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The Shipping Act of 1984: A Return to Antitrust Immunity

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I. INTRODUCTION

Few people realize the importance of international maritime shipping. It is not only a major vehicle for trade in a world where countries are becoming increasingly economically interdependent, but also provides an ever-ready reserve naval fleet in the interest of national defense. Early in the 20th century, Congress recognized this importance and passed the Shipping Act of 1916,[1] which provided the shipping conferences with protection from the antitrust regulations sweeping the business world. This protection, however, has been significantly eroded by the federal judiciary during the ensuing decades.

As a result, the U.S. Federal Maritime Policy has been, in effect, a policy in disarray. The shipping industry has been operating in an unstable environment; lawyers cannot advise their clients with any degree of certainty as to which of the conferences' activities are subject to the antitrust laws and which are subject to protection under the Shipping Act. This confusion has forced the United States shipping conferences to operate at a severe disadvantage in the international maritime community, and has wholly frustrated maritime commerce from reaping the benefits intended them by Congress.

Lately, there has been a flurry of Congressional activity designed to remedy the ocean shipping dilemma. The Shipping Act of 1984[2] is by far the best effort, with unsurpassed potential to stabilize the regulatory environment and reinstate the original intention of the 1916 Congress. This article will examine the specific problems which led to the need for such a bill, how and why the case law developed as it did, the changes this Act will make in the regulatory scheme, and the effectiveness of the Shipping Act of 1984 in curing the ills of United States maritime policy.

II. LEGISLATIVE HISTORY

A. *PRE-TWENTIETH CENTURY*

In order to understand contemporary U.S. maritime policy, it is necessary to review pre-twentieth century policy.[3] The colonists came to North America with strong maritime backgrounds, which were reflected by the government of the infant nation. The first enactment of the first Congress in April 1789 produced a tariff system designed to protect U.S. shipping. In 1817, Congress also secured cabotage[4] protection for

1. Ch. 451, 3a Stat. 728 (codified as amended at 46 U.S.C. §§ 801-42 (1982)).

2. Pub. L. No. 98-237, 98 Stat. 67.

3. *See generally* Bess & Farris, *U.S. Maritime Policy: A Time for Reassessment*, 21 TRANSP. J. 4 (1982); H. BESS & M. FARRIS, U.S. MARITIME POLICY: HISTORY AND PROSPECTS 7-95 (1981).

4. S. ABRAHAMSSON, INTERNATIONAL OCEAN SHIPPING: CURRENT CONCEPTS AND PRINCI-

ocean shipping. Supported by these policies, the U.S. shipping industry prospered to the point 92.5% of foreign shipments were carried in U.S. ships.[5] Between 1930 and the Civil War, the United States was a leader in the shipbuilding industry, producing wooden clipper ships widely considered to be the best sailing vessels in the world at that time.[6] The American shipwrights, however, were hesitant to abandon their wooden sailing vessels for the more modern steel ships being produced in Europe. "When the United States opted to protect its youthful steel industry by a protective tariff, the Morrill Act of 1864, American steel ships were noncompetitive in price."[7]

> Another adverse factor was the Civil War, which seriously depleted the U.S. fleet. Further, U.S. vessels that had fled to foreign registry to escape confederate privateers were not allowed to return to U.S. registry. By 1900 the U.S. fleet consisted of but 816,795 tons: less than that of the 1810 fleet. Moreover, the U.S. share of its foreign waterborne commerce was a meager 9.3 percent.[8]

B. *Early Twentieth Century*

In 1904, after becoming aware of the tremendous weakness of its merchant marine, the United States promulgated its first "cargo preference law"; American military shipments were required to be carried in U.S. vessels. This did little to improve the lagging U.S. shipping industry. It was not until World War I that substantially increased aid to the merchant marine was realized.[9]

1. *The Shipping Act of 1916*

At the onset of the first World War, the United States, though neutral at the time, suffered from a severe shipping deficiency. Congress' solution to this dilemma was the Shipping Act of 1916 which remains current law in the U.S. shipping industry.[10] This was the first piece of comprehensive maritime legislation of the 20th century. Its promulgation was not the result of any desire to regulate the then infant shipping industry, but was a response to the war raging in Europe. The Act provided for antitrust immunity by permitting carriers to openly organize shipping conferences, established a U.S. Shipping Board (which later became the Fed-

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PLES 33 (1980) (Cabotage or domestic water transport, can be coastwise — shipping along a coast or, put differently, between ports located on the same coast — intercoastal, interisland, or through inland waterways).

