made in the regulatory regime for shipping companies operating between the United States and foreign countries. One of the most significant changes was allowing for "service contracts" between carriers and shippers. However, carriers that were members of a conference needed the approval of a conference to enter these contracts. In 1998, Congress passed the Ocean Shipping Reform Act, which contained additional deregulatory amendments to the Shipping Act of 1984. This Act was a significant pro-market shift in shipping regulations and allowed for "confidential service contracts" by prohibiting conferences from interfering with contracts between vessel-owning carriers and shippers. As a result, almost all containerized cargo is moved under service contracts rather than under publicly available tariffs.

Functions

The principal statutes or statutory provisions administered by the Commission are contained in subtitle IV of title 46, United States Code. These FMC functions include overseeing the filing of tariffs and service contracts under chapter 405; regulation of controlled carriers under chapter 407; regulation of ocean transportation intermediaries such as freight forwarders under chapter 409; and actions to address unfair foreign shipping practices under chapters 421 and 423. The principal responsibility of the FMC is to ensure that ocean common carriers, marine terminal operators, conferences, ports, and ocean transportation intermediaries ("OTIs") which operate in the U.S. foreign commerce maintain just and reasonable practices related to shippers who import and export goods from the United States.

The Federal Maritime Commission's specific regulatory responsibilities include:

1. Regulating certain activities of international shipping lines (called "ocean common carriers"), marine terminal operators, and ocean transportation intermediaries that operate in the U.S. foreign commerce or the trade between individuals or legal entities in U.S. and different countries. (An Ocean Transportation Intermediary is either an ocean freight forwarder or a non-vessel operating common carrier. An ocean freight forwarder is an individual or company that dispatches shipments from the United States via common carriers and arranges or books space for those shipments on behalf of shippers. They also prepare and process the documentation and perform related activities pertaining to those shipments. A non-vessel operating common carrier is a common carrier that purchases a block of space on a containership and resells that space to shippers.)

2. Overseeing the financial responsibility of cruise ship lines and other passenger ship operators to ensure they have the resources to pay compensation for personal injuries or non-performance of contracted duties.

3. Monitoring the laws and practices of foreign governments that could have a discriminatory or otherwise adverse impact on the U.S. maritime trade and U.S. shipping industry and administrating bilateral trade sanctions to persuade foreign governments to remove adverse conditions.

4. Enforcing special regulatory requirements applicable to shipping lines controlled or owned by foreign governments (so-called "controlled carriers").

5. Reviewing and regulating agreements between marine terminals and/or shipping lines (which enjoy statutory immunity from antitrust laws) as well as service contracts between shipping lines and their customers.

6. Licensing and regulating ocean transportation intermediaries in the U.S., and ensuring they maintain evidence of financial responsibility. These intermediaries include freight forwarders, who make bookings and process paperwork for shipper customers (roughly analogous to a travel agent for freight), and "non-vessel-operating common carriers", who act as resellers of space on shipping lines' vessels.

7. Reviewing common carriers' privately published tariff systems for accessibility and accuracy.

The Commission is authorized by chapters 421 and 423 of title 46, United States Code, to take action to ensure that the foreign commerce of the U.S. is not burdened by non-market barriers to ocean shipping. The Commission may take countervailing action to correct unfavorable shipping conditions in U.S. foreign commerce and may impose penalties to address actions by carriers or foreign governments that adversely affect shipping in the U.S. foreign oceanborne trades or that impair the access of U.S. flag vessels to ocean trade between foreign ports.

The Commission conducts informal and formal investigations as a part of its regulatory responsibility. If a person or company is unable to settle a dispute that involves a possible violation of the Shipping Act, that person or company may file a complaint with the Commission. The complaint will be referred to the Commission's Office of Administrative Law Judges ("ALJs"). If an ALJ is unable to decide the case merely by reading written evidence, a hearing may be conducted in which witnesses appear and give testimony under oath. The ALJ's initial decision may be appealed to the Commission if either party files an exception within 22 days, or may be reviewed by the Commission on its own motion. If there are no exceptions to the initial decision, it becomes administratively final 30 days after the date of issuance.

Among the regulatory issues that the Subcommittee Members may explore are:

- The purpose and use of antitrust immunity for carriers and conferences when 95 percent of goods are transported under contracts rather than by traditional tariffs.
- The impact that a decrease in antitrust immunity by the European Union (in effect in October 2008) will have on U.S.- Europe trade as well as on global trade.
- The purpose and use of tariff filing when most goods are not shipped by tariffs.
- The growing use by ports and marine terminal operators of filing agreements with the Commission to obtain antitrust immunity for their collective actions.
- The extent to which the limited availability of containers and ship capacity is constraining the ability of U.S. exporters to get their goods to foreign markets.

Organization

The Commission is typically composed of five Commissioners appointed to five-year terms by the President with the advice and consent of the Senate. Not more than three members of the Commission may belong to the same political party. The Chairman of the Commissioners is designated by the President. The Commission currently does not have a Chairman and one of the other Commissioners (Mr. Paul Anderson) has resigned since the last Subcommittee hearing on the Commission in April 2008.

The Chairman is the administrative officer and chief executive of the agency. In the absence of a Chairman, all the remaining Commissioners are responsible for the day-to-day management of the Commission including hiring and establishment of Senior Executive Service ("SES") positions, oversight of renovations to the Commission's offices, and other personnel and administrative matters.

The Commission's organizational units consist of: Office of the Secretary; Office of the General Counsel; Office of Administrative Law Judges; Office of the Inspector General; Office of the Executive Director; Office of Equal Employment Opportunity; Bureau of Consumer Complaints and Licensing; Bureau of Enforcement; and Bureau of Trade Analysis. The Executive Director assists the Chairman in providing executive and administrative direction to the bureaus in the Commission. The offices and bureaus are responsible for conducting the Commission's regulatory programs or for providing administrative support.

In fiscal year 2007, the Commission was authorized a total of 119 full-time equivalent positions and had a total appropriation of $20 million. In the President's FY 2009 budget, 131 full-time equivalent positions have been requested. The majority of the Commission's personnel are located in Washington, D.C., with area representatives in Los Angeles, New York, Miami, New Orleans, and Seattle.

Management of the Commission

In 2004, the then Chairman of the FMC hired a management consultant, Mr. Donald A. Cole, to help him identify management problems at the Commission. Some of the issues identified by Mr. Cole were raised at the April 2008 hearing and the Members indicated that they would like to receive testimony from Mr. Cole regarding his finding. The current Commissioners testified that they had not seen the report. The findings are as follows:

1. "Lack of Trust—at all levels in the organization but especially in the leadership, women and minorities feel disenfranchised, conflict abounds between people, managers, SES and even the bureaus.
2. "No leadership team exists, managers do not know how to give or receive feedback to employees or customers, people do not know where they fit in.
3. "Communication—people are starved for information-no staff meetings are being held, there is little interaction with industry, there are no vision or operational values exhibited.

4. "The agency appears to be adverse to change—people are fearful to suggest improvements, empowerment is not in their vocabulary.

5. "Relationships with customers, clients, stakeholders and the Hill are poor.

6. "The organization operates in a command and control manner. The Executive Director has ruled with an iron hand. The Bureau of Enforcement operates with a hammer mindset rather than how the agency can work in partnership with industry and individuals. The organizational structure supports this top down power with only two direct reports to the Chairman—the Executive Director and the General Counsel. There is little support, training or development for the workers and no socialization.

7. "The budget is controlled by a few. No bureau has its own budget allowance thus no budget responsibility or accountability exists.

8. "IT-Automation of processes both inside the agency and the industry you serve are outdated and no plan exists to improve. Computer security is questionable at best and no disaster recovery plan exists.

9. "There is little interaction between the Commissioners and the staff. They are a rich resource and should be used/included in the products/services you deliver.

10. "There is no concept of "Stewardship of the Whole"—that all the leaders/managers are responsible for managing efficiently and effectively the resources of the agency. It is not OK for one part of the agency to do just fine at the expense of another. The leadership/management team will succeed together or fail together."

April 2008 Hearing

The Subcommittee was concerned during the April 2008 hearing that the then-four Members of the Commission did not collectively make decisions and were not effectively overseeing the administration of the Commission. Further, Subcommittee heard testimony indicating that the Commission rarely met in public sessions to consider either administrative or regulatory issues -- and often held votes that entailed the use of blank vote forms that had been pre-signed by a Commissioner and were then subsequently filled in when a vote was called. Additionally, Federal employee responses to the Federal Human Capital Survey conducted by the Office of Personnel Management tended to be negative, particularly regarding the lack of trust and leadership issues.

As a result of the April 2008 Subcommittee hearing, the FMC has held several publicly open meetings of the Commissioners to discuss and approve both management issues and regulatory issues – rather than the "notational voting" that they had been using that allowed Commissioners to vote while not present.

PREVIOUS COMMITTEE ACTION

The Subcommittee held a hearing on April 15, 2008, on the FMC budget request.

WITNESSES

Commissioner Joseph E. Brennan
Commissioner
Federal Maritime Commission

Commissioner Harold J. Creel Jr.
Commissioner
Federal Maritime Commission

Commissioner Rebecca F. Dye
Commissioner
Federal Maritime Commission

Mr. Donald A. Cole
Management Consultant

Mr. Peter Freidmann
Executive Director
Agriculture Transportation Coalition

Mr. Michael Berzon
President
Mar-Log Inc.
Chairman, Ocean Transportation Committee
The National Industrial Transportation League

Mr. Win Froelich
General Counsel
National Association of Waterfront Employers

Ms. Mary Jo Muoio
President
National Customs Brokers and Forwarders Association of America, Inc.

Mr. Stanley O. Sher
Acting President
World Shipping Council

FEDERAL MARITIME COMMISSION MANAGEMENT AND REGULATION OF INTERNATIONAL SHIPPING

Thursday, June 19, 2008

HOUSE OF REPRESENTATIVES,
COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE,
SUBCOMMITTEE ON COAST GUARD AND MARITIME TRANSPORTATION,
Washington, DC.

The Subcommittee met, pursuant to call, at 2:45 p.m., in Room 2167, Rayburn House Office Building, Hon. Elijah E. Cummings [Chairman of the Subcommittee] presiding.

Mr. CUMMINGS. The hearing is called to order.

Let me apologize to all of you. We have a record of starting our hearings on time, if not early, but we had some votes and the swearing in of a new Member from Maryland. And I am from Maryland, so I had to be there.

So we will get started now. We will move this hearing along, and I just told Mr. LaTourette we will try to expedite the hearing as best we can.

Today, the Subcommittee convenes for a second hearing on the Federal Maritime Commission. The Subcommittee held its first hearing on the Commission in the 110th Congress in April of this year. At that time, there were four Commissioners; and, in the absence of a chairman, all four were collectively responsible for administrative decisions as well as for deciding on the regulatory issues brought before the Commission. However, the Commission rarely held public hearings, and testimony suggested that four Commissioners had limited visibility over the functioning of the Commission.

Additionally, responses to the Federal Human Capital Survey suggested that employees at the Commission had deep concerns about a number of issues, including the effectiveness of the management exercised by senior leadership. They were also concerned about fairness in the resolution of disputes and complaints and the ability of the Commission to recruit qualified personnel.

Between April and today's hearing, the Commission has begun convening regular public meetings. Further, Mr. Paul Anderson, who had been serving as a Commissioner and had been nominated by the President to be the chairman of the Commission, has resigned from the Commission and withdrawn his nomination for the chairmanship.

We look forward to hearing the testimony of the three current Commissioners regarding the steps that they are taking to effectively administer the Commission and conduct the Commission's business.

We will also receive testimony from Mr. Donald Cole, a consultant who had been hired by FMC's former chairman to lead a strategic planning initiative at the Commission. As a prelude to the strategic planning effort, Mr. Cole conducted an organizational analysis that uncovered findings that in many ways echo the concerns expressed by the Commission employees in the Federal personnel survey.

The effective functioning of the Commission is critical, because it must be prepared to respond to the dramatic changes that are occurring in the international shipping arena. The organization of the maritime industry and the pricing of carrier services are unique and are, to be frank, generally contrary to the standards of competitiveness within an open market system that most other industries are required to observe.

Tariffs for ocean freight transportation have historically been set by cartels of liner services, often called conferences.

In 1916, Congress passed a Shipping Act that formally sanctioned the existing cartel system by granting immunity from antitrust requirements in certain circumstances for the tariff decisions and other actions taken by ocean common carriers acting in collusion with one another.

In 1961, Congress enacted legislation to require that the agreements decided by cartels be filed with the Federal Maritime Commission, which was established by legislation as the successor to the United States Shipping Board. The FMC was empowered to reject those agreements that were found to be contrary to the public interest, but many in the industry complained that the FMC often took years to grant approval.

Congress revisited the regulation of ocean shipping by enacting the Shipping Act of 1984. This Act took a first step towards the introduction of pro-market competition in rate setting by allowing carriers to enter into service contracts with shippers. However, the cartels still often limited the ability of carriers to sign such agreements.

At the same time, the Shipping Act altered the FMC's authorities by eliminating the power of the Commission to reject agreements that were not found to be in the public interest. Instead, agreements filed with the Commission were allowed to go into force unless challenged by the Commission as being unlikely to reduce competition or lead to an unreasonable reduction in transportation service or an unreasonable increase in transportation cost.

The Shipping Act of 1984 was subsequently amended by the Ocean Shipping Reform Act of 1998, which allowed carriers to establish confidential service contracts without the approval of conferences and without the disclosure of the negotiated rates. Nonetheless, the Act did not eliminate the conference system; and the Act continued to grant antitrust immunity to many acts taken by carriers acting in collusion with one another.

The European Union is now taking the next step in the deregulation process and will eliminate its so-called "block immunity" for ocean carriers in October of this year. As a result, carriers will no longer be able to collude in the establishment of tariffs for service to Europe.

At present, antitrust immunity will continue to be granted by the European Union for other types of agreements among carriers relating to service provision. The full effects that this move will have on international shipping and particularly on ocean carrier service to the United States market remain to be seen but will certainly be critical.

The witnesses who will appear on our third panel today will present multiple perspectives on this issue. Some will argue that the maritime transportation market continues to have characteristics that require it to be exempted from competition requirements, and they will argue that antitrust immunity enables carriers and other actors in the maritime industry to address critical public policy issues such as congestion and air quality around ports that they would not or could not address on their own.

Others will argue that the United States should follow the EU's move by eliminating antitrust immunity for ocean common carriers because carriers are not constraining the ability of shippers to move their products to foreign markets and because the antitrust immunity allows them to charge rates higher than would be charged in a purely competitive market. This is one of the most critical issues facing not only international shipping today but really the American economy, which is so dependent on ocean common carrier services to move the cargos that keep our economy moving.

So it is, and I look forward to the testimony of today's witnesses. I want to thank you all for being here. I want to thank you for your patience. We also look forward to continuing to examine this issue as data recording the impact of the EU's actions become available.

And now it is my honor to grant such time as he may consume to the distinguished Ranking Member, Mr. LaTourette.

Mr. LATOURETTE. Mr. Chairman, thank you for yielding and thank you for holding this hearing. I will move through my statement quickly so we can get to the witnesses.

This Subcommittee is meeting this afternoon to continue its oversight of the Federal Maritime Commission and to examine conditions that impact U.S. interests in the maritime trades. Since our last hearing, the Commission has begun making significant changes in the way that it conducts its business; and I want to commend the Commissioners for making positive changes since our last hearing. A lot of times you come before the Congress and people express disappointment. I want to express my appreciation for your taking the last hearing seriously and doing the things that you can.

However, as we are aware, during the time since our last meeting, there is another vacancy on the board, leaving only three members, and I would be interested to hear the Commissioners' observations about how that is going to impact the work before the Commission.

The FMC has responsibilities to oversee U.S. interests in maritime trade and to enforce international and domestic shipping regulations. Recently, the Commission took action to approve a plan to reduce air pollution from trucks servicing the Ports of Los Angeles and Long Beach. As I understand, the Commission's approval is based solely on the plan and that the FMC will monitor the implementation of the plan in the future. I look forward to hearing the Commissioners' views on that as well.

I am also interested in discussing how conditions in foreign markets and practices by foreign industries are impacting U.S. maritime interests today and in the future.

I want to thank you for coming, and I look forward to your testimony, and I yield back my time.

Mr. CUMMINGS. Thank you very much.

Ms. Richardson.

Ms. RICHARDSON. I will waive my opening comments if I can be first up with questions, given the time frame.

Mr. CUMMINGS. Thank you very much.

We will now hear from Ms. Dye, and it is my understanding that Mr. Creel will have a brief statement. Is that right, Mr. Creel?

And, Mr. Brennan, you will not have an opening statement; is that correct?

Mr. BRENNAN. I would like to make a very brief statement.

Mr. CUMMINGS. Very well.

We will start with Ms. Dye. Thank you all very much for being here and again, thank you for your patience.

TESTIMONY OF COMMISSIONER REBECCA F. DYE, COMMISSIONER, FEDERAL MARITIME COMMISSION; COMMISSIONER HAROLD J. CREEL, JR., COMMISSIONER, FEDERAL MARITIME COMMISSION; AND COMMISSIONER JOSEPH E. BRENNAN, COMMISSIONER, FEDERAL MARITIME COMMISSION

Ms. DYE. We appreciate it.

Mr. Chairman and Members of the Subcommittee, thank you for opportunity to appear before you today. Of course, with me are my fellow Commissioners, Hal Creel and Joe Brennan.

We have made significant operational and management changes at the Commission since the last hearing. We have begun regularly scheduled meetings of the Commission, which facilitate public access and provide a forum for the Commission to conduct its day-to-day business efficiently in the absence of a chairman. We have previously provided you and Members of the Subcommittee with information on additional concerns raised at our last hearing.

I want to emphasize to you, Mr. Chairman, and to the other Members of the Subcommittee our sincere commitment to improving the working environment at the Federal Maritime Commission and our desire to work with you and the Members of the Subcommittee to address any additional concerns you may have about the management of our agency.

We are appearing before you today at an interesting time not only for the Commission but also for the industry at large. Due to international economic conditions, we are facing dramatic increases in demand for U.S. exports on the eve of shifting ocean competition policies by one of our largest trading partners.

The Ocean Shipping Reform Act of 1998 significantly deregulated U.S. ocean shipping and eliminated some of the regulatory obstacles between shippers and ocean carriers. Competition in the U.S.

trades has increased because of the success of confidential contracting.

The Commission has been closely monitoring recent developments in the U.S. export trade, particularly since the United States is one of the world's largest exporters, a fact little recognized because of the volume of imports.

Due to a variety of international economic conditions, U.S. exports have experienced strong growth, while imports have slightly declined. This growth, however, has not come without corresponding challenges. Shippers in some parts of the country have had difficulty in obtaining enough equipment and service to ship their goods abroad.

One of the purposes of the Shipping Act, which we enforce, is to promote the growth of U.S. exports. The Commission is reaching out to carriers and shippers to assist the industry in overcoming the challenges of shifting trade dynamics and finding a workable solution to our exporters' problems. We are pleased that a meeting among interested exporters and ocean carriers is scheduled for next week, and we will be monitoring the results of that meeting.

Concurrently, in the European Union, like the United States—the European Union, like the United States, grants antitrust immunity to certain ocean carrier agreements. On October 17, the European Union's antitrust immunity for ocean carrier agreements is scheduled to expire. Agreements that improve efficiency in ocean transportation will continue to be immunized under European regulations. We estimate that six agreements in our trades that are currently filed with the Commission may need to be restructured or eliminated to comply with the new European competition laws. But to put this figure into perspective, there are 234 ocean carrier agreements of all types on file with the Commission, and the majority of these agreements increase efficiency of the ocean carriers involved.

The Commission will monitor this transition and will study the impacts of the European Union's elimination of immunity for ocean carrier agreements. The Commission encourages members of the maritime industry and the shipping public to participate in our study and to provide their insights into this transition.

The Commission has focused most recently on many agreements among marine port terminal operators. These agreements include those that address operational issues such as port congestion, security, and air pollution.

One of these agreements involves the Clean Trucks Program in the Ports of Los Angeles and Long Beach. The Ports of L.A./Long Beach filed an agreement with the Commission to allow them to discuss and agree upon joint programs to address environmental issues.

The Port of Los Angeles has announced its intention to limit access to port terminals to qualified trucking companies who must use only employee drivers to the exclusion of independent owner/operators. In order to implement the Clean Truck Program, the ports and their marine terminal operators filed an agreement with the Commission providing authority for the parties to cooperate on the implementation of the programs. Last week, the Commission concluded an expedited review of the implementation agreement and allowed the agreement to go into effect, but it is our position that there was no basis at this time to determine that the implementation agreement would result either in an unreasonable increase in transportation or a decrease in service.

We will continue to closely monitor developments at the ports to ensure that the agreement activities do not violate the Shipping Act. We have emphasized to the parties the need to immediately file with the Commission all substantive aspects of the Clean Truck Program.

Mr. Chairman, we hope these comments have provided you with an overview of some of the most important issues the Commission is currently addressing; and we are, of course, happy to answer any questions you may have. Thank you so much.

Mr. CUMMINGS. Thank you very much, Ms. Dye.

Mr. Creel.

Mr. CREEL. Thank you, Mr. Chairman and Members of the Subcommittee.

I apologize for the late notice of this statement, but I thought it might be helpful—after being mired down in the details for this hearing, preparing for this hearing, I thought it might be helpful to step back and take a larger look at some of these issues. I offer the following thoughts on some of the issues being faced by the ocean shipping industry and being addressed by the Committee today.

Having worked on shipping issues virtually my entire career, as Merchant Marine Counsel in the Senate and then as Chairman and Commissioner at the Federal Maritime Commission for 14 years, I want to share these perspectives.

Antitrust immunity for shipping companies to agree on rates is the most significant issue that has been raised. It has been raised in the context of the European Union that is altering its treatment of carrier rate making under its antitrust laws. Honestly, I don't think that what Europe is doing much matters in how we regulate the industry in this country. Their shipping regulation system, in my opinion, was arcane. They gave full immunity for rate making by conferences only, but there was no government oversight. Extremely anti- competitive, in my opinion.

We, on the other hand, changed our regime 10 years ago to introduce more competition between carriers and to allow carriers to contract directly with their shipper customers.

Will the Europeans' actions have an effect in U.S. trades? Some. Carriers trading between the U.S. and Europe can't set rates collectively, but the vast majority of cargo carried in that trade is not carried under collectively set rates but, rather, under individual contracts between shipper and carriers. So, very few agreements on file with the Commission will be affected.

While I am not so concerned about what Europe is doing, I do think that it provides a case study for review of our own regulatory system of international shipping. It has been 10 years since we did such a review. We made major pro-competitive changes to our laws and regulations 10 years ago. It has worked better than anyone ever would have imagined. But 10 years is 10 years, and a lot has changed in the world and in the industry since then.

I caution you, however, not to throw the baby out with the bath water. This has been the challenge faced by every Committee or commission that has looked at these issues since the first liner conference was formed in 1875. Shipping is a unique international industry, and it's a means by which most of our trade is conducted. So we have to be careful and make the right decisions.

Congress has wrestled over these issues since the Merchant Marine Committee hearings in 1912 to 1914, 1959, 1984, and 1998; and, in each of these hearings, antitrust immunity has been the focus.

Some of these old questions may have new answers, but some of the questions are new. The industry has changed, and the focus of the Commission has evolved over the last several years.

Much of our focus is now on port operations. Why is that? Well, the numbers of containers moving in and out of this country in the last 10 years has doubled, and they all come through the same ports that have been serving ships since the early sailing days.

So why all this focus on ports? I believe that is because there has been exponential growth in trade, meaning container volume, and with that growth an exponential increase in problems related to growth. More volume, more problems that come with more volume, but the same geography. And there are huge problems now: congestion, pollution, degrading infrastructure.

Just imagine what it will be like in the next 10 years when trade is expected to double yet again. What will be the effect on roads and bridges? What will be the effect on non-port traffic, pollution? These are all issues on which ports, terminal operators, and carriers will need to discuss and agree upon in order to frame a common plan of action.

Specifically, as to antitrust immunity, of course, it is generally anti-competitive. That is why Congress has gone to great pains over the years to determine if it is necessary and has been extremely careful in granting immunity in order to limit its impact.

Does immunity serve a vital role in some circumstances? I would say absolutely. For example, carriers and shippers alike concur that carriers should be able to agree on sharing space on ships or coordinating service that creates efficiencies, thereby lowering cost. Is there a good reason that competing ports or terminal operators should be able to get together and agree on issues that benefit the environment or that reduce congestion or that enhance security? I believe so.

My point is that we need to figure out what is broken and fix that. Not everything is broken. In fact, I would say very little is broken. But this is a complicated issue.

For example, some will testify today that you need to do away with antitrust immunity and let there be wide-open competition, but that you should keep the provisions of the Act that will protect them from carriers who refuse to deal with them or who discriminate against them. That doesn't sound like wide-open competition to me. I am not saying that the point is not valid or that I don't agree with it. I am saying that individual issues should be viewed in the context of the totality of the industry.

I feel strongly that we should take a good look at the industry and the Commission's regulation of it. I view this as a very positive project. We should be looking at new initiatives to increase exports and facilitate imports in a business environment that is fair and a physical environment that is clean and safe. In fact, I think we are obligated to do that.

Has the Ocean Shipping Reform Act been successful in carrying out its primary purposes in creating a more competitive shipping environment? Indeed, and in spades. Could more be done? You bet. Can the Federal Maritime Commission help you achieve those goals? Absolutely.

There is just one last thing I would like to say; and that is that the working environment among affected parties, especially the shippers and carriers, is vastly better than it was 10 years ago. And the reason for that I believe is that 10 years ago they were given the ability to work one-on-one and craft confidential contracts. This I believe creates an environment in which positive change that is beneficial to all is possible.

Finally, we at the Federal Maritime Commission will do our part in helping identify any changes that should be made to the regulation of international shipping and assist you in bringing about those changes.

Thank you very much.

Mr. CUMMINGS. Thank you very much.

Mr. Brennan.

Mr. BRENNAN. Mr. Chairman and Members of the Committee, at the last hearing in April the Committee questioned employee morale and agency operations in general. In general, the idea was that it must have been a terrible place to work. Well, I think some of the criticism was, frankly, based on out-of-date information. When I returned to the Commission, I talked with a good number of the employees, and they were stunned by all the criticism.

The fact is that the 2006 Federal Capital Survey of employees showed that the FMC's results were better than the average of most of the Federal Government. The 2007 results were even better than 2006. But we are not going to rest on our laurels.

And I will say this, Mr. Chairman: You were very effective in motivating us to have more meetings and hearings, and we have been having them every other week, and I think they have been very effective in building morale. But we are proud of the direction that we are going.

I said I would be brief, and I will be available for questions.

Mr. CUMMINGS. I want to thank all of you for being here and thank you for your testimony.

Mr. Brennan, I had not intended to start with you, but I will. It is good to know that we were able to do a hearing to help push the process along, and you say that you believe morale is up; is that right?

Mr. BRENNAN. That's what I believe, and there are some studies that reflect that.

Mr. CUMMINGS. Now, can you discuss specific changes you have made to strengthen the management—and when I say "you" I am directing this to all of you—to strengthen the management of the Commission and to respond to the findings of the Federal Human Capital Survey conducted by the Office of Personnel Management?

Because it seemed as if having to manage with four people was a bit much. It seemed as if you all had to meet on every little thing and it was difficult. So now I guess it is better in a sense because now there are only three.

But I am just wondering what all did you all do and what things have you done which you see remaining in place so that it does not take a hearing and does not take the Congress of the United States to push you along? That is not our job. And, as I say to my staff, if I have to do your job, then I don't need you. I have to do my own job.

So I am just wondering if you would just give us an idea, any of you. But, Mr. Brennan, since you were kind enough to address the morale, you might want to start.

Mr. BRENNAN. I think, for a start, we are meeting every other week and many members of the Commission are there. Half of it is a public meeting; half of it are closed meetings. The SCS is meeting more among themselves. They are meeting among the Commission.

I think there is a tremendous increase in morale. But, as I said, the surveys, as I look at it, as I read it, we weren't doing badly compared with the rest of the government, but we know we want to do more, and that is what we are going to continue to do.

Mr. CUMMINGS. Ms. Dye, did you have some comments?

Ms. DYE. Yes. Mr. Chairman, we have established a working group to review some of the concerns that were raised in the '07 study; and we intend to take back additional concerns from some of the things that you had sent over to us and anything that we hear today, for that group to consider and make recommendations to us. We have a lot of vacancies to fill, and we have made sure that the staff is working as soon as possible to get people on board. We also have a few SCS positions to fill that report directly to us.

Mr. CUMMINGS. How many vacancies would you say you have now to fill? Do you know?

Mr. CREEL. Fifteen.

Ms. DYE. We have two that report directly to us, plus a few other decisions that we have to make, and hopefully we will make those if there is an agreement among us. So I am very pleased about that.

An additional point about the Federal Maritime Commission is that it is in our charter that, even though we have gone down to three members, two of us is a quorum. So we can continue to do business regardless the fact that we are down to three.

Mr. CUMMINGS. Mr. Creel, you seemed like you were about to jump out of your seat. Did you have something?

Mr. CREEL. You said that last time. I will try to restrain myself. I didn't mean to act like that.

I don't have anything to add to what my colleagues have said except—I just can't tell you how different things are now. The difference is palpable. I mean, you can feel it in the staff, the senior staff, and also——

Mr. CUMMINGS. First of all, tell me this so that we can put what you are saying in context. When you are saying "I can't tell you what the difference is", difference from what?

Mr. CREEL. Well, from before. I mean——

Mr. CUMMINGS. What was before? That is what I am trying to get to. Before our last hearing?

Mr. CREEL. Right. I think the point is having our meetings provides a forum for us to hear each other talking, not only us but also for the senior and junior staff to hear us talking. And then what happens is, after we have a meeting, everybody is on the same page or understands where the Commission is coming from so there is no sort of behind-the-scenes manipulation of what they think a member was saying or they thought a member was saying. It is all out there in the open.

And then the senior staff gets together immediately after our official meeting and discusses what happens. There is an agreement on what was said and also what their marching orders are. So, at that moment, there is an understanding of exactly what the Commission decided and where it is going from there.

And the value of that is tremendous, because it takes care of a lot of stuff, and it is all out in the open. It's all done. Everyone is planning for these meetings ahead of time. They know 2 weeks from now they had better get their issues on board because it is coming up. And if it doesn't come up in this meeting, it is going to be carried over to the next one. So that is very helpful for planning purposes.

But the other thing, as I mentioned last time, Mr. Chairman, is one of my concerns is about upward mobility. And just mentioning that at this hearing last time and subsequently in our meetings, I have had a number of employees come up to me and talk to me about that in my office. And I don't have the answer to that yet, but it is of concern to me and to us and we have identified it. Through this working group, this ad hoc working group, we hope to address that. So just by getting the word out, giving folks hope that there is some way for them to move up the ladder I think is extremely beneficial.

Mr. CUMMINGS. Is it because basically it is a kind of dead-end agency——

Mr. CREEL. I don't like the sound of that. It is not a dead-end agency.

Mr. CUMMINGS. What I meant was there are certain agencies that are structured in a way where there is simply nowhere to go, and I am just wondering are you looking at possibly trying to figure out a way to restructure it so that people can feel they can move up within the agency?

Mr. CREEL. It is not so much restructuring as it may be retraining. And, remarkably, I have had people there that are in jobs that you would not expect them to be reading the regulations and they tell me they have read the regulations over and over. And these are people who don't need to read the regulations for what they do necessarily.

So my point is that I think the training is essential. And slots do come available. Things do open up. So if you provide the training and education, then I think we can provide—we are not going to fill every job with someone from below that we would like to, but there is the opportunity there, I think. So I would say, yes, there is opportunity.

Mr. CUMMINGS. There are two words that I want you to zero in on, and that is effectiveness and efficiency. Effectiveness and efficiency. If we have a situation—going back to the training that you just talked about, where we can do a much more effective and efficient job and training would help us do that—in other words, we don't want five people doing a job where really we should have just three doing and two others doing something else to make the agency more effective and efficient. So you all are seeking outside expertise on that?

Mr. CREEL. Not yet. We are identifying the issues. We are talking to the staff. We haven't committed to that. That is certainly an option. You mentioned that last time. That is certainly an option.

Mr. CUMMINGS. But I would ask that you look at effectiveness and efficiency, please, sir.

Mr. CREEL. And I would add one more thing. What I have always found is people who are motivated make the best workers, and if you give the people an opportunity, they are motivated.

Mr. CUMMINGS. I just want to ask two more questions, and then I am going to turn it over to Mr. LaTourette.

I just want to go back to one of the issues that we are dealing with today. Would you all agree that the primary purpose of regulating international shipping is to protect shippers that import and export cargos to and from the United States?

Ms. Dye?

Ms. DYE. Mr. Chairman, I think that is obviously one of the main concerns of all transportation regulation. But I have always thought that our regulatory scheme is to promote growth in our economy, which benefits consumers directly. Now, of course, the Shipping Act of 1984, the major law that we enforce, one of the purposes is for us to encourage the growth of exports, which is one of the reasons we are so concerned about the problems that our exporters are having right now obtaining the equipment service to get their goods sold.

Mr. CUMMINGS. Well, if 95 percent of U.S. imports and exports are shipped by contract carriage and not by common carriage, do the remaining shippers need to be protected by having tariffs filed and publicly available?

Ms. DYE. I am on record, Mr. Chairman, as saying that I believe it has been 10 years, we have had a lot of experience with the '98 Act, and it is time for us to consider the next phase of deregulation. What that involves——

I also believe that reason that the '98 bill was effective was because all the parties were involved. It was a comprehensive bill, and everybody bought into the result.

Whether tariff filing or publication should be eliminated in that context is a good question. I am on record as favoring our considering at the Commission eliminating tariff publication, because I understand that not a lot of people use tariffs that are publicly filed or available anymore because 90 or 95 percent of cargo goes by contract. That is an undeniable conclusion.

What other types of reforms would be included in a comprehensive package I would be grateful to talk to you about if you ever start to consider something like that.

Mr. CUMMINGS. Mr. Creel?

Mr. CREEL. Mr. Chairman, I guess there are two issues on that, and one is there has been a lot of questions about whether the Federal Maritime Commission can exempt tariff publication by regulation. There is a legal question there. Quite frankly, I am a little skittish about stepping on the toes of Congress. I am not sure that we can do it by regulation. So I think there is a valid question there.

The other issue is whether it's good policy; and, as you said, that is a remnant of common carriage. And, in the trans-Pacific, I think about 5 percent of all cargo is carried under tariff; trans-Atlantic, 5 to 10 percent; Caribbean, 10 to 15 percent. So those are some significant numbers.

So before prejudging myself on something like that—we may get a petition at the Commission to do this, so I don't want to prejudge myself, but those are all things to consider, I think. And the role of common carriage is a valid concern. As I mentioned in my statement, I think you have to look at everything in totality. It is all related.

Mr. CUMMINGS. All right. I am going to go to Mr. LaTourette.

Mr. LATOURETTE. Thank you very much, Mr. Chairman.

Thank you again for your testimony. Thanks for coming back.

I just have three areas that I want to explore.

First, Mr. Creel, I understood you to say in your written and oral testimony that, in your opinion, the actions of the European Union aren't going to have a huge impact on our shipping trades, and it would be your recommendation—I think I heard Ms. Dye say this as well—that we revisit the '98 Act. And you are not on the side of the repealers, and you are not on the side of the do-nothings, and, like in most things, the totality of the circumstances, I guess—I guess my question is—I think I got what you think—Mr. Brennan, do you agree with that?

Mr. BRENNAN. Philosophically, I am opposed to antitrust immunity. I think the right thing to do now is we will be working on that. We will be watching what happens with the European Commission.

I don't like it for the simple reason that people are in business to make money, and they want to maximize profits. And to maximize profits it is kind of a pretty good deal if you can set rates.

I used to wonder—when I first came to the Commission, I would talk to carriers, and they said they weren't making any money, and I was sort of stunned. How is it you don't make money when you can fix rates?

So, generally, I am opposed to it, but I think at this stage it might be instructive what happens with the European Commission.

Mr. LATOURETTE. Ms. Dye, do you agree with that as well?

No.

Ms. DYE. I am not going to prejudge my study, the study that we are holding. But I do believe that it is time for the Congress or for us to look at rate making in the ocean transportation system. Yes, sir, I do believe the time has come.

I am probably not as prepared to go as far as Mr. Brennan in saying we should get rid of all of it. We frankly didn't start deregulation of ocean transportation until '98. So that would be a huge step. But it is definitely time to start considering whether or not we should do something about rate making.

Mr. LATOURETTE. Thank you.

The Subcommittee has heard from a number of folks in the industry that are having trouble getting containers, particularly if they are not located near ports or near container depots. And I guess the question is, is there something that any of you feel the Commission can do to solve or help alleviate this problem?