5. Bess & Farris, *supra* note 3, at 4.
6. *Id.*
7. *Id.* at 5.
8. *Id.*
9. *See Id.*
10. Ch. 451, 3a Stat. 728 (codified as amended at 46 U.S.C. §§ 801-42 (1982)).

eral Maritime Commission), prohibited discriminatory practices and required the filing and publication of tariffs with the FMC.[11] In this respect, the Act was both regulatory and innovative, providing incentive for the production of ships in the event of military engagement. By the time the Act was implemented, however, the United States was already at war.

2. *The Conference System*

The combination of shipowners' propensities to price at destructive levels and the existence of surplus shipping capacity resulted in rate wars during the nineteenth century, and culminated in the creation of conferences at the turn of the century. Through agreements enforced among its members, the conference system attempted to combat the tendency toward destructive pricing, and to prevent wasteful over-tonnaging and loss of the huge investments in fleets and equipment.[12] One of the major governmental investigations subsequently undertaken was the House Committee on Merchant Marine and Fisheries inquiry into shipping combinations, conducted from 1912 to 1914.[13] The Alexander Committee (named for Representative Joshua M. Alexander, then Chairman), whose conclusions helped establish the basis for United States shipping policy, found that there were basically two types of conference agreements. The first were used to restrain competition among the conference members and included agreements for ratefixing, sailing rationalization, apportioning traffic by allotting the number of movements for each line, and various pooling agreements for revenues and cargoes. The second were used to restrain non-conference competition. These included deferred rebates[14] and preferential contracts with shippers which persuasively attached them to the conference.[15]

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11. Report to the 37th Meeting of the AST&T (American Society of Traffic and Transportation) on the Impact of Current Legislation on U.S. Maritime Programs 197-98 (1982) [hereinafter cited as AST&T Report].

12. Schmeltzer & Weiner, *Liner Shipping in the 1980's: Competitive Patterns and Legislative Initiatives in the 96th Congress*, 12 J. MAR. L. & COM. 25, 26 (1980); Note, *The Shipping Act of 1916: Proposed Amendments and their Impact on the U.S. Merchant Marine*, 15 J. INT'L L. & ECON. 639, 641 (1981).

13. *See* Fawcett & Nolan, *United States Ocean Shipping: The History, Development, and Decline of the Conference Antitrust Exemption*, 1 NW. J. INT'L L. & BUS. 537, 540 (1979); Jacobs & Weintraub, *supra* note 12, at 641.

14. The deferred rebate system gives shippers who agree to exclusive use of the conference lines in a given trade a rebate of a certain percentage of their payments. The rebate is computed for a designated period but is not paid for several months. During the contract period and the additional months, the shipper must continue the exclusive use of the conference lines to earn the rebate. This system was found to be the most effective device for control of a trade. HOUSE COMM. ON MERCHANT MARINE AND FISHERIES, REPORT ON STEAMSHIP AGREEMENTS AND AFFILIATIONS IN THE AMERICAN FOREIGN AND DOMESTIC TRADE, H.R. Doc. No. 805, 63rd Cong., 2d Sess. 287 (1914) [hereinafter cited as ALEXANDER REPORT].

15. The Alexander Committee found both advantages and disadvantages in conference

Fearing that removal of the conference system would produce either rate wars or mergers, the Alexander Committee did not recommend prohibiting the conference system entirely. The Committee feared that the U.S. market might become monopolized by either of these possibilities.[16]

> Nor did the Alexander Committee recommend preserving the status quo, because the potential for abuse in the conference system was inherent and required some control. The solution the Alexander Committee proposed, was supervisory control over the U.S. trades by a government agency. The shipowners' reaction to the committee's recommendations was so hostile that no action was taken on the investigatory report until 1916, when the Shipping Act was passed embodying the Alexander Committee's recommendations."[17]

The Shipping Act of 1916 specifically addressed the conference system and laid down the rules from which case law later departed. The primary purpose of the Act, detailed in section 15, required all conference agreements to be filed with the FMC (and subject to approval by FMC in order to be exempt from antitrust laws). The FMC is required to disapprove, after notice and hearing, any agreement it finds:

(1) to be unjustly discriminatory or unfair,
(2) to operate to the detriment of the commerce of the United States,
(3) to be contrary to the public interest, or
(4) to violate the Shipping Act.[18]

Agreements that create closed conferences and those which do not provide a right of independent action for the participants are automatically vetoed.[19]

3. *Development of the Conference System*

> The conference system . . . had developed in response to the fact that the ocean liner industry is highly capital intensive, leading individual liners to attempt to fill their vessels through intensive competition, which, if not controlled, would result in excessive and destructive competitive practices. The

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agreements. The conferences provided regular service, which was essential for the health of the shippers' conferences, the domination of shippers by the lines, the arbitrary rate-setting by the conference, the potential for abuse and the secrecy of the conference agreements. ALEXANDER REPORT, *supra* note 14, at 287-90, 295-307, 416-21; Note, *supra* note 12, at 642-43.

16. Note, *supra* note 12, at 642-43.

17. *Id.*

18. 46 U.S.C. § 814 (1982). The 1961 amendment to the Shipping Act added the public interest standard to § 15. Act of Oct. 3, 1961, Pub. L. No. 87-346, § 2, 75 Stat. 762, 763.

19. The Act provides:

> No such [conference] agreement shall be approved, nor shall continued approval be permitted for any agreement . . . which fails to provide reasonable and equal terms and conditions for admission and readmission to conference membership of other qualified carriers in the trade, or fails to provide that any member may withdraw from membership upon reasonable notice without penalty for such withdrawal.

46 U.S.C. § 814 (1982).

> shipping conference, itself, is a voluntary association of ocean carriers operating on a particular trade route between two or more countries. The purpose of a shipping conference is the self-regulation of price competition, primarily through the establishment of uniform freight rates and terms and conditions of service between the member shipping lines.[20]

Conferences are comprised of two types of membership, open or closed. In the open system, any carrier can be admitted to membership if he has the intent and ability to offer liner service and agrees to the terms of the conference agreement. Closed conferences are distinctly different in that the acceptance of a new member is subject to concurrence of the already existing members. Closed conferences, by thus limiting service, act as a restraint on supply by limiting empty cargo space and "thus provide a curb against uneconomic sailings which in turn can result in overall lower-cost shipping."[21] By functioning in this manner conference members seek protection from the predatory practices and rate wars which would otherwise result. As a defense mechanism against the competitive practices of non-members, and to assure members adequate return on their investment, conferences will use shipper loyalty devices, such as dual rates[22] or deferred rebates, which provide adequate incentive for shippers to continue to employ conference members.

This discount/rebate system has come under attack in recent years, particularly from the federal judiciary. This has been a drastic step away from the conclusions and recommendations of the Alexander Committee. In essence, the Committee concluded that the conference system could not successfully function without immunity from U.S. antitrust laws.[23] The Committee did not feel that the shipping industry should arbitrarily be given exemption from the antitrust laws, but in light of the elements of an international shipping market, the Committee did feel a certain amount of immunity from antitrust should be allowed.[24] The Committee in its report of 1914 stated:

> To terminate existing agreements would necessarily bring about one of two results; the lines would either engage in rate wars which would mean the elimination of the weak and the survival of the strong, or, to avoid a costly struggle, they would consolidate through common ownership. Neither result can be prevented by legislation, and either would mean a monopoly fully as effective, and it is believed more so, than can exist by virtue of an

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20. S. REP. NO. 3, 98th Cong., 1st Sess. 2 (1983).

21. *Id.*

22. "Under the dual rate system, a shipper agrees to give all or some fixed portion of its patronage to the contracting conference carriers, in return for . . . percentage discount, commonly fifteen percent, from the rates applicable to those shippers which do not enter into such an agreement." Fawcett & Nolan, *supra* note 13, at 539-40.