Mr. Creel, you first.

Mr. CREEL. Yes, sir, that is a problem. We met with Pacific shippers a few weeks ago, and they expressed some serious problems about being able to get their exports moved.

There are a number of issues. I mean, one thing is the cost of shipping a container into the country and outside of the country is vastly different. The revenue, I should say. It is more than double coming in than it is going out. So there are some carriers that have a vested interest in trying to move their container back to China where they can fill it up and ship it back and get more revenue than shipping wastepaper or hay from the United States. But there also are agricultural commodities and beef and other things that need to be moved. Yes, there is a problem there.

The additional problem is where the containers are located. Containers coming into the country go to the port, and they get stuck there, and the cargo gets loaded into 53-foot trailers and moved to the hinterlands. When you are tying to move cargo from the hinterlands to the ports, you have got 53-foot containers which won't go on a ship. You have to transload it back into a 40-foot. These are all additional costs.

In addition, we are exporting mostly not to China but to Taiwan, Japan, Korea; and that is not where we are importing from. So you also have a problem with the containers being in the wrong place internationally. So the container displacement is a big issue.

And as to the role of FMC, we have been talking to the carriers and the shippers in trying to get them together. As Commissioner Dye mentioned, they are meeting next week, some of them, to try to address this problem amongst themselves, but we stand ready to help mediate any of these issues that we can help with.

Mr. LATOURETTE. I guess I would ask after that meeting occurs, with the good offices of the chairman, if somebody could share back to the Subcommittee what progress you are making and if there is any assistance you need in that.

Mr. CREEL. You bet.

Mr. LATOURETTE. Before my time goes, on the next panel is Mr. Cole, and we talked about Mr. Cole and his contract at the last hearing. I know he is going to share his thoughts.

I have a document that is a page and a third, and my question was I think the last time we all got together that the Commission had not received a report. Apparently, the Senate Democratic staff had received a report that made its way over here. So, today, as we sit here in June, have you all received a report?

Mr. CREEL. Yes, sir. We received that a couple weeks ago, 2 or 3 weeks ago. And it is not dated, but it seems like that report is from 2003. I am not sure.

Mr. LATOURETTE. Is it different from the document that I have described? Is it a lengthy thing?

Mr. CREEL. It's a page and less than a quarter, I think.

Mr. LATOURETTE. Okay. And are discussions ongoing between the Commission and Mr. Cole's representatives relative to outstanding contract items?

Mr. CREEL. They are. He has hired counsel. There is potential litigation.

Mr. LATOURETTE. And just for my purposes, when did you all receive the document? You didn't have it when you were here last.

Mr. CREEL. No. It was 2 or 3 weeks ago.

Mr. LATOURETTE. All right. Thank you.

Mr. CUMMINGS. Ms. Richardson.

Ms. RICHARDSON. Thank you, Mr. Chairman.

And, Commissioners, I am the new kid on the block, so if you could make your responses as brief as possible because we have only got 5 minutes here.

I am going to focus my questions primarily on what Mr. LaTourette referred to and, Ms. Dye, you mentioned, which is your decision of the FMC on Friday regarding particularly the Ports of Long Beach and Los Angeles. Mr. Rohrabacher represents those ports specifically, but one foot outside of the Port is my district. So 45 percent of the entire Nation's cargo goes through my district, and your decision was very pertinent to my role in this Committee today.

Number one, in your press release, it said that you contemplate future discussions to determine the extent to which terminal operators will administer certain aspects of this plan. What is the timeline to do so?

Ms. DYE. Ms. Richardson, the parties are under obligation when they have actually discussed the implementation of the plan, and they will file the amendment to that agreement with us, and then we will look at that under the same process.

Ms. RICHARDSON. You also stated in your press release that the Commission noted that its decision today does not foreclose future actions with respect to the AIA. So does that mean that if that amendment was not satisfactory you might change your decision?

Ms. DYE. We could.

Mr. CREEL. And if I could add there, what was filed—what we agreed to was to allow the agreement to discuss basically—for the ports to discuss with the marine terminal operators may be required to do. It does not lay out the specifics of exactly what they are going to do. Once they decide on what they are going to do with the MTOs, it is our opinion that they will have to file another amendment which we will then review as well.

Ms. RICHARDSON. Okay. Now, I started off on the City Council in Long Beach, and when we originally had this idea, we were told we couldn't do it because there was a difference between intrastate and interstate. So I found it kind of interesting that the FMC took this position honoring local bodies, especially given the point that you were coming before this body one week later. Can you tell me how you view that this is an appropriate jurisdiction within your body of allowing intrastate to take the lead versus an interstate overall nationwide proposal?

Mr. CREEL. I will address that.

We have jurisdiction because, under the Shipping Act, the agreements that are filed are both between marine terminal operators. There are two agreements; one between the two ports who are acting as marine terminal operators and between the two ports and the Association of Marine Terminal Operators. Because there are agreements on file, the parties are able to discuss with antitrust immunity and also to be able to facilitate any sort of program, we have jurisdiction, and can conduct both a competitive analysis under 6(g) or review under section 10 of the Act. If perhaps any action is an unreasonable refusal to deal or we believe they are operating under an unfiled agreement, that gives us authority.

Ms. RICHARDSON. Are you aware of Mr. Calvert's bill that's on file?

Mr. CREEL. No, I am not.

Ms. RICHARDSON. What I would like to do—I have got about 1-1/2 minutes. I have one more question I would like to ask.

But, for the record, I had an opportunity to speak with the Chairman and hope to work with both him and Mr. LaTourette and other Members of this Committee to conduct a hearing on this very issue in our particular area no later than the end of July; and I hope that you would participate and be involved and testify and share your reasons.

Because Mr. Calvert's bill, which has gained some discussion here on the Hill—in fact, Chairman Oberstar was looking into what these potential implications could be. And the fact that a lot of this is stemming from my area, I think it is important everyone is hearing all pieces, what the Port of Los Angeles and Long Beach proposed, what Mr. Calvert is proposing.

And then, also, which leads me to my final point, what do you anticipate the impacts being of the potential legal action of the Port of Los Angeles' plan and also State Senator Lowenthal's legislation?

Mr. CREEL. Well, I will just say that the difference between the Long Beach plan and the L.A. Plan is, for the most part, that Los Angeles——

Ms. RICHARDSON. I am familiar with that.

Mr. CREEL. Okay. I am sorry.

Ms. RICHARDSON. My question to you is, what do you foresee as being the impact? Because, if I am not mistaken, there is potential pending litigation on the one plan because they are leaving out independent operators; isn't that correct?

Mr. CREEL. That's correct.

Ms. RICHARDSON. So my question was, what do you anticipate that legal action to be and what do you anticipate the impact of State Senator Lowenthal's legislation?

Mr. CREEL. I don't know what Senator Lowenthal's legislation is, but I——

Ms. RICHARDSON. It has been going on for at least 3 years now. I look forward to seeing you at that hearing. Thank you.

Thank you, Mr. Chairman.

Mr. CUMMINGS. Thank you very much.

Mr. Taylor.

Mr. TAYLOR. Mr. Chairman, I have no questions, but I want to welcome my first next-door neighbor in Washington, Congressman Brennan, back to town.

Mr. BRENNAN. Thank you very much.

Mr. TAYLOR. And just a matter of curiosity, I know you had a relative, I believe it was a sister, who lived in south Mississippi. I am curious how she did in the storm.

Mr. BRENNAN. She did well, actually; and she speaks very strongly about your representation.

Mr. TAYLOR. I am glad she did.

Thank you, Mr. Chairman.

Mr. CUMMINGS. It sounds like a commercial to me.

Mr. Coble, I apologize. I didn't realize you snuck back in on me.

Mr. COBLE. That is okay. I have been in and out, Mr. Chairman; and I hope I won't repeat a question.

Ms. Dye, let me start with you. Since the Committee's last hearing, an additional vacancy has been created on the Commission, leaving only three of you sitting members. How does the current status impact the Commission's abilities to conduct oversight and make decisions on pending matters?

Ms. DYE. Thank you, Mr. Coble.

In our charter, we have authority to conduct business even though we go down to three members because two of us can constitute a quorum. So we still—if two out of three of us agree on any matter, then that is the Commission's position; and we found that that is working well. We are holding public meetings now and doing all of our major and our routine business in meetings, and things are working very well.

Mr. COBLE. Very well.

Mr. Brennan, are U.S. maritime interests currently playing on a level playing field internationally?

And let me put a second question to you. And are there specific areas that the Commission is focusing on to improve conditions internationally?

Mr. BRENNAN. Mr. Coble, we had ongoing, long-term problems dealing with getting certain type services for some of our people, you know, in the Far East, in Asia, in Japan and in China, but we are working on it. And I know Mr. Creel, even before I came on the Commission, took major steps to advance that.

Mr. COBLE. Mr. Creel, do you want to add anything to that?

Mr. CREEL. I would agree with Mr. Brennan. Yes, we still have an outstanding proceeding on the Japan harbor practice issue that carriers that serve the U.S. were not treated the same way in Japanese ports—as Japanese vessels are in U.S. ports. That is still an open proceeding. We are monitoring that. There are some issues in China regarding freight forwarding. We worked closely with the Maritime Administration, who negotiates on behalf of the administration. So we are actively involved with them.

Mr. COBLE. Let me put this question to you. Since you are operating apparently effectively with three, do you think that we should stay with three or should we go back to five?

Mr. CREEL. As long as it is these three, we are okay!

Seriously, clearly, we can do the job with three. But one thing that is interesting, because of the Sunshine Laws, two of us cannot get together and talk about substance. So whenever we get together, we can't make decisions or talk about our decisions or how we might come to a decision. So we have to be very mindful of that with just two of us. Where you have 5 members, for the 14 years I have been there, two members would get together and talk and then you talk to another member and of course then decide things in public, but we are not able to do that. So we are frustrated in that way.

Mr. COBLE. I got you. Thank you all for being with us.

Thank you very much, Mr. Chairman.

Mr. CUMMINGS. Thank you very much.

Just two items. Again, as I said a little bit earlier, I was impressed by the fact that you all have now moved more towards addressing some of the leadership issues and morale and staff issues, and one of my concerns is that you stay on course. So, therefore, I am going to ask that you all come back to us—not come back to us but give us a report in 90 days. Let us take a look at it to see where you are. In particular I am concerned about the issues raised by Mr. Cole.

I just want to—what is the matter, Mr. Brennan? What is wrong?

Mr. BRENNAN. I would just like to make a brief comment on the Mr. Cole matter.

Mr. CUMMINGS. Sure.

Mr. BRENNAN. Some of the things that you read in his talking points, that was done about 5 years ago.

Mr. CUMMINGS. I understand.

Mr. BRENNAN. And if you give a lot of weight to that, it would be like grading somebody who was in the eighth grade on what happened in the third grade, to use an analogy. That's 4 or 5 years ago. I think there is a substantially different Commission at this time.

Mr. CUMMINGS. I understand.

What we will do is we will put together a set of questions. And we need some benchmarks. We need some benchmarks, and then we need to measure, to see where we are going. I don't want a situation where we are talking about these same issues 6 years from now. If we are talking about them, I want us to be talking about the progress that we made.

So what we want to do, the way the Subcommittee operates is that we try to—I am going to say this in a nice way—keep your feet to the fire. So we will check back with you in 90 days. Staff will work with us on both sides—and, Mr. LaTourette, I am sure you all will work with us—to come up with some questions as to where we are on these issues.

Because we want the agency to function properly. And now that you all are meeting and it sounds like you are one big family of three and you are moving forward, we want to see that you continue to do that.

Is that all right, Mr. LaTourette?

Mr. LATOURETTE. Just one thing, I want to thank you for the positive progress that you have made since our last get-together.

Mr. CUMMINGS. I do, too.

Mr. LATOURETTE. And, Mr. Brennan, I would say that I could tell without knowing that you are not only a former Member of this House but the former Governor of Maine. Because in your observation about Mr. Taylor, a lot of us have strong feelings about his representation, and you didn't say which way those strong feelings went.

Thank you very much for being here.

Mr. CUMMINGS. The only other thing I would have is I just want to know to what extent do you all believe that ocean common carriers are colluding with regard to guidelines or the floors and the rates—with regard to the rates that are being charged even under confidential service contracts, and what impact, if you believe that there is such collusion, would you say such collusion is having on prices?

Ms. Dye, we will start with you, if you have a response. Did you understand the question?

Ms. DYE. Yes, I believe I did, Mr. Chairman.

Part of our job is to monitor all of the discussions that agreement parties have. Anytime they actually get together and hold meetings and operate under their agreements under which they get antitrust immunity, they have to report to us; and our folks make sure that they are operating within the agreement and not in ways that concern the worst of anti-competitive process, like capacity, rationalization.

Also, confidential contracting at the option of the shipper starves any cartel from information, and without information the group can't hold it together because they cheat on each other. And that is one of the reasons that we began by pulling the rug out from under the system of collusion in '98 by keeping information confidential between the shipper and the carrier. When 90 to 95 percent is carried confidentially, there is not a lot of information on which to collude.

Mr. CREEL. I would agree with that, and I would just add for those agreements that have antitrust immunity, whether it is discussion agreements or the very few conferences that exist, they have to file minutes with us.

Now, you might say, why don't they just file what they want us to hear? You would be surprised what we find out from the minutes. That is not a justification for antitrust immunity or anything. It is just a statement.

The other thing I would say is that, on service contracts, back in '98 and prior to '98, some of the carriers went kicking and screaming to agreeing to service contracts. They did not want to have service contracts. And, lo and behold, they actually like it now. They use them. They are able to tailor their contracts with their customer shippers, and it works.

Mr. CUMMINGS. I want to thank you all very much, and we will look forward to hearing from you in 90 days. I just want you to understand if we review that document and we are not satisfied, you will get an invitation to come back.

Thank you very much.

Mr. CREEL. Thank you.

Ms. DYE. Thank you, Mr. Chairman.

Mr. CUMMINGS. We will now hear from Mr. Donald Cole, who is the management consultant who worked with the FMC under the direction of his former chairman.

Thank you very much, Mr. Cole. You have 5 minutes.

TESTIMONY OF DONALD A. COLE, MANAGEMENT CONSULTANT

Mr. COLE. Mr. Chairman and Members of the Subcommittee, I am pleased to be here at your request to testify on issues at the Federal Maritime Commission.

In December 2003, Chairman Blust sought outside assistance because he wanted two things: to transform the agency focusing on compliance rather than enforcement, and to create an agency that would work in partnership with industry.

Among the major issues that I identified for the FMC during the diagnostic phase of my work were: there was no vision and no positive operational values; that the Commissioners rarely met as a group to deliberate on internal/external issues; that there was a lack of basic communication from the leadership to the staff, people were starved for information; there was a lack of trust; there was serious conflict and resistance to change.

In June 2005, the first phase ended with the chairman and the senior staff accepting my findings. We scheduled a retreat to set up groups to work on each of the major issues. The Commissioners were invited to attend that retreat. All attended except Commissioner Anderson. They were invited to be full participants, so they were certainly aware of staff efforts to improve the organization. Their support and engagement has not been strong, but they have been aware.

In November 2006, Chairman Blust and his director of administration left the agency. My contract was cancelled and my final invoice was not paid by FMC, because the Inspector General was beginning an audit and raised issues about my contract with the new director of administration, Peter King.

My contract with FMC was standard in the consulting industry, both the scope of work and the fee schedule. From 2003 to 2006, each of my invoices was paid without question and without concern. Again, it was a normal agreement, and progress was being made. I earned my fees, provided insight and recommendations for changes, and worked with the staff to implement improvements.

The audit of my contract and the behavior of the IG have been puzzling, and the IG has compromised his independence in the process. He directed management not to pay my final invoice. This instruction is clearly beyond his authority. He was directly involved in the cancellation of my contract, which occurred at the very beginning on this audit and was not appropriate. After meeting with congressional staff, he reported his discussion back to the Commissioners.

Since the chairman's departure, Mr. King has claimed to be the sole authority of FMC, stating that the Commissioners will not meet with me. Certainly the Commissioners are all aware of this controversy, even though they wanted to deny knowledge of it during your April 15 hearing.

The controversy about me and my work has cost me and the agency time, energy and money. It has caused angst for the staff. But the real issue for me, as a 37-year public servant and a 6-year consultant to Federal agencies seeking change, is that the FMC has serious problems that need to be addressed. To a large extent, the issue of my contract being cancelled acts as a diversion from the real issues.

Since Blust left the public service, inside FMC has struggled. They have toiled without leadership, lived in fear, and worked where conflict abounds. The Commissioners and SES have not stepped up to fill the leadership role. Those who could leave the agency have, due to the toxic environment. Among those who have left: four of the six employees selected for the SES Candidate Development Program, the next generation of senior leaders, the deputy general counsel, the deputy for administration, the director of EEO, the senior IT supervisor, the secretary and others.

People have reached out to me and to others for help and support because there is none to be had inside FMC's leadership.

The April 15th hearing precipitated changes, some for the better, some not. On the positive side, Commissioner Anderson resigned in May. Sadly, his counsel is being considered for permanent Federal employment. On the positive side, the EEO case that was filed by the agency's general counsel is being settled. Sadly, no such case should have ever had to be filed.

On the positive side, the Commissioners called the staff together to tell them what happened at the hearing. Sadly, they stated that some disloyal employees provided information to congressional staff and added, "This, too, will pass."

On the positive side, work may have started on the results of the Human Capital Survey. Sadly, the report lay dormant until this Committee, you, brought attention to it.

Commissioner Dye stated today, as well as the others, that changes are under way. I am encouraged to hear that. The bottom line is, your oversight is beginning to show through. Now, industry watches, the employees watch.

The future is where we must focus. The FMC needs leadership and a strategy to produce outcomes that meet stakeholders' expectations. The requisite skills for change not available within the FMC can be brought in. The Human Capital Survey and my findings and recommendations identify the challenges and offer direction. The value of those and the work of the staff can, again, be useful.

I am an optimist, but I know that hope is not a strategy. Your involvement is FMC's only chance to bring the agency back into alignment both for the staff within and to the industry it serves.

Mr. Chairman, this concludes my statement, and I will be pleased to answer your questions.

Mr. CUMMINGS. Thank you very much, Mr. Cole.

In your testimony, you provide what you indicate are the results of the organizational assessment you conducted as a prelude to intended strategic planning exercises at FMC. You then indicate that you were working closely with the chairman to address these issues, including visiting each office at the FMC together to meet with all employees to explain the issues and concerns.

Are the issues that you found in your organizational assessment a reflection of the leadership or lack thereof at the top of the organization?

Mr. COLE. Yes, sir, it was.

Mr. CUMMINGS. And how do you think that things got so bad? And was the then-chairman solely responsible? And what led him to seek to hire an organizational consultant in the first place, if you know?

Mr. COLE. I do not actually know his decision process. But I certainly think his observations, after being there for a few months, gave him an understanding of the leadership team and the skill level he had. And he knew that he needed outside help to bring about the change that he wanted to do.

Mr. CUMMINGS. Now, you heard the testimony from at least one of the Commissioners, I think it was Mr. Brennan, when I asked him a question, when I was talking about wanting him to go back and take a look at what you had done and then give us a report in 90 days. And if you will recall, he said just a few moments ago, sitting I think in the very chair you are sitting in, that he felt that your concerns were not relevant today.

Now, you know, I don't know whether you feel comfortable or you think you can answer the question, since you haven't been around there this year or the last few years. Right?

Mr. COLE. I haven't.

Mr. CUMMINGS. But the things that you saw—I guess what concerns me is that it seems as if Mr. Brennan tried to paint a nice picture. Basically, what he was saying was this: that either, one, it is not as bad as you made it out to be; and, two, that even if it were, this is a new day, and that is old stuff, and we don't need to really pay too much attention to what you have said since it is old.

Now, I know that sometimes when people look at these kinds of situations, they see certain things that are systemic, and they see things that they can almost pretty much bet every single professional talent that they have, that at least remnants of those things will go on, if not results from those problems.

And I just wanted to know, do you feel like you can render an opinion with regard to that? Do you understand my question?

Mr. COLE. I understand your question perfectly, Mr. Chairman.

I would say that certain patterns exist, from my findings in 2003 to the last two Human Capital Surveys. As you well know, trust is fundamental in all relationships. And if trust has been broken, it takes a long time to restore that. You can't do it in 60 days or 90 days and sometimes in 6 months or a year or sometimes even in a lifetime.

So while I am glad to hear Commissioner Brennan's views, I don't necessarily believe that. I would have to be there and see the results myself or have somebody else that I trusted be able to do that to say that everything is on the up and up.

These are significant fundamental issues about taking care of people, stewardship, respecting others. And it takes a long time to build that, Mr. Chairman.

Mr. CUMMINGS. And so, in all your findings, what are the things that, kind of, caused you the greatest concern? Remember what I said a few minutes ago, is that what we are talking about is effectiveness and efficiency, effectiveness and efficiency. What were your major concerns?

And one of the things that has been brought up is the whole question of people who feel, having a sense of morale, that morale being high at the institution. One of the reasons that has been presented is that people have nowhere to go, that they have sort of a dead-end situation or they don't feel that they can go anywhere.

Can you talk about that and talk about what your major findings were, in a limited amount of time, please, sir?

Mr. COLE. Yes, sir. I would say that there was no leadership team. There was no vision. And, as you know, with no vision, that people perish. There was no support and development of people. There was a sense that people were not valued, their opinions. I think the employees there—and they have some really great employees, or they did before the great exodus—had valuable information to provide and improve the operation. They just were not honored and asked for their opinion.

So in a nutshell, those three or four things: honoring the people, leadership, having a vision, and communication. Communication is always a big thing. In the absence of communication, people make up stuff.

Mr. CUMMINGS. Now, you indicated in your written testimony that you completed an interview as part of the organizational assessment with all the Commissioners, except for Mr. Anderson, who left in the middle of your interview.

Did he just get up and leave, or did you make him upset? I mean, what happened?

Mr. COLE. No, sir, I did not make him upset. Although I could do that, I think. He got up after 20 minutes and said he had to get a plane. So I said, okay. And then, as I put in my testimony, I tried to reschedule.

Mr. CUMMINGS. Okay. Well, how closely did you work with the Commissioners other than the chairman to develop and implement responses to the findings of your organizational assessment?

Mr. COLE. I met with each of the Commissioners twice or more, except Commissioner Anderson. As I stated, I invited them to the retreat to be full participants in the work of the Commission.

One of my findings, as I said, was I considered the four Commissioners and their counsels extremely valuable resources that I didn't think the Commission was using.

Mr. CUMMINGS. Say that again?

Mr. COLE. One of my findings was that there was not very much use, in my opinion, of what I saw, of the four Commissioners and their counsel, all of whom are very bright, smart people. So I considered that a huge underutilization of resources for the operation of the Commission.

Mr. CUMMINGS. That goes to effectiveness and efficiency.

Mr. COLE. Yes, sir.

Mr. CUMMINGS. Yes, so basically you have talent, but the talent is not being pulled together.

Mr. COLE. Mr. Chairman, I believe in something that is called stewardship of the whole. That is where everybody in the organization is responsible for and accountable for the expenditure of the resources that the agency is given. So no one part succeeds or no one part fails, and it is okay, everybodyis in it together.

Mr. CUMMINGS. Were you pleased to hear that the Commissioners are now meeting?

Mr. COLE. Very pleased, sir.

Mr. CUMMINGS. And if you were, since at least one of them—oh, they are all three here. Since you are sitting here and they are sitting here, they have expressed their desire to be effective and efficient, and if you were to give them a message, what would it be today?

I am not trying to mess with you. I really want to know. I am trying to make sure your testimony is effective and efficient to help us make them effective and efficient.

Mr. COLE. Mr. Chairman, I would have them develop a 12-month plan with goals, objectives, plans of action, and milestones which would identify and address the issues raised here, plus the operational parameters for their mission as chartered. In other words, are there backlogs? How are they dealing with that? Are they efficiently utilizing the resources? Is there an overload in one area and an underload in another, where they could become efficient and effective by moving people around to execute their mission?

That would be the message I would give them: Come up with a 12-month plan; report back to you in 90 days. They ought to report to you voluntarily on a monthly basis. If I was in their position, I certainly would do that.

Mr. CUMMINGS. All right. Thank you very much.

Mr. LaTourette?

Mr. LATOURETTE. Thank you, Mr. Chairman.

Welcome, Mr. Cole.

The document that I referred to when the Commissioners were still here but when they were testifying, I have with me a document called ″Thorough Maritime Commission Organizational Analysis for Discussion with Chairman Blust and the SES and Rachel.″ Are you familiar with that?

Mr. COLE. Yes, sir.

Mr. LATOURETTE. And am I correct in my observation that it is a full page and then a part of a second page?

Mr. COLE. Correct, sir.

Mr. LATOURETTE. When was that document prepared?

Mr. COLE. My handwritten document was prepared in, I believe, December 2003.

Mr. LATOURETTE. And was it subsequently converted—mine is typewritten; it is not handwritten. So when did you type it on the computer?

Mr. COLE. I am not certain when I typed it. But I can tell you that, when I was asked for it, I went back to my handwritten notes and produced it.

Mr. LATOURETTE. Okay. And let's go through that. When you were asked for it by whom?

Mr. COLE. By the Senate, sir.

Mr. LATOURETTE. And that was earlier this year?

Mr. COLE. That is correct.

Mr. LATOURETTE. Okay. And who over in the United States Senate asked you for your report?

Mr. COLE. The Senate Committee, I guess, on Transportation.

Mr. LATOURETTE. A member of the Democratic staff of the Senate Committee of jurisdiction?

Mr. COLE. I believe that is correct, sir.

Mr. LATOURETTE. Okay. And prior to that request, you had not prepared a typewritten document? It was your handwritten notes?

Mr. COLE. Actually, I was in the process of preparing a document after my contract was cancelled for my meeting which I thought was going to take place with the Commissioners.

Mr. LATOURETTE. And that was at the end of 2006?

Mr. COLE. That is correct, sir.

Mr. LATOURETTE. When is the last time that you performed an act or a service on behalf of the Commission that you would have been entitled to bill and receive compensation for?

Mr. COLE. In November, December 2006.

Mr. LATOURETTE. Okay. I ask you that because I had understood you to say—I don't know if it was in response to a question by the Chairman or maybe in your—you made some observations about things that went on at the Commission after our last hearing. And I think that you specifically indicated that the Commissioners—you praised the Commissioners for having a meeting with employees, but said it wasn't such a good idea. And I am paraphrasing now, that some bad eggs were responsible for this.

Do you remember saying that?

Mr. COLE. I do, sir.

Mr. LATOURETTE. How is it that that information comes to your attention if you are not under contract with the FMC today?

Mr. COLE. Well, Mr. LaTourette, I worked in that agency for 3 years, and I developed relationships. I think I am a good listener, and a lot of people came to me and asked for help. I think that I am fairly empathetic and nonjudgmental, and therefore I developed a great deal of trust with the employees at the Commission.

Mr. LATOURETTE. So basically they felt comfortable calling you, today, still today, calling you and just chatting about things that are happening at the shop. Is that right?

Mr. COLE. I would say that lots of people would feel comfortable contacting me.

Mr. LATOURETTE. Okay.

Back to the inception of the contract, because I am going to be straight-up with you, when you said that you earned all the money that you billed for, I believe you, and I am sure you do good work and you are good in your field and everything else. I have difficulty, I think, understanding how this contract came to be initially, and in particular on page 1 of your testimony that, "We agreed that I would only report to the chairman."

Now, this is a Commission made up of multiple members. And I don't think I am aware, and I guess I would ask you, are you aware of contracts like this where—and I get sole source and all this other business—but that you didn't have to report to all the other members of the Commission ever?

Mr. COLE. Mr. LaTourette, any top-notch consultant will only report to the top of the organization. They will not report to lower levels in the organization, because it, based on my experience and the experience of others in the field, is problematic. So my point in putting that there was to emphasize that I would only work for the top person in the organization.

Mr. LATOURETTE. Okay. And I——

Mr. COLE. Does that make sense to you?

Mr. LATOURETTE. Sure, it makes perfect sense. And I guess I would understand that better—and I am not disputing that that is your belief and that is your practice—but I would understand that better if we were dealing with a Fortune 500 company and you only dealt with the president or the CEO or chairman of the board of directors perhaps. But these men and women are all presidential appointees, and they have been appointed by different Presidents of both parties. And each of them, even though they may be a nominal chairman confirmed by the United States Senate, each of these folks has a responsibility to the organization.

I guess—and this is not a "you." I guess I am questioning the former chairman and his acceptance of an agreement where he had his own consultant that reported only to him.

And to that point, because I think I have made the point I wanted to make, but did you—I heard what you said about your handwritten notes, converted at the request of the Senate Democratic staff before this last hearing. But did you report to the chairman in writing on a regular basis?

Mr. COLE. I was typically there 2 days a month. I did an in-brief and an exit brief with the chairman most every visit. Because of the nature of some of the work that I did, there were not a lot of written reports. We were in constant communication with one another.

Mr. LATOURETTE. Okay.

And the last question—and thank you for your indulgence, Mr. Chairman.

Mr. Creel was a Commissioner that you would have sat down with and answered all your questions and so forth and so on. Did any of the Commissioners ever say to you, "Are you going to tell us what you are doing, or are you just talking to Blust?"

Mr. COLE. No, sir.

Mr. LATOURETTE. Okay.

Mr. COLE. As I said, I met with each Commissioner, save Commissioner Anderson at the time, at least twice. I met with Commissioner Creel on more than two occasions.

Mr. LATOURETTE. And the meeting that got cancelled when Blust was leaving, and then you got the call from somebody in SES who said, "Don't come, because there is this IG thing, and we took a vote, and we are going to cancel your contract," was it your intention at that meeting, if it had not been cancelled, to report to the full Commission?

Mr. COLE. It was my intention. The chairman had asked me if I would stay on through the transition to the next chairman, and I had agreed to do that.

Mr. LATOURETTE. And if your deal was you were only going to report to the chairman—I mean, what we saw with Mr. Anderson, nominated by the President a very long period of time, still not confirmed, and now he has resigned—who would you have reported to then under this contract?

Mr. COLE. I guess I would have reported to the four Commissioners.

Mr. LATOURETTE. Okay.

Thank you very much, Mr. Chairman.

Mr. CUMMINGS. Thank you.

I just want to—staff was trying to find, Mr. LaTourette, the reference, but it is our understanding that, under the law, he can only report to the chairman. And we will find that reference for you, but apparently that is——

Mr. LATOURETTE. Will the Chairman yield?

Mr. CUMMINGS. Yes, of course.

Mr. LATOURETTE. Mr. Cullather there has a great stage voice, so I have heard what he said. And that is, I agree with him that the chairman is responsible for the administrative and the head of the board.

But I would very much like to see a Federal citation that says that these Commissioners aren't co-equal, in terms of—I mean, for Christ's sake, they have been appointed by the President of the United States to oversee the agency.

Mr. CUMMINGS. I am not trying to defend anybody. All I am saying is we are going to try to find the citation for you. And Mr. Cole may not even know this. Apparently there is law that says there are certain people that he has to deal with, period, and doesn't have to deal with the others.

But this is probably a very unique situation in that we didn't have a chairman. But we are trying to look at that cite and just see exactly what it says so that we can all be clear. I was just trying to see if I could bring a little clarification to it. And we will find that cite.

Mr. LATOURETTE. Thank you.

Mr. CUMMINGS. One other thing. Do you believe that—I mean, this whole morale thing, part of the question that you didn't address is this upward mobility issue. Did you look at that part of the organization, the structure?

Mr. COLE. Yes, sir.

Mr. CUMMINGS. And what is that about, this whole thing of upward mobility? Are the positions not there?

Mr. COLE. It is as you said. There are some people who are in dead-end jobs. We tried to do some reconstruction to expand duties and to do some retraining. There is at least one FMC member in this room who was in a dead-end job who is now in another much better job, I can tell you that.

But I think there are certain jobs—and I don't care what agency you are in—that are just flat out dead-ended, Mr. Chairman.

Mr. CUMMINGS. What can be done about that, though? They talked about retraining.

Mr. COLE. It depends on the skill that is in the individual and whether they can develop other skills. If we can train them, you know, that is one option. But there are just flat-out some dead-ended jobs.

And the pity of it is that a lot of them are in the lower ranks, from GS-9 and -10 on down, the secretaries and the staff assistants and that kind of thing. And it is not a good thing. People need to earn a living wage in this country, and people in dead-end jobs feel disenfranchised when they don't do that.

Mr. CUMMINGS. What do you think other agencies do?

As you were speaking, I could not help but think about the University of Maryland professional schools which are in my district. And one of the things that they do, let's say, for example, a guy comes in as a parking attendant. And they will go to that guy and say, "Look, you have been a great employee for 2 or 3 years. We've got the hospital over here. We need orderlies. We will train you to do that. And you won't stay under the parking situation, but you will move up." And they have a wonderful system where people see themselves moving up. They have hope. They are making more money, and they see themselves progressing from one point to another.

And the program has been around 10 or 15 years now. You have somebody who would have been stuck almost at minimum wage who is now making maybe $50,000, $60,000 and feeling better about themselves, able to do more for their family, and just moving up in life.

And, you know, I am assuming that there are people like you and others who consult with folks and say, you know, "These are the kinds of things you might want to do." And I just was wondering, did you do any of that?

Mr. COLE. A little. It requires a huge horizon. It requires a lot of networking. It requires individual communication, knowing what people's desires and capabilities are and seeking those out and doing exactly what you said when you find somebody that is bright.

Mr. CUMMINGS. But I guess you have to have a good human resources person, too.

Mr. COLE. I think it is just a function of leadership, Mr. Chairman. It is not a function of human resources. I wouldn't want to put that on them. The leadership has got to pay attention and know the people.

Mr. CUMMINGS. Thank you very much.

Mr. COLE. Thank you, sir.

Mr. CUMMINGS. By the way, do you think, in the Commissioners that you have gotten to know, do you think they have the potential to do that, to do what you just said?

In other words, you said a little bit earlier that you have very bright people and they are sharp, and it is a question of them having a vision.

Mr. COLE. A lot of their talent has left, Mr. Chairman. There is something seriously wrong when you spend a couple hundred thousand dollars, I must think, to develop the next generation of your senior leadership, your SES and a candidate development program, and four of them leave. That is a huge message.

So I think, you know, they have a leadership void.

Mr. CUMMINGS. And I would assume that—do exit interviews—I mean, for some people like what you just said, I assume that somebody in your position would say, "You have to really sit down and find out why these people left."

Mr. COLE. Absolutely. I do exit interviews at a number of agencies.

Mr. CUMMINGS. Are they helpful?

Mr. COLE. Very helpful, especially in the Ph.D. Community, where lots of people come and stay for 2 or 3 years and then leave. And they leave for primarily the same two reasons.

Mr. CUMMINGS. What are those?

Mr. COLE. Those are lack of leadership and lack of support and understanding the culture in which they enter into. There is nobody that explains to them how to travel, how to do all the basic things that you want people to do. So they get disenfranchised. And for those people who are post-docs, it is easy for them. But the feelings are the same, Mr. Chairman.

Mr. CUMMINGS. You know, I read once that the greatest thing that destroys relationships between human beings are two things: one, the expectations that each party has but that are never communicated with each other. And that leads to disappointment. And they don't even know what they expected from each other. And the other part is they are assuming that the other person knows.

Mr. COLE. That is the communication and the clear expectations. You are absolutely correct, Mr. Chairman.

Mr. CUMMINGS. Anything else?

Thank you very much.

Mr. COLE. Thank you, sir.

Mr. CUMMINGS. We will now hear from Mr. Peter Friedmann, who is executive director of the Agriculture Transportation Coalition; Mr. Michael Berzon, president of Mar-Log, Inc., and chairman of the Ocean Transportation Committee of The National Industrial Transportation League; Mr. Win Froelich, who is the general counsel for the National Association of Waterfront Employers; Mr. Stanley O. Sher, who is acting president of the World Shipping Council; and Ms. Mary Jo Muoio, who is the president of the National Customs Brokers and Forwarders Association of America.

Thank you all for being with us. We are not going to ask that you use your whole 5 minutes. You don't have to. We are not forcing you.

Mr. Friedmann?

TESTIMONY OF PETER FRIEDMANN, EXECUTIVE DIRECTOR, AGRICULTURE TRANSPORTATION COALITION; MICHAEL BERZON, PRESIDENT, MAR-LOG, INC., CHAIRMAN, OCEAN TRANSPORTATION COMMITTEE, NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE; WIN FROELICH, GENERAL COUNSEL, NATIONAL ASSOCIATION OF WATERFRONT EMPLOYERS; MARY JO MUOIO, PRESIDENT, NATIONAL CUSTOMS BROKERS AND FORWARDERS ASSOCIATION OF AMERICA, INC.; STANLEY O. SHER, ACTING PRESIDENT, WORLD SHIPPING COUNCIL

Mr. FREIDMANN. Thank you, Mr. Chairman. I will try not to.