23. S. REP., *supra* note 20, at 3.

24. *Id.*

agreement.[25]

Currently, there are few who would argue with the importance of the shipping conference system as a stabilizing factor in the U.S. shipping industry. Experts believe that the conference system "is a prerequisite for stable liner services, operates in the interests of shippers and consumers, and should not be prohibited or otherwise inhibited from performing its normal commercial functions by legislative interference."[26] Today, proponents of the conference system continue to argue that if a trade is overtonnaged and the conference is not strengthened, destructive competition will again ensue because of the individual shipowner's cost structure and pricing policy.

> The overall level of rates is at best only marginally adequate to finance replacement of equipment and improvement of services . . . . The system's supporters further contend that any weakening of the conference system will lead to violently oscillating tariffs, which in the long run will prove more expensive to shippers than the present system.[27]

4. *THE SHIPPING ACT OF 1920*

After World War I the government had the dual problem of disposing of surplus vessels and implementing an innovative peacetime shipping policy. The legislative solution took shape in the Merchant Marine Act of 1920.[28] The new Act mandated that the United States require, for national defense, international relations and trade, an adequately equipped merchant marine.[29] While the goals of the Act were well directed, its effectiveness was somewhat lacking. Surplus ships were sold to the private sector at prices below cost. Even so, the government could not rid itself of all of them.[30]

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25. *Id.*

26. *Introduction*, J. MAR. POL'Y & MGMT., July 1978, at 1.

27. S. LAWRENCE, UNITED STATES MERCHANT SHIPPING POLICIES AND POLITICS 14-15 (1966); Note, *supra* note 12, at 643-44.

28. Ch. 250, 41 Stat. 988 (codified as amended in scattered sections of 46 U.S.C.).

29. [I]t is necessary for the national defense and domestic commerce that the United States shall have a merchant marine of the best equipped and most suitable types of vessels sufficient to carry the greater portion of its commerce and serve as a naval reserve or military auxiliary in time of war or national emergency, ultimately to be owned and operated privately by citizens of the United States and it is hereby declared to be the policy of the United States to do whatever may be necessary and to develop and encourage the maintenance of such a merchant marine, and, insofar as may not be inconsistent with the express provisions of this Act, the United States Shipping Board shall be in the disposition of vessels and shipping property as hereinafter provided, in the making of rules and regulations, and in the administration of the shipping laws keep always in view this purpose and object as the primary end to be obtained.

Id. See also Bess & Farris, *supra* note 3, at 5.

30. Bess & Farris, *supra* note 3, at 5.

5. *The Merchant Marine Act of 1928*

The ineffectiveness of the Shipping Act of 1920 in stabilizing the U.S. shipping industry resulted in passage of the Merchant Marine Act of 1928.[31] By 1928, the state of the fleet was rapidly deteriorating and new legislation was required. "It reaffirmed the 1920 Act's statement of policy, set up direct mail subsidies to promote trade, and established a construction loan fund to promote replacement of reconditioning of the aging wartime fleet."[32]

The Shipping Act of 1920 and the Merchant Marine Act of 1928 were two of the very few legislative enactments which attempted to modify the Shipping Act of 1916. The primary modification of the 1916 Act, however, did not occur until enactment of the Merchant Marine Act of 1936.

6. *The Merchant Marine Act of 1936*

The Merchant Marine Act of 1936[33] set the congressional foundation on which modern-day maritime policy rests and was the first attempt to set down a comprehensive maritime policy in the post-1916 Act period. The act itself was a legislative monument, as it enacted the first specific peacetime promotion of America's maritime program. The program was revolutionary because never before had the U.S. merchant fleet been directly subsidized. Prior to this, Congress consistently refused to consider the necessity of government aid to the maritime industry.[34] It can even be argued that Congress contributed to the decline of the fleet by failing to address fundamental shipping industry problems.[35] By the year of enactment, U.S. flagships were carrying only 29.7% of U.S. trade. Concern over the declining merchant marine and the failure of the 1928 Act to attain its goal led to the eventual enactment of this pivotal piece of legislation.[36]