First of all, I want to say that, while I may not personally agree with every position that the three Commissioners have, I respect all three Commissioners. I think they are doing a good job. They all three take their job seriously.

And they have also initiated a program where they help your constituents, who I represent, in dealing with the steamship lines or, as you call them, and the cartels, because sometimes your constituents are small businesses and need a Government regulatory agency such as the FMC to step in, sometimes on seemingly minor matters but are major to your constituents. And so we appreciate that. And I can explain what that function is later, if you want.

Secondly, Mr. Chairman, I want to say that I am really encouraged by something you said that I gleaned out of your opening statement. You know, when you get into the Ocean Shipping Act, that sometimes takes several years of debate on Capitol Hill. You said something there that gave me an idea that maybe we have some sort of path to a solution that could get to a solution much faster. And that will take a little while to describe, but I will be happy to discuss that. But I am encouraged.

The Agriculture Transportation Coalition represents, really, the most fundamental form of the positive balance of trade of this country, the exporters.

And I will say this: There are few issues that come before this Subcommittee that warrant top-of-the-fold, front-page coverage in the Wall Street Journal, the Los Angeles Times, the Seattle Times, and every newspaper around the country in the last few weeks. I have attached to my submitted testimony the Wall Street Journal and the Los Angeles, but there are dozens of other newspapers that have been covering this issue.

And it is an issue that this Subcommittee can play an effective role in addressing. And I think you may be hearing from other colleagues of yours and other Committees, Agriculture and so forth, who are going to be looking to this Subcommittee and the Senate counterpart to start addressing some specific components.

So this is a rare issue, and I think you are going to see more in the international publications about this issue, the issue being the lack of capacity to handle U.S. exports.

So, whether it is cotton from Mississippi, whether it is poultry or pork producers in the Carolinas and poultry folks in Maryland, horticulture in Washington State, we all had a meeting, and we have had several meetings throughout this year, over the current crisis. We could be exporting maybe 20, sometimes 30 percent—depending on the sector, and particularly in poultry—more if there was more shipping capacity out of this country.

Now, we are working with the ports and others, and there are many reasons why there is insufficient capacity right now in the United States. And it is North America, East Coast, Gulf Coast, West Coast, Canada and the United States, there is insufficient capacity. And I laid out in my testimony some of the reasons.

So what is the issue that is before this Subcommittee? Is this a temporary blip, all these exporters? Is it due to the exports? Is it due to the low value of the dollar? The answer is, no. The agriculture exporters and other exporters reported that the surge of demand for U.S. exports preceded the decline in the U.S. dollar. The consuming nations—China, India, Korea and so forth—their ability to consume more and better food or the products that we manufacture in this country are indeed growing, their ability to consume is growing and will continue to grow. We are going to be an exporter.

So, what can we do about that? Well, there are only limits on what Congress can do to increase capacity. But one of our concerns is that we have a system of regulation of international ocean transportation of containerized, not the bulk ships, but the containerized cargo that is now out of synch at least with Europe, coming in October, and perhaps other countries as well.

The European Union has terminated the exemption from the antitrust immunity because they believe that it hurts the economy of Europe, the exporters and the importers. That antitrust immunity is the law that is under the jurisdiction of this Subcommittee.

Now, we, the agriculture exporters, want to work with the individual ocean carriers, and we have constructive relationships. We have put together—actually, we met in Memphis with a group of the cotton folks from the Southeast—and meeting with the individual ocean carrier and then again with another individual ocean carrier or how we can improve service, how they can improve revenues, and so forth.

Our concern is that, in transportation today, we are dealing through the filter of, well, you called it a cartel, and people don't like to be called a cartel; they like to be called an agreement or a stabilization agreement and so forth. But let me just read to you the specific law under the jurisdiction of this Subcommittee.

″The law allow ocean carriers to discuss, fix or regulate transportation rates; to control, regulate or prevent competition in international ocean transportation; to limit the volume or character of cargo that is to be carried; to restrict and regulate the number and character of sailings between ports.″

That is what the law says. People say, well, we don't do those things. But the law allows them to do that, and they may or may not be doing it. We suspect—that is what the law allows, and we don't blame ocean carriers for doing those things.

The act also states at the beginning the purposes of this shipping act. And this, again, is under this Subcommittee's jurisdiction. ″The purposes of the act are to stimulate exports, to support the U.S. Merchant Marine, and to be consistent with international shipping practices.″

Well, today, as Commissioner Creel said, 10 years have gone by. This act now is inconsistent with the European Union's regulatory scheme. Under this antitrust immunity and the Shipping Act, most of the U.S. flag liner fleet has gone out of business, unfortunately. And the act is currently, we believe, the exporters believe, undermining the growth of exports from this country. So we believe this act can and should be looked at by this Committee, and we will stand by.

I would say that we strongly support, also, the position of other constituents of yours that are represented by the NIT League and by the National Customs Brokers and Freight Forwarders and the Pacific Coast Council of Customs Brokers and Freight Forwarders, the people that are the travel agents for U.S. cargo exports. Those folks are all in agreement with the need for this Subcommittee to review the act.

Thank you very much.

Mr. CUMMINGS. Thank you very much.

Mr. Berzon?

Mr. BERZON. Thank you, Mr. Chairman. I am Michael Berzon, and I am here today representing the National Industrial Transportation League, which is the Nation's oldest and largest association of companies engaged in freight transport.

As a member of the League, I serve as chairman of our Ocean Transportation Committee, whose members are concerned with the transportation of goods via vessels, including liner carriers regulated by the Federal Maritime Commission.

The League is no stranger to the issue of international shipping and the oversight of this industry by the FMC. We were actively engaged in past reforms of U.S. International Shipping that led to the adoption of the Shipping Act of 1984 and, more recently, the Ocean Shipping Reform Act of 1998.

The League today, as it has in the past, supports a competitive, robust transportation environment which delivers timely and efficient ocean transportation services to importers and exporters who rely upon these services. We strongly believe in an ocean transport system where competition is encouraged among carriers and the forces of supply and demand determine the level of rates and charges assessed to the carriers' customers.

The reforms brought forth by OSRA, most significantly the introduction of confidential contracting between liner carriers and shippers and later with third-party intermediaries, have resulted in commercial benefits for both carriers and their customers, as well, and has improved the working relationship between them.

Despite these significant statutory and regulatory reforms, we do not believe it is appropriate to stand aside and admire our past accomplishments. Ocean liner carriers still engage in collective discussions regarding supply and demand, as well as establishing benchmarks for rates and surcharges for the U.S. trades through carrier organizations known as discussion agreements. This ability leads shippers to question why liner carriers cannot establish their pricing based on individual costs plus a reasonable return on investment, like other industries that operate internationally.

We believe that Congress should conduct a comprehensive review of the Shipping Act. The international liner shipping industry has changed substantially over the last 10 years, in part driven by the Shipping Act reforms of the 1980s and 1990s. Additionally, the forthcoming deregulation of the maritime industry in Europe will eliminate the ability of carriers to fix prices and will give European companies a distinct advantage over their U.S. counterparts.

It is important to note that the independent Antitrust Modernization Commission told Congress last year that the antitrust immunity afforded to liner carriers has outlived any utility and should be repealed. Finally, where antitrust immunity has in the past existed for other transport modes, action by two executive branch agencies in the last year has resulted in repealing antitrust immunity for sectors of the aviation and motor carrier industries.

The League believes there are serious questions on whether carrier liner immunity should be continued in the U.S. trades. If Congress agrees with this conclusion, it is clear that other reforms will be necessary. For example, service contracts must now be filed with the FMC. Service contracts are by far the dominant way that liner shipping is conducted today. This filing requirement was designed to facilitate enforcement of certain prohibited acts in the Shipping Act and to monitor joint carrier activities.

While the FMC rarely reviews these contracts except in the case of a complaint, contract filing is an expensive administrative burden and cost to the carriers that ultimately falls back on their customers. In our view, this requirement has devolved to a make-work project that has little or no value and could easily be eliminated or modified.

We have already submitted the list of modifications that the League suggests to the Shipping Act, and I won't go through them here. But if the reforms that we propose in that context were adopted, the proper role and structure of the FMC would then need to be addressed by Congress.

In conclusion, we believe the time is right for Congress to review the Shipping Act and to determine whether additional reforms could result in greater competition, efficiencies and other benefits to U.S. businesses. The review should examine the value of antitrust immunity in light of changes in the industry, the great strides that have taken place in Europe, a major trading partner and competitor, the recommendations of the AMC, as well as repeal the antitrust immunity in other modes of transportation.

We believe this review will result in changes which will lead to a more efficient competitive and vibrant maritime industry which will be best suited to serve our Nation's needs. Thank you.

Mr. CUMMINGS. Thank you very much.

Mr. Froelich?

Mr. FROELICH. Thank you, Mr. Chairman and Members of the Committee. My name is Win Froelich, and I am the general counsel of the National Association of Waterfront Employers. NAWE represents the marine terminal operators and stevedores who load and unload the ships in virtually all of the Nation's ports.

Let me make three quick points. I have gone into great detail in the written testimony. One, the first one goes without saying. We are a maritime nation. Twenty percent of the world's maritime commerce comes to or from the country. Fifteen percent of the U.S. GDP goes through our ports. That, I think, under-represents the impact that our ports have on the U.S. economy, because that 15 percent goes and creates other jobs in every State and every city and every county in America.

Second point: The regulation of the maritime commerce of the United States is exclusively a Federal responsibility. The reason our Constitution was founded was to take regulation of maritime commerce away from the original 13 colonies and give that responsibility to the Federal Government. Now I believe that any review of the Shipping Act should include a review of that Federal responsibility, and that Federal role in regulating maritime commerce needs to be strengthened.

Third and finally, I know the Committee is considering changes related to antitrust immunity. Mr. Chairman, you mentioned tariffs. Let me request that the Committee consider any changes related to ocean common carriers separate and apart from changes related to marine terminals.

The reason is the economic environment and the legal structure that marine terminals operate in are very different than the issues confronting ocean common carriers. And NAWE members believe it is important that those be considered separately and distinctly to have the merits addressed on their own basis.

So, with that, I will stop and turn it over to the next witness.

Mr. CUMMINGS. Thank you very much.

Ms. Muoio?

Ms. MUOIO. Thank you, Mr. Chairman. I am Mary Jo Muoio, president of the National Customs Brokers and Forwarders Association of America. And I am senior vice president of Barthco, International, a division of Ozburn-Hessey Logistics, a company providing international logistics services.

Members of the NCBFAA provide U.S. exporters and importers, both large and small companies, with the transportation and logistic services that are essential to the movement of their goods in international trade.

By the way, Mr. Chairman, let me tell you how appreciative our Baltimore members are of the attentiveness you have to the port and the shipping issues. And they asked me to send you their regards.

The Shipping Act refers to us as ocean transportation intermediaries. The members of the NCBFAA are an essential cog in arranging for international ocean shipping both into and out of the United States. Ocean freight forwarders and NVOCCs arrange for the actual movement of cargo aboard the vessels owned or operated by the steamship lines but are regulated somewhat differently. Without getting into too much detail at this point, suffice it to say that both ocean forwarders and NVOCCs are subject to extensive regulation by the Federal Maritime Commission.

We have numerous issues before the FMC that we address in full in our written testimony, such as the anachronistic retention of antitrust immunity and the puzzling conclusion emanating from the FMC last Friday. However, in the interest of observing the time limits, let me address our most pressing concern.

At the outset, it is worth noting that ocean freight forwarders and NVOCCs are the only entities that are subject to the licensing and bonding requirements of the Shipping Act. More specifically, the Shipping Act requires that any company in the United States providing services as an ocean freight forwarder or under the NVOCC must be licensed by the Commission and otherwise obtain a bond or other proof of financial responsibility that would be available to pay claims to the public or Government arising out of their ocean transportation-related activities.

In addition, although foreign-based NVOCCs are not subject to the Commission's licensing requirements, they are also required to maintain FMC-mandated levels of financial responsibility. The NCBFAA has long-supported the Commission's implementation of its statutory licensing and bonding requirements.

Another aspect of the current policy, however, does carry undue and totally unnecessary burdens; namely, the requirement that NVOCCs publish and maintain rate tariffs.

Section 8 of the Act requires that both the vessel operators and NVOCCs publish the rates to be charged the shipping public for moving cargo in international commerce. This is the embodiment of the concept of common carriage that was originally established for ocean shipping. The idea behind common carriage, of course, was to prevent undue discrimination so that all similarly situated shippers would be entitled to receive comparable rates from any carrier.

The passage of the Shipping Act of 1998, however, substantially transformed the ocean shipping industry in a number of ways. Perhaps chief among these changes was the rapid and almost total shift from the public rates applicable to comparably situated shippers through the system of common carriage created by the Shipping Act of 1916, to the privately negotiated contract carriage that.

Now, through the introduction of confidential service contracts, carriers may negotiate individualized rates with each of their various customers. And, unlike before, carriers no longer have to file extensive publicly available information with the FMC outlining the details of their charges.

OSRA did not authorize NVOCCs to enter into confidential service contracts with their customers, but the changes brought by the Act were just as significant for us.

In the post-OSRA environment, shippers no longer rely on pre-established rates in determining how or when to ship or in selecting which carrier or NVOCC to utilize. Four years ago, the NCBFAA petitioned with the FMC asking for regulatory relief by exempting NVOCCs from having to publish and maintain freight tariffs in those situations where they have separately negotiated rates with their customers. The FMC ultimately did agree to utilize its exemption authority, but only to authorize NVOCCs to enter into what are called NVOCC service arrangements, or NSAs, and denied the broader relief sought by the NCBFAA.

The granting of NSA authority has been little utilized by the industry for many reasons but primarily because they are of little use to both the shippers and NVOCCs. Consequently, these anachronistic regulatory requirements compel NVOCCs to continue to memorialize negotiated rates by publishing rate tariffs despite the clear record that these rate tariffs are almost never reviewed or used by customers; the NVOCC rates are almost uniformly negotiated individually with individual customers and only later published; and that the cost of tariff publication needlessly increases NVOCC costs, thereby reducing flexibility and competitiveness.

In the view of the burden and unnecessary costs resulting from continuing this mandated tariff rate publication, the NCBFAA will in the near future again request the FMC to utilize the liberalized exemption authority.

Mr. Chairman, this concludes my remarks, and I would happy to respond to questions.

Mr. CUMMINGS. Thank you very much.

Mr. Sher?

Mr. SHER. Thank you, Mr. Chairman, Members of the Subcommittee. My name is Stanley Sher. I am the acting president of the World Shipping Council.

Essentially, the World Shipping Council's members are the carriers that you have heard discussed here earlier. We are, of course, the carriers that are regulated by the agency. Therefore, we have a very, very definite and strong interest in seeing that the regulatory system be clear, fair and flexible. That is our main objective.

I have explained the role of the FMC in my testimony, and I have extensively gone into certain things we think the Commission can do and where it is headed over the future time. In the few moments I have, I would like to, if I can, talk about three things.

The first one is there is general agreement that the major congressional overhaul of the Shipping Act of 1998 achieved exactly what Congress desired. What has happened is that the objectives of the Congress were achieved. The ocean carriers' authority over rates were significantly decreased, and the negotiating powers of the shippers were significantly increased.

The amendments are a true success. The system in the United States, since the revisions in 1998, is competitive, commercial and flexible. And, indeed, the major beneficiaries of the revisions to the Shipping Act in 1998 are the U.S. exporters. That isn't completely due to the act, but it is due in part to the act and in part to the economics.

U.S. exporters, for the last 10 years, or at least the 9 1/2 years, have shipped their goods all over the world from the United States on container carriers with service on 2 to 3 days' notice at exceedingly low rates. The rates have been so low that I would term them to be noncompensatory.

As a matter of fact, I will make the more broad statement, and that is, on virtually every voyage over the last 10 years that has left the United States with U.S. exports, the carriers lost money. So the U.S. exporters have been the beneficiaries, partly because there was significant excess capacity for those 9 1/2 years. That has changed over the last 6 months, and I will talk about that in a minute.

The second point I want to talk about briefly is the change in the European law. Two points.

The first point is that, even after the European repeal, the majority of countries in the world will still grant an antitrust exemption of different types to liner operators. In other words, Europe will be in the minority; the United States will still be in the majority.

But the point I want to make, and maybe it is the most important point, is this. This debate over antitrust immunity has been going on for years. The arguments are always the same. The one thing that is lacking and has been lacking since the 1960s, 1984, 1997, have been involved in the situation in Europe, and that is we don't have any real facts. The repeal of the European system gives us that opportunity. Because the system has been in effect for 140 years worldwide, we have never had an opportunity to say, what does it look like when you don't have this system? In Europe, we now have that opportunity.

The Maritime Commission is going to study it. It seems to us—and we are not dogmatic on this—that makes all the sense in the world. Let's look at this, let's get the facts, and then take a look at the system and see how it has worked in Europe. If it hasn't worked or there are problems, we can learn from them. We don't have to learn on the job ourselves. If it turns out that there are benefits to it, we are perfectly prepared to look at them.

Our point, though, is the system works, works well now. And it seems to us that people that want to change it should have the burden to establish the need for change.

My last point is the export situation that Mr. Friedmann spoke about. I guess if I had one point I would leave with the Subcommittee on, it is this: this is a sharp turn of events that has come about over the last 6 months. But our customers are struggling, and we are also struggling with them to provide the type of space they have been used to on 2 and 3 days' notice. It has been difficult.

So the point I would like to leave with you is this: The ocean carriers are concerned about this. We are working to do something about this. We are not ignoring it. But we must be realistic. There are significant economic forces going on in the world right now—and I describe those in my testimony—that make this flexibility very difficult to achieve.

I think there are things we can do. I think we will sit down with our exporters, and we will make some changes. But this is a joint problem. It is their problem, and it is our problem. At the end of the day, it is a commercial problem. Each of these shippers has contracts with us. We must address it as such. I know that carriers intend to do it, and do it in good faith. I think we can find some solutions, but they are not going to be easy.

Thank you.

Mr. CUMMINGS. Thank you very much.

Mr. LaTourette?

Mr. LATOURETTE. Thank you, Mr. Chairman.

I thank all of you for coming.

Before I ask this panel any questions, Mr. Chairman, I just want to thank you and Mr. Cullather for your courtesy. And Mr. Cullather has shown me the citations you were referring to. And, although I perhaps don't agree with it, I will concede the point.

But I just want the record to be clear, my concern is not with Mr. Cole. I think my concern is that, if this is the law or the regulation, that the chairman of a commission where all members are appointed by the President of the United States can enter into his own contract for a person that reports solely to him, and then—but, in this instance, when there was no chairman, apparently we don't know who he is going to report to, one; and, two, that the first time that this document, which I guess I would ask unanimous consent to be made part of the record——

Mr. CUMMINGS. So ordered.

Mr. LATOURETTE. —Mr. Cole's report is seen by the Commission after it is delivered to the United States Senate. And I think that it doesn't matter who is in charge, I think that is a strange way to do business.

And so that is the point I want to make. But I thank you for your courtesy.

Mr. LATOURETTE. I want to talk about this container shortage, because, Mr. Sher, I was very interested in your last point. What we are hearing, when you say things like 2 to 3 days, some of the shippers that we have talked to indicate that they can't find containers if they are not near a port or a container storage facility.

And then they can't get on a ship unless they have a reservation for as far as away as 6 weeks. And I think that is of a concern.

And I guess I would ask you, is the sharp turn that you are talking about in the last 6 months, again, I have been told that it is more cost-efficient, if you will, or you can make more money. And I heard what you said, that they sort of got a free ride for 9 1/2 years. But that it is better from a profit standpoint to send empty containers back to Korea and China than it is to put, I think as one of the Commissioners indicated, American agricultural products on board.

Mr. Sher, I guess I would start with you.

Mr. SHER. Well, I think, first of all, what I would start with is this. And it is more a question of a little bit of common sense. And that is, the carriers are in the shipping business. They are in the shipping business to transport cargo. There would be no reason for them to do anything that would interfere with the growth of their customers, and that is, the growth of our customers is also our growth.

What has happened here is that there is a combination of things. One, the exports have boomed, absolutely boomed. Some commodities have gone up 100 percent.

The second aspect of this is that you have to look, you can't generalize on this, because you have to look at each geographic area because they are different. And that is, in Europe the situation is different; in Asia, the situation is different; in South America, it is a little bit different. But let me talk about Asia, because that is the biggest trade.

What is happening here is that the ships are full; they are full going out. I think this is going to get a little bit better now, because some additional capacity is coming into the trade. The head haul part of the trade is the inbound; that is where the money is. That essentially subsidizes the outbound, the export. That trade is seasonal, and the season is now picking up, so I expect additional capacity to come in. I don't think it will necessarily solve the problem, but I think it will go some ways to alleviating it.

The problem is partly an operational problem. When the ships are going out, outbound, they are full. We, unfortunately, in the United States export a lot of heavy, low-value goods: metal scrap, wastepaper. Those commodities are so heavy compared to what is coming in that you can't load some of these ships more than 60, 65 or 70 percent, because the dead weight is such that you create safety or stability problems. So we have this constraint. That constraint was not a problem for 9 or 10 years because there were so little exports that, even filling 50 percent of the ship, we still didn't fill the ship.

Mr. SHER. Now we are filling the ship. There are some empties on that are going back to Asia. But that is part of the service. If you can't get those containers back to Asia, you can't service the U.S. retailers that are bringing the cargo back. So it is a balance. And we are trying to get it into a little better shape, but it's going to take some time.

I mean, this isn't unique to us. You have all sorts of businesses where there is a sudden and violent shift in the marketplace and they are overwhelmed at times. We have to deal with it, and we are dealing with it the best we can.

But the point is you can't—one more point and I will quit. What adds to the problem is the cost of fuel. There may have been a time in the cost of cheap fuel that maybe you would put a ship in and you would say, well, it won't be used efficiently and we will bring it back half empty. Our fuel costs have gone up so rapidly, just 25 percent since the beginning of the year, that to send a container ship from the United States' west coast round trip on a 28-day voyage to Asia costs more than $4 million in fuel alone. So if we are going to be here, we have also got to be very careful and make sure that we use our assets efficiently and effectively. So there is the weight constraint, the operational constraint, and the economic constraint.

Mr. LATOURETTE. Right. I get all that, and I think my concern is these empty containers. And I have heard what you said. I am not unmindful of the difficulties that you have, but there is something wrong in the trade of balance equation when we have got all this stuff coming in and it is more cost effective for your shippers to take empty containers back than it is to load them with American goods and send them back over to Asia.

And on the fuel we are having a rather spirited discussion here on Capitol Hill about the cost of energy, and I expect it will continue on. And I can just tell you on this $4 million for a voyage, I was with the Commandant of the Coast Guard on Monday. He was kind enough to come to Ohio, and he indicates that, as a result of some of the melting of the polar ice cap, we may have a trans-Siberian route opening up in the near future that could save you $2 million. So I hope, should that occur and you are now able to sail more directly and save 2 million bucks in gas, that you take some more American-made stuff and less empty containers.

But thank you, Mr. Chairman.

Mr. CUMMINGS. Thank you.

I only have a few questions.

Mr. Sher, outside of the possible need for the ability to engage in collective discussions regarding the rationalization of certain services, under what basis and justifications should Congress maintain antitrust exemptions?

Mr. SHER. I think there are a number of considerations.

One—and I go back to—I think it would be very informative to see what the FMC study is of the European system versus ours, so you may get some benefit from that. But, beyond that, I would say this:

First of all, I think, one, there is a question of comity. That is that our major trading partners, except for Europe—all over the world. I am talking about Australia. I am talking about China. I am talking about Japan, Canada—all maintain an exemption. So there still the balance tips in favor of comity.

I would say the other thing to weigh is that the antitrust immunity is not just for carriers. You have heard the marine terminal operators in the United States have an antitrust immunity and want to maintain it. The ports, U.S. ports, that have filed a statement with the Subcommittee have an antitrust immunity and want to maintain it.

But I think that my principal argument would be that it has created a competitive, robust environment and that before one changes something that is working you ought to look very carefully at what the reason is, what the grounds are, and what you expect to get.

I think that, in terms of the immunity itself, one also has to look at what we are really talking about. And that is, as the Maritime Commission pointed out and we pointed out to some extent in our testimony, there must be 200 or 300 antitrust-exempt agreements on file with the Maritime Commission, and I would say probably less than 15 have to do with rates.

So the antitrust immunity does not just deal with rates. It deals with a number of other things. One of the things it deals with is—and the ocean carriers probably have 200 of these on file. They deal with what I would call asset-sharing agreements. These are efficiency promoting agreements, and this is the exemption that the Europeans have continued.

So, Mr. Chairman, in response to your question, what I would say is that one aspect of the antitrust immunity which is very important is it promotes efficiency in terms of providing broader multipurpose services; and I would say, without that exemption, our problem with U.S. exporters would be worse, not better.

Mr. CUMMINGS. All right.

Mr. Froelich, you have argued in your testimony that antitrust immunity remains critical for marine terminal operators; is that right?

Mr. FROELICH. Yes, sir.

Mr. CUMMINGS. Couldn't that antitrust immunity be retained for terminal operators even if the antitrust immunity for ocean common carriers were removed?

Mr. FROELICH. It could. And NAWE's position certainly is the two need to be considered separately. Again, the economic issues, the legal issues are very different when it comes to terminals located in the United States versus ocean common carriers that obviously travel the world.

Mr. CUMMINGS. Ms. Muoio, vessel-sharing agreements have generally been viewed as positive for importers and exporters because they allow a carrier to offer a service every day of the week, even if it is not on a carrier's own ships but is instead on a ship owned by someone in the agreement. For example, in the aviation world, this is called ″co-chairing.″ Do you think that these types of agreements are good or do they ultimately limit the best and increase prices?

Ms. MUOIO. We actually support anything that will lead to efficiencies, Mr. Chairman.

However, with respect to antitrust immunity, we see that there is certainly an opportunity for negative consequences to come out of this, that being opportunities for setting prices, limiting competition, driving down service to the United States, which could actually exacerbate the container shortage situation.

We also find in our sphere of the world that it has the result of driving up the prices for the NVOCCs.

Mr. CUMMINGS. Now, Mr. Friedmann and Mr. Berzon, just one quick question. Are there some activities by carriers in conferences for which antitrust immunity should be retained because they benefit importers and exporters, such as the ability to charter space on each other's vessels?

Mr. FRIEDMANN. This is something that gets a little bit closer to your initial point in your opening statement that I think gets us to a pathway. We have talked to the Justice Department. We have talked to the Judiciary Committee. They have been involved in it. Last week, we had our meeting and we had the soy and specialty grain exporters from the Midwest, and we talked about all these issues.

The fact of the matter is you can do joint ventures without having antitrust immunity. Anybody who is familiar with any of the transportation modes under the jurisdiction of this Committee or construction and so forth can have joint ventures. So these efficiency enhancing initiatives, which are very good—vessel sharing and slot charters and all the rest—fine. Good. And they can clearly function without antitrust immunity. You see that in all industries, and the Justice Department and the Judiciary Committees here on the Senate side will confirm that.

So, yes, efficiency enhancing is good, but it doesn't request antitrust immunity. Antitrust immunity is needed to collectively get everybody together to fix the prices, to discuss the terms, even the terms that find their way into the so-called confidentially negotiated service contracts. And all you need to do is read the press releases from the ocean carrier agreements to see exactly what they agree on doing and then you can judge for yourself whether you want them to do that.

Mr. CUMMINGS. Mr. Berzon.

Mr. BERZON. I agree with what Mr. Friedmann has said. We feel that the ocean carriers should be able to make money. I mean, if they make money, then they can invest in ships. They have got to, at the very least, earn their cost of capital. And it is capitalism, and it is the way American business thinks. We have no problem with that.

What we have a problem with, though, is price fixing, fixing the service terms, the surcharges, and other ancillaries. And what happens is that when the—even with contracts, as long as the ocean carriers have the opportunity to get together and talk about these issues of——

Let's take the fuel surcharges, for instance. There is no question that the price of fuel is going up, but do the carriers need to have benchmarks to then use when they come to the shipper to write contracts? We think they should not be able to do that.

We want to work one on one. We want to be fair. There is no question about that. But we don't want the carriers to come in with a benchmark that four or five or how many of them have put together. We want to negotiate that from scratch.

Mr. CUMMINGS. Mr. LaTourette.

Mr. LATOURETTE. Thank you, and I will be brief.

But, Mr. Friedmann, on my container question, I had to leave the room to meet some constituents. Did you have an observation about empty containers that you wanted to make?

Mr. FRIEDMANN. Yes. The world changes. For the last 20 years, imports have been flooding into this country. That was the ″head haul″. The ocean carriers allocated containers—allocated ships to this service to handle the imports. Whatever exports went on the way back, that was fine.

Things have changed. It may well soon be—and we had exactly this discussion with the Midwest grain exporters—that the head haul may soon be the exports. And if you see the dramatic increase in the costs being agreed to or charges being agreed to by the agreements, by the conferences, cartels, whatever you want to call them, that generate increases and the fuel surcharges, and you see upon whom those are being imposed, they are being imposed on U.S. exporters more than they are being imposed on the importers.

So the stuff coming in from China, the manufactured parts coming in from China, may not be paying all the fuel surcharges that the collectors have agreed to being imposed. They may not be paying them all, but the U.S. exporters are paying them.

So we don't know exactly what the revenues are; and, frankly, we don't care to know what the carriers collectively are doing. We want to deal with an individual carrier. Let them each decide how much fuel should be charged and so on.

Now, on the containers going out, we believe that this long-term trend, this is not—you talk to your agriculture folks throughout the country. None of them believe this is due to the temporary blip of the dollar going down. The dollar comes up, and this demand will continue for a long time, therefore justifying more revenue to the carriers because the people in this country will be willing to pay.

Now, here is our problem with the conference deal collectively, and we heard it just 2 days ago when the largest cotton exporters out of this country said, do you know what I want? I want to talk to my ocean carrier one on one, and I want to tell him how much more I would be willing to pay, if that is more.

And we took a survey in our workshops. We asked exporters, how many of you would be willing to pay more, 50 percent, 100 percent more, if you could get the containers, the vessels? You know what? Virtually every hand went up. But you know what? The carriers acting at the conference agreements aren't talking to the individual exporters. The individual carriers aren't talking. It is the conference talking. And they set sort of a benchmark, and they don't know what the demand is for your exporters for a space. And if they did, we believe there would be more containers and more ships allocated to this trade if they could talk individually without going back.

Mr. LATOURETTE. Thank you for that.

And, Mr. Chairman, I think I need to ask you to respond to that. Because if Mr. Friedmann is accurate, that troubles me. Are shippers charging American exporters more in tariffs, fuel surcharges, other fees to send our stuff overseas than you are to bring it into the country?

Mr. SHER. Categorically not. The facts are these. What Mr. Friedmann has just said, as far as I am concerned, is something I have never heard; and I don't relate to it all.

First of all, it doesn't make any sense. All these contracts are negotiated one on one, the shipper and the carrier. They sit down together, and they negotiate. I cannot believe, as it runs contrary to common sense, if a shipper comes to one of our carriers and says

I want to pay 50 percent more and what does our carrier say? No? I mean, I don't understand that.

Mr. LATOURETTE. I hear you. That doesn't make sense to me either, but I think their observation——

Mr. SHER. But let me give you the facts.

Mr. LATOURETTE. Let me just finish my thought. I think their observation is that that is right, that there is a contract negotiated but everybody has gotten together ahead of time and set the floor, maybe not the ceiling but the floor. That's the allegation I heard.

Mr. SHER. Let me go back and mention one point. Because this discussion, as I indicated before, where I thought it was good for the FMC or somebody who was studying to get the facts because we get these sweeping generalizations without the facts—the facts are the last time I looked at it the average rate coming inbound to the west coast for the imports, the average rate was in the $2,000 category; and in the outbound the export rate, the average rate was in the $1,000 category. So $1,000 differential or 100 percent, depending on how you do your math. The rates are not higher going out than they are coming in. That hasn't been the case for at least a decade.

Mr. LATOURETTE. Thank you very much.

Mr. Chairman, I guess I know why they are seated at the opposite ends of the table.

Mr. SHER. You noticed that.

Mr. CUMMINGS. Ladies and gentlemen, we are bringing this hearing to an end. We want to thank all of you for your presentations. There may be some follow-up questions to some of you, if not all of you.

We will continue to be vigilant. If you have heard anything during this hearing that you want to add—in other words, if there are things you need to add to what you have already said, we welcome your comments.

The hearing is adjourned.

[Whereupon, at 5:05 p.m., the Subcommittee was adjourned.]

SUBCOMMITTEE ON COAST GUARD & MARITIME TRANSPORTATION

**"Federal Maritime Commission
Management and Regulation of International Shipping"**

**June 19, 2008 – 2:00 p.m.
Room 2167, Rayburn House Office Building**

Script of Chairman Elijah E. Cummings

The Subcommittee will come to order [GAVEL].

Today, the Subcommittee convenes for a second hearing on the Federal Maritime Commission.

The Subcommittee held its first hearing on the Commission in the 110th Congress in April of this year. At that time, there were four Commissioners – and in the absence of a Chairman, all four were collectively responsible for administrative decisions as well as for deciding on the regulatory issues brought before the Commission.

However, the Commission rarely held public hearings and testimony suggested that the four Commissioners had limited visibility over the functioning of the Commission.

Additionally, responses to the Federal Human Capital Survey suggested that employees at the Commission had deep concerns about a number of issues, including the effectiveness of the management exercised by senior leadership, fairness in the resolution of disputes and complaints, and the ability of the Commission to recruit qualified personnel.

Between April and today's hearing, the Commission has begun convening regular public meetings. Further, Mr. Paul Anderson, who had been serving as a Commissioner and had been nominated by the President to be Chairman of the Commission, has resigned from the Commission and withdrawn his nomination to be Chairman.

We look forward to hearing the testimony of the three current Commissioners regarding the steps that they are taking to effectively administer the Commission and conduct the Commission's business.

We will also receive testimony from Mr. Donald Cole, a consultant who had been hired by the FMC's former Chairman to lead a strategic planning initiative at the Commission. As a prelude to the strategic planning effort, Mr. Cole conducted an organizational analysis that uncovered findings that in many ways echo the concerns expressed by Commission employees in the Federal personnel survey.

The effective functioning of the Commission is critical because it must be prepared to respond to the dramatic changes that are occurring in the international shipping arena.

The organization of the maritime industry – and the pricing of carrier services – are unique and are, to be frank, generally contrary to the standards of competitiveness within an open market system that most other industries are required to observe.

Tariffs for ocean freight transportation have historically been set by cartels of liner services, often called "conferences."

In 1916, Congress passed a Shipping Act that formally sanctioned the existing cartel system by granting immunity from anti-trust requirements in certain circumstances for the tariff decisions and other actions taken by ocean common carriers acting in collusion with one another.

In 1961, Congress enacted legislation to require that the agreements decided by cartels be filed with the Federal Maritime Commission, which was established by legislation as the successor to the U.S. Shipping Board.

The FMC was empowered to reject those agreements that were found to be "contrary to the public interest" – but many in the industry complained that the FMC often took years to grant approval.

Congress revisited the regulation of ocean shipping by enacting the Shipping Act of 1984. This Act took a first step toward the introduction of pro-market competition in rate setting by allowing carriers to enter into service contracts with shippers; however, the cartels still often limited the ability of carriers to sign such agreements.

At the same time, the Shipping Act altered the FMC's authorities by eliminating the power of the Commission to reject agreements that were not found to be in the public interest. Instead, agreements filed with the Commission were allowed to go into force unless challenged by the Commission as being likely to reduce competition or lead to "an unreasonable reduction in transportation service or an unreasonable increase in transportation cost."

The Shipping Act of 1984 was subsequently amended by the Ocean Shipping Reform Act of 1998, which allowed carriers to establish confidential service contracts without the approval of conferences and without the disclosure of the negotiated rates. Nonetheless, the Act did not eliminate the conference system and the Act continued to grant anti-trust immunity to many acts taken by carriers acting in collusion with one another.

The European Union is now taking the next step in the deregulation process and will eliminate its so-called "block immunity" for ocean carriers in October of this year. As a result, carriers will no longer be able to collude in the establishment of tariffs for service to Europe. At present, anti-trust immunity will continue to be granted by the

European Union for other types of agreements among carriers relating to service provision.

The full effects that this move will have on international shipping – and particularly on ocean carrier service to the U.S. market – remain to be seen but will certainly be critical.

The witnesses who will appear on our third panel today will present multiple perspectives on this issue.

Some will argue that the maritime transportation market continues to have characteristics that require it to be exempted from competition requirements – and they will argue that anti-trust immunity enables carriers and other actors in the maritime industry to address critical public policy issues, such as congestion and air quality around ports, that they would not or could not address on their own.

Others will argue that the United States should follow the EU's move by eliminating anti-trust immunity for ocean common carriers because carriers are constraining the ability of shippers to move their products to foreign markets and because the anti-trust immunity allows them to charge rates higher than would be charged in a purely competitive market.

This is one of the most critical issues facing not only international shipping today but really the American economy – which is so dependent on ocean common carrier services to move the cargoes that keep our economy moving.

I look forward to the testimony of today's witnesses and also look forward to continuing to examine this issue as data recording the impact of the EU's actions become available.

With that, I recognize the Ranking Member.

Statement of
Chairman James L. Oberstar
Hearing on
Federal Maritime Commission Management
and
Regulation of International Shipping

June 19, 2008

Mr. Chairman, thank you for scheduling today's hearing to look at management issues at the Federal Maritime Commission.

I applaud you Mr. Chairman for the six hearings your Subcommittee has already convened this year. I appreciate your follow up on important issues and the issues within the Federal Maritime Commission are important.

During the last hearing, issues with leadership and the management of the Commission were raised. Results of a Federal Human Capital Survey revealed budgetary concerns, low employee moral, a lack of leadership and communication, and a host of other management issues.

We have Mr. Cole, a management consultant who reviewed the management at the FMC for the then chairman of the Commission, Steve Blust, here to testify today. I look forward to your testimony.

Mr. Chairman, at the last hearing, you told the Commissioners you wanted to hear what steps they were going to take to address the management issues at the Commission. As always, you are a man of your word.

Some of the issues raised concern trust and leadership by the Commissioners and senior staff of the Commission. We recognize that it takes time to build trust and we do not expect that a few changes in the past 60 days will fix all of the problems. However, we would like to hear what changes have been made to correct the issues within the Commission and what the Commission is doing to implement processes to address the longer-term problem. The last hearing was not meant to tear down the Commission, but to highlight the problems and ensure they are dealt with, so the Commission can fully and wholly serve its purpose and be worthy of the support of the American taxpayers money.

We will also be hearing from the Agriculture Transportation Coalition, Ocean Transportation Committee, World Shipping Council, the National Association of Waterfront Employers and the National Customs Brokers and Forwarders Association of America. International shipping is critical to the U.S. economy. I am concerned by reports that U.S. exporters are unable to get their goods to foreign markets and believe that the carriers need to address this problem. Regulation of international shipping has changed dramatically since the advent of confidential service contracts in 1998. Now the European Union is taking further steps to eliminate much of the carriers' antitrust immunity in those trades. The global transportation system is dynamic and evolving, and it is imperative that the United States adjust its regulations to meet the growing demands of U.S. importers and exporters. I also look forward to your testimony.

Chairman Cummings, I am privileged to work with you and Ranking Members Mica and LaTourette to ensure the Federal Maritime Commission is operating in a positive and productive manner.

Thank you.

STATEMENT OF MR. MICHAEL BERZON

PRESIDENT, MAR LOG, INC.

on behalf of

THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE

1700 N. MOORE ST.
SUITE 1900
ARLINGTON, VA 22209
703-524-5011

Before the

MARITIME AND COAST GUARD SUBCOMMITTEE OF THE

COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE

UNITED STATES HOUSE OF REPRESENTATIVES

Regarding

THE FEDERAL MARITIME COMMISSION MANAGEMENT AND

REGULATION OF INTERNATIONAL SHIPPING

June 19, 2008

Before the

MARITIME AND COAST GUARD SUBCOMMITTEE OF THE

COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE

UNITED STATES HOUSE OF REPRESENTATIVES

STATEMENT OF MR. MICHAEL BERZON

on behalf of

THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE

June 19, 2008

Chairman Cummings, and members of the subcommittee, I am Michael Berzon, President of Mar-Log Inc., located in North East, Maryland. My company provides consulting services to shippers in the area of logistics and supply chain. Prior to establishing Mar-Log, I was employed by the E.I. DuPont de Nemours and Company for 27 years. At DuPont, I held a number of different positions involving the management of DuPont's maritime transportation services procurement and responsibility for marketing in Latin America.

I am here today representing The National Industrial Transportation League ("League"). The League is the nation's oldest and largest association of companies interested in transportation. The League's more than 600 members range from some of the largest companies in the nation to much smaller enterprises. The League's members primarily include companies that move their products through our country's transportation network and are engaged in the movement of goods both domestically and internationally. These members ship their products via all modes of transportation, including ocean transportation, and they export and import products to and from points all over the world. League members also include carriers and transportation intermediaries that arrange transportation services. Therefore, our members are greatly affected by our nation's maritime policy. However, most of our members are customers of the ocean liner carriers.

I am the Chairman of the League's Ocean Transportation Committee, which is composed of League members concerned with transportation of goods via vessel carriers, including the ocean liner carriers that are regulated by the U.S. Federal Maritime Commission.

I. INTRODUCTION

The League is pleased to have been invited to present testimony on the regulation of international shipping and the oversight of that industry by the Federal Maritime Commission. Our organization is no stranger to this issue. We actively supported and participated in prior initiatives to reform U.S. regulation of international shipping that led to the adoption of the Shipping Act of 1984 and, more recently, the Ocean Shipping Reform Act of 1998 (OSRA). Our objectives then are no different than our objectives today—we support an international maritime system that is competitive, robust and delivers timely and efficient ocean transportation services to U.S. industries that rely on imports and exports. It has long been the policy of the League to support transportation policies which promote competition among carriers and the forces of supply and demand to determine the rates and charges assessed to the carriers' customers.

A. U.S. Businesses Require Competitive and Efficient International Ocean Transportation Services to Compete in Today's Global Marketplace

More than at any time in our history, American companies are required to compete in a global marketplace. Competition from China, India, and other regions of the world is fierce and the world-wide marketplace is more complex than that which existed when the 1984 reforms and 1998 reforms to our international shipping regulation were adopted. U.S. businesses that rely on imports and exports strive continually to improve their competitive position. International ocean transportation costs and reliable services are important factors in their success.

The League strongly believes that the regulation of the U.S. ocean transportation industry must advance a competitive, market-driven system, in which the ocean liner carriers price their services individually based on the free market. OSRA's contracting reforms have assisted in stimulating competition among the foreign ocean liner carriers that serve the U.S. trades. However, the League believes that the continuation of antitrust immunity for ocean liner carriers remains a barrier to achieving an even more robust, competitive and efficient maritime industry. Accordingly, we believe it would be appropriate for the Congress to review the existing international shipping regulatory structure to determine if additional reforms would result in even greater benefits to U.S. businesses that use ocean liner carriers to transport their goods and materials around the world.

B. U.S. Shipping Regulation Must Be Responsive to Changing Market Conditions

The maritime industry is required to operate in a dynamic economic environment and needs the flexibility to adapt to changing market conditions. For most of the past decade, U.S. imports have far exceeded exports resulting, in some cases, in limited capacity on vessels during peak seasons for inbound cargo and added equipment repositioning costs for outbound cargo. More recently, with the decreased value of the U.S. dollar, among other factors, the demand for our exports has grown significantly, creating vessel capacity and equipment shortages which are preventing many exporters from getting their goods into foreign markets in a timely manner.[1] Just as market conditions fluctuate, creating both new opportunities and challenges for shippers

[1] Where's the Beef? Shortages of Containers, Space on Ships May Frustrate U.S. Exporters for Years, *American Shipper*, June 2008, at 80-85; Coming Up Empty, Exporters Have Problems Finding Containers for Their Cargo,

and carriers alike, the League believes that the regulation of the international shipping industry must evolve to ensure that it will meet, and is meeting, the pro-competitive policies of the free market economy in the U.S.

II. CHANGES SINCE THE PASSAGE OF OSRA WARRANT A REVIEW OF U.S. INTERNATIONAL SHIPPING REGULATION

The reforms brought forth by OSRA in 1998, most significantly, confidential contracting between shippers and individual ocean liner carriers, have resulted in commercial benefits for both carriers and shippers and have improved relations between them as well. The League strongly supported the passage of OSRA and is pleased to report that its members overwhelmingly engage in confidential contracts with the ocean liner carriers. Without question the contractual freedoms established by OSRA have worked well to the benefit of both shippers and carriers, as well as other industry stakeholders.

However, since OSRA's adoption nearly ten years ago changes in commercial practices and, in particular, the deregulation of the maritime industry in Europe, have led the League to conclude that now is an appropriate time for Congress to once again review the Shipping Act to determine whether additional reforms can bring about even further improvements to the competitiveness of our maritime system. The answer to that question will have profound consequences for those U.S. industries that depend on ocean shipping for the efficient movement of their goods.

A. Commercial Practices Have Changed Since the Passage of OSRA

Since OSRA was passed, business practices in the liner shipping industry have changed significantly. As noted, both shippers and carriers have enthusiastically embraced contracting on

---

Journal of Commerce, January 21, 2008, at 14-15; Exporters' Beef, Weak Dollar, Full Vessels Send Perishables Shippers Scrambling, Commonwealth Business Media, Spring 2008, at 8-14.

an individual basis, and confidential service contracts are now the preferred business arrangement. The desire of both shippers and carriers to negotiate one-on-one relationships led quickly to the demise of many of the carrier liner conferences that once dominated the liner shipping industry and dictated the rates and service terms offered to shippers. Today, competitive forces play a more significant role in the establishment of liner shipping rates and charges.

Despite these benefits that have resulted from OSRA, ocean liner carriers still engage in collective discussions of supply and demand, and still establish freight rates and surcharges on a collective basis in the U.S. trades, primarily through "Discussion Agreements." Although any action taken as a result of collective discussions must be "voluntary" and not mandatory, one cannot always distinguish between the two. In general, General Rate Increases ("GRIs") and surcharges established by Discussion Agreements serve as benchmarks for service contract negotiations. However, some shippers may not have the leverage to negotiate discounts from the collectively established benchmarks. In addition, many shippers question why ocean liner carriers are not required to establish prices based on their individual costs like most other industries that operate on an international basis, but provide services to businesses within the United States. They further question whether there is a compelling need for the carriers to continue to be insulated from the antitrust laws, given the current structure and modern workings of the maritime industry, and whether even greater public benefits would result from removal of the immunity.

In addition, the level of surcharges assessed on ocean transportation movements appears to be particularly influenced by antitrust immunity. In most cases, surcharges that apply to a variety of activities or matters, such as fuel costs, currency adjustment, security compliance, and documentation charges, among others, are established collectively by the carrier Discussion Agreements. The carriers then seek to apply these jointly established charges to shipments transported pursuant to both tariffs and contracts. Even if a shipper attempts to negotiate the level of the surcharge, the collectively set charges would likely have an influence on the actual charges assessed by the carrier, and that influence is likely to result in prices that are higher than might otherwise be established by negotiation in a purely competitive marketplace.

The carriers' collective activities are not limited to Discussion Agreements but rather extend to vessel sharing, slot-chartering, and other mechanisms to rationalize and promote the efficient utilization of the carriers' assets. The League strongly supports these kinds of efficiency-enhancing activities that do not involve the collective establishment of shipping rates and charges. However, we believe these arrangements should be examined to determine whether these activities would be permitted under the existing antitrust laws or whether a special grant of immunity is required in order for carriers to engage in such activities.

Moreover, the continuation of antitrust immunity has resulted in a regulatory scheme that requires oversight and monitoring of collectively-based actions, at a significant cost. Carrier Conference and Discussion Agreements must be filed and monitored by the FMC. In addition, tens of thousands of service contracts and hundreds of thousands of contract amendments entered into between shippers and carriers are filed electronically with the FMC annually, at a significant cost to the industry. These contracts are stored in an electronic database and the League understands that they are examined only when a complaint is made at the agency. The contracts also may be randomly reviewed when the agency evaluates market trends. However, it is highly questionable whether the practice of filing service contracts continues to make sense from a cost/benefit viewpoint.

While the maritime industry has evolved and prospered under OSRA's reforms, the League believes that even greater benefits could be achieved if competition among service providers is the only factor that determines shipping rates and charges. U.S. businesses that depend upon ocean transportation should not be required to pay higher rates or charges that are derived from collectively established benchmarks, unless there is a compelling need to permit the anticompetitive conduct. Many shippers doubt that such a compelling need exists in today's global market. Accordingly, the League believes that a review of the immunity provided under the Shipping Act should be conducted in order to examine whether any tangible benefits occur from the immunity and, if so, whether those benefits outweigh the costs and competitive detriments that also result from collective discussion by carriers of supply and demand, and the collective establishment of freight rates and surcharges.

B. Elimination of Antitrust Immunity in Europe

Another significant change that occurred since OSRA was enacted is that, on September 26, 2006, the European Union's Competitive Council agreed to repeal Regulation 4056/86 (also known as the "Liner Block Exemption"), which exempted Liner Shipping Conferences from the EU's antitrust laws.[2] The repeal is scheduled to take effect on October 17, 2008. This change by one of our nation's major trading partners to its regulation of international liner shipping is remarkable, since ocean liner carriers were authorized to fix international shipping prices in the European trades since the 1870s. The elimination of antitrust immunity in Europe means that ocean liner carriers will no longer be permitted to jointly establish freight rates or surcharges on shipments transported between Europe and the United States, and other nations.

Charlie McCreevy of the European Commission who was involved in the decision to

[2] Commission Regulation 1419/90, Repealing Regulation 4056, 86, 2006 O.J. (L269)1.

repeal the block exemption summarized the basis for the EC decision as follows: "The European shipping industry will benefit from the more competitive market that will result from the repeal of the block exemption and the EU economy as a whole stands to benefit from lower transport prices and more competitive exports."[3] In addition, the EC determined that "a thorough review of the industry carried out by the Commission has demonstrated that liner shipping is not unique as its cost structure does not differ substantially from that of other industries. There is therefore no evidence that the industry needs to be protected from competition."[4] Thus, the underlying rationale for the repeal of the block exemption in Europe was based on the determination that the ocean liner carriers do not require special protection from competition, as well as the desire in Europe to bring about substantial economic benefits that will result from the elimination of price fixing by the vessel operators. To assist the ocean liner carrier industry in transitioning to a new free-market environment, the EC is in the process of finalizing Guidelines on the application of the competition rules to maritime transport services.

The League believes that the action taken in Europe warrants a timely review of the antitrust immunity granted to ocean liner carriers under the Shipping Act. League members are interested in obtaining the same economic benefits that are expected to occur in Europe as a result of the repeal of the block exemption. Our members are concerned that European businesses may achieve a competitive advantage vis-à-vis U.S. businesses when competing in the global economy.

[3] Press Release, European Commission, Competition: Commission Welcomes Council Agreement to End Exemption for Liner Shipping Conference, available at
http://europa.eu/rapid/pressReleasesAction.do?reference=IP/06/1249&format
=HTML&aged=1&language=EN&guiLanguage=en).
[4] Commission Regulation 1419/90, Repealing Regulation 4056, 86, 2006 O.J. (L269)1.

Furthermore, the elimination of antitrust immunity in Europe can be expected to have an impact on shipments moving between the United States and European nations. Indeed, the EC itself has commented that:

> The abolition of the exemption for liner conferences will affect EU and non-EU carriers operating on routes both to and from Europe. The market distorting effects of price fixing will be corrected, and lower prices for sea containers are likely to result.[5]

The approaching incompatibility in the United States and European legal regimes is likely to add costs and inefficiencies to the global supply chains of those companies shipping products in the trans-Atlantic trade, since additional administrative processes may be necessary to ensure compliance with two different legal systems. The removal of antitrust immunity in Europe raises questions as to the carriers' ability to collectively establish and assess GRIs and surcharges on shipments moving between the United States and EU countries. Although we believe that shipments transported between the United States and Europe will be required to comply with the competition laws in Europe, it is not perfectly clear how the ocean liner carriers intend to straddle the different regulatory systems that will exist in the United States and Europe. If the carriers are required to apply the European regime to shipments moving in the trans-Atlantic trade in order to avoid the risk of violating Europe's competition policies, the antitrust immunity granted under the U.S. Shipping Act may longer be used by the carriers. Therefore, this circumstance begs the question whether antitrust immunity should even be retained in the United States.

[5] Press Release, European Commission, Competition: Commission Welcomes Council Agreement to End Exemption for Liner Shipping Conference, available at http://europa.eu/rapid/pressReleasesAction.do?reference=IP/06/1249&format =HTML&aged=1&language=EN&guiLanguage=en.

C. The Antitrust Modernization Commission Has Recommended a Review of Ocean Liner Carrier Antitrust Immunity

Yet another important change that has occurred since OSRA was passed is that the U.S. Antitrust Modernization Commission ("AMC") released a report on April 3, 2007, following a comprehensive 3-year study of the U.S. antitrust laws, in which the AMC made several recommendations, including that antitrust immunity afforded to ocean liner carriers under the Shipping Act "ha[s] outlived any utility [it] may have had and should be repealed."[6] The AMC held a hearing on antitrust immunity provided under the Shipping Act of 1984, on October 18, 2006, for which the League submitted written comments. In general, the League's comments recognized the more flexible and customized shipping arrangements that have occurred as a result of OSRA but we also informed the AMC that it would be prudent to evaluate whether even greater public benefits could be achieved if pricing for international shipping services were established solely by competition among the various individual ocean liner carriers and each of their customers.

The AMC rejected arguments from proponents of the antitrust exemption, finding that the international shipping industry is not so unique that it requires protection from competition when compared to other international industries that are required to make significant investments. In issuing its Report, the AMC specifically analyzed the antitrust exemption provided under the Shipping Act in the following manner:

> A related and equally questionable justification appears in support of the antitrust exemption under the Shipping Act. Although Congress substantially modified the Shipping Act in 1998 to allow individually negotiated rates, which has sharply reduced ocean carriers' use of jointly set "conference rates," proponents assert that an antitrust exemption remains necessary for other purposes. They maintain that carriers need an antitrust exemption to adopt more efficient practices jointly, such as agreements that allow

[6] Statement of Commissioner Jacobson, Joined by Commissioners Valentine and Warden, AMC Report at 422.

ocean carriers to share certain equipment at ports in order to reduce congestion. Acknowledging the possibility that such agreements could withstand antitrust scrutiny, one witness maintained that the ocean carriers nevertheless would not attempt them absent the certainty that no antitrust liability would result. The witness emphasized the enormous investments of ocean carriers and the need to eliminate even the potential for antitrust liability.

However, this reasoning reduced to an argument that ocean carriers should not be subject to the same costs of doing business as other industries. These costs of doing business include managing firms' conduct to comply with antitrust, and many other, laws. *All kinds of businesses across the United States—including firms that make investments comparable to or greater than those of ocean carriers—comply with the antitrust laws as they plan their activities, including joint activities with competitors.* This is not hypothetical economic theory; it is how hundreds of thousands of firms do business every day. Because they must comply with the antitrust laws, these firms structure their activities to avoid anticompetitive effects. This promotes consumer welfare. *There does not appear to be anything unique about ocean carriers that would merit holding them to a lesser standard.*

Indeed, contrary to the asserted need for an immunity, ocean shipping provides a good example of an industry that now operates more efficiently with competition than without. An exhaustive survey of ocean shipping has found that:

> [t]he steepest declines in observed freight rates have coincided with a generalised decrease in conference power in the face of competition from strong independent operators and the implementation of competition-enhancing legislation in the United States trades . . . . Carriers have delivered better quality and more shipper-responsive services in recent years. This improvement in shipping services has not come about because of price fixing, but, rather, has accompanied a decline in conference power and an increase in competition.[7]

The findings of the AMC provide further support for Congress to initiate a review of the antitrust exemption set forth in the Shipping Act.

[7] AMC Report at 352 (citations omitted) (emphasis added).

D. Elimination of Antitrust Immunity Involving Other Modes of Transportation

In addition to the recent action taken by foreign governments to end antitrust immunity within the maritime industry, the United States Department of Transportation and the Surface Transportation Board have taken measures to end antitrust immunity in other transportation sectors. The United States Department of Transportation's Office of the Secretary issued a Final Order on March 30, 2007, terminating the International Air Transport Association's ("IATA's") antitrust immunity, which permitted joint activities and price-fixing by air carriers pursuant to conference agreements in the airline industry.[8] In May 2007, the Surface Transportation Board eliminated antitrust immunity for motor carrier rate bureaus, pursuant to which trucking companies could collectively establish freight rates for trucking services, and for the National Classification Committee, the trucking industry's classification regime.[9] These recent decisions from U.S. federal agencies with jurisdiction over air carriers and motor carriers demonstrate the lack of a need for continuation of antitrust exemptions in other transportation industries. These decisions at least raise the question as to whether the exemption is necessary in the maritime sector.

III. CONGRESS SHOULD UNDERTAKE A COMPREHENSIVE REVIEW OF THE SHIPPING ACT

Based on the above, the League believes that there are serious questions surrounding whether ocean liner carrier antitrust immunity should be continued in the United States. If antitrust immunity were to be eliminated, it is clear that other reforms would become necessary, since many aspects of the current regulatory regime are based on the need for government

---

[8] International Air Transport Association Tariff Conference Proceeding, Office of the Secretary of Transportation, Docket No. OST-2006-25307, March 30, 2007.
[9] Motor Carrier Bureaus- Periodic Review Proceeding, STB Ex Parte No. 656, et al. (STB served May 7, 2007)(Periodic Review Proceeding), corrected (STB served May 16, 2007).

oversight of collective carrier activities undertaken under the umbrella of antitrust immunity (e.g. the filing of carrier agreements and enforcement of certain prohibited acts). In addition, today, the ocean transportation industry operates primarily under contractual agreements, which are modeled after proprietary relationships which exist in virtually all other U.S. industries, including other modes of transportation.

However, unlike other contracts involving other U.S. transportation modes, service contracts between ocean liner carriers and shippers are required to include certain essential terms and the contracts are filed confidentially with the Federal Maritime Commission ("FMC").[10] Thousands of contracts and contract amendments are filed with the FMC every year. However, the FMC does not have the authority to review and "approve" service contracts. Rather, contracts are required to be filed with the FMC to facilitate the agency's enforcement of certain prohibitions in the Shipping Act and to monitor joint carrier activities, to the extent that multiple carriers participate in a service contract under the protection of the antitrust immunity afforded under the Act.[11] The League understands that, in most cases, the FMC never reviews the contracts that are filed except when a complaint involving a particular contract is registered with the agency.

Moreover, carriers are still required to publish tariffs containing their rates and charges and such rates are enforceable under the Shipping Act.[12] The contract filing and tariff publication and enforcement requirements result in significant administrative costs to the carriers, which ultimately get passed down to shippers. The League believes that it would be appropriate for Congress to review the utility of these requirements, including whether they

[10] 46 U.S.C. § 40502(b)(1).
[11] 46 U.S.C. § 41104; 46 U.S.C. § 41105.
[12] 46 U.S.C. § 41104(1).

should be eliminated, as was previously done in the U.S. domestic motor and rail industries.

Accordingly, the League has identified a number of reforms to the Shipping Act that should be considered by Congress, as well as certain regulations that should be retained and modified or simply retained as they currently exist. These reforms and regulations include:

- Elimination of antitrust immunity for ocean liner carriers but the carriers may continue to perform joint activities (other than collectively establishing or discussing rates and charges) that enhance efficiencies, subject to guidelines issued by the U.S. Department of Justice.

- Elimination of all requirements relating to the filing with the FMC of ocean liner carrier agreements.

- Elimination of the requirement for ocean liner carriers to file service contracts (and for Non-Vessel-Operating Common carriers to file NVOCC Service Arrangements) with the FMC.

- Common carriage should be retained in a limited form, such that ocean liner carriers and NVOCCs should be obligated to provide service to shippers on reasonable request and shall provide to shippers copies of or access to their rates, charges and rules prior to performing the transportation service.

- Elimination of the "filed-rate doctrine" (i.e. enforcement of tariff or contract rates by the FMC) but retention of certain "prohibited acts", such as the restrictions against unreasonable refusals to deal and unreasonable practices by carriers.

- Licensing and bonding requirements for Ocean Transportation Intermediaries should be retained.

- The Controlled Carrier Act and the Foreign Shipping Practices Act should be retained.

- Mergers among ocean liner carriers should continue to be reviewed by the U.S. Department of Justice.

If the above reforms, or similar reforms, were to be adopted in whole or in part, the proper role and structure of the FMC would then need to be considered. However, at this time, the League is not advocating any specific change to the oversight agency. Moreover, the above listed reforms and regulations are intended to serve as a starting point for discussion within the Congress and among the major maritime industry stakeholders.

IV. CONCLUSION

For the foregoing reasons, the League believes that it would be appropriate for the Congress to review the Shipping Act to determine whether additional reforms would result in greater competition, efficiencies, and other benefits to U.S. businesses that depend on international ocean transportation services. Specifically, the League believes that the review should evaluate whether antitrust immunity should be continued in today's modern shipping environment, in which most shipping arrangements are governed by confidential contracts between ocean liner carriers and their customers. Moreover, the decision by Europe to revoke antitrust immunity and the recommendation of the AMC to review the U.S. exemption for the liner shipping industry are also compelling reasons for Congress to analyze whether antitrust immunity should also be repealed in the United States. Finally, the League asks the Congress to consider its proposals of possible reforms that the League believes would result in a more competitive, efficient, and robust maritime industry.

****

I would be pleased to answer any questions from the subcommittee.

Statement of Donald A. Cole

Before the

Subcommittee on Coast Guard and Maritime Transportation

of the

Committee on Transportation and Infrastructure

U.S. House of Representatives

Donald A Cole
DAC Consulting
221 Robinhood Road
Asheville, NC 28804
828 350 1600

2:00 PM
Thursday, June 19, 2008

Mr. Chairman and members of the Subcommittee, I am pleased to be here at your request to testify regarding the Federal Maritime Commission (FMC) Management and Regulation of International Shipping.

BACKGROUND

Chairman Blust came to the Federal Maritime Commission in 2002 knowing that the maritime industry had changed and was continuing to change. The FMC, however, had not changed and was continuing with an enforcement mindset rather than one of compliance and working in partnership with the industry it regulated and served. Chairman Blust wanted to make the FMC into a high performing organization working with its clients, stakeholders, and its constituents. He knew that the understanding and skills to make this change did not exist in the FMC and sought the services of a consultant. FMC contacted the Federal Executive Institute, a government agency and part of the Office of Personnel Management, for assistance. Three consultants were referred and interviewed by a panel including the Chairman, members of the Senior Executive Service (SES), and his counsel. The Chairman selected me, Donald A Cole to support the change effort and requested help with strategic planning as a first step.

During the selecting interview, I discussed the process of organizational change, provided a copy of my professional fee schedule and travel policy, discussed how I normally work with an organization (i.e., on site charged at a daily rate and off site work charged at an hourly rate, frequency of visits, telephone and email, etc.) and the roles and responsibilities of political and civilian leadership. I follow this practice with all of my clients to ensure clarity prior to starting work. The first step would be to perform an organizational analysis. I also stated that there needed to be chemistry and energy between the consultant and the client organization for a successful long-term relationship. This analysis consisted of conducting interviews up, down, and across the organization to determine several basic factors concerning the "as is" situation with respect to leadership, trust, vision, values, conflict, communication, operational systems, and to gauge the level of morale of employees, among other factors. The parties agreed to start with the interviews. We agreed that I would only report to the Chairman. It is my practice to only take direction from the top person because he/she sets the tone for the entire organization.

The interagency agreement was issued and work started in December 2003. The analysis interviews were conducted over three days and a report of the findings/issues was immediately provided to the Chairman, the SES, and his counsel.

FINDINGS AND REPORT OUT TO FMC

The following were provided to the Chairman, his counsel, and the SES in December 2003:

1. Lack of Trust—at all levels in the organization but especially in the leadership: women and minorities feel disenfranchised; conflict abounds between people, managers, SES, and even the bureaus.

2. No leadership team exists, managers do not know how to give or receive feedback to employees or customers, people do not know where they fit in. There is no vision.

3. Communication—people are starved for information; no staff meetings are being held, there is little interaction with industry, there are no operational values exhibited.

4. The agency appears to be adverse to change—people are fearful to suggest improvements; empowerment is not in their vocabulary.

5. Relationships with customers, clients, stakeholders, and the Hill are poor.

6. The organization operates in a command and control manner. The Executive Director sits atop an unbalanced structure and has 90% of the organization reporting to him. The Bureau of Enforcement operates with a hammer mindset rather than how the agency can work in partnership with industry and individuals. The organizational structure supports this top-down power with only three direct reports to the Chairman—the Executive Director, the General Counsel, and the Secretary. There is little support, training, or development for the workers and no socialization.

7. The budget is controlled by a few. No bureau has its own budget allowance, thus no budget responsibility or accountability exists.

8. IT-Automation of processes both inside the agency and the industry you serve are outdated and no plan exists to improve. Computer security is questionable at best and no disaster recovery plan exists.

9. There is little interaction between the Commissioners and the staff. They are a rich resource and should be used/included in the products/services you deliver.

10. There is no concept of "Stewardship of the Whole"—that all the leaders/managers are responsible for managing efficiently and effectively the resources of the agency. It is not OK for one part of the agency to do just fine at the expense of another. The leadership/management team will succeed together or fail together.

There were eighteen findings in all and some are combined here to give a sense of what I found. In my opinion, a functional review should be accomplished as well - what to continue, what to start and what to stop doing. I recommend we review all and then combine and categorize the issues, these if you intend to work them.

The good news: FMC has some high-quality people. FMC must support and develop them or they will leave. The 2 top reasons why people leave jobs: a bad boss and lack of support. People want to be communicated with and asked what they can contribute to improve operations. They want to know what is going on routinely and when their leaders travel/meet industry/speak, etc. If FMC can create a safe environment where change is wanted/expected and dialogue occurs (and management LISTENS), employees will respond. They must also be told that failure of one of their ideas does not mean they will suffer any penalty. It is safe to experiment. Bottom line—FMC has the opportunity to make change and has this supporting data on what people have disclosed.

Another note was the high number of SESs (seven) for such a small agency, 130 personnel, and budget of $21M. In other organizations, a GS-13 or -14 would have that span of control.

I stated that the issues found during the organizational analysis were so significant that I felt those issues had to be processed/addressed prior to conducting strategic planning. Further, if the FMC wanted to directly proceed with strategic planning, they should hire another consultant because I would not proceed, as I believed it to be a waste of precious resources. The Chairman and his leadership team agreed that the issues should be addressed first.

WORK ON THE ORGANIZATIONAL ISSUES/FINDINGS

During the next visit, the issues and findings were reviewed and discussed individually at greater depth to allow an understanding of the impact on the performance of the organization. The issues were grouped and I provided a process for working the issues. Later teams, with membership from across the organization, were established to work the five major categories/topics. Work then proceeded to develop a plan of action and milestones for each of the categories.

Since communication was a major issue, the Chairman and I went to each office to meet with all employees to explain the process that was being launched and to listen to their issues and concerns. Periodic updates continued to be provided so all would know what was going on. This practice of continued communication and visits to employee offices and spaces continued for the duration.

Later the organizational structure was addressed. Under the previous Chairman, an Executive Director was in place with four SESs reporting to him. The Chairman had three direct reports: the Executive Director, the General Counsel, and the Secretary. Almost all of the power/control and resources were under the Executive Director who ruled with an iron hand. The SESs were asked to provide at least two options for a realignment that made functional and operational sense. After a considerable period of time they came back with two recommendations which were discussed at length before a realignment was announced and implemented.

To address the issues of feedback on leadership and management of the organization, I recommended doing Benchmarks, a 360 degree feedback instrument, starting with the leadership team. This 360 degree instrument looks at 16 characteristics of an individual across the areas of Meeting Job Challenges, Leading People, and Respecting Self and Others. It also looks at what is most important for success in the organization and problems that can stall a career. Once this was accomplished, the next level of leadership was also included. I provided individual feedback sessions of approximately two hours for each of the nearly thirty individuals. I also conducted sessions for the individual groups and the combined group so that they could understand the implications to the organization. This joint session lasted one-half day. For some in this group, this was a very painful process because they were not self aware and were shocked to receive this feedback. For most, it was the first time in their careers to receive feedback. Some wanted to shoot the messenger—and probably would now also.

During my monthly visits, I scheduled one or two open appointments, time permitting, where staff could meet with me on any topic for a one on one. As a result, I met with a significant number of the staff on various issues both personal and professional. The range of topics included a wide variety of topics from 360 feedback interpretation to secretarial support and career development, not just the issues pursuant to my contract. I reached out and touched many while there.

I tried to interview the Commissioners to obtain their sense of what was going on and to ask for their issues, to determine the level of communication amongst themselves and the agency. Each Commissioner also has a counsel. Interviews were completed with all Commissioners except Commissioner Anderson. After twenty minutes into the interview, he got up and said he had to catch a plane to Florida. We agreed to finish the interview later. I contacted his counsel repeated times, sent emails, left voice messages, and none were returned—ever. Over the three years, I was typically on site two days per month. I saw Commissioner Anderson perhaps three times. I went by his office on most visits and he was never there. As a result of those interviews, I suggested monthly meetings between the Chairman and the Commissioners, more interface between the Commissioners and the staff, and a strategy of how to better use the Commissioners inside and outside the agency since they were obviously a valuable resource that was severely under-utilized. The Chairman proceeded to have meetings and coffees as needed during which time he briefed the Commissioners on the organizational change work that was going on, among other things. The Chairman had two issues here: one Commissioner who was never there and one who was the previous chairman. Both proved problematic.

I also designed a two-day offsite to review the issues and establish the five working groups and the leadership team. The offsite was conducted in another government facility two blocks away. The Commissioners were invited to attend a working lunch on the second day and were briefed on the status of all ongoing work and were asked for their questions/input/views on future issues that could affect the agency. All Commissioners attended except Commissioner Anderson. A comprehensive report of the offsite was also issued.

Teambuilding and trust building was also started for the leadership team because the General Counsel was a recent internal selection by Chairman Blust and the reorganization would depose the Executive Director, who had been in power for eight years with the previous Chairman and one year with Blust. The Chairman also utilized internal attorneys for his counsel and did not bring on any political appointees. He was very conscientious about the budget and using internal people.

The Bureau of Enforcement did not agree with nor want to change its mindset from enforcement to compliance. The bureau did not even want to consider using alternative dispute resolution internally or externally. They were not concerned about working with industry in partnership to solve issues with existing law and regulation. The bureau also did not want to give up having the field offices report to them. This battle lasted over two years. When I asked if there was a backlog of cases, I was told "Sure, and it is normal." So I pressed and asked how big it was. Two months later it was finally disclosed and it was huge. There was no sense of urgency to bring anything to closure. Some cases were over ten years old and no one in BOE cared. The staff attorneys did the work and then the head of the bureau took the trip and negotiated the final deal. He really got angry when I asked how he expected the attorney who did all the work to get the experience of getting to closure.

I do want to make sure it is understood that there were some really good people at FMC who wanted change, empowerment, and to become a high performing organization. They wanted good leadership and support so they could become successful. The employees were glad for new political leadership and wanted new civilian leadership as well. People in the organization had not been exposed to leadership training and development and therefore did not have the skills to do this kind of change work—which is difficult and demands high-quality leadership and support.

I also recommended establishing a working group consisting of all the deputies so they could better understand what their bosses were doing, how to manage up, how to communicate, and what happens when you do not—people make up stuff to fill the void. They would be in charge if for some reason their boss left and they needed to be ready to take over without missing a beat.

I took the agency through a visioning exercise which produced a vision statement which was agreed upon by all members of the agency. Industry was also contacted for their input. We also worked on values, which proved to be extremely difficult for them. Remember, there was low trust. It took approximately seven months to put together a values statement that was eventually shelved. In addition to leadership and vision, values are a fundamental building block for how people are treated. It is the measure of how we hold each other accountable for behavior. When values are violated, trust is gone. There is not an automatic way to get trust. Trust is based on watching people and their actions and words—doing what you say you are going to do—relationships. It is accountability. So, an event that occurred ten or twenty years ago and was not processed and resolved causes a person to lose trust in another. It has not been rebuilt.

A number of cases like this existed and currently exists in FMC. Some examples where I worked included mediations/interventions between: supervisors and subordinates, the Alternative Dispute Resolution office and the Bureau of Enforcement, a Bureau Director and his four managers, and between two SESs. One in particular that stands out was between Commissioner Creel and the General Counsel who has now left the agency. This conflict reached such a level of concern for me because of the damage it was doing to the organization that I went to Chairman Blust and requested permission to do an intervention or mediation. He agreed with me and I took that on. I met with each separately for a couple of hours to understand the history and the issues. I then conducted a joint session to address the baggage and issues they had built up over the years. They agreed to bury the past and to work civilly together for the interest of their own careers and for their leadership responsibilities to the organization which had been observing their behavior. This agreement lasted until Chairman Blust left and then it spiraled out of control. I think many were waiting for his departure, and mine too, so that they could return to the old ways. Conflict erupted between at least two Commissioners and their counsels with the General Counsel since she was a Blust appointee and supported change. The General Counsel tried to work with them at my suggestion, but it got nowhere. Open hostility existed.