C. *Mid-Twentieth Century*

From 1936 to 1970, the U.S. fleet fluctuated in size in response to national defense demands. By the late 1960's, the shipbuilding and operating industries were on an apparently irreversible downward trend.[37] The response manifested itself in the Merchant Marine Act of 1970.[38] The Act sought to: (1) broaden the firms eligible for direct subsidy, and (2)

31. Ch. 675, 45 Stat. 689 (codified in scattered sections of 46 U.S.C.).
32. Bess & Farris, *supra* note 3, at 5-6.
33. Ch. 858, 4a Stat. 1985 (codified in scattered sections of 46 U.S.C.).
34. S. Lawrence, *supra* note 27, at 55.
35. Bess & Farris, *supra* note 3, at 6.
36. *Id.*
37. *Id.*
38. Pub. L. No. 91-469, 84 Stat. 1018 (codified in various sections of 46 U.S.C.).

increase efficiency by encouraging more forward planning and by limiting certain types of subsidy-eligible cost increases.[39] It is generally accepted that, though some parts of the Act were relatively successful, the 1970 Act was indeed a failure.[40]

It is well documented that legislation promulgated subsequent to the Shipping Act of 1916 has been less than effective in stabilizing the United States shipping industry. The major factor in the current strife ridden industry, however, is the gradual erosion of the antitrust exemption which has occurred as a result of numerous decisions and rulings by the federal judiciary.

III. Problems In U.S. Maritime Policy

A. *Erosion of Carrier Antitrust Immunity*

It is no secret that the carriers, under current U.S. maritime policy, are suffering. To date, the intentions of Congress in passing the Shipping Act of 1916 have not been realized. Carriers are, in many cases, unable to secure timely approval for conference activity and tying arrangements which give them their economic durability.[41] Such agreements are generally in the form of ratemaking agreements, intermodal arrangements, pooling agreements, joint service ventures, rationalization agreements, discussion agreements, and inter-conference agreements. "Even when approval by the FMC is secured, there remain wild fears of prosecution under the antitrust laws should the parties' conduct subsequently be found to exceed the permissible bounds of the agreement or to be otherwise in violation of the Shipping Act of 1916."[42] Under the Shipping Act, carriers were, in essence, encouraged to act in concert, but often encountered problems complying with the antitrust laws.[43] This has consistently occurred despite Congress' intent to treat foreign waterborne commerce of the United States differently from those forms of commerce and industries subject to the antitrust laws. Currently "there is a compelling need to clarify that ocean common carriers be exempt from the antitrust laws and that this exemption should be clearly written into the Shipping Act."[44]

The Shipping Act of 1916 was, indeed, clear on its face. In short, it mandated that Shipping Act remedies pre-empted antitrust remedies.[45] "However, there can be no doubt that the antitrust immunity provisions of

39. Bess & Farris, *supra* note 3, at 7.
40. *Id.* at 8.
41. S. Rep., *supra* note 20, at 4.
42. *Id.*
43. AST&T Report, *supra* note 11, at 200.
44. *Id.*
45. *See* Note, *supra* note 12, at 648-49.

current law have caused carriers to be uncertain as to which of their activities are truly covered by immunities and which are not."[46] Since 1961, conference immunity from antitrust laws has been continually eroded by the federal courts and the Department of Justice.[47] Early court decisions on this issue did establish that the antitrust statutes were unable to proscribe agreements of shipping conferences and that remedies for violations of the 1916 Act were found within the act itself.[48] This uncertainty about the applicability of the antitrust laws is a severe disadvantage to U.S. carriers in the face of international competition.