Information Technology (IT) was antiquated and did not serve the agency or its clients. Backlog existed in processing applications and it took new equipment and software to eliminate this problem, over three years.

To recap my involvement over three years at FMC, I was typically on site two days per month unless something more was required. I also provided support from off site in the form of consulting, coaching, designing, doing reading and research, creating agendas via telephone/email, and that typically took somewhere between one-half to one day per month. Again it depended on what was going on and what was requested by the Chairman and the SESs. I was very generous in giving my time to FMC. I did not charge them for all that I did because they were a small agency with a small budget. I was happy to see the progress they were making, and I was committed to their success because my success depended, in part, on theirs.

I began working at FMC under an interagency agreement with FEI that was terminated by FMC in 2004 because I was not being paid in a timely manner. FMC decided to utilize a sole source procurement in order to retain my services and to save the 32 percent surcharge OPM placed on top of my costs.

CHAIRMAN BLUST'S DEPARTURE

The Chairman called me in late March or early April 2006 and told me he would not be renominated for a second term. We immediately started transition planning and he started a job search process. We also discussed when to disclose to the Commissioners/SESs and to the agency. He asked if I would stay through the transition to the new Chairman's arrival and I said I would. The Chairman anticipated his search would take at least 90 days.

As we started work on the transition and the news was released, a couple of things happened that led me to believe that privileged communication had been obtained. So I asked the Chairman if his communication systems were secure and he said he was not sure. As a result, we arranged alternative communication methods from June until his departure at the end of November 2006.

Chairman Blust left FMC on November 30, 2006. I was scheduled for my monthly visit during his last week in office. He called the week before and asked if I could reschedule to the following week. I was able to accommodate the change and we agreed that I would be at FMC on December 5 and 6 to meet with the Commissioners and continue with the change process. On Monday, December 4, I was in Washington, DC and received a call at 6:00 PM, from the Acting Director of Administration; I was told that my visit has been suspended by a vote of the Commissioners because of questions raised by an IG audit of my contract. He said he would get back to me. What he failed to tell me was that he decided it was a problem based on what the IG told him, and he had the Commissioners vote. What a huge coincidence that the timing of this takes place the day after the Chairman and the former Executive Director depart. The Chairman was not aware of any kind of audit being done before he left. I wonder what the basis was for the extreme action taken by the DOA based on the information furnished by the IG at such an early stage in the audit. My contract was, in fact, over.

There is a provision in my fee schedule that says I will try to accommodate a change in an agency schedule if given three weeks advance notice. Cancellation or rescheduling will be done without penalty if I can. If not, the agency is liable for payment. In this case, the visit was canceled with one day's notice. I charged FMC for this cancellation in accordance with my fee schedule. I think the IG told the Director of Administration not to pay it. In any case, my final invoice was just like all the others that had been submitted and paid by FMC's contracting office. FMC has refused to pay my final invoice. It is over a year and a half old. The finance office personnel who issue the rejections said they are not allowed to talk to me and that Mr. Peter King, the DOA, is the only person in the agency who can take any approval action. So I went to Mr. King and the General Counsel on multiple occasions to see if we could talk or meet. Mr. King refused to respond to calls and multiple emails. When I asked to meet directly with the Commissioners, he shot back saying he was the sole authority to speak for the Commission and the Commissioners would not meet with me. Mr. King refused to meet with me and the General Counsel and the Contracting Officer. The Contracting Officer was gagged by Mr. King and told he could not communicate with me in any way. Is this stewardship of our tax dollars and serving the public interest?

The power has shifted to the four Commissioners and the Director of Administration. A pertinent point is that the DOA was the former Deputy in the Bureau of Enforcement and held the same mindset as his boss—command and control, power and not much concern for the feelings of people or industry. He rejected most of my recommendations while in BOE and his current actions as the DOA smack of retaliation. The unraveling of three years of hard work begins with Blust's departure. After the General Counsel left, the DOA, Mr. King, became the Acting General Counsel. The Commissioners met in two's, deliberately I might add, to avoid having an open meeting. The SES leadership splits as well. The Secretary and General Counsel left, and the SES corps was split 4 to 2. All abdicate their leadership responsibility and then all employees suffered.

There was a second SES Candidate Development Program. FMC spends approximately $100K or so for this program to develop six candidates. Four have left the agency in the last six months. We might ask, why? We should look at all who have left the agency since November 2006 and ask why. Is it not obvious? Would you want to work there?

THE INSPECTOR GENERAL AUDIT

In May 2007, the IG issued his audit of my contract. It must have been the only contract he was auditing. If the audit started in November 2006, it took six months to conduct one audit of a small contract ($160,000 over three years). No other audits were produced or posted on the FMC website during this time. FMC had already paid a private firm to audit this same contract. The audit by the private firm, Clifton-Gunderson, found nothing wrong. What was the cost of the two audits? The cost of the IG and his staff for seven months is roughly $160,000. Why did the IG expend resources to audit a contract which had already been audited with no findings?

The audit did point out internal problems in FMC's contracting process. The contract did not require administrative reporting and travel receipts from me. Although the type of contract was never stated, it was in essence a Firm Fixed-Price contract. I acted in good faith under the terms of the contract. There was never any question about the work I performed or the dates I was on site. During the audit, the IG decided the contract should have been a Time and Materials contract and sought support of his position from another agency, GSA, to validate his opinion. I furnished the documents requested by the contracting Officer via the IG request only to receive not one, but two, subpoenas for documents that I did not have because the contract did not require any record keeping. When my attorney contacted the IG in response to the subpoena and asked what records to produce, the IG said to provide only what I could immediately lay my hands on. The IG stated there was no need to get telephone, credit card and other records. In hindsight, this was a setup, in my opinion, as he deliberately used the missing data to raise his recovery number as high as possible. Inside the IG community, the individual value of an IG is measured by the highest number of dollars they can recover.

The IG compromised his independence on several occasions and abused his position. The IG went to other agencies where I had worked and requested investigations of my contracts. Nothing irregular was found by any other agency. Any activity by an IG creates fear. As a direct result of the IG's contact with other agencies, a chilling effect occurred. At least one contract was not renewed. Other clients contacted me concerned about the IG's call.

The IG compromised both his and management's independence on numerous occasions. First, he directed management not to pay my last invoice. This instruction is clearly beyond his authority. Second, he was directly involved in the cancellation of my contract, which occurred at the very beginning of his audit and was not appropriate. Third, after meeting with Congressional staff, he reported his discussions back to the Commissioners. These examples clearly demonstrate that the IG has compromised his independence and interfered with the agency's audit follow-up responsibility.

I have provided support and responded to many, many calls, emails and requests for support from FMC staff since December 4, 2006. I did so freely and at no charge. The people up and down the organization needed help. Where else could they go? They trusted and respected me and what I had to offer.

After the April 15, 2008 hearing, I called my attorney to discuss the possibility of another settlement offer even though FMC had rejected all others. My attorney said that Mr. King had personalized my case and that it would be a waste of my time. He reminded me that

Mr. King had told him that he wanted to ensure that I suffered all $56,000.00 worth of pain and money. So I have lost my sense of humor over this. This has been the worst experience of my forty years of serving the government I love. It has taken—correction—it has wasted so much of my time, energy and money. FMC, on the other hand, has unlimited resources with which to continue this saga. They are not concerned about the amount of taxpayer funds they expend and no one knows how much they have spent on my case. I am certain it is in the range of $250,000. I hope the Subcommittee will review how FMC has spent its funding in the past, but more importantly in the future. Their budget request for 2009 is a good starting place. The public wants stewardship, not vengeful spending.

I have had contact with people from the agency and the press since the April 15, 2008 hearing. The reporter stated that no one from inside or those who had left the agency would speak to him and he wanted to know why. I told the reporter that I thought an environment of fear and intimidation existed, but I could not be certain since I had not been in the agency in eighteen months. He wanted a story and I told him he had one—why would the public servants at FMC be afraid to speak up?

CLOSING

So where do we go from here? We, the Subcommittee and I, are faced with the same problem. We each have to deal with the now remaining three commissioners and the Director of Administration/Acting General Counsel. We both want responsible leadership to serve the maritime industry and the public interest while supporting and developing the 131 employees who do the work. And they want $25 million and to be left alone with no oversight and accountability for those resources.

Mr. Chairman, this concludes my statement and I would be pleased to answer your questions.

STATEMENT OF
THE HONORABLE HAROLD J. CREEL, Jr.
COMMISSIONER, FEDERAL MARITIME COMMISSION
800 NORTH CAPITOL ST., N.W.
WASHINGTON, D.C. 20573
(202) 523-5712
(202) 523-0522

BEFORE THE
COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE
SUBCOMMITTEE ON COAST GUARD AND
MARITIME TRANSPORTATION
UNITED STATES HOUSE OF REPRESENTATIVES
JUNE 19, 2008

I offer the following general thoughts on some of the issues being faced by the ocean shipping industry and being addressed by this Committee today. Having worked on shipping issues virtually my entire career – as Merchant Marine Counsel in the Senate and as Chairman and Commissioner at the Federal Maritime Commission for 14 years - I wanted to share my perspective with you.

Antitrust immunity for shipping companies to agree on rates is the most significant issue that has been raised. It has been raised in the context of change that the European Union is making to its treatment of carrier ratemaking under its antitrust laws. Honestly, I don't think that what Europe is doing matters so much in how we regulate the industry in this country. Their shipping regulation system, in my opinion, was arcane. They gave carriers full immunity for ratemaking by conferences, but there was no government oversight – extremely anticompetitive. We, on the other hand, changed our regime 10 years ago to introduce more competition between carriers and to allow carriers to contract directly with their shipper customers. Will the European's action have an effect in the U.S. trades? Some. Carriers trading between the U.S. and Europe can't set rates collectively. But the vast majority of cargo carried in that trade is not carried under collectively set rates, but under individual contracts between a shipper and a carrier. So, very few agreements on file with the Commission will be affected.

While I am not so concerned about what Europe is doing I do think it provides a case study for a review of our own regulatory system of international shipping. It's been 10 years since we did such a review. You made major pro-competitive changes to our laws and regulations 10 years ago. And it has worked better than anyone ever imagined. But 10 years is 10 years and a lot has changed in the world and in the industry since then.

I would caution you, however, not "to throw the baby out with the bathwater." This has been the challenge faced by every Committee or Commission that has looked at these issues since the first liner conference was formed in 1875.

Shipping is a unique international industry and it is the means by which our trade is conducted. So we have to be careful and make the right decisions. Congress has wrestled over these issues since the Merchant Marine Committee hearings in 1912-1914, 1959, 1984; and 1998. And in each of those hearings, antitrust immunity has been the focus.

Some of these old questions may have new answers. But some of the questions are new. The industry has changed and the focus of the Commission has evolved over the last several years. Much of our focus is now on port operations. Why is that? Well, the numbers of containers moving in and out of this country in the last 10 years has doubled. And they all come through the same ports that have been serving ships since sailing days. So why all of the focus on ports? I believe that's because there has been an exponential growth in trade (i.e., container volume) and with that growth an exponential increase in problems related to that growth. More volume, more problems that come with more volume – same geography. And there are huge problems now: congestion; pollution; degrading infrastructure. Just imagine what it will be like in the next 10 years, when trade is expected to double. What will be the effect on roads and bridges? What will be the effect on non-port traffic – pollution? These are all issues on which ports, terminal operators and carriers will need to discuss and agree upon in order to frame a common plan of action.

Specifically, as to antitrust immunity, of course, it is generally anticompetitive. That is why Congress has gone to great pains over the years to determine if it is necessary and has been extremely careful when granting immunity in order to limit its impact. Does immunity serve a vital role in some circumstances? I would say "absolutely." For example, carriers and shippers alike concur that carriers should be able to agree on sharing space on ships or coordinating service that creates efficiencies, thereby lowering costs. Is there a good reason that competing ports or terminal operators should be able to get together and agree on issues that benefit the environment or that reduce congestion or that enhance security? I believe so.

My point is that we need to figure out what is broken and fix that. Not everything is broken. In fact, I would say very little is broken. But this is a complicated issue. For example, some will testify today that you need to do away with antitrust immunity and let there be wide open competition but that you should keep the provisions of the Act that protect them from carriers who refuse to deal with them or who discriminate against them. That doesn't sound like wide open competition to me. I'm not saying that the point is not valid or that I don't agree with it. I'm saying that individual issues should be viewed in the context of the totality of the industry.

I feel strongly that we should take a good look at the industry and the Commission's regulation of it. I view this as a very positive project. We should be looking at new initiatives to increase exports and facilitate imports, in a business environment that is fair and in a physical environment that is clean and safe. In fact, I think we are obligated to do that. Has the Ocean Shipping Reform Act been successful in carrying out its primary purposes of creating a more competitive shipping environment? Indeed - and in spades. Could more be done? You bet. Can the Federal Maritime Commission help you achieve those goals? Absolutely.

There's one last thing that I would like to say. The working environment among the affected parties – especially the shippers and carriers – is vastly better than it was 10 years ago. And, the reason for that, I believe is that 10 years ago they were given the ability to work one-on-one and to craft confidential contracts. This, I believe, creates an environment in which positive change that is beneficial to all is possible.

Finally, we at the Federal Maritime Commission will do our part in helping you identify any changes that should be made to the regulation of international shipping and assist you in bringing about those changes. Your staff and ours are the most expert on these issues, and we commit to working with you to make trade in U.S. international shipping fair and to serve its purpose – facilitating the vital trade of this country.

STATEMENT OF
THE FEDERAL MARITIME COMMISSION
PRESENTED BY
THE HONORABLE REBECCA F. DYE
COMMISSIONER, FEDERAL MARITIME COMMISSION
800 NORTH CAPITOL ST., N.W.
WASHINGTON, D.C. 20573
(202) 523-5721
(202) 523-0298 (Fax)

BEFORE THE
COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE
SUBCOMMITTEE ON COAST GUARD AND
MARITIME TRANSPORTATION
UNITED STATES HOUSE OF REPRESENTATIVES
JUNE 19, 2008

Mr. Chairman, and members of the Subcommittee, thank you for this opportunity to address the Subcommittee. With me today are my fellow Commissioners, Hal Creel and Joe Brennan. As you know, Commissioner Paul Anderson recently left the agency.

We have made significant operational and management changes at the agency since the last hearing. We have instituted regularly scheduled bi-monthly meetings of the Commission. These meetings facilitate public access and provide a forum for the Commission to conduct its day-to-day administrative activities efficiently in the absence of a chairman. Further, our senior staff are reviewing the results of our employee survey, receiving staff suggestions and converting good ideas into positive action. We believe these actions by both the Commissioners and our senior staff will begin to address the concerns raised at the previous hearing. We are happy to answer any questions on the management of the agency.

We are appearing before the Committee during a very interesting time - not only for the Commission, but also for the maritime industry at large. Due to international economic conditions, we are facing dramatic increases in demand for U.S. exports on the eve of shifting competition policies among our trading partners.

The Ocean Shipping Reform Act of 1998 ("OSRA") significantly deregulated the U.S. trades and eliminated some of the commercial obstacles between shippers and carriers. Since the enactment of OSRA we have witnessed tremendous growth in the U.S. trades. Competition in the U.S. trades has been enhanced because of the success of confidential contracting under OSRA. If additional regulatory improvements or efficiencies are warranted, we will analyze the options and pursue those that are most promising.

Growth in U.S. Exports Brings New Challenges

As we identified in the April 2008 budget hearing, the total cargo volume of U.S. liner exports shipped worldwide grew by 12 percent in fiscal year 2007 and by 18 percent in the first half of this fiscal year. These increases are due largely to the declining value of the U.S. dollar relative to foreign currencies and the rising standard of living of our trading partners. For the first time in many years, total imports have declined slightly by a little over one percent in fiscal year 2007, and by five percent for the first half of fiscal year 2008. However, import cargo still exceeded export cargo, an imbalance of approximately one (1.0) twenty-foot equivalent container units ("TEU") of goods exported out of the U.S. for every 1.8 TEUs of cargo imported into the U.S. This increase in export cargo has had corresponding impacts on the supply chain.

As in preceding years, China was the leading trading partner in liner cargo with the U.S.; over half of all U.S. liner cargoes (both imports and exports) are concentrated in trade with countries in Northeast Asia. Cargo growth in imports from Asia slowed substantially by the end of fiscal year 2007, to less than one percent, down from a growth rate of 15 percent in fiscal year 2006. Some of this drop can be attributed to the corresponding declines in the U.S. housing market and rising costs of energy and fuel. Conversely, U.S. liner exports to Asia grew by 11 percent, up from a 6 percent increase in the preceding fiscal year.

The Commission has been closely monitoring recent developments in the U.S. export trade. Due to a variety of international economic conditions, the U.S. export trade has experienced strong growth. This growth, however, has not come without corresponding challenges as the nature of the import/export equation shifts due to the increasing demand on the export side. Namely, shippers in some parts of the country have been having difficulty in obtaining sufficient equipment and service to ship their goods overseas. The Commission is reaching out to carriers and shippers in an effort to find a solution to our exporters' problems and help the industry overcome the challenges of shifting trade dynamics.

Competition Review

With the European Union's block exemption set to expire in five months, the Commission is already exploring how elimination of the exemption in the E.U. trades would affect agreements filed with the Federal Maritime Commission. We estimate that only 6 agreements currently filed with the Commission will need to be restructured or eliminated to ensure carrier compliance with EU guidelines.

To put this figure into perspective, there are 234 carrier agreements currently filed with the Commission relating to the U.S.-foreign trades. Of these 234:

- 164 are vessel-sharing agreements
- 27 are rate discussion agreements
- 8 are non-rate-based discussion agreements
- 11 are cooperative working agreements

- 7 are joint service agreements
- 8 are conference agreements
- 6 are equipment interchange agreements
- 2 are alliance agreements, and
- 1 is a sailing agreement.

Perhaps more important than the elimination of the bloc exemption, the European Commission is scheduled to review the existing exemption for other carrier consortia agreements which is due to expire in 2010. Elimination of the consortia exemption could have significant impacts on U.S. trades through the elimination of numerous carrier alliances and vessel-sharing agreements (commonly known as "VSAs"). These operational agreements tend to enhance efficiency, restrain carrier consolidation and extend available services. The Commission receives many more alliance and vessel-sharing agreements than rate-making or discussion agreements. The impact on vessel-sharing agreements alone, as the most numerous type of agreement filed, would place at risk many of the efficiency enhancing attributes of such agreements.

From the U.S. perspective, a primary objective of VSAs is to ensure an efficient and adequate supply of ocean transportation services so that U.S. exports and U.S. trade can compete globally. When vessel operators use their limited exemption from competition laws to coordinate their operations or share assets to reduce costs or improve service it is not just carriers who benefit, but also U.S. businesses, producers and U.S. consumers.

The Commission will, however, have a better indication of the immediate and long term effects of the repeal of the bloc exemption on the European trades in the months following its effectiveness. We expect to monitor the transition and will study the impacts of the European Union's repeal of the bloc exemption. While the full parameters of the Commission's study are still being developed, we intend to conduct before-and-after comparisons of market conditions within the U.S. trades that would be most affected by the bloc exemption repeal. The Commission encourages members of the industry and the public to participate in our studies and to provide their insights upon this transition.

Agreement Activities

The Commission has continued to monitor the international liner trades, focusing most recently on agreement activities relating to marine terminal operators. Such agreements include those that address supply-chain and operational issues such as port congestion, security, air pollution and environmental concerns that affect local communities and the industry, including, in particular, the Clean Truck Program ("CTP") in the Port of Los Angeles and the Port of Long Beach ("the Ports"). The cities of Los Angeles and Long Beach, acting through their Harbor Boards, filed the *Los Angeles and Long Beach Port Infrastructure and Environmental Programs Cooperative Working Agreement* ("the Infrastructure Agreement") with the Commission to allow them to discuss and agree upon joint programs to address environmental and transportation infrastructure issues. Pursuant to that agreement the Ports developed the San Pedro Bay Ports Clean Air Action Plan ("CAAP") to address diesel emissions from multiple port sources, including heavy-duty trucks used in cargo drayage, ocean-going vessels, cargo-handling equipment, harbor craft, and railroad locomotives.

In order to implement the CTP, the Ports and the respective marine terminal operators filed the Los Angeles/Long Beach Port/Terminal Operator Administration and Implementation Agreement ("Implementation Agreement"). This agreement provides authority for the parties to cooperate on the administration and operation of port programs relating to port security, infrastructure, or clean air, such as the testing and implementation of TWIC and the administration of certain CTP programs. It also permits and provides for future agreement upon the admission or exclusion of licensed motor carriers ("LMC") trucking firms, and barring non-CTP-compliant equipment from entering the marine terminals. Los Angeles has announced its intention to limit access to port terminals to qualified LMCs who must use only employee drivers to the exclusion of independent owner-operators. Due to concerns for these latter provisions, the Commission initially requested additional information from the parties relative to the competitive effects of the activities conducted pursuant to the agreement.

Last week, the Commission concluded an expedited review of the Implementation Agreement and allowed the agreement to go into effect. The AIA contemplates future discussions to determine the extent to which the terminal operators will implement certain aspects of the San Pedro Ports Clean Trucks Program and the AIA Parties have not agreed to specific implementation procedures. The Commission concluded that there was no basis at this time to determine that the Implementation Agreement is likely to result in an unreasonable increase in transportation costs or decrease in transportation service. The Commission will continue to closely monitor developments at the Ports in order to ensure that agreement activities do not contravene the Shipping Act, and has emphasized to the Parties the need to immediately file with the Commission all substantive aspects of the Clean Truck Programs.

Mr. Chairman, we hope that these comments have provided you with an overview of some of the important issues the Commission is currently addressing. We are happy to answer any questions you may have.

Before the

MARITIME AND COAST GUARD SUBCOMMITTEE OF THE
COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE

UNITED STATES HOUSE OF REPRESENTATIVES

STATEMENT OF MR. PETER FRIEDMANN

on behalf of the
AGRICULTURE TRANSPORTATION COALITION

June 19, 2008

I. ABOUT AgTC

The AgTC was founded 21 years ago on the following principles:

1. Agriculture is the largest contributor to the positive side of our nation's balance of trade, **but**

2. there is nothing produced in US agriculture that cannot be sourced elsewhere in the world, **and**

3. if we don't assure a dependable and affordable transportation system to get our products to the foreign markets, those customers will go elsewhere.

The membership of the Agriculture Transportation Coalition is comprised of virtually all food and fiber agriculture exports (and imports) from all locations in the country, and every state of the Union. Farmers, ranchers, growers, food processors, packing houses, freight forwarders, compresses, ag warehouses are all members of the AgTC. They are located in rural areas and near the ports.

The AgTC conducts each year Ag Shipper Workshops for agriculture exporters and importers. Earlier this year they were held in Minneapolis, Seattle, Boise, Modesto, Long Beach and Atlanta. Just last week we concluded our 21st Annual Ag Transportation Conference last week, with overwhelming turnout and updates on the current ocean transportation capacity situation. The crisis is real.

The AgTC has organized meetings with the Federal Maritime Commission, dialogue with carriers, press briefings, participates in the Maritime Administration National Advisory Council (MTSNAC), and now briefs Congress, because all play an essential role in achieving the mission of the AgTC: to assure affordable, efficient and dependable transportation to keep U.S. ag competitive in the global marketplace.

II. OVERVIEW; ROLE OF THE TRANSPORTATION & INFRASTRUCTURE COMMITTEE

From the *Wall Street Journal* to the *Los Angeles Times* (both attached), newspapers around the country are reporting on an ocean transportation crisis facing U.S. exporters generally, and agriculture in particular, who seek to export U.S. grown, produced and manufactured products. These challenges are severely restricting this country's ability to export, are increasing our international trade deficit, threatening and limiting US jobs, and profoundly impacting the commerce of the United States.

United States farmers and manufacturers are being denied access to foreign customers, at a time when the low dollar and rising wealth overseas is presenting unprecedented opportunities to stimulate economic opportunities for growth here at home and export sales overseas.

The livelihoods of our entire agriculture food and fiber chain depend on the ability to access foreign markets. That access is jeopardized today. The result is millions, if not hundreds of millions, of dollars of forgone or lost sales from grain, to meat, to cotton, to produce, etc, etc. Agriculture exporters and their freight forwarders can attest to the fact that they simply cannot fulfill sales because they cannot get the cargo delivered, because the ships are full. This is true on the west coast, east coast, gulf coast, both U.S. and Canada.

Does Congress and specifically the Coast Guard and Maritime Transportation Subcommittee of the House Transportation & Infrastructure Committee, have the ability to constructively address the problem? Can this Committee keep U.S. exporters competitive in the global marketplace?

There are many reasons for the surging demand for U.S. exports, what this Committee can do is play a central role in removing a significant barrier to physically getting those exports to the foreign customers. That barrier is the collective actions of the ocean carriers to jointly discuss and fix transport charges and transportation services. The law that allows this activity is the Shipping Act of 1984 (as amended in 1998). It falls under this Committee's jurisdiction. It grants ocean carriers immunity from U.S. antitrust laws, and it is sorely in need of review.

The U.S. is not alone. To protect its own exporters, the European Union has recently repealed its laws which are similar to the Shipping Act, which have allowed ocean carriers to collectively discuss and fix ocean transportation rates. The repeal will be effective in October of this year.

It is time for Congress, and this Committee, to act, to protect U.S. exporters from such ocean transport price fixing.

III. THE CAUSES

There are numerous components to the current challenges facing U.S. agriculture exporters accessing the global marketplace. We roughly estimate that agriculture exports could be as much as 20-30% greater (by value) in certain sectors, if there was sufficient vessel capacity available at North American ports.

The causes of the current crisis include:

1. Growing wealth of foreign countries, demanding more and better food, and ag inputs. A global shift in consumption is underway. The most populous nations in the world, China and India, as well as Korea and southeast Asia countries, are becoming rapidly wealthier, with a middle class with increasing incomes, which are driving demand for U.S. products, and agriculture in particular. This is not a temporary trend, but one that will only accelerate in the coming years.

2. Low value of the dollar has accelerated the trend of foreign consumption of U.S. exports. Note: It is easy to attribute the demand for U.S. exports to a temporary drop in the value of the dollar. However, this is not the case. Agriculture exporters reported growing demand from foreign buyers BEFORE the dollar dropped so precipitously.

3. Leveling of consumption by U.S. consumers, meaning the volume of imports (and import containers) is not growing.

4. Insufficient vessel capacity to meet demand for current and future sales. The ocean carriers have, over the past two years, taken many vessels out of service to the U.S. Those vessels are now serving other trades, such as Asia to Europe. This reduced supply of vessel capacity and containers has created a shortage which is severely restricting U.S. access to world markets.

5. Specialty grain shifting from bulk shipping to container, due to foreign customer demand.

6. Railroad service reductions to rural (agriculture) locations, particularly in the Midwest.

7. Container imbalance. Exports weigh more than imports. A ship carrying 8,000 TEU of imports can only carry 6,000 TEU of exports. Cell phones come in boxes of Styrofoam and air, shoes are in boxes full of air, while compressed hay cubes, cotton, frozen poultry, etc. are heavy, and a ship cannot carry all 8,000 containers full of heavy export cargo.

8. Dramatically increasing fuel costs.

9. Ocean carrier antitrust immunity. Current law allows carriers to discuss and fix freight rates, surcharges, vessel capacity, etc. Thus, it is no surprise that every carrier comes out with same surcharges at the same time, takes similar capacity reductions, and imposes one-size-fits-all pricing. The state of customer service, of carrier-to-shipper relationships is horrendous. The AgTC has long championed the termination of carrier antitrust immunity, and we are very glad that the European Union has now done so, effective October of this year. This is the one factor under the complete control of Congress and this Committee.

10. Foreign entities are controlling U.S. agriculture and manufacturing access to foreign markets. Almost all of the containerized ocean carrier capacity serving the U.S. is now foreign owned, in some cases by foreign governments.

IV. THE OCEAN SHIPPING ACT

Has the Act Succeeded?

Under Section 2. DECLARATION OF POLICY, the purposes of the Shipping Act are stated.

1. To establish a nondiscriminatory regulatory process for the common carriage of good 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;**

3. To encourage the **development of an economically sound and efficient United States-flag liner fleet** capable of meeting national security needs; and

4. To **promote the growth and development of United States exports** through competitive and efficient ocean transportation and by placing a greater **reliance on the marketplace**.

Has the Act Succeeded? Apparently Not

In fact, the Shipping Act has accomplished the opposite:

1. The immunity from antitrust laws will shortly be ***inconsistent*** with the EU;

2. Even with the protection of the antitrust immunity, most of the United States flag liner (container) fleet has ***gone out of business***;

3. Allowing ocean carriers to collectively fix ocean transport rates and "prevent competition" (as authorized by the Act).

4. The Act is ***undermining*** the growth and development of United States exports.

The Times Have Changed

It is this last factor, that the Act is in fact undermining the growth and development of United States exports, which is the motivation for our urgent appeal to this Committee to promptly review this Act under its jurisdiction.

The Ocean Shipping Act of 1984 and the Ocean Shipping Reform Act of 1998 were appropriate to those times, but circumstances have changed, in some cases dramatically.

Those laws are now badly in need of review and revision by this Committee and Congress. Today they are badly out of step, they are inconsistent with international shipping practices, and in some respects have proven to be dismal failures, not achieving their stated objectives. The European Union, which has long had similar laws, has determined that they are injurious to

European economic interests, and have thus repealed them effective this October. It is time for this Committee to begin to seriously review these laws.

It is not a given that changing these laws will immediately result in increased vessel capacity serving U.S. exports, but it is clear that these laws are providing a means by which ocean carriers can, and do, collaborate to fix prices for transportation, to discuss how many ships they keep in the trades, and, if they wish, agree to reduce available ocean shipping capacity in order to drive prices up.

What Does the Act Allow Carriers to do?

Members of Congress are generally shocked to read the actual language of the Shipping Act:

SECTION 4. AGREEMENTS WITHIN SCOPE OF ACT

a) Ocean common carriers. This Act applies to [allows] agreements by or among ocean common carriers to –

   1) **Discuss, fix, or regulate transportation rates**, including through rates, cargo space accommodations, and other conditions of service;

   2) Pool or apportion traffic, revenues, earnings or losses;

   3) Allot ports or **restrict** or otherwise **regulate the number and character of sailings between ports**;

   4) **Limit** or regulate **the volume or character of cargo** or passenger traffic to **be carried**;

   5) Engage in exclusive, preferential, or cooperative working arrangements among themselves or within one or more marine terminal operators;

   6) **Control, regulate, or prevent competition in international ocean transportation**; or

   7) Discuss and degree on any matter related to service contracts.

Carriers utilizing this immunity can and have at various times organized into groups to discuss and fix rates and service. Whether they call themselves cartels, or conferences, or something sounding more benign, such as talking agreements, stabilization agreements, or discussion agreements, really makes no difference.

V. CONCLUSION

We do not allow collective price fixing and capacity manipulation, for any industry, in our own economy. The European Union will not, effective October this year, allow ocean carriers to have this authority, as it is revoking carriers' antitrust immunity in the international trades serving European exports and imports. Why should we allow it here? Why should we allow such outdated concepts to restrict U.S. access to the global economy and our ability to export our agriculture and manufactured products, thus exacerbating our balance of trade deficit?

Please see attached *Wall Street Journal* and *Los Angeles Times* articles.

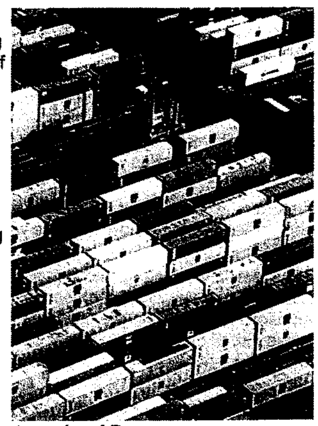
THE WALL STREET JOURNAL.

Container Shortage Frustrates U.S. Exporters

Agriculture Industry Battles Bottleneck At Many Ports

By ILAN BRAT and TIMOTHY AEPPEL
The Wall Street Journal
May 9, 2008; Page A4

Surging U.S. exports on a range of goods including corn, soybeans and frozen pork are hitting a bottleneck in the nation's overloaded ports, threatening to crimp profits for U.S. farmers and agricultural processors at a time when it is easier than ever for them to sell their goods abroad.



Associated Press
Shipping containers are stacked on a wharf at the Port of Newark, N.J.

The problem can be traced to a shortage of once-plentiful shipping containers and other transportation equipment, along with a lack of space on outgoing ships. The shortage is affecting other industries, including exporters of manufactured goods and sellers of scrap metal and paper.

Exporters' frustration is building even as U.S. agricultural exports have jumped 20% by weight in the six months ended Feb. 29, compared with the same period last year, according to the Department of Agriculture. Shipments of lentils and peas are being delayed by months. Cargo-ship operators are raising prices. Many cold-storage facilities are packed to near capacity with pork and other meat products waiting to be loaded into containers -- rectangular boxes that are generally 20-feet or 40-feet long.

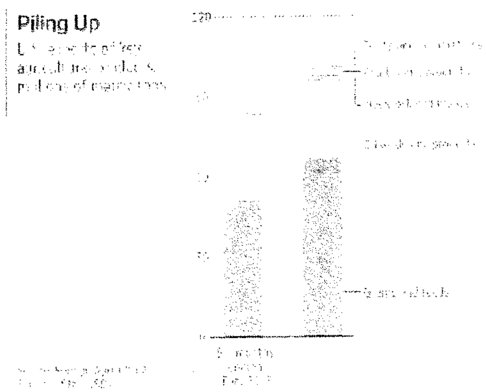
Peter Friedmann, executive director of the Agriculture Transportation Coalition, estimated agricultural exporters could have shipped 20% to 30% more products in the past six months if more containers were available.

The port congestion comes as food prices are rising and grain stocks are dropping amid a surge in demand from fast-expanding nations such as India and China. Two other factors boosting food prices are the increasing use of grains in the production of biofuels and poor harvests in several big food-producing nations. The increased shipping costs could push grain prices higher still.

"My partner and I are pulling our hair out trying to figure out what to do," said Larry Jansky, a senior trader in agricultural commodities for North Pacific Group Inc., which trades specialty grains and is based in Portland, Ore. Birdseed and other grain cargo he had scheduled to leave the country for the Far East and Caribbean in late February and early March now won't ship until later this month, he said.

Finding enough containers for agricultural products used to be easy. The U.S.'s massive demand for imports meant shipping firms typically scoured the country for anyone willing to fill outgoing boxes. Often grains, scrap metal and paper fit the bill.

As shipping lines have shifted more of their fleet to lucrative routes in Asia and between Asia and Europe, there are fewer containers available to handle grains and other commodities in the vast agricultural heartlands of the U.S. and Canada.



Mr. Jansky said the shortage has forced him to pay truck drivers to camp overnight at rail yards to line up for empty containers to cart to agricultural loading points.

The container shortage also is complicating pricing, especially for refrigerated containers. Producers of products such as cheese, poultry and meat are accustomed to calling up a local shipping depot and getting a container sent over on short notice. Now, they sometimes have to pay for containers to be sent hundreds of miles. The prices producers quote when inking deals on big foreign sales sometimes don't include or only partially reflect the added cost of getting a container to where it is needed.

"Before, the price would take into consideration that the empty container was sitting down the road in Chicago or somewhere else close," said Victor Cruz, of Lakehurst, N.J., who makes international delivery arrangements for shipping companies. "Now the container has to be hauled out from New Jersey, so [customers are] paying for a round trip."

Adding to the problem is that shipping rates are steadily increasing, and shippers are boosting their fuel surcharges. In the past, rates were set for six months or even a year.

Some exporters, worried about availability, have resorted to ordering containers months before they need them, and sometimes they show up at the wrong time.

Some exporters "are calling up and making a booking for 100 containers for eight weeks out," and then the customer shows up with enough goods to fill only 40 or 50 containers, said Bob Sappio, American President Lines Ltd.'s senior vice president for trans-Pacific trade. APL, which is a subsidiary of Neptune Orient Lines Ltd. of Singapore, last year swung five to 10 of its 120 ships world-wide away from U.S. ports, Mr. Sappio said.

Large agricultural companies such as Archer-Daniels-Midland Co. may not be as affected by the container shortage as smaller companies, said Jay O'Neil, a senior agricultural economist at Kansas State University, as they have greater shipping resources.

Partly to address the problem, Mr. Friedmann of the Agriculture Transportation Coalition held a conference call with 59 members in late April to discuss what to do. Participants talked about getting Congress -- with the help of other industries -- to repeal parts of a shipping law that allows carriers to discuss and fix transportation rates and service. By doing so, he believes carriers will respond more to supply and demand. They also considered pushing federal regulators to examine shipping companies' pricing practices.

Mr. Friedmann worries any possible solution will come too late to help with the container shortage. U.S. agricultural exporters currently worry their customers will start buying from other countries that produce grains, meat and other commodities.

Los Angeles Times

U.S. exporters face cargo container shortage at ports

The weak dollar has increased demand for American goods overseas, but a decline in imports means fewer ships are coming from Asia.

By Ronald D. White, Los Angeles Times Staff Writer
May 12, 2008

At a time when the struggling U.S. economy needs the biggest boost it can get from booming exports, companies and agricultural producers with American goods bound for overseas can't find enough empty cargo containers and have to wait weeks to get space on ships headed to Asia.

Only a few years ago, the trade bottleneck was the reverse. At U.S. harbors -- particularly the nation's biggest container complex at the twin ports of Los Angeles and Long Beach -- there were too few dockworkers to handle surging imports. Inland rail capacity to the rest of the U.S. was similarly strained.

Now, because of the container problem, U.S. exporters find themselves unable to take full advantage of the competitive edge of a weak U.S. dollar.

"We could export a good 20% more in agricultural products from this country if there was the capacity to handle it," said Peter Friedmann, general counsel for the Washington-based Agriculture Transportation Coalition, a lobbying group formed to help growers become more competitive internationally.

"People talk about how important it is to reduce the trade deficit. Well, here is one way to do it, and the opportunity is slipping away."

The container problem is being most acutely felt in the Midwest, said Friedmann and other experts. Southern California isn't suffering as much because of its ports' role as a key gateway to Asia.

Los Angeles and Long Beach moved 15.7 million containers in 2007, nearly three times as much as the No. 3 port, New York/New Jersey, and attracted many more empty containers for shipping back to Asia than any other port complex.

This year, imports through March were down 7% at Los Angeles and 11% at Long Beach, while exports were up 21% and 26%, respectively -- and the numbers of empty containers were down 28% and 25%.

"Last year, I could have called for a ship and had it by next week. Now it takes up to six weeks to book one. There just isn't enough room on the ships," said Howard Wallace, president of the Los Angeles Harbor grain terminal, where exports are up 150% this year.

Friedmann said he knew of a California dairy that could have sold 600 more containers of goods overseas, if it had been able to find cargo boxes. A beef and poultry producer in the Midwest, Friedmann said, missed out on at least $10 million in sales overseas for the same reason.

There are several reasons for the bottleneck of exports bound for Asia through the West Coast ports. The weak U.S. dollar has combined with growing Asian economies to increase the demand for U.S. goods, raising the need for containers.

But when the U.S. economy cooled and American consumers began tightening their belts, oceangoing shipping lines pulled as many as 30% of their vessels, and a commensurate number of containers, out of the routes from Asia to the West Coast. They moved them to Asia-to-Europe routes and to routes between Asian countries where the economies were more robust, said Paul Bingham, an economist for Global Insight.

Another problem was pure physics, said Asar Ashaf, head of the Washington office of the University of New Orleans' National Ports and Waterways Institute. A ship that can carry 8,000 containers of finished goods such as electronics, toys and apparel from Asia to the U.S. can't carry 8,000 containers of exports from the U.S. back to Asia.

"The exports are heavier -- grains, paper, scrap metals. The ship reaches its tonnage limit much faster, so maybe it is carrying only two-thirds as many containers of exports back to Asia," Ashaf said.

Also, the shipbuilding industry has placed far more emphasis on building container vessels than on the bulk carriers that used to dominate trade in items such as grains and scrap metal. Wallace said the competition for the limited amount of space available on bulk vessels has made using them much more expensive than container ships. Plus, Wallace said, his Asian customers prefer their agricultural goods shipped in sealed containers.

"Once they start using containers, they don't want to go back to bulk," Wallace said.

All of that has combined to make it harder for exporters to find space quickly on container vessels. Spokesman Mark Bagby said that members of Calcot, a Bakersfield-based farmer-owned cooperative with about 1,400 members, said, "We're having a little trouble finding space on the ships," even though they are exporting less.

The export problems have been compounded by a significant change in the way shipping lines view empty containers. They were once so plentiful because of the import boom and huge trade imbalance that the shipping lines "were happy to have anything in them" for the return trip to Asia, said Mike Zampa, a spokesman for APL, a subsidiary of Singapore-based Neptune Orient Lines.

Now, with fuel costs soaring and fewer containers available, Zampa and others say that exporters are going to have to pay more to make doing business with them profitable. To combat that, Zampa said, exporters are going to have to put the same effort into logistics planning that importers do on a routine basis now.

"We're telling them they have to plan ahead, try to even out their shipments, try to take advantage of times of the year when there may be more slack in the demand," Zampa said.

Exporters aren't happy with the new balance in the shipping trade.

Friedmann of the Agriculture Transportation Coalition said the fault is with the shipping lines for talking too much among themselves and not enough to their export customers. Many exporters, he said, are willing to pay more to get the empty containers they need -- if only they could get them.

"The mind-set of the shipping lines is that they serve the import cargo. That is where the money is," Friedmann said. "They just didn't see this problem coming."

Before the

SUBCOMMITTEE ON COAST GUARD AND MARITIME TRANSPORTATION

Hearing on

FEDERAL MARITIME COMMISSION MANAGEMENT

and

REGULATION OF INTERNATIONAL SHIPPING

JUNE 19, 2008

Testimony of

WIN FROELICH, *General Counsel*

NATIONAL ASSOCIATION OF WATERFRONT EMPLOYERS

919 – 18TH STREET, NW, SUITE 901

WASHINGTON, DC 20006

202.587.4802

NAWE

SUBCOMMITTEE ON COAST GUARD AND MARITIME TRANSPORTATION

Hearing on

FEDERAL MARITIME COMMISSION MANAGEMENT AND REGULATION OF INTERNATIONAL SHIPPING

Testimony of

NATIONAL ASSOCIATION OF WATERFRONT EMPLOYERS

JUNE 19, 2008

I INTRODUCTION

Mr. Chairman and distinguished members of the Subcommittee, I want to thank you for inviting me to testify on this important issue of the Federal Maritime Commission Management and Regulation of International Shipping. My name is Win Froelich, and I am the general counsel to the National Association of Waterfront Employers (NAWE).

NAWE is a not-for-profit trade association organized under section 501(c)(6) of the tax code. NAWE represents the United States private sector marine terminal operators (MTOs) and stevedores. NAWE member companies load and unload vessels at the vast majority of the general cargo and container terminals along the Great Lakes, East Coast, Gulf Coast, West Coast, Alaska, Hawaii, and the territories and commonwealths of the United States.

The ports of the United States handle approximately 15% of the U.S. Gross Domestic Product (GDP), and NAWE member companies handle the majority of this cargo. The national and world economies are dependent upon the efficient flow of commerce through NAWE member facilities.

My objective today with this written testimony is to provide the Subcommittee with background on the legal and factual structure of the U.S. maritime industry. I believe that it is important for the Committee to understand three facts:

1. The United States is a maritime nation dependent upon maritime commerce for survival.
2. The U.S. Constitution assigns responsibility for regulating the maritime commerce to the federal government exclusively, and removes regulatory power from states and local authorities.
3. Private sector marine terminal operators are increasingly being called upon to help solve public policy problems—congestion, pollution, security, safety—that will be difficult to solve without the antitrust immunity provided in federal law.

Let me address each of these points in order.

2 MARITIME COMMERCE

The United States is dependent upon maritime commerce for its survival. The starting point of this discussion should be geography. The United States has land connections with only two countries—Canada and Mexico—and has no direct land connections with Alaska, Hawaii, Puerto Rico and the territories. Furthermore, most of the states have no direct coastal outlet to world maritime commerce. Instead, most states are dependent on the ports in their sister states for access to world markets.

The U.S. is the world's principal maritime country with 20% of the world's maritime volume coming either to or from the U.S. Roughly 15% of the U.S. GDP—approximately $2.5 trillion in commerce—flows into or out of our ports. The 15% of commerce that flows through our ports only scratches the surface of the impact maritime commerce has on the U.S. economy. For each ton of maritime commerce that flows through the ports, scores of U.S. jobs are created in every sector of the economy: jobs that are dependent on imports and exports. I believe, but cannot point to a study to substantiate it, that more than half of the U.S. GDP is directly or indirectly dependent upon maritime commerce.

Much of this commerce now moves through containers. In 2006, U.S. maritime commerce required more than 27 million TEU containers. Cargo volume has grown 10% annually for most of the recent past, and there is no reason to believe that there will not be significant growth well into the future.

Fortunately, the U.S. has significant natural and man-made resources available to it to handle this maritime commerce. The U.S. has 25,000 miles of waterways and 1,000 harbor channels that contain more than 350 ports with more than 3,700 marine terminals. These marine terminals handle more than 65,000 port calls of vessels over 10,000 DTW (2006) and 110,000 commercial and recreational fishing vessels. One hundred thirty million passengers move by ferry each year, and there are more than five million cruise ship passengers.

While the U.S. has natural and man-made maritime resources, increasingly, the flow of maritime commerce is concentrated in a few "super ports." LA/Long Beach and New York/New Jersey are at the top of the list. Of the 27 million TEU containers that entered the U.S. in 2006, 14 million TEUs, or slightly over half, went through these two ports. More importantly, from an economic standpoint, the most valuable commerce tends to flow through these two ports. If you measure cargo by value instead of volume, roughly 5% of the GDP flows through LA/Long Beach and roughly 5% flows through New York/New Jersey. The remaining 5% flows through all the rest of the U.S. ports.

Most of the cargo flowing through a port—usually well over 66%—is going to or coming from states other than a port state. As mentioned earlier, most states today have no direct coastal outlet to the world's markets.

Let me give you a practical example of how this maritime commerce system works. On Friday, a 6,000 TEU vessel containing approximately $5 billion of commerce—food, clothing, auto parts, furniture and other essential goods—will arrive in LA/Long Beach. That vessel represents just 6,000 of the approximately 30 million TEU that will be transported this year.

That ship will be unloaded over the weekend, and by Monday the offloaded cargo will be enroute to various distribution centers across the nation. It takes approximately 60 trains each and every day, each train more than a mile long, plus tens of thousands of trucks to move cargo to and from LA/Long Beach. By the following Wednesday, that ship will be reloaded with billions of dollars of US exports and on its way to foreign ports.

Within one week, the cargo from that ship arriving Friday will be in the distribution centers of this nation. Within two weeks, the cargo will be on retail store shelves and in factories. The food, clothing, and other goods will be on our retail shelves in large and small towns across the country. The auto parts will be going into cars in assembly plants in Michigan, Tennessee, Alabama and other states. Some of the cargo arriving Friday will already have been sold two weeks from now, and the export goods that were loaded on that ship will have been unloaded in some distant port.

This is the modern just-in-time delivery system that is now the basis of the entire U.S. and world economy. The ships and marine terminals of today are the warehouses of yesterday. When the flow of maritime commerce stops, the U.S. and world economies stop. U.S. factories close and grocery shelves and retail stores start to empty within weeks of a disruption in the flow of maritime commerce.

Any disruption in the maritime commerce system has an immediate and measurable impact on the economy. The Nation saw this during the short lockout on the West Coast several years ago. The Nation had months of advance notice that a strike or lockout might occur. Many businesses tried to stockpile critical parts and supplies in anticipation of such a strike or lockout. Nonetheless, within a week of the lockout, plants started to close and goods started to disappear from store shelves.

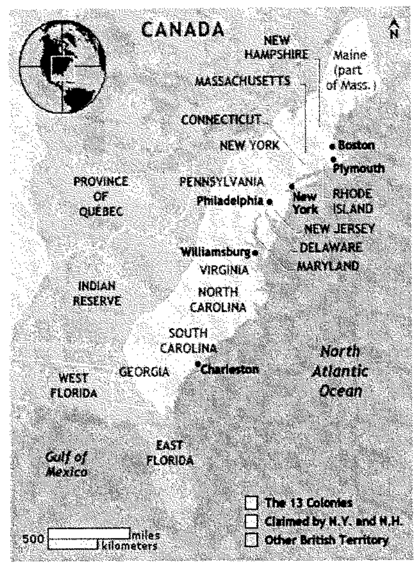
Furthermore, it takes a long time to recover from any disruption in the maritime commerce system. The Department of Transportation estimates that recovery from a one-day disruption takes one month. Recovery from a week-long disruption takes six months.

The maritime commerce system has to work, and it has to work smoothly. As the Committee considers changes to the Nation's laws governing maritime commerce, NAWE looks forward to working with the Committee to make sure that changes improve the reliability and efficiency of the system.

3 FEDERAL RESPONSIBILITY

The above example brings me to my second point which is that the regulation of maritime commerce is exclusively a federal responsibility. Let me again start with geography. The map below is of the thirteen original colonies at about the time the Constitution was adopted.

From its inception, the United States was a maritime nation. Most of the commerce with the world, and between the states, flowed over the navigable waters. Each of the original colonies had direct outlets to the sea to facilitate this commerce. The borders of the original colonies were frequently the major rivers and harbors of the Nation. Not surprisingly, the ports of the Nation were located on these harbors and rivers, and the major population centers were these port cities.



This geography placed each of the original thirteen colonies in a position to interfere with the maritime commerce of the other colonies; and interfere they did. Each of the original thirteen colonies attempted to negotiate its own deals and make its own laws concerning maritime commerce. Virginia for example attempted to require all vessels destined for the Port of Baltimore to first make a port call in Norfolk.

This lack of uniformity and constant interference between the colonies led to the Virginia Resolution on January 21, 1786:

> *Resolved*, That Edmund Randolph, James Madison, jun. Walter Jones, Saint George Tucker and Meriwether Smith, Esquires, be appointed commissioners, who, or any three of whom, shall meet such commissioners as may be appointed by the other States in the Union, at a time and place to be agreed on, to take into consideration the trade of the United States; to examine the relative situations and trade of the said States; to consider how far a uniform system in their commercial regulations may be necessary to their common interest and their permanent harmony; and to report to the several States, such an act relative to this great object, as, when unanimously ratified by them, will enable the United States in Congress, effectually to provide for the same.

The Virginia Resolution called for a meeting of the colonies. The meeting had one purpose, to centralize the control of maritime commerce. The Virginia Resolution led to the Annapolis Convention in September 1786. The Annapolis Convention led to the Philadelphia Convention in May 1787 where our Constitution was written. The Constitution was then ratified in September 1787.

The Constitution reflects the concern over federal regulation of maritime commerce. The Constitution is full of clauses concerning maritime commerce. These clauses can be divided into four categories:

Some clauses grant power to the federal government. Examples of this type of clause include:

- "The judicial Power shall extend . . . to all Cases of admiralty and maritime Jurisdiction," Art. III, § 2 (Admiralty Clause)
- "The Congress shall have power . . ."
- "To provide for the common defense," Act. I, § 8 cl. 1
- "To regulate Commerce with foreign Nations, and among the several States," Art. I, § 8, cl. 3 (Commerce Clause)
- "To define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations," Art. I, § 8, cl. 10
- "To declare War, grant Letters of Marque and Reprisal, and Rules concerning Captures on Land and Water," Art. I, § 8, cl. 11
- "To provide and maintain a navy," Art. I, § 8, cl. 13
- "To make rules for the government and regulation of the land and naval forces," Art. I, § 8, cl. 14
- "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the Unites States, or in any Department or Officer thereof," Art. I, § 8, cl. 18

Some clauses restrict the power of the federal government. Examples of this type of clause include:

- "No tax or Duty shall be laid on Articles exported from any State," Art. I, § 9, cl. 5
- "No Preference shall be given by any regulation of Commerce or Revenue to the Ports of one State over those of another; nor shall Vessels bound to, or from, one State, be obligated to enter, clear, or pay Duties in another," Art. I, § 9, cl. 6

Some clauses restrict the power of the state and local governments. Examples of this type of clause include:

- The Admiralty Clause Non-Delegation Doctrine, Art. III, § 2
- Negative Commerce Clause, Art. I, § 8, cl. 3
- "No State shall enter into any Treaty, Alliance, or Confederation," Art. I, § 10, cl. 1
- "No state shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing it's inspection laws: and the net produce of all duties and imposts, laid by any state on imports or exports, shall be for the use of the treasury of the United States; and all such laws shall be subject to the revision and control of the Congress," Art. I, § 10, cl. 2
- "No State shall, without the Consent of the Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compacted with another State , or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay," Art. I, § 10, cl. 3

Finally, the Supremacy Clause makes all of this federal maritime and commerce law the supreme law of the land, overriding any state or local laws that might conflict.

- "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding," Art. VI, § 2

The federal focus on maritime issues did not end with the adoption of the Constitution but continued with the first Congress. One of the first acts was the Judiciary Act of 1789, which created the federal courts and included the "saving to suitors" clause which is still part of the admiralty law of the United States. The principal reason for creating the lower federal courts was the need for federal courts to exercise admiralty jurisdiction. The new government also needed a funding mechanism, and, again, the first Congress turned to maritime commerce. The Revenue Cutter Service of 1790 established what is now the Coast Guard to enforce the maritime tariffs that provided the funding source for the new nation.

The new Supreme Court also immediately turned to maritime law issues. The early Supreme Court addressed maritime issues such as insurance for vessels and cargo (*Wallace v. Child and Styles*, 1 U.S. 7 (1763)), the admiralty jurisdiction of the United States (*Montgomery v. Henry*, 1 U.S. 49 (1780)), and prizes taken at high sea (*Talbot v. Commanders & Owners of Three Brigs*, 1 U.S. 95 (1784)).

The regulation of maritime matters by all three branches of the federal government has continued to this day, and it must continue into the future. As we saw mentioned earlier in this text, the reasons for giving power over maritime commerce to the federal government and removing it from the states, is even more compelling today. Most states today do not have direct outlets to the sea. Those non-coastal states must have as much say in how the maritime commerce system works as the coastal states do. Nebraska, South Dakota and Iowa can no more allow California to interfere with the flow of their grain to world markets than could Maryland allow Virginia to interfere with the flow of commerce to the Port of Baltimore back in the 1770s. Since the adoption of the Constitution, the regulation of maritime commerce has been exclusively a federal responsibility.

The loading and unloading of a vessel by MTOs and stevedores is a maritime activity and part of the federal regulatory responsibility to the exclusion of the states. *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917); *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149 (1920); *Washington v. W. C. Dawson & Co.*, 264 U.S. 219 (1924). Virtually every aspect of the work performed by NAWE members is regulated by federal, not state law. The industry's workers' compensation system is federal under the *Longshore and Harbor Workers' Compensation Act*, 33 U.S.C. §§ 901 *et seq.* (LHWCA). The industry's contracts for leasing land are federal contracts regulated by the Federal Maritime Commission (FMC) under *The Shipping Act of 1998*, 46 U.S.C. App. §§ 801 *et seq.* (*The Shipping Act*). The industry's customer contracts for loading and unloading vessels are federal contracts regulated by the FMC under *The Shipping Act*. The industry's tort liability for handling cargo is federal under the *Carriage of Goods by the Sea Act*, implementation codified at 46 U.S.C. §§ 1300, *et seq.* The industry's security is governed by federal law through the Maritime Transportation Security Act, 46 U.S.C. §§ 70101 *et seq.*, and other federal laws.

The same federal admiralty/maritime jurisdiction that gave the federal government authority to regulate every aspect of the MTO/stevedoring industry also protected the industry from conflicting and inconsistent state laws. *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917); *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149 (1920); *Washington v. W. C. Dawson & Co.*, 264 U.S. 219 (1924). While it probably goes too far to say that states have no role when it comes to maritime commerce, it is safe to say that the role of states is minimal at best. Any state regulation of maritime activities is unconstitutional if it:

1. Discriminates against or burdens the maritime commerce of the United States (U.S. Constitution, Article I, Section 8, Clause 3. *Healey v. Beer Institute, Inc.*, 491 U.S. 324, (1989); Hughes *v. Oklahoma*, 441 U.S. 332 (1979)).
2. Works a material prejudice to any characteristic feature of the general maritime law of the United States or interferes with the harmony or uniformity of the maritime law of the United States (U.S. Constitution, Article III, Section 2, Clause 1. *Southern Pac. Co. v. Jensen*, (244 U.S. 205 (1917); *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149 (1920); *Washington v. W. C. Dawson & Co.*, 264 U.S. 219 (1924)).
3. Lays imposts or duties on the maritime commerce of the United States in an amount that is not absolutely necessary for executing state inspection laws. (U.S. Constitution, Article I, Section 10, Clause 2).
4. Taxes the exports of any state (U.S. Constitution, Article I, Section 9, Clause 5).
5. Lays a duty on tonnage (U.S. Constitution, Article I, Section 10, Clause 3).
6. Imposes a tax or fee on the maritime commerce of the United States unless the tax or fee: (i) directly applies to activities with a substantial nexus to the state; (ii) is fairly apportioned between the maritime commerce of the United States and other entities in the state; (iii) does not discriminate against the maritime commerce of the United States when compared to other entities in the state; (iv) is fairly and directly related to the services provided by the state; (v) does not enhance the risk of multiple taxation of the maritime commerce of the United States; and (vi) does not impair federal uniformity in an area where federal uniformity is essential, unless such tax or fee has been expressly approved by Act of Congress. (U.S. Constitution Article I, Section 10, Clause 2. *Washington Rev. Dept. v. Stevedoring Assn.*, 435 U.S. 734 (1978); *Japan Line, LTD. v. County of Los Angeles*, 441 U.S. 434 (1979); *Oregon Waste Systems v. Environmental*, 511 U.S. 93 (1994)).

This list of constitutional restrictions that directly apply to state regulation of maritime commerce does not include a large number of other constitutional clauses that indirectly apply, e.g., due process, search and seizure and equal protection, and also does not include the countless number of additional statutory restrictions that may directly or indirectly restrict state authority.

There can be no doubt that Congress and the federal government have a constitutional obligation to protect maritime commerce from the interference of state and local governments. It is NAWE's position that the Congress has not done enough to fulfill its constitutional obligation to protect maritime commerce from state and local interference. It is interesting to contrast what this Committee has done for aviation versus maritime commerce. Aviation does not enjoy constitutional protection the way that maritime commerce does. However, when a state or local government takes any action that might interfere with aviation, Congress has established an administrative process for rapidly reviewing that state or local action. There is an officer of the United States, the FAA Administrator, who is responsible for ensuring that no state or local interference occurs. 49 U.S.C. § 40103 Sovereignty and Use of Airspace. No such federal official exists when it comes to maritime commerce.

NAWE respectfully requests that any revisions to *The Shipping Act* include the addition of a statutory provision similar to that contained in the *Federal Aviation Act*. At the very least, maritime commerce should be on the same footing as aviation commerce. NAWE looks forward to working with the Committee as it reviews the maritime commerce laws to further ensure that regulation of maritime commerce remains the exclusive domain of the federal government.

4 ANTITRUST IMMUNITY AND SOCIAL PROBLEMS

NAWE recognizes that this Committee will review the issue of antitrust immunity in light of the recent actions of the European Union. I have attached the NAWE submission to the Antitrust Modernization Commission, which reviews our position in great depth. Let me make a few points here. First, any review of the ocean common carrier immunity should be separate from that of MTOs. The environments in which carriers and MTOs operate are different. The Committee should note that its witnesses by and large are not calling for or addressing the antitrust immunity for MTOs. The legal and economic issues are different when it comes to carriers and MTOs and they must be considered separately.

Second, MTOs are increasingly being asked to solve public policy problems that are not directly within their control and do not lend themselves to market forces. An easy example is the move to truck traffic using night gates in LA/Long Beach. The public wanted more truck traffic to move at night to reduce congestion and pollution. MTOs have no direct contractual relationship with trucks and the customer demand was for the cargo to move during the day. If any MTO had acted unilaterally to force cargo to move at night, the marketplace would have shifted the cargo to a competitor. The only mechanism for moving the cargo to night gates was for all the MTOs to work together. Without the antitrust immunity in *The Shipping Act*, this change never would have occurred.

A second example is some of the cooperative efforts that MTOs have undertaken to improve security. Again, these efforts have involved sharing costs and imposing uniform obligations on the market place so that security is improved for all.

Again, NAWE looks forward to working with the Committee to address the issue of where antitrust immunity is appropriate in the maritime commerce system.

Mr. Chairman and members of the Committee, thank you for your kind attention.

NAWE

NATIONAL ASSOCIATION OF WATERFRONT EMPLOYERS

Submission to the Antitrust Modernization Commission On Behalf of the National Association of Waterfront Employers

1. INTRODUCTION

1.1. Summary of Arguments

The National Association of Waterfront Employers (NAWE) submits this paper to the Antitrust Modernization Commission (Commission) in support of retaining the limited antitrust immunity for the marine terminal operator (MTO) industry contained in *The Shipping Act of 1998*, 46 U.S.C. App. §§ 1701 *et seq.* (*The Shipping Act*). NAWE advances several arguments as to why the limited antitrust immunity should be retained for MTOs:

1. MTOs operate in a sea of antitrust immunity. NAWE members compete with, and operate in, a marketplace where virtually every participant enjoys some degree of antitrust immunity including state entities that operate MTOs, foreign "controlled carriers" (some of whom own and operate MTOs), ocean common carriers and organized labor. NAWE submits that it would be nonsensical to consider repealing the limited antitrust immunity under *The Shipping Act* for MTOs without also considering the other antitrust immunities from other statutory and judicial sources such as the state action doctrine, enjoyed by other participants in the marketplace.

2. Both the carriage of goods by ocean common carriers and the operation of ports are "natural monopolies" as that phrase is defined by economists. Any repeal of the limited antitrust immunity contained in *The Shipping Act* must be evaluated in light of these "natural monopolies" and the potential impact on the maritime commerce and other markets. NAWE submits that repealing the limited antitrust immunity under *The Shipping Act* would result in greater consolidation in the maritime commerce marketplace and, more importantly, less competition in other markets that are more important to American consumers.

3. The MTO market is as far from a "perfect market" as that phrase is used by economists. As a result, the MTO marketplace is not responsive to market forces in the same way that a "perfect market" would respond. The government response to this economic fact has been to heavily regulate the MTO marketplace at the federal level.

919-18th Street, NW ■ Suite 901 ■ Washington, DC 20006
www.nawe.us ■ 202.587.4800

NAWE

4. Where antitrust immunity has been removed, there is little competition and cost of services is greater. The one area where the limited antitrust immunity in *The Shipping Act* does not apply is in the domestic trade between Hawaii, Alaska and the West Coast and Puerto Rico and the East Coast.

5. MTOs are being asked to solve problems that have nothing to do with meeting the needs of customers, such as increasing security, reducing pollution and reducing highway congestion. In many instances, these problems are not under the direct control of MTOs, are not subject to market forces and cannot be solved without port-wide, state-wide or coast-wide cooperation.

1.2. NAWE Background

NAWE is a not for profit, trade association organized under section 501(c)(6) of the tax code. NAWE represents the United States private sector marine terminal operators (MTOs) and stevedores. A marine terminal operator is a defined entity under *The Shipping Act:*

> (14) *marine terminal operator* means a person engaged in the United States in the business of furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier, or in connection with a common carrier and a water carrier subject to subchapter 11 of chapter 135 of title 49, United States Code.

The Shipping Act, 46 U.S.C. App. § 1701(14). *The Shipping Act* definition of MTO covers both private sector MTOs and public sector MTOs (port authorities) that are controlled by state governments, local governments and multi-state compacts.

NAWE member companies load and unload vessels at the vast majority of the general cargo and container terminals along the Great Lakes, East Coast, Gulf Coast, West Coast, Alaska, Hawaii, and territories and commonwealths of the United States. The ports of the United States handle approximately 15 percent of the United States gross domestic product and NAWE member companies handle the majority of this cargo. The national and world economies are dependent on the safe and efficient flow of commerce through NAWE facilities.

For example, cargo that is off loaded from a vessel in LA/Long Beach over the weekend may be in Chicago by Friday and on store shelves by the following Monday. If the cargo doesn't move efficiently, the store shelves start to become bare in a matter of days or weeks. The federal government has estimated that a one day shut down of the ports on either coast would take one month to get the system back to where it would have been without the shut down. A one week shut down on either coast would take six months to straighten out the cargo/logistics backup.

NAWE

NAWE member companies are heavily regulated by the federal government through the admiralty/maritime jurisdiction and commerce powers of the federal government. The industry's workers' compensation law is federal under the *Longshore and Harbor Workers' Compensation Act*, 33 U.S.C. 901 *et seq.* (LHWCA). The industry's contracts for leasing land are federal contracts regulated by the Federal Maritime Commission (FMC) under *The Shipping Act*. The industry's customer contracts for loading and unloading vessels are federal contracts regulated by the FMC under *The Shipping Act*. The industry's tort liability for handling cargo is federal under the *Carriage of Goods by the Sea Act*, implementation codified at 46 U.S.C. 1300. The same federal admiralty/maritime jurisdiction that gave the federal government authority to regulate every aspect of the MTO/stevedoring industry also protected the industry from conflicting and inconsistent state laws. *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149 (1920).

1.3. Regulating Process Versus Outcomes

The Shipping Act granted MTOs limited antitrust immunity for certain activities when conducted in accordance with the requirements of *The Shipping Act*, 46 U.S.C. App. § 1706. In exchange, *The Shipping Act* gives the Federal Maritime Commission (FMC) the right to regulate outcomes. The FMC has the authority to review the terms and conditions of MTO agreements, even after those agreements have been performed, to determine if the terms and conditions conform to the requirements of *The Shipping Act*. The FMC can conduct such reviews on its own initiative or in response to a complaint from an interested person. This approach to the maritime commerce marketplace is the exact opposite of how most other markets are regulated in the U.S.

United States antitrust laws regulate the process of making business decisions, not the end result. Thus, a group of competitors who agree on price may have committed a crime, even if the agreed upon price were extremely low and arguably in the interest of consumers. On the other hand, a single market participant with a natural monopoly who charges "monopoly prices" (a Microsoft or pharmaceutical company, for example), acts lawfully as long as the process through which the monopoly was achieved is legal. Our antitrust laws guarantee individual consumers a fair process, but do not guarantee individual consumer goods or services at fair or reasonable prices. The underlying assumption is that as long as the process of setting terms and conditions of goods and services is fair, the marketplace will protect and benefit consumers.

The federal approach to the maritime commerce system has been different for more than 100 years. While *The Shipping Act* does heavily regulate and supervise the process through which carrier and MTO business decisions are made, *The Shipping Act* also regulates outcomes. Individual consumers are assured the availability of services on terms and conditions that are reasonable without discrimination between customers.

NAWE submits that this system of regulating maritime commerce is justified by the unique aspects of maritime commerce outlined below. As a bottom line, the current system provides more protection for consumers and assures that there are more competitors in the

NAWE

market place than would be the case if the limited antitrust immunity for MTOs were repealed.

2. MTOs OPERATE IN A SEA OF ANTITRUST IMMUNITY.

Any analysis of the MTO antitrust immunity must recognize that MTOs operate in a sea of antitrust immunity. Virtually every participant in the marine transportation system has some antitrust immunity from one or more legal sources. Those participants include the ocean common carriers, port authorities, MTOs and organized labor.

2.1. Ocean Common Carriers

As the Commission is well aware, the ocean common carriers have limited antitrust immunity in the United States under *The Shipping Act.* While NAWE will leave it to others to address the merits of ocean carrier immunity, the Commission should understand that some ocean common carriers are "controlled carriers." Under *The Shipping Act* a "controlled carrier" is an ocean common carrier that is directly or indirectly owned or controlled by a government. The current list of [foreign government] controlled carriers include:

1. American President Lines, Ltd and APL Co., Pte., controlled by the Republic of Singapore

2. Ceylon Shipping Corporation, controlled by the Democratic Socialist Republic of Sri Lanka

3. COSCO Container Lines Company, Limited controlled by the People's Republic of China

4. China Shipping Container Lines Co., Ltd., controlled by the People's Republic of China

5. China Shipping Container Lines (Hong Kong) Company, Ltd., controlled by the People's Republic of China

6. Compagnie Nationale Algerienne de Navigation, controlled by the People's Democratic Republic of Algeria

7. Sinotrans Container Lines Co., Ltd. (d/b/a Sinolines), controlled by the People's Republic of China

8. The Shipping Corporation of India Ltd., controlled by the Republic of India

Because commercial activity is an express exception to the *Foreign Sovereign Immunities Act of 1976* ("FSIA"), 28 U.S.C. § 1605(a)(2), in theory, U.S. antitrust laws could be applied to these ocean common carriers controlled by foreign governments. However, the Commission must recognize that this is both a practical and political impossibility. The

NAWE

Commission should consider how the United States government might apply its antitrust laws to these [foreign government] controlled carriers.

For example, as both a practical and political matter does the U.S. really want to bring civil or criminal charges when two foreign government officials involved with two controlled carriers talk to each other? One can only speculate that such an application of United States law is more likely to be resolved by the State Department than by the Justice Department. Applying U.S. antitrust law in circumstances like these will never happen. Under such circumstances, *The Shipping Act* has two significant advantages over the antitrust laws:

First, *The Shipping Act* requires that minutes of such conversations along with any "agreements" reached must be filed with the Federal Maritime Commission (FMC) for review by the United States government.

Second, and perhaps more importantly, *The Shipping Act* allows the United States government to regulate the results of such conversations—i.e., the reasonableness of the terms and conditions of services of ocean common carriers that operate between United States ports and foreign ports regardless of whether those business practices are the result of individual decisions or collective decisions. Thus, the results are regulated independent of the process.

2.2. Port Authorities

U.S. port authorities are government entities that also have limited antitrust immunity. First, under *The Shipping Act*, when a government port authority either leases land to a private sector MTO or operates the port itself, that port authority is an MTO under *The Shipping Act* because the public port authority is furnishing wharfage, dock, warehouse, or other terminal facilities, in this case to a private sector MTO. Therefore, the public port authorities have limited antitrust immunity under *The Shipping Act*.

Second, under current antitrust law, many port authorities will qualify for state action antitrust immunity under the *Parker v. Brown*, 317 U.S. 341 (1943), line of cases. While we will not attempt to analyze how the federal antitrust laws would or could be applied to the multitude of local, state and multi-state players under the state action doctrine, it is safe to say that any simple repeal of *The Shipping Act* antitrust immunity would result in decades of litigation to sort out the effect on the public port authorities. It is also safe to say that any simple repeal of *The Shipping Act* would leave a major player in the maritime transportation system—the public port authorities—with antitrust immunity.

Third, under the Eleventh Amendment to the United States Constitution, many port authorities enjoy sovereign immunity. *Federal Maritime Commission v. South Carolina Ports Authority*, 535 U.S. 743 (2002). To the extent public port authorities have sovereign immunity today, this immunity would remain after any repeal of *The Shipping Act* antitrust immunity.

NAWE

2.3. Marine Terminal Operators (MTOs)

Today, MTOs have limited antitrust immunity under *The Shipping Act* for conversation that occurs within a FMC approved discussion agreement. The subject matter of what can be discussed requires prior FMC approval, and the content of all discussions must be filed with the FMC. Any agreement that comes out of such discussions must also be filed with the FMC and published. Any agreement that is reached between MTOs is subject to challenge by the FMC on its own initiative and by any injured party on multiple grounds.

As noted above, MTOs in the U.S. are both privately owned and government owned. Some MTOs in the U.S. are operated by the state or local port authorities. For example, the Commonwealth of Virginia controls the Virginia Port Authority that operates the Port of Norfolk; the South Carolina State Ports Authority operates the Port of Charleston, etc. As noted above, simple repeal of *The Shipping Act* antitrust immunity would still leave these state port authorities with immunity under the state action doctrine and the Eleventh Amendment.

Furthermore, some MTOs are owned or controlled by [foreign government] "controlled carriers." While a simple repeal of *The Shipping Act* antitrust immunity would in all likelihood reach these MTOs, it is not clear that these foreign government owned/controlled MTOs are subject to the same market forces to which privately owned MTOs are subject. Furthermore, these vertically integrated—and in some cases, foreign government controlled MTOs—may be in the position to offer other benefits such as access to government owned ports in foreign countries.

Thus, the simple repeal of antitrust immunity for MTOs under *The Shipping Act* would leave significant competitors in the MTO marketplace with practical and legal antitrust immunity.

2.4. Organized Labor

Organized labor also has antitrust immunity that has both a statutory basis under the *Clayton Act of 1914* and a non-statutory basis though federal case law. For the purpose of this submission, the Commission should be aware that the MTO industry is the only U.S. industry under judicial compulsion to participate in multiemployer bargaining. Thus, many of the terms and conditions of employment are set coast-wide through the collective bargaining process. These terms and conditions of employment frequently have a direct impact on the terms and conditions of service that MTOs can offer their customers. In other words, some of the terms and conditions of service are agreed to and standardized through the collective bargaining process. It also should be noted that these collective bargaining agreements prohibit MTOs from competing on the largest single component of their costs—labor.

NAWE

NATIONAL ASSOCIATION OF WATERFRONT EMPLOYERS

Therefore, even if the limited antitrust immunity for MTOs under *The Shipping Act* were repealed, MTOs would still collectively discuss many of the terms and conditions of services that they offer through the collective bargaining process.

3. MTOS OPERATE IN A "NATURAL MONOPOLY."

The maritime transportation system is different from most other U.S. industries in that it is a "natural monopoly." The phrase "natural monopoly" is used here in the economic context to mean that costs per unit of service provided continuously decrease for producers as volume increases. Both the carriage of goods at sea and the operation of ports are "natural monopolies."

3.1. Ocean Common Carriers are "Natural Monopolies."

The carriage of goods by ocean common carriers is a "natural monopoly." There is a reason why ocean common carriers are moving to larger and larger ships: it costs less to operate one larger vessel than it costs to operate two smaller vessels. For example, one study found that the cost of building one 12,000 twenty foot equivalent (TEU) vessel was 16% less than the cost of building two 6,200 TEU vessels and that fuel costs of operating a single 12,000 TEU vessel was17% less. Obviously, crew costs for the larger vessel would be less as well. Therefore, it is not surprising that ocean common carriers are increasingly moving to 8,000 TEU and larger vessels.

As large ocean common carriers move to larger vessels, their cost advantage over small and medium size ocean common carriers only increases. As cargo is consolidated onto larger vessels, the entry barriers for new market entries in a given trade route only increase. The bottom line is that for the foreseeable future, the cost of operating vessels for individual market participants will continue to decrease as cargo volume for that individual market participant increases—i.e., ocean common carriage is what economists call a "natural monopoly."

Not surprisingly, in today's market, the largest ocean common carrier has more cargo handling capacity than the second and third largest ocean common carriers combined. The ongoing consolidation is further evidence of the economies of scale in the industry.

A pure free market in ocean common carriers should result in a "race to the bottom of the cost curve." In other words, the ocean common carrier with the highest volume that can use the largest number of large capacity vessels will have the lowest costs and be in the best position to compete for additional business. The end result would be significant consolidation of the market. If the market were allowed to run its natural course, a pure free market confronted with this natural monopoly should ultimately lead to a handful of ocean common carriers.

From a political standpoint, the Commission should address the question of whether it is the foreign government controlled ocean common carriers or the privately owned ocean

NAWE

common carriers that would be in a better position to take advantage of the pure free market in maritime commerce and what the implications are for the United States.

In the current regulatory environment, the industry has used the limited antitrust immunity to address this economic reality while benefiting consumers. The industry has increasingly entered into load sharing agreements, especially among medium sized carriers. A load sharing agreement works by having several competing carriers enter into an agreement to jointly operate one or more large vessels. Each participant in the agreement is then responsible for selling and filling some percentage of the vessel's capacity.

With load sharing agreements, a smaller carrier that might only be able to sell 1000-2000 TEUs/week over a trade route can still enjoy the cost savings afforded by an 8,000 TEU vessel because other competitors are also selling capacity on that vessel. Consumers benefit from these load sharing agreements both in the short run and in the long run. In the short run, consumers have benefited because the load sharing agreements have increased the rate at which larger/lower cost vessels enter trade routes. In the long run, consumers will benefit because there are more carrier choices in the market place.

If *The Shipping Act* antitrust immunity were repealed, these load sharing/cost sharing agreements between competitors would be at risk. The end result would be further concentration of capacity in the industry.

3.2. Ports are "Natural Monopolies."

Ports/MTOs are also "natural monopolies." Cargo handling in the United States continues to become more and more concentrated into essentially two ports: (1) LA/Long Beach and (2) New York.[1] As mentioned, the roughly 15% of the U.S. GDP flows though the ports of the United States. Approximately one-third of the cargo by value (5% of the U.S. GDP) is handled by the Port of New York and a little over one-third of the cargo by value (5.5% of the U.S. GDP) is handled at the Port of LA/Long Beach. The remaining 30% of the cargo (4.5% of the U.S. GDP by value) is handled by the remaining 300+ U.S. ports.

The concentration of cargo handling capacity has continued to become more and more concentrated over the last 60 years because the ports are a "natural monopoly." As vessels get larger, the number of port calls actually falls, while the volume of cargo increases. A modern port requires deep water, high volume rail connections, high volume road connections, a large skilled work force, special cranes and other cargo handling equipment, warehouses and other cargo distribution capacity, etc. The public and private capital investment to efficiently operate a modern port is in the hundreds of billions of dollars.

1 While the cargo handled has continued to increase in most of the ports of the United States, the relative percentage of cargo handled by LA/Long Beach and New York has increased relative to the other ports for most of the last fifty years.

NAWE

But more importantly, the cost of moving cargo once this infrastructure is in place continues to drop as the volume handled increases. There is a reason why cargo is becoming more and more concentrated in the two large ports of the United States—cargo handling is a "natural monopoly."

3.3. Summary

It is in both the economic and security interests of the United States to try and maintain some diversity in both the ocean common carrier and port capacity of the United States. Fully applying the antitrust laws of the United States, i.e., moving to a pure free market system, will result in accelerating consolidation and concentration of assets in the maritime transportation system.

4. MTOS HAVE NO DIRECT RELATIONSHIP WITH THE ULTIMATE PAYER.

To understand how a pure free market might impact consumers, it is important to understand how maritime transportation services generally, and MTO services specifically, are contracted. The mechanism through which maritime cargo shipment is contracted can vary widely.

4.1. Stevedoring Versus MTO Services

We need to distinguish between two types of services: (1) the stevedoring services which consist of loading and unloading the cargo from the vessel and (2) the MTO services which involve a wide range of services provided to the cargo while the cargo is on the terminal.

Stevedoring services are charged against every piece of cargo that is loaded and unloaded from a vessel. The stevedoring services are typically negotiated directly between the ocean common carrier and the MTO. The costs of the stevedoring services are typically included in the price charged by the ocean carrier.

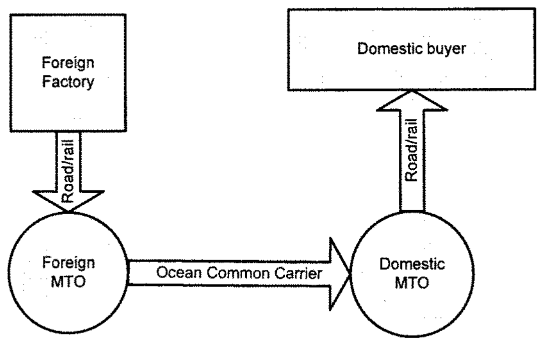
The MTO services, on the other hand, are typically charged directly against the cargo. The MTO services can vary widely from one piece of cargo to another. Some cargo can leave a marine terminal without any MTO charges, while other cargo may be assessed MTO charges that are ten or more times the stevedoring charge. Examples of MTO services include storage of the cargo for periods longer than the grace period, moving cargo for the purposes of customs inspections, and hooking up refrigerated containers to power.

4.2. MTO Services Are Not Typically Negotiated

MTO services are charged against the cargo, meaning that the cargo is not released to the vessel or the motor carrier until the charges are paid. If sufficient time passes without the charges being paid, the cargo can be liquidated to recover the charges. The cargo is

NAWE

charged for MTO services because the MTO typically does not know or care who actually owns the cargo at the time. The reasons for this fact are many.



First, title to the cargo typically changes at some point during transit. Take for example a shipment of tennis shoes being purchased from a foreign shoe manufacturer by a U.S. retailer. Title to the cargo can change from the manufacturer to the retailer at the manufacturer's door, when the cargo is delivered to the foreign port, when the cargo is loaded on the vessel, when the cargo is received at the domestic port, when the cargo leaves the domestic port or when the cargo is delivered to the retailer's door (or somewhere in between).

Second, the party who contracts to ship the cargo of shoes (typically referred to as the "cargo interest") could either be the foreign manufacturer of the shoe or the domestic retailer who is buying the shoe.

Third, the cargo interest can either contract directly with the ocean common carrier or contract indirectly through an intermediary who arranges shipment. Larger corporations typically contract directly with the ocean carriers, but most entities that ship smaller quantities of cargo typically use third parties who contract with the ocean common carriers.

The end result is that under this system:

(1) the cargo interest typically does not know what MTOs will handle their cargo,

(2) the cargo interest virtually never has an opportunity to negotiate with an MTO before services have been provided, and

(3) the MTO typically does not know who contracted for services and does not know who owns the cargo at the time MTO services are provided.

NAWE

NATIONAL ASSOCIATION OF WATERFRONT EMPLOYERS

4.3. MTO Charges are Far From a "Perfect Market."

When economists talk about markets, they preface the discussion by noting that they are talking about a theoretical "perfect market"—i.e.: (a) there is a large number of buyers; (b) there is a large number of sellers; (c) the quantity of goods bought by any individual is so small relative to the total quantity traded that individual trades leave the market unaffected; (d) the units of goods sold by different sellers are the same - the product is homogeneous; (e) there is perfect information, i.e., all buyers and sellers have complete information on the prices being asked and offered in other parts of the market; and (f) there is perfect freedom of entry to and exit from the market.

The MTO "marketplace" violates virtually every aspect of a theoretical "perfect market." Buyers not only do not have complete information and perfect freedom, they have none. Only the largest shippers—the Wal-Marts, Targets and Home Depots—exercise any control whatsoever over choosing and contracting for MTO services. As just noted, the vast majority of the cargo shippers do not know which MTO will be used, nor do they generally have control over which MTO will be used. There is no opportunity to negotiate for services before those services are provided, and there typically is no opportunity to reject services provided.

There simply is no analogy anywhere else in the economy to the way maritime cargo services operate. If the airline industry operated in an analogous manner, most customers would purchase their airline tickets from Expedia without ever knowing what airline they would be flying on or what airports they were going through. Then once they got to their destination, they might be required to pay hundreds or thousands of additional dollars on top of their ticket costs to the airport where they landed before they could leave the airport.

Current federal law recognizes the simple fact that the maritime transportation system is not, never has been, and probably never can be a "perfect market." Instead, the maritime transportation system is heavily regulated at the federal level. MTO and carrier charges are subject to challenge on a number of grounds even after the services have been provided.

5. IMPACT ON CONSUMERS

One of the goals of the current regulatory system for maritime transportation is to eliminate discrimination between shippers of goods. A pure free market in shipping costs might potentially result in some cost savings for some shippers, but would undoubtedly result in a greater difference between the shipping costs of large and smaller shippers.

An issue that should be considered by the Commission is whether increased competition in the maritime shipping market will result in less competition in other markets. To the extent the shipping cost differences between large and small shippers becomes greater, this difference in shipping costs could result in less competition in other markets, an unintended consequence.

NAWE

6. MTOS ARE BEING ASKED TO SOLVE PROBLEMS THAT HAVE NO DIRECT BENEFIT TO THE ULTIMATE CONSUMER.

The ports of this nation are a national resource, but some have argued they are a local nuisance as well. The goods and services that enter one of the nation's major ports support the economy of the entire nation. The goods that are dockside in LA/Long Beach on Monday may be in a Chicago distribution center on Friday and on a store shelf in Minnesota or Iowa by the weekend. Clearly, the entire nation benefits from our ports.

On the other hand, the road congestion, noise and other annoyances associated with a modern port are concentrated locally around the ports. This incongruence has increasingly led local communities to ask ports and MTOs to address these local concerns. MTOs are being asked to reduce road congestion, reduce noise, reduce pollution and increase security. It is important to recognize that these changes are not being driven by the marketplace, and in some cases, are opposed by market forces.

For example, market forces would tend to encourage that cargo be delivered from an MTO as quickly as possible, while security concerns may require that cargo be delayed for inspections.

MTOs have been addressing these concerns in innovative ways that benefit both the market place and the local community. In LA/Long Beach, the MTOs came together to require motor carriers to use RFID tags on their tractors. This requirement allowed MTOs to increase security by tying tractors and drivers to databases on business purposes. On the East Coast, MTOs are working together to reduce pollution emissions on a port wide basis. On the West Coast, MTOs "colluded" on terms and conditions of services, including establishing common fees, to coerce a significant percentage of the motor carrier traffic to evening hours, reducing both road congestion and pollution. None of these solutions to local problems would have been lawful under the antitrust laws of the United States.

7. CONCLUSIONS

For all the reasons stated above, NAWE requests that the Commission recommend that the limited antitrust immunity for MTOs contained in *The Shipping Act* be retained.

NATIONAL CUSTOMS BROKERS & FORWARDERS ASSOCIATION OF AMERICA

National Customs Brokers & Forwarders Assoc. of America, Inc.

1200 18TH ST., NW, SUITE 901 WASHINGTON, DC 20036
PHONE 202/466-0222 FAX 202/466-0226

BEFORE THE
SUBCOMMITTEE ON COAST GUARD
AND MARITIME TRANSPORTATION

STATEMENT OF
MARY JO MUOIO, PRESIDENT
THE NATIONAL CUSTOMS BROKER AND FORWARDERS ASSOCIATION OF AMERICA, INC.

June 19, 2008

Mr. Chairman, I am Mary Jo Muoio, President of the National Customs Brokers and Forwarders Association of America (NCBFAA) and Senior Vice President of Barthco International, a company providing international logistics services. NCBFAA is the national association for companies providing a wide variety of similar such services in the air, sea and land modes of transportation. As relevant here, the members of the NCBFAA provide the US exporters and importers, particularly the smaller and intermediate sized companies, with the transportation and logistics services that are essential to the movement of their goods in international trade.

In their roles as what the Shipping Act refers to as Ocean Transportation Intermediaries, the members of the NCBFAA are an essential cog in arranging for international ocean shipping both into and out of the United States. The Shipping Act defines an Ocean Transportation Intermediary as including both ocean freight forwarders and non-vessel operating common carriers (or NVOCCs). (Section 3(17))[1]. Both ocean freight forwarders and NVOCCs arrange for

[1] 49 U.S.C. §40102(19).

INTERNET: www.ncbfaa.org E-MAIL: staff@ncbfaa.org

the actual movement of cargo aboard the vessels owned or operated by the various steamship lines, but are regulated somewhat differently depending upon which particular function these entities perform. Without getting into too much detail at this point, suffice it to say that both ocean forwarders and NVOCCs are subject to extensive regulation by the Federal Maritime Commission and, accordingly, the NCBFAA is pleased to have the opportunity to discuss our experience with the Commission's implementation of the Act.

NVOCC Regulation

At the outset, it is worth noting that ocean freight forwarders and NVOCCs are the only entities that are subject to the licensing and bonding requirements of the Shipping Act. More specifically, Section 19 of the Act requires that any company in the United States providing services as an ocean freight forwarder or NVOCC must be licensed by the Commission and otherwise obtain and maintain a surety bond or other proof of financial responsibility that would be available to pay claims to the public or government arising out of their ocean transportation related activities. In addition, although foreign-based NVOCCs are not subject to the Commission's licensing requirements, they are also required to maintain FMC-mandated levels of financial responsibility.

The NCBFAA has long supported the Commission's implementation of these requirements. We believe that the licensing and bonding provisions of the Act are useful to the public both from the standpoint of enhancing the professionalism and expertise of the intermediary industry and for providing at least some minimal level of protection to members of the shipping public on matters arising out of intermodal ocean transportation. In addition, from a security standpoint, there is something to be said in support of having a system in which the public can be assured that ocean freight forwarders and NVOCCs have a recognized track record of expertise and competency. In that way, both the vessel operators and the government can have some level of assurance that the cargo that is booked and/or tendered by ocean freight forwarders and NVOCCs is less likely to be a threat to security and that the import and export data flow to the various governmental agencies is likely to be accurate. The NCBFAA accordingly believes that the Commission's vetting process has tended to set the right balance of establishing reasonable standards as a precondition to licensure without being unduly burdensome.

Another aspect of current regulatory policy, however, does carry undue and totally unnecessary burdens – namely, the requirement that NVOCCs publish and maintain rate tariffs. Section 8 of the Act[2] requires that both the vessel operators and NVOCCs publish the rates (or, "tariffs") to be charged to the shipping public for moving cargo in international commerce. This is the embodiment of the concept of common carriage that was originally established, for ocean shipping, in the Shipping Act, 1916. The idea behind common carriage, of course, was to prevent undue discrimination, so that all similarly situated shippers would be entitled to receive a comparable rate from any carrier. The passage of the Ocean Shipping Reform Act of 1998 (OSRA), however, substantially transformed the ocean shipping industry in a number of ways. Perhaps chief among those changes was the rapid and almost total shift from the public rates applicable to comparably situated shippers through the system *of common carriage* created by the Shipping Act, 1916 to the privately negotiated *contract carriage* system that exists today. This shift took place with respect to ocean common carriers in OSRA through the introduction

[2] 49 U.S.C. § 40501.

of confidential service contracts, which enable vessel operating common carriers to negotiate individualized rates with each of their various customers. Thus, unlike before, carriers no longer had to file extensive publicly available information with the FMC outlining the details of their charges (or, "rates").

While OSRA did not authorize NVOCCs to enter into confidential service contracts with their customers, the shift toward a contract carriage system with NVOCCs and subsequently their customers was just as significant as was the case with the steamship lines. In the post-OSRA environment, shippers no longer rely on rate tariffs in determining how or when to ship or in selecting which carrier or NVOCC to utilize. To the contrary, freight rates are almost always separately negotiated based on the involved **movements**, anticipated cargo **volume** and required **services** to be provided by the carrier. Four years ago, the NCBFAA filed a petition with the FMC requesting that the agency utilize its exemption authority, under Section 16 of the Act, to provide regulatory relief and exempt NVOCCs from having to publish and maintain freight tariffs in those situations where they have separately negotiated rates with their customers.[3] At the same time, several individual NVOCCs filed related petitions requesting the agency to use the exemption authority to grant a more narrow form of relief – namely, to permit NVOCCs to enter into confidential rate agreements with their customers in a manner that is comparable to the legal service contracts that are offered by vessel operators. The FMC ultimately did agree to utilize its exemption authority, but only to authorize NVOCCs to enter

[3] FMC Docket No. P5-03, "Petition of National Customs Brokers and Forwarders Association of America, Inc. for Limited Exemption from Certain Tariff Requirements of the Shipping Act."

into what are called NVOCC Service Arrangements (or NSAs), and denied the broader relief sought by the NCBFAA.[4]

The grant of NSA authority has been little utilized by the industry for many reasons, but primarily because they are of little use to both shippers and NVOCCs. Consequently, these anachronistic regulatory requirements compel NVOCCs to continue to memorialize negotiated rates by publishing rate tariff form despite the clear record that those rate tariffs are almost never reviewed or used by customers, that NVOCC rates are almost uniformly negotiated individually with individual customers <u>and</u> <u>only</u> **later** published in tariff form, and that the cost of tariff publication needlessly increases NVOCC costs, reducing their flexibility and competitiveness.

In view of the continuing burden and unnecessary costs resulting from continuing this mandatory rate tariff publication, the NCBFAA will in the near future again request the FMC to utilize the liberalized exemption authority Congress provided in Section 16 of the Act[5] to exempt NVOCC rate tariffs from mandatory publication and enforcement. The NCBFAA believes that an affirmative response from the Commission would be consistent with the Congressional mandate that the agency reduce regulation in instances where this would not result in a substantial reduction in competition or be detrimental to commerce, but rather would be a very positive, pro-competitive step for the Commission to take.

[4] FMC Docket No. 04-12, *Non-Vessel-Common Carrier Service Arrangements,* 30 S.R.R. 598 (2004).

[5] See 49 U.S.C. §40103(a), which provides:

> The Federal Maritime Commission, on application or on its own motion, may by order or regulation exempt for the future any class of agreements between persons subject to this part or any specified activity of those persons ***from any requirement of this part*** if the Commission finds that the exemption will not result in substantial reduction in competition or be detrimental to commerce....

Emphasis supplied.

Antitrust Immunity

Another issue of concern to the NCBFAA pertains to the antitrust immunity enjoyed by the steamship lines through Sections 5-7 of the Shipping Act[6]. The NCBFAA provided testimony on the subject to the Antitrust Modernization Commission and would of course be pleased to provide this Committee with a copy of that statement.

Without unduly burdening this record, we should note that the NCBFAA is concerned about concerted action to set prices and limit competition. We are not concerned about the ability of the various steamship lines to enter into what are referred to as Vessel Sharing Agreements. The agreements tend to enhance efficiency and maximize the utilization of capacity, which is normally pro-competitive. [In this instance, there is no good reason for antitrust immunity to be necessary to protect pro-competitive behavior.]

Contrariwise, steamship lines are able to enter into immunized Agreements with their competitors in order to discuss rates and services collectively, jointly establish what are referred to as "voluntary guidelines" concerning the rates they collectively wish to establish, and agree to ration capacity in a way that regulates the number of sailings to or from U.S. ports. And, all this can be done, under current law, with the antitrust immunity afforded the steamship lines by the Shipping Act (as long as their Agreement has been filed with and not challenged by the FMC).

While OSRA does permit the carriers individually to enter into confidential contracts with their customers, the fact remains that the ability of the various steamship lines to collectively discuss and establish voluntary guidelines undoubtedly has the effect of escalating

---

[6] 49 U.S.C. § 40301 *et seq.*

rates and surcharges to a level that is higher than would be the case if the carriers were required to compete with their competitors in the same way that is required of virtually every other industry.

This has a significant adverse effect upon the NVOCC industry. To understand this, it is helpful to look at NVOCCs as they are sometimes viewed by the steamship lines. On the positive side, many vessel operators see NVOCCs in a favorable light, as customers, which is not surprising given the amount of traffic controlled by NVOCCs. Indeed, some NVOCCs control and tender more cargo than even the largest so-called proprietary shippers. Similarly, when NVOCCs consolidate smaller shipments into full container load lots, they are able to tender traffic that the steamship lines would otherwise not have enjoyed because it would have been too expensive to ship.

On the other hand, some carriers view NVOCCs with suspicion, as competitors, often refusing to enter into service contracts with NVOCCs on any basis or otherwise requiring that NVOCCs pay a higher freight rate than proprietary shippers. This necessarily means that the shipping rates to NVOCC customers – who tend to be the smaller and medium size shippers – are normally higher than the rates enjoyed by the larger so-called proprietary shippers that deal directly with the steamship lines.[7]

In 2002, the NCBFAA filed a petition with the FMC in an attempt to stem patently anti-competitive practices by the carrier members of what is called the Transpacific Stabilization Agreement ("TSA"), whose members control almost all of the vessel capacity in the trades between Asia and the United States. The TSA had collectively agreed to refuse to negotiate or

[7] This is the case despite the fact that such discriminatory practices are specifically prohibited by the Act; *see* Sections 10(b)(10) and 10(c)(7), 49 U.S.C. §§ 41104(10) and 41105(7).

enter into service contracts with NVOCCs until such time as they had completed negotiations and signed contracts with proprietary shippers. In addition, the TSA members had also collectively agreed to require NVOCCs as a class to pay substantially higher rates than proprietary shippers were paying TSA members for the same services. Ultimately, the Commission did issue an order of investigation[8] and ultimately, after its investigation, entered into a settlement agreement with TSA by which the TSA carriers were required to pay $1,350,000 to settle the charges brought against them for violations of the Act. In addition, the settlement agreement required the members not to repeat that misconduct.

Unfortunately, the same situation has continued in recent years, in that the TSA members as well as members in other antitrust immunized agreements still have a double standard when dealing with their shipper customers ("proprietary shippers") versus their willingness to tender services to NVOCCs. When negotiating service contracts, the steamship lines still refuse to negotiate with NVOCCs until they have concluded their negotiations with proprietary shippers. Similarly, it is still the normal practice that rates to NVOCCs are higher than those to proprietary shippers.

We believe that the ability of the antitrust immunized Agreements to collectively agree to limit capacity in the U.S. trades is currently having an acute and adverse effect on the ability of U.S. exporters to market their goods overseas. In other words, the carriers are able to collectively discuss how many vessels and sailings are appropriate in order to service shippers in any given area. This is akin to United, Delta and American Airlines collectively deciding how many flights they believe should be available to the traveling public between New York and Los

[8] *Fact Finding Investigation No. 25 – Practices of Transpacific Stabilization Agreement Members Covering the 2002-2003 Service Contract Season* (order of investigation served August 23, 2002.)

Angeles. While it has been customary in the past for exporters to be able to book and obtain space on outbound vessels with two or three days' notice, today it is not uncommon for shippers to have to book six to eight weeks in advance due to the lack of carrier capacity. While there are a number of reasons for this shortage of vessel and container capacity, the fact that the steamship lines can collectively decide to move capacity out of the U.S. trades is undoubtedly a contributing factor to the current difficulties confronting U.S. exporters.

Parenthetically, the ability of the steamship lines to enter into confidential service contracts with their customers, coupled with their antitrust immunity, has had the curious side effect of essentially deregulating the steamship lines by removing them from the continuing scrutiny of the FMC. In other words, as long as the carriers file their service contracts and their antitrust immunized agreements with the agency, the Commission appears to have little reason to devote any of its enforcement oversight to their activities. As a result, the Commission's enforcements efforts are now directed almost entirely at ocean transportation intermediaries. While it is true that ocean freight forwarders and NVOCCs should adhere to the affirmative statutory requirements of the Shipping Act, Commission staff is often engaged in exercises that seemingly attempt to micromanage the ocean transportation intermediary industry.

For example, the Commission recently determined that the U.S. agents of licensed ocean freight forwarders and NVOCCs needed also to have their own licenses and surety bonds without any reasonable explanation of the necessity for this redundant structure.[9] Similarly, it

[9] FMC Docket No. 06-08, *In the Matter of the Lawfulness of Unlicensed Persons Acting as Agents for Licensed Ocean Transportation Intermediaries - - Petition for Declaratory Order* (decision served February 15, 2008); appeal pending in *Landsstar Express America, Inc. v. Federal Maritime Commission*, Case No. 08-1152 (D.C.Cir.). Curiously, the Commission recently moved to dismiss the appeal on the grounds, *inter allia*, that its decision was not ripe for review and that the NVOCC petitioner was not "aggrieved", despite the fact that every NVOCC risks the imposition of substantial penalties for any noncompliance with the decision.

appears that the Commission may be focusing upon establishing rigid procedures for the cooperative, non-antitrust immunized working arrangements of NVOCCs that are intended to enhance operating efficiencies. The NCBFAA believes that, if antitrust immunity was removed, the Commission would be better able to expend its resources in detecting and dealing with large scale market distorting behavior that has a more significant effect on the shipping industry.

The NCBFAA has supported several recent efforts in Congress to repeal the antitrust immunity provisions of the Shipping Act[10] and agrees with the conclusions of the Antitrust Modernization Commission that the justification and support of the antitrust exemption under the Shipping Act is now "questionable" at best.[11] The Association therefore believes that any review of the Shipping Act should consider a complete repeal under those provisions.

Moreover, it seems odd that the United States is about to become the only country in the world that provides such protection from the antitrust laws to ocean carriers, most of whom are foreign owned and controlled. As this Subcommittee is well aware, the European Union is about to terminate the block exemption from its Competition Laws which the carriers have enjoyed for a number of years. Yet, it appears that the steamship line industry will be able to accommodate itself to the need to compete, rather than act collectively in Europe. We are not aware of any reason why shippers in the United States should not be entitled to expect the same competitive environment for ocean shipping as exists in Europe and elsewhere around the world.

[10] H.R. 1253, *Free Market Antitrust Immunity (FAIR) Act* 2001 (House of Representatives)

[11] *Report and Recommendations of the Antirust Modernization Commission*, April 2007, at 351-52.

Domestic Port Activities

Finally, while the NCBFAA and its members support efforts to reduce environmental pollution, the Association is very concerned about the Clean Truck Plan ("CTP") being espoused by the Ports of Los Angeles and Long Beach, California. As you are undoubtedly aware, the ports appear to have collectively developed a proposal that would both establish fees that are apparently intended for use to enhance port infrastructure and limit access to the ports to an arbitrarily narrow group of so-called "clean" trucks. It seems clear that the CTP will substantially reduce the already inadequate pool of cartage companies that are available to move containers into and out of the port, thus further exacerbating the problem that U.S. importers and exporters are having in effecting the movement of their goods.

The Association believes that the justification currently being offered in support of the substantial fees that the ports are contemplating is dubious at best. As currently proposed, these do not appear to be user fees that are reasonably related to offset the cost of services being provided by the ports, but instead are taxes intended to pay for port infrastructure and other initiatives. As such, they appear to be a constitutionally prohibited tax on exports as well as a violation of U.S. obligations under various trade agreements with respect to imports.

Moreover, the actions of the ports of Long Beach and Los Angeles raise significant questions under the Shipping Act. We are aware that the FMC is looking into the issue of whether the collective behavior of the ports, and their attempts to have that behavior insulated from antitrust concerns through an approved Agreement, contravenes Section 6(g) of the Act,[12] which prohibits substantially anticompetitive agreements. In addition, we understand that the

[12] 49 U.S.C. § 41307.

FMC is also looking into the question of whether the CTP itself contravenes Section 10(d) of the Act, which prohibits marine terminal operators from engaging in unjust and unreasonable practices, unreasonably refusing to deal or negotiate cartage companies, and otherwise subjecting disfavored cartage companies to unreasonable prejudice or disadvantage.[13]

However, we are aware that the FMC announced last Friday that it had completed its review of the Agreement proposed by the ports of Long Angeles and Long Beach and had determined to let it take effect as of that day. While we are not privy to the facts that were presented to the Commission, and since its deliberations took place in closed door sessions, we are at a loss to understand how the agency could conclude that their proposal would not likely result in an unreasonable increase in transportation costs or any decrease in transportation services. At the very least, the fact that these two major ports were able to seek and obtain antitrust immunity of a proposal that will have a clear and dramatic effect on the ability to move cargo to and from these terminals again raises the question of how it is beneficial to US shippers for the FMC to retain this remarkable authority.

In summary, the NCBFAA believes that it is time to substantially amend the Shipping Act to more appropriately recognize the shift from the common carriage notions underlying the Shipping Act, 1916 to the contract carriage industry that has developed since the enactment of OSRA. The Association also believes that the FMC should continue to use its authority to free the industry from unnecessary regulation, so that the agency's oversight becomes more appropriate to the changing nature of the industry.

Mr. Chairman, this concludes my remarks. I will be happy to respond to your questions.

[13] 49 U.S.C. § 41106.

WORLD SHIPPING COUNCIL
PARTNERS IN TRADE

Testimony of

Stanley O. Sher

On Behalf of the

World Shipping Council

Regarding

Federal Maritime Commission Management and
Regulation of International Shipping

Before the

House Sub-Committee on
Coast Guard and Maritime Transportation

June 19, 2008

1156 15th Steet, NW, Suite 300 ▪ Washington, D.C. 20005 ▪ Phone: +1 202.589.1230 ▪ Fax: +1 202.589.1231 ▪ www.worldshipping.org

TESTIMONY OF STANLEY O. SHER

On Behalf of

THE WORLD SHIPPING COUNCIL

My name is Stanley Sher. I am Acting President of the World Shipping Council. The World Shipping Council ("WSC" or the "Council") is a non-profit trade association of over twenty-five international ocean liner shipping carriers, established to address public policy issues of interest to the international liner shipping industry. The Council's members include the leading liner companies from around the world. The Council's member lines represent the full spectrum of carriers from large global lines to niche carriers, offering container, roll-on/roll-off, and car carrier service as well as a broad array of logistics services. The liner shipping companies regulated under the Shipping Act are also Council members, and the Council therefore has a strong interest in ensuring that the industry operates under a U.S. legal regime that is fair, stable, predictable, and flexible enough to support the huge capital investment and innovation necessary to continue to carry the ever-increasing volume of America's foreign trade.

The Industry Today

This hearing is entitled "Federal Maritime Commission Management and Regulation of International Shipping." I will return to that subject in a moment. In order to make sense of that topic, however, it is necessary to understand what the industry does and how it operates.

"Globalization" is not an abstract concept for container carriers. The carriers are an integral and indispensable part of it. Today, over 1,500 ocean-going liner vessels, mostly containerships, make more than 26,000 calls at U.S. ports each year, offering faster, more flexible and more efficient services. The liner industry has made extraordinary investments to keep pace with exponential growth in U.S. international trade. To give you a feel for the size of that growth, over 29 million international cargo container units (TEUs) transited U.S. ports in 2007, equating to more than half a million containers every week.[1] In 1998, when the Ocean Shipping Reform Act (OSRA) was passed, that number was just over 15 million TEUs, an increase of 87% in nine years.

This country's international trade has grown worldwide, but nowhere more than with Asia. The large majority of those containers flow through ports on the West Coast. In the largest U.S. port complex, Los Angeles/Long Beach, international container traffic has more than doubled since 1998 – from 5,144,439 TEUs in 1998 to 10,661,646 in 2007. Other U.S. ports on both coasts have also experienced significant growth.

Ocean carriers could easily have been overwhelmed by this growth in trade. Instead, they made the huge investments necessary to provide the service their customers demanded. In recent years, the liner shipping industry has invested over $200 billion in new vessels, accompanying terminal facilities, containers, chassis, and other equipment. As a result, service options for U.S. importers and exporters have grown significantly. Vessel space for over seven million U.S. container loads was added during 2001 to 2007 alone, a 60% increase. Total vessel capacity of the worldwide active fleet is expected to increase by another 13% in 2008. Not only is overall vessel capacity increasing, the average size of vessels has also grown. The largest vessels in the world fleet in 1990 were 4,409 TEUs, which increased to 7,200 TEUs by 2000. Ships larger than 12,000 TEUs are on order today, representing further future increases in capacity between 2008 and 2010, and continued capital investment by the industry.

[1] International cargo container units are measured in Twenty-foot Equivalent Units (TEUs); however, most containers are equal to two TEUs.

In short, cargo demand has grown very rapidly along with the global economy, and ocean carriers have historically met that demand. Presently, for the first time in over 20 years, shipping space in the U.S. export trades is very tight. I address the specifics of that aberration later in my testimony.

Container shipping has been a genuine success story in the last two decades. It has over that period provided U.S. exporters and importers with superior service at reasonable rates. This has promoted and facilitated the global commerce that is critical to the economy of the United States and the economies of the rest of the world. But like other global industries, the carriers face enormous challenges. These multiple and simultaneous challenges have required the industry to become ever more efficient, and for each carrier to examine each service that it offers to ensure that it is sustainable in a volatile economic and regulatory world. I describe some of those challenges below, not only because of their importance, but because some of the responses to these challenges can be facilitated, in part, by a wise and insightful administration of the regulatory process.

a. Fuel Now Represents Over 60% of Vessel Operating Costs.

Fuel price spikes have affected the shipping industry in the same dramatic way that they have affected individual motorists and other transportation modes – two of which, truck and rail, we rely upon heavily to provide the inland portion of the door-to-door service we offer to our customers. Although ocean shipping is by far the most energy-efficient means of transporting cargo on a ton/mile basis, we are still an energy-intensive and reliant industry. Whereas a few years ago fuel costs were in the range of 15-20% of total vessel operating costs, that number is now in excess of 60%. Fuel costs for vessels have more than doubled since early 2007, and increased 25% in just the past 6 months. The fuel bill for a new modern containership of 7,750

TEUs sailing between U.S. and Asia now exceeds $50,000,000 annually. Just as it has in the rail industry, where we have seen rates for inland transportation of shipping containers rise 25-35% in the last eighteen months, the rapid run-up in fuel prices has forced the shipping industry to closely examine operating efficiencies and the financial contributions of every offered service.

b. Environmental Challenges Will Further Increase Costs.

The liner shipping industry, through the World Shipping Council, has embraced fundamental changes to the international convention for reducing air pollution from ships. Recognizing the public health benefits of substantially reducing air pollution from ships, the Council was an early supporter and champion of a U.S.-sponsored proposal at the International Maritime Organization (IMO) to substantially tighten the MARPOL Annex VI provisions dealing with vessel air emissions. That proposal has now been agreed to by the responsible working group at IMO, and is scheduled for final approval in October. Assuming that Congress enacts the implementing legislation for the revised Annex VI, this agreement will in the coming years dramatically reduce the nitrous oxides, sulfur oxides, and particulates emitted by ocean vessels. Those reductions will come through technical changes and retrofits to vessel engines and through conversion to low-sulfur fuel when vessels are closer to shore. The expected benefits are projected to be significant, but so are the costs. The low sulfur fuel that ships will burn in the future costs more, and that will push the 60% of operating costs associated with fuel that I mentioned earlier even higher. That will have economic impacts on carriers and their customers.

Also in the area of vessel emissions, the IMO has begun work in earnest on evaluating measures to address greenhouse gas emissions from vessels. Design changes, fuel taxes, speed reductions, and other proposals have been made. Each of those proposals carries costs and implications for service worldwide.

In addition, wholly independent of the IMO, individual container carriers and terminal operators have been actively investing in pollution control systems on their ships and in their terminals to address environmental concerns.

c. Infrastructure Constraints Hurt Productivity, Drive Up Costs, and Exacerbate Environmental Challenges.

Although ocean carriers have made the investments necessary to provide adequate vessel and container capacity to carry the world's containerized cargo, land-based infrastructure investments have not kept pace. For economic and geographic reasons, major ports also tend to be places with large populations. People and goods trying to move at the same time using over-subscribed roads, bridges, and railroads cause congestion, and congestion means delays, higher costs, and increased air emissions from truck and locomotive engines. The federal government plays a role in financing public infrastructure. States and localities also share in those costs, but under any analysis the available resources are inadequate to the task at hand. The result is that cargo that moves freely over the oceans often encounters infrastructure-related delays getting to or coming off of a ship.

d. Cargo and Vessel Security Requirements Present a Continuing Need to Balance Public Safety With the Free Flow of Commerce.

Especially since the terrorist attacks in 2001, cargo and ship security has represented a continuing joint government/industry challenge. The Council was an early supporter of the C-TPAT program and supports the Department of Homeland Security's pending "10+2" proposal for increased supply chain visibility. Our members daily submit tens of thousands of pieces of information to the government for the purposes of identifying high-risk cargo for thorough screening by government security personnel. These efforts are today a necessary part of doing business in a less secure world, and the industry has supported the United States government and governments around the world in their efforts to develop practical and effective security systems. These efforts too, however, come at an operational and financial cost, one that must be reflected in the price of services.

These examples of the challenges facing the liner industry are simply reflections of the global economic and environmental situation in which we collectively find ourselves. I do not raise them by way of complaint or by way of a request that this Subcommittee do anything about them. Instead, I raise them because I think that they provide some insight into what the organization and the regulation of the industry in the future might look like.

The Industry Tomorrow – The Changing Role of the FMC

One common thread among the challenges that the industry faces is that they often combine commercial issues with regulatory issues. Both at the national level and at the international level, the liner shipping industry and the government will of necessity have to work together to ensure that this critical link in the international economy continues to be capable of performing the functions that shippers, manufacturers, and consumers across the globe depend upon and indeed take for granted. For example, although fuel costs at first glance appear to be a solely commercial issue, the fact is that low-sulfur fuel requirements and likely future greenhouse gas regulations from the IMO will affect these costs. Security is another area in which government regulations and industry implementation of those regulations are equally essential elements of an effective system. Similarly, landside infrastructure solutions increasingly rely on public/private partnerships – formal or de facto – in order to keep freight moving.

Governments and industry have in recent years been required by circumstances to work together more closely to keep trade moving in a secure and environmentally responsible way. The future will amplify that trend. The other related and less appreciated trend that has emerged is that industry participants – carriers, marine terminal operators, and ports – have of necessity in recent years had to work more closely together to solve problems that either the government could not solve for political or fiscal reasons, or that were not the government's to solve in the first place. It is at this center where the government and individual industry players meet in seeking solutions to increasingly complex and interrelated commercial, environmental, and trade mobility problems that I believe the Subcommittee might productively focus its attention as it considers what is next for the Federal Maritime Commission.

One of the traditional and continuing roles of the Commission has been to review and monitor carrier, port, and marine terminal operator agreements that these industry players are required to file with the Commission when cooperating with respect to service or commercial issues. In the years before the passage of the Ocean Shipping Reform Act (OSRA) in 1998, many of those agreements were "conferences," groups of ocean carriers that banded together to offer common rates and service agreements. Since OSRA, most of the conferences serving the United States have disappeared.

Today, and this is not well understood, the majority of the ocean carrier agreements on file with the Federal Maritime Commission (166 of 236) are vessel sharing agreements of one type or another. Under these efficiency enhancing arrangements, a group of carriers, typically between two and four, share space on one another's ships. These arrangements allow for each participating carrier to serve more ports with greater frequency at a lower capital cost. The result is that customers get better service and a greater number of competing carriers from which they may choose. These agreements range from very simple arrangements to charter space on other carriers' ships to substantially integrated services that share terminal facilities and engage in long-range planning for vessel deployment in addition to sharing space on vessels. These types of agreements have been consistently praised by shippers for their contribution to increased service quality. These agreements have been facilitated, and at the same time carefully reviewed, by the Commission.

There is another class of agreements that has grown in importance over the past several years, including agreements between carriers, ports and terminal operators that seek to address the environmental and infrastructure challenges that are facing our industry. These agreements demonstrate both the amount of change that the industry has undergone since OSRA and also the reason why Shipping Act agreements are becoming an integral part of solutions to problems that increasingly test the entire intermodal transportation system. I believe that of necessity this class of agreements will become the most important type in future years, and I think that they will define the relationships among industry participants and the federal government. They are, in short, the future of the FMC.

One example of such agreements is the West Coast MTO Agreement. This agreement is made up of marine terminal operators, or "MTOs," not carriers. MTOs, like ocean common carriers, may file certain types of agreements with the Federal Maritime Commission and thereby obtain authority to undertake collective activities that might otherwise be prohibited under the antitrust laws. The West Coast MTO Agreement was formed to deal with the very serious port congestion and environmental problems in the ports of Los Angeles and Long Beach, California, the nation's largest port complex. All cargo arriving at or leaving those ports does so either by truck or rail, and the volume of trucks necessary to move the cargo entering and leaving the port had grown to the point that it was causing substantial delays at the terminal gates. That meant that trucks would idle for long periods of time, reducing throughput efficiency and contributing to an already substantial air quality problem.

The MTO agreement, filed with the FMC under the Shipping Act, was used to set up a program called "PierPASS." Under that program, the marine terminal operators that provide vessel loading and unloading services at the ports agreed that they would open additional gates and provide expanded services during nighttime hours. To encourage use of the night shifts, they adopted a charge on cargoes entering and leaving the ports during normal daytime work hours, and the money collected was used to help defray the costs of extending the operating hours of the terminals into the night. As a result of this program, nearly 40 percent of truck traffic (over 8,000,000 truck trips since 2005) has been moved to off-peak hours, reducing congestion on port area highways and greatly reducing the waiting times for trucks serving the ports. Trucks come and go more quickly without waiting in line. Air pollution is decreased, and truckers can make more trips during a workday, allowing them to earn more money. Moreover, the effective throughput volume of the ports has been expanded – with no expenditures for the construction of additional physical infrastructure and no government money required. By all measures, the undertaking has been a success, and one that has succeeded where numerous attempts at local and state government solutions had failed.

Another agreement filed with the FMC under the Shipping Act that is providing a creative and efficiency-enhancing solution to port congestion problems (at both seaports and inland rail yards) is a chassis pool program created under the auspices of a carrier agreement called the Ocean Carrier Equipment Management Association (OCEMA). A long-standing problem at many U.S. marine terminals and rail yards is that the truck chassis used to transport shipping containers (which can be transferred from ships to trucks to trains without being unloaded) are owned by different shipping lines. Traditional practice has been that, when a trucker arrives at a port to pick up a container transported by a particular ocean carrier, the container must be matched with a truck chassis owned or leased by that same ocean carrier. In addition to slowing the loading process, this practice requires many more chassis to be stored on a terminal than would be the case if the trucker could use any available chassis.

The system being implemented under the OCEMA agreement in many parts of the country today allows carriers to contribute chassis to a common pool of equipment and to draw any chassis from that pool. This has reduced the number of chassis that need to be maintained at any location. That has freed scarce terminal acreage. This in turn allows for expanded throughput capacity without the need to consume additional surrounding land. In addition, because containers and chassis no longer have to be matched according to the owner of the equipment, this system, like PierPASS (although by a different mechanism), reduces truck waiting times – thus reducing air pollution, speeding cargo processing through the terminal, and allowing truckers to make more trips, save fuel, and earn more money. Again, no government funds are required. Both the Department of Transportation and the U.S. Environmental Protection Agency have publicly praised this efficiency-enhancing arrangement. And importantly, it has only been made possible by a creative use of the regulatory process.

I believe that these two examples, one involving marine terminal operators and one involving ocean common carriers, are typical of the kinds of agreements that we will see more of in the coming years. Although investment in ships – the leg of the international intermodal system for which carriers are responsible – has more than kept up with rapidly escalating demand, the same is not true of the U.S. highway, bridge, and rail assets that must move cargo tc and from the nation's ports before and after the cargo is transported by ship. Because it will require billions of dollars to build out of these land-side transportation bottlenecks, and because trade volumes are expanding more rapidly than are the public funds necessary to relieve choke points in the system, the availability of a mechanism that allows the industry to collaborate to create additional capacity through increased efficiency is vital to economic growth. The Shipping Act agreement filing and FMC oversight regime is not the only tool for allowing such solutions, but it has allowed solutions where no others have yet appeared.

The Commission has recently become involved in review and oversight of an even newer type of agreement. The public ports operated by the cities of Long Beach and Los Angeles have in the past eighteen months engaged in wide-ranging discussions and agreements dealing with environmental, operational, and capital construction projects at the two neighboring ports. Because these ports are "marine terminal operators" under the Shipping Act, their agreement falls under the FMC's jurisdiction. As the ports come closer to transitioning from planning and discussion to implementation of their various programs, which run the gamut from requiring cleaner trucks operating at the ports to collecting fees to finance bridge replacements, affected parties have increasingly engaged the Commission with concerns about operational impacts, discrimination against certain service providers, compliance with the Shipping Act by the ports, and other issues associated with the ports' programs.

The Commission is, frankly, learning as it goes with respect to this new form of MTO agreement. Some would argue that it has gotten in the way, and some would argue that it has not gotten in the way enough. The challenge for the Commission of course is to get the regulatory balance right in the end. In that process, it is important that the Commission allow agreement parties reasonable flexibility to formulate business solutions to current industry challenges. One thing is clear at this stage, however. The Commission has become a significant player in the new and evolving issues – efficiency and the environment – and can be a useful and effective mediator in these areas.

In sum, while any regulatory regime can be improved, the Shipping Act, as comprehensively revised by OSRA in 1998, provides a flexible and robust structure under which industry participants can act jointly to solve problems that require industry-wide solutions while at the same time providing the regulatory oversight and the transparency that are necessary to prevent today's innovative solutions from becoming tomorrow's unintended problems. That existing statutory structure so far is proving remarkably adaptable to the new private-sector joint solutions with which industry participants are experimenting.

The OSRA structure has provided a framework for private sector solutions to a growing list of challenges to the global transportation system. Importantly, at the same time, OSRA has successfully created, and the FMC presides over, an environment of carrier competition that ensures a wide choice of service and rate levels for customers to access depending on the needs of their individual supply chains. I believe it will continue to do so. But continued success requires that the FMC will have to work smart, stay engaged, and be prepared for the fact that the next ten years will likely bring unforeseen changes to the industry that will require a flexible response. I believe that the Shipping Act, as it presently stands, provides the Federal Maritime Commission with the tools necessary to craft those responses.

In my statement above, I have sought to put the FMC and its regulatory process in perspective, and made suggestions concerning long term future trends and the role of the FMC.

There are, however, two recent developments in which the Subcommittee may have an interest and on which I would like to comment. These are the recent surge in U.S. container exports and the decision by the European Union to eliminate its so-called block exemption for shipping conferences.

The Recent Surge in U.S. Container Exports Presents a Challenge for Carriers and Shippers

In the 10 years since OSRA was enacted, U.S. exporters and importers transporting their cargoes on containerships in the foreign commerce of the United States have enjoyed superior service at reasonable rates. Container shipping, however, like most international businesses, is subject to swings in the market, some of which may be steep, unanticipated, or both. This is presently occurring in the U.S. export trades, which have seen a sharp surge in cargoes due to a number of economic market factors, but principally the decline in the value of the U.S. dollar, which makes our exports more competitive, and increased consumer demand in emerging countries like China and India.

The surge in U.S. exports, which began in 2007, is continuing. Last year container exports increased about 17%, and they are expected to increase about 10% or 11% this year. Correspondingly, imports have declined by roughly 10% over the U.S. West Coast thus far in 2008. As a result, while there is growing demand for export shipping space, the amount of capacity in the trade is driven by the traditional "headhaul" or import demand from Asia, which is calibrated to meet the requirements of the higher volume cargo being imported into the U.S. When import demand was growing at double digit levels as was the case over the last five plus years, there was a constant increase of capacity entering the Transpacific which provided for growth in export demand even though exports have not, until very recently, grown at anywhere near the rate of growth of the inbound market to the U.S.

Over recent months, we now have seen a very unusual situation develop in which export capacity, both containers and vessel space, has become, for the first time in over a decade, tight. For the past decade or more, a U.S. exporter could book cargo on a containership on two or three days notice. Now, in an unprecedented reversal of that history, export bookings in some trades must be made well in advance. Carriers are finding it more challenging than ever to satisfy this demand, and some outbound vessels are booked weeks in advance of sailing. Nevertheless, export ocean transportation rates, which have historically been a fraction of the rate levels for inbound shipments, remain low even with recent increases. Rates for most exports were lower at the end of 2007 than they were 7 years ago.

The shortage of export space is created by some very basic operational constraints. Container ships arriving in the U.S. from Asia are for the most part well utilized, and due to the commodities being shipped – garments, electronics, footwear, and other relatively light weight consumer items – vessels carry a volume of loaded containers that approaches the "nominal" design capacity of the vessel. Export cargoes, however, weigh more than import cargoes; as a result, the container vessels leaving the U.S. can accommodate only about 50% or 60% of their volumetric capacity with full export containers before approaching the "dead-weight" capacity of the vessel. As a result, far fewer loaded containers carrying commodities like wastepaper, cotton, scrap metal, machinery and agricultural products can be loaded on a vessel sailing from the U.S. to Asia than can be loaded in the inbound direction. Carriers must also "balance" their container fleet by repositioning some containers back to Asia empty to have enough equipment to accommodate the demand for shipments from Asia to the U.S. If this were not the practice, Asia would soon run dry of containers, shippers in Asia would not have sufficient equipment to meet demand, and an enormous excess of containers would accumulate in the U.S. This is not a sustainable result.

Carriers are individually working with their customers to do whatever is possible to alleviate this unprecedented shipping pinch. More generally, carriers have met with shippers collectively in shipper or carrier forums and other industry events to address this issue. Carriers will continue to work with their customers on both fronts. While the FMC has an important role to play in this dialogue, the near term capacity issues are, at bottom, a commercial challenge having little to do with regulatory rules or the Shipping Act. They are caused by a sudden shift in market conditions promoted by the weak dollar.

The European Union's Repeal of the Block Exemption for Conferences

Finally, there is one regulatory development outside the U.S. on which I would like to comment, namely, the decision by the European Union to eliminate the so-called "block exemption" for shipping conferences, which becomes effective later this year. A logical question is how this development impacts the U.S. regulatory system, or, to put it another way, should the U.S. follow Europe?

While this development should not be ignored, and, we understand, will be the focus of FMC study, it is premature to consider following this European development. First of all, the change in EU law does not affect the U.S. regulatory scheme. Both systems can and will exist side-by-side. We should not forget that the EU has still retained an antitrust exemption for ocean carriers permitting them to share assets and coordinate service. Further, concerning its repeal, the EU is in the minority on this issue. Apart from the EU, virtually all of our trading partners maintain an antitrust exemption for ocean carriers.

Second, and this is often overlooked, the EU and U.S. systems are not comparable. The prior European system and experience is markedly different than that of the U.S. In the mid 1990s, when the antitrust exemption for ocean carriers was under review in both the United States and Europe, the countries took sharply different approaches. The EU embarked on a course of litigation and confrontation. This eventually resulted in a series of legal decisions which essentially gutted the system and indeed, resulted in the absurd requirement that for the antitrust exemption to be applicable, the carriers must fix uniform prices. This European system was simply unworkable. In my view, it contained the seeds of its own demise. In contrast, in the U.S., the system was comprehensively reformed. It was made more flexible. It also provides more clarity and certainty than the EU system. This new system was supported by carriers, shippers, labor and ports and was embodied in OSRA. So the U.S. developed a flexible and responsive system that is different from and a decade ahead of the European system. There was a palpable need to change the European system. There is no such need in the U.S.

Third, in Europe there was a simple statutory exemption from the competition laws solely for "conferences." There was, surprisingly, no European government oversight of this exemption. In contrast, the U.S. antitrust exemption is only part of a larger, comprehensive regulatory scheme. The U.S. exemption not only applies to carriers, but also to U.S. marine terminal operators. In addition, the U.S. regulatory scheme contains some 30 prohibitions providing far-reaching protections to shippers, and provides for investigations, double damages and private complaints. It also has a licensing requirement covering thousands of intermediaries as well as protections against discrimination in U.S. trades. Therefore, unlike Europe, the antitrust immunity for ocean carriers is only a part, and a relatively small part, of a broad regulatory scheme.

What the European change does offer is the opportunity to examine the system and learn from it. As noted, we understand that the FMC intends to review and report on the European experience under its new system. The Commission will receive the full cooperation of the industry. That study should be helpful in assessing the desirability of any changes to the U.S. system. Our view is that the present OSRA system works well, and that those who would change it have the burden of showing that change is necessary. At this point, there is no evidence that such a change is needed. The FMC's report, however, should provide the facts and analysis which would help to focus any future debate.

# # #

AAPA American Association of Port Authorities

Alliance of the Ports of Canada, the Caribbean, Latin America and the United States

AMERICAN ASSOCIATION OF PORT AUTHORITIES
1010 Duke Street • Alexandria, VA 22314
Phone: (703) 684-5700 • Fax: (703) 684-6321

Testimony of Jean Godwin

Executive Vice President and General Counsel
American Association of Port Authorities

Before the
House Transportation and Infrastructure
Subcommittee on Coast Guard and Maritime Transportation

June 19, 2008

Thank you for the opportunity to submit this statement for the hearing record. Founded in 1912, AAPA is an alliance of the leading public ports in the Western Hemisphere. Our testimony today reflects the views of our U.S. members, which are state and local public agencies located along the Atlantic, Pacific, and Gulf coasts, the Great Lakes, and in Alaska, Hawaii, Puerto Rico, Guam, and the U.S. Virgin Islands.

Port authorities develop, manage and promote the flow of waterborne commerce and also act as catalysts for economic growth in their state, county or city. Public ports own, develop and maintain terminal facilities, some of which are leased to private terminal operators. U.S. ports handle 99% of this nation's overseas cargo by volume.

Whether products are arriving at our shores or departing for foreign sale, trade relies on an efficiently operating U.S. port system. On average, each of our 50 states relies on 13 to 15 ports to handle its imports and exports, which total more than $1.3 billion worth of goods moving in and out of U.S. ports every day. While the cargo tonnage and passenger count numbers that go through America's ports are already staggering, projections are even larger. The nation's cargo volumes will double by 2020; passenger counts on cruise lines will also more than double. Ports stand at the forefront of the impact of the liberalization of U.S. trade policies.

Terminal development is a key priority at America's seaports, as they plan for this unprecedented projected increase in overseas cargo trade. Without significant increases to port development investments—currently running about $2.1 billion a year nationwide—efficiency at America's ports will surely suffer as will industries that rely on these goods, and ultimately the U.S. consumers. The next 15 years will be very challenging since the U.S. maritime industry needs to find the resources to fund the infrastructure, technology, terminal access and personnel improvements that will ensure America's ports are able to accommodate the huge influx of trade while at the same time meeting security requirements and addressing environmental needs.

The ability of ports to meet collectively to address these challenges, with antitrust immunity under the Shipping Act, is extremely important. Ports and marine terminal operators effectively coordinate on a variety of important issues, ranging from clean air initiatives to labor allocation to the collection of fees to fund security enhancements.

Public ports are extremely valuable public resources, which play a major role in the health and vitality of regional, state and national economies. The federal agreements were established originally to allow ports to confer, discuss and make recommendations on marine terminal practices and other matters of concern to the shipping industry, including, but not limited to, labor practices, infrastructure development, railroad practices and services, and environmental policy. These guiding principles continue to provide important policy direction in today's goods movement marketplace. The limited antitrust authority the ports enjoy facilitates appropriate discussion before operational, pricing or significant policy changes occur at one port, which may have detrimental, and perhaps unknown, effects on other ports.

AAPA believes that the 1998 amendments to the Shipping Act have worked well, and meet the needs of the U.S. public port community as well as U.S. trade. The amendments related to conference agreements and antitrust immunity created more flexibility in the business relationship between shippers and carriers while ensuring continued, effective regulatory oversight where it is most appropriate. While the bill was under consideration, AAPA sought continued regulatory scrutiny particularly of joint activity among competitors immune from antitrust laws.

Unlike carriers and shippers, ports cannot move their assets, which are the product of the investment of billions of dollars of public funds. Ports can be whipsawed by the other players in the transportation market--a fact exacerbated by ports' need to protect the billions of dollars in public investment and their public nature itself, which makes all their actions open to public scrutiny.

As noted above, ports and marine terminal operators work cooperatively in a number of areas, some of which are included in the examples below. We believe that the Shipping Act strikes the appropriate balance between providing antitrust immunity in this unique industry but providing regulatory protection through the Shipping Act to prevent anticompetitive or monopolistic behavior.

The following are examples of the use of antitrust immunity by ports and marine terminal operators.

Port Infrastructure and Environmental Programs

In June 2006, the neighboring ports of Los Angeles and Long Beach released the draft San Pedro Bay Clean Air Action Plan outlining measures that they will take to cut air pollution emissions from port-related activities. The Plan addresses air quality issues resulting from tenant operations at terminals, as well as the ships, trucks and trains that move cargo through the ports.

Historically, each port addressed air quality issues separately by implementing a wide range of environmental initiatives. It became apparent, however, that inconsistent or conflicting transportation projects and environmental measures implemented by each port may have unintended or counterproductive effects on air quality improvements. Therefore, the two ports decided to work together and, with cooperation and input from state and federal environmental regulatory agencies, developed the Plan.

The Plan currently envisions various strategies the ports intend to utilize to reach the clean air goals. These strategies may include tenant leasing requirements, tariff changes, operation incentive programs, and voluntary measures.

In order to discuss and agree upon joint programs and strategies, the ports filed a discussion agreement with the FMC. The agreement has been in effect since August 2006 and authorizes the ports to agree upon the various proposed joint strategies. Without this agreement in place, the two ports would not have antitrust immunity and therefore would not be able to discuss, decide upon and implement the Plan.

Through on-going reporting requirements, the ports will keep the FMC apprised of their actions, allowing the FMC to monitor the progress of the Plan implementation and the impacts it may have on the Southern California ocean transportation system.

Under the authority of the FMC discussion agreement, the two ports seek to accommodate projected trade growth volumes through efficient cargo movement while concurrently addressing adverse environmental impacts such as air pollution emissions. The antitrust immunity provided by the FMC discussion agreement has provided the federal level framework through which the Ports of Los Angeles and Long Beach will be able to reach their goals in the Clean Air Action Plan.

West Coast Labor Issues

The Northwest Marine Terminal Association (NWMTA) and the California Association of Port Authorities (CAPA) have an inter-conference terminal agreement to confer, discuss and make recommendations on rates and charges. Currently, this joint conference is working together with carriers and longshore employers to promote consistent labor practices at West Coast ports (something that could not happen without antitrust immunity). These joint meetings allow the ports to discuss labor issues affecting their operations and ability to meet customer needs.

The public ports involved are **not** members of the Pacific Maritime Association, which is the management association whose principal business is to negotiate and administer maritime labor agreements with the International Longshore and Warehouse Union (ILWU). However, the agreements negotiated by PMA, which determine wages, employee benefits, and conditions of employment, and other decisions made by PMA addressing labor allocation, training, etc. directly affect the cargo volumes and the competitiveness of the West Coast ports. Labor shortages and the lack of skilled labor (crane operators, foremen, etc.) can significantly affect a port's ability to maintain customers and attract new business.

A few years ago, the West Coast ports found that there were a number of labor issues affecting them that they wanted to discuss and develop a coordinated response to in order to ensure that decisions made by PMA did not create a competitive imbalance among ports. For example, (1) manpower allocations were being made based on historical use of labor with no consideration given to future needs, even in instances where existing contractual commitments would clearly increase the need; (2) manpower allocations were not addressing seasonal fluctuations in business and the use of traveling labor gangs was not flexible enough to meet those needs; (3) the use of a single coast-wide labor contract (geared to address the need of container facilities) did not provide the flexibility needed for non-container lines of business; and (4) there was no mechanism in place to facilitate any regular dialogue between the public ports and PMA on these issues.

The ability of the ports to meet and discuss these and other issues facilitated the development of a common position that was then brought to PMA, allowing the issues to be resolved with all affected parties at the table and in agreement. A new PMA committee was created to interact with the ports, ports are now able to attend PMA steering committee meetings on a request basis, PMA has developed 2 coast-wide agreements (one for container terminals and one for other cargoes), and the workforce allocation problems have been substantially improved. The joint ports conference has since expanded its focus to other issues of common interest, including gentrification (use of scare coastal property for non-maritime cargo use, such as real estate) and environmental issues.

Security Practices and Fees

Another area where ports and MTOs have worked together is on the issue of port security. Without antitrust immunity, ports would "compete" on port security resulting in a rapid "race to the bottom" when it comes to security. Furthermore, they would not be able to discuss "best practices" amongst themselves. The antitrust immunity has allowed ports and MTOs to discuss different approaches to port security, including the cost of those approaches.

The West Coast MTO Discussion Agreement has also allowed MTOs to work together in implement port wide security programs such as the use of RFID tags on motor carriers that have both increased security while lowering costs. Members agreed to share the cost of RFID tags and to require local motor carriers to use the tags.

The Gulf Seaports Marine Terminal Conference (GSMTC) (FMC Agreement 224-200165-001) includes 20 public ports in the Gulf of Mexico from Florida to Texas. This conference was formed in June 1995 to be able to consult with each other and to establish port terminal minimum rates and charges, as well as uniform rules and regulations. With respect to any action taken by the Conference, any member may decide to take independent action by simply notifying the Conference members of its intent.

Over the years, the GCMTC has been successful in addressing a variety of issues that impact its members including: dockage, free time, crane charges and most recently security fees. Because of the ability of Gulf ports to be able to discuss security costs and a partial fee recovery plan that includes both the vessel operator and the owner of the cargo, Gulf Coast ports were the first range of ports that implemented security fees covering a wide variety of cargo across multiple ports. Because of the uniformity of application at ports that chose to implement the fees, individual shippers/consignees and vessel operators were not able to leverage one port over another over the implementation and collection of the security fees. Several ports did exercise independent action and decided not to implement the fees (primarily ports that tend to compete with ports outside the GSMTC).

In conclusion the GSMTC enables its members to compete on an equal basis, by not allowing cargo interests to play one port against the other over these few, very specific but very important issues and associated fees. The ability of the Conference to establish these uniform fees and the ports' ability to collect them has made clear that the cost of port security is a partnership among the ports, the cargo interests, and the vessel operators as well as the Federal Government.

Reducing Air Emissions and Enhancing Security

Private marine terminal operators (MTOs) on the west coast (tenants of our public port authority members) have used their antitrust immunity to achieve public policy objectives demanded by government where competition would not be appropriate. For example, on the West Coast, there was a demand for environmental and safety reasons to reduce truck congestion during daylight hours on public roads. The customers wanted their cargo delivered during daylight hours so competition alone would not have addressed this important public policy problem.

Members of the West Coast Marine Terminal Operating Discussion Agreement agreed to assess a fee on cargo movements that would be refunded to any company using terminal facilities during off-peak hours. As a result of this PIERPASS system, a significant percentage of the cargo has been shifted to evening hours. This shift has reduced truck congestion and pollution, but has increased costs to the customers—the cargo shippers, who had to change their business practices. The solution could never have been accomplished without an agreement between the operators, supervised by the federal government.

MTO's typically have no direct contractual relationship with motor carriers or cargo shippers. Instead, their contractual relationship is with the ocean carrier. Many of the environmental and security issues have involved the MTO/motor carrier interface. Therefore, MTOs have needed the ability to discuss terms and conditions of service to develop common approaches to address these environmental and security issues. Without the ability to work together, these types of programs could never have been accomplished.

Chassis Pooling and Other Congestion Issues

In July 2004, in response to the tremendous growth in containerized trade, Virginia International Terminals and the Ocean Carrier Equipment Management Association ("OCEMA"), a group of 20 international ocean carriers, joined in the Hampton Roads Chassis Pool Agreement ("HRCP Agreement"). Given the antitrust immunity authorized under the Shipping Act of 1984, the parties were able to form a port-wide chassis pool covering the ports under the auspices of the Virginia Port Authority which allowed the carriers to pool their equipment under management by a single entity. This resulted in 5,000 chassis being removed from Hampton Roads terminals – a reduction of 20% from the existing fleet which freed up 40 acres of on-terminal land. The availability of standardized, fleet-wide management and maintenance improved equipment availability and reliability, reduced terminal turn times for motor carriers, eased congestion, put safer equipment on the road, and resulted in cost savings for terminals, ocean carriers, truckers and shippers.

Marine terminals and OCEMA's affiliate, Consolidated Chassis Management, have since formed similar pools at Savannah, Charleston, Wilmington, Jacksonville, and Tampa and will soon begin pool operations in Houston and New Orleans, all made possible by agreements filed with the Federal Maritime Commission ("FMC"). The purpose of these cooperative agreements is to permit the parties to discuss, evaluate and reach agreement with respect to matters pertaining to the interchange, transportation, use and operation of ocean carrier equipment. Thus, the ability to cooperate under the 1984 Shipping Act's agreement authority and FMC oversight has been an essential element in achieving significant efficiencies, reducing costs, reducing trucker waiting times, and freeing up urgently needed marine terminal space.

Operational Efficiencies at California Ports

The California Association of Port Authorities (CAPA) is comprised of California's eleven commercial, publicly owned ports. Since 1940, CAPA has managed agreements with the Federal Maritime Commission (FMC), which grant member ports limited antitrust immunity under specified circumstances. This authority, while restricted, allows member ports to participate in appropriate discussions through the Association and to take certain actions within the scope of, and in accordance with, the procedures provided for through federal agreement. The dialogue facilitated by these agreements helps to ensure the efficient operation and continued health of our CA public ports, promotes better services to the shipping public, and maintains vigorous and appropriate competition in the marketplace.

While each port functions independently, under governance rules spelled out in federal agreement, each port is also required to inform all members and the Association before significant policy changes are taken at any individual port. Each port is allowed to take independent action regardless of the will or desire of other member ports, but the process identified in federal agreement assures that all ports are well informed before action is taken and allows for discussion of significant policy changes. All CAPA meetings governed by federal agreement are noted and minutes of each meeting are submitted to the FMC.

The authority provided to the ports, and the process identified by federal agreement, protects these valuable public resources to some degree from potentially unfair pricing or business practices, and assures that important public policy decisions are not made in a vacuum. The agreements allow the ports to share best management practices, operational efficiencies, security concerns and environmental policy positions among themselves so that each can learn from the experiences of others and can limit the need for duplicative and costly research.

By providing a limited degree of uniformity in the establishment of operational practices, the shipping public benefits by easier comparison of services, procedures, and rate structures. In addition, the goods movement industry benefits when member ports share their practices and policies and are not required to make additional expenses that would otherwise be rolled into the costs for services. In some cases, multiple ports will participate in infrastructure development projects or security programs, for example, which benefit more than one port. In these cases, significant costs can be appropriately shared and unnecessary expenses kept to a minimum. Some examples include:

- Gerald Desmond Bridge replacement: joint effort of Ports of Long Beach and Los Angeles. Built in 1968, provides one of three routes onto terminal island servicing both ports.

- Port of Sacramento management services agreement with the Port of Oakland. The Port of Sacramento, struggling during the last few years with budget deficits, has entered into an agreement with the Port of Oakland to assist in the management of the port, providing cost savings and other benefits.

- Joint Command and Control Center. Long Beach and Los Angeles effort to provide centralized communications center for harbor and local police forces, Coast Guard and other law enforcement entities.

- Joint Container Inspection Facility. Long Beach and Los Angeles joint effort to provide facility for Customs and Border Patrol to inspect targeted containers.

The limited antitrust immunity granted to California's public ports continues to play an important role in facilitating discussions that have greatly improved the operational efficiency of our ports; that have promoted very significant environmental improvements to port operations; that have helped to manage potential labor issues, including worker shortages; that have led to more secure facilities; and that have assisted in the development of key infrastructure projects of statewide and national significance, while maintaining healthy competition in the goods movement marketplace.

Pacific Northwest Port Cooperation

The Northwest Marine Terminal Association (NWMTA) is a voluntary association of deepwater ports and marine terminal operators in Oregon and Washington, and has operated continuously since 1939 under an agreement approved by the Federal Maritime Commission subject to provisions of Section 15 of the Shipping Act of 1916, the Shipping Act of 1984, and more recently the Ocean Shipping Reform Act of 1998 (OSRA). This and other information is available on the NWMTA website located at: http://home.comcast.net/~nwmta/.

Currently, NWMTA members include the Ports of Anacortes, Astoria, Bellingham, Everett, Grays Harbor, Kalama, Longview, Olympia, Port Angeles, Portland, Seattle, Tacoma and Vancouver.

The provisions of the NWMTA agreement provide ample authority for the 13 member ports to agree on uniform rates, establish consistent rules and practices, exchange relevant information, and pursue cooperative ventures. Association members are free to abstain from any vote regarding rate increases or policy changes, and may take independent action on any rate, charge, practice or any item required to be filed in a tariff.

Member ports routinely meet to discuss changes in policies and procedures in addition to setting rates. These meetings are critical to the membership in ensuring consistency across the public ports in the northwest. The association has established policies governing port operations. For example, at the request of a member port, the association discussed and implemented uniform procedures to ensure efficient cargo operations at all member ports.

A major effort of the association in recent years has been to develop consensus regarding the implementation of a security fee. It is the ability to meet under antitrust immunity that allows the members to exchange and share confidential information needed to arrive at consensus. The security fee was agreed to by association members in the fall of 2005 and implemented in member tariffs in January 2006. Through independent action, ports were able to deviate from the recommended security fee developed during NWMTA discussion and also were able to make exceptions to the fee according to their individual terminal operations.

Customers affected by association policies and prices may request review by association membership. The membership is committed to fully considering any customer feedback of its policies and prices. Within the past 15 years, the association has not received any customer requests for review of policies and prices.

The NWMTA regularly practices the sharing of information by discussing possible ways to attract new cargo then promoting the NWMTA Ports as part of the logistics chain for that cargo. Also, the NWMTA has jointly marketed their facilities (pursing cooperative ventures) by participating in the Russian American Pacific Partnership forum that supports business with the Russian Far East.

The antitrust immunity provided to the NWMTA is critical to enable association members to share information and discuss potential impacts of changes to pricing, policies and procedures, all with the proviso that any member may pursue independent action without penalty.

Conclusion

In conclusion, AAPA supports the Shipping Act and the related antitrust exemptions in the maritime industry, which permit ports and marine terminal operators to work cooperatively to address a multitude of challenges.

Thank you. I would be happy to answer any questions.

STATEMENT OF TERRY R. HEAD

My name is Terry R. Head and I am President of the Household Goods Forwarders Association of America, Inc. This is an association which represents a number of freight forwarders or non-vessel-operating common carriers by water (NVOCCs), as they are called by the Federal Maritime Commission, which are engaged in the transportation of household goods via ocean vessel to overseas points. As such they have been required to file door-to-door tariff rates with the Federal Maritime Commission for all commercial shipments of household goods which they handle. This filing requirement serves little purpose as it is entered into only after an agreement or negotiated rate arrangements have been arrived at between the NVOCC member of our Association and either another NVOCC or a direct vessel operator. In any event, the filing of tariff rates serves no useful purpose.

The burden is heavier for our NVOCC members, since unlike general commodities, which move in predictable fashion from concentration points such as factories or distribution centers, household goods shipments move to and from residences situated at myriad locations. This makes the F.M.C. tariff-filing requirement even more burdensome.

Further, the filing of tariff rates creates an unnecessary expense which has no offsetting public benefit and which needs to be passed on to the shipping public. Every one of our member NVOCCs who handles commercial household goods shipments requiring tariff filing with the Federal Maritime Commission has hired a tariff-filing agent to perform this service for them. This, in their opinion, is an unnecessary expense presently imposed by the Federal Maritime Commission although they advise me that is less expensive than if these electronic filings were made by themselves.

We strongly support the elimination of the requirement to file tariff rates with the Federal Maritime Commission because, in our opinion, it is unnecessary, accomplishes nothing and involves costs which must be passed on to the shipping public.

Sincerely,

Terry R. Head
President
Household Goods Forwarders
Association of America

○