B. Case Law Development

The first major litigation concerning section 15 of the Shipping Act reached the Supreme Court in the early 1930's. In *United States Navigation Co. v. Cunard Steamship Co.*,[49] the U.S. Navigation Company sought injunctive relief against the Cunard Steamship Company and its fellow conference members. In disregard of the legislative intent to provide antitrust immunity, it was charged that the conference, through exclusive patronage or dual rate agreements, had violated the Sherman and Clayton antitrust Acts. It was also alleged that the conference activities had never been approved by the Shipping Board, which later became the FMC. The Court held that:

> In any event, it reasonably cannot be thought that Congress intended to strip the board of its primary original jurisdiction to consider such an agreement and "disapprove, cancel or modify" it, because of a failure to file it as § 15 requires. A contention to that effect is clearly out of harmony with the fundamental purposes of the act and specifically with the provision of § 22 authorizing the board to investigate *any* violation of the act upon complaint, or upon its own notion and make such order as it deems proper. And whatever may be the form of the agreement, and whether it be lawful or unlawful upon its face, Congress undoubtedly intended that the board should possess the authority primarily to hear and adjudge the matter. For the courts to take jurisdiction in advance of such hearing and determination would be to usurp that authority. Moreover, having regard to the peculiar nature of ocean traffic, it is not impossible that, although an agreement be apparently bad on its face, it properly might, upon a full consideration of all the attending circumstances, be approved or allowed to stand with modifications.[50]

As to the availability of a private right to sue under § 16 of the Clayton

46. *Hearings on S. 47 Before the Subcomm. on Merchant Marine of the Senate Comm. on Commerce, Science and Transportation*, 98th Cong., 1st Sess. 59 (1983) (statement of Alan Green, Jr., Chairman, FMC).

47. AST&T Report, *supra* note 11, at 189.

48. *See* Note, *supra* note 12, at 648.

49. 39 F.2d 204 (S.D.N.Y. 1929) *aff'd*, 50 F.2d 83 (2d Cir. 1931), *aff'd*, 284 U.S. 474 (1932).

50. *Id.*, 284 U.S. at 487 (emphasis in original).

Act, the Court ruled such a right did not exist.[51]

Exactly twenty years after *Cunard*, the Supreme Court was presented with the issue of whether the United States could do what a civil litigant could not, that is, enjoin conference agreements which had not been approved by, or even submitted to, the Federal Maritime Board. In *Far East Conference v. United States*,[52] the Supreme Court, in a majority opinion authored by Justice Frankfurter, held that the government's plea for injunctive relief fared no better than a civil litigant's and that any such action under the antitrust statutes was barred under the rationale of *Cunard*.[53] The United States could not enjoin, under the antitrust laws, conference agreements that had not been submitted to the Federal Maritime Board for approval.[54] Thus, it was clearly settled that the antitrust laws were not controlling where the actions alleged fell within the jurisdiction of the Shipping Act, and remedies for violating section 15 were within the provisions of the Act.[55]

For more than a decade afterward, the lower federal courts followed *Cunard* and *Far East*, consistently ruling that shipping conferences fell outside of the antitrust statute, and that the remedies for unapproved conference activities under section 15 of the Shipping Act of 1916 must be found within the provisions of the Act itself.[56] *Federal Maritime Board v. Isbrandtsen*[57] was the first Supreme Court case involving the Federal Maritime Board's approval of a conference using exclusive patronage contracts with shippers. Isbrandtsen was an independent carrier serving the Japan-Atlantic trade in direct competition with the Japan-Atlantic and Gulf Freight conference. By consistently undercutting the conference rates, Isbrandtsen captured thirty percent of the trade.[58] The conference was forced to retaliate. Initially the conference cut its rates to meet those of Isbrandtsen, but Isbrandtsen only undercut the conference rate, maintaining its price advantage.[59] The conference then promulgated a dual rate contract which would push the shippers toward the conference carri-

51. *Id.* at 486.

52. 342 U.S. 570 (1952).

53. *Id.* at 573.

54. *Id.*

55. *Id.* In a later case it was held that although the Commission can approve prospective operations under agreements which have been implemented without approval, the Commission has no power to validate preapproval implementation of such agreements. Therefore, Far East and Cunard principles only preclude courts from awarding treble damages when the defendant's conduct is arguably lawful under the Shipping Act. Carnation Co. v. Pacific Westbound Conference, 383 U.S. 213, 222 (1966).

56. Fawcett & Nolan, *supra* note 13, at 546.

57. 356 U.S. 481 (1958).

58. *Id.* at 485.

59. *Id.* at 486.

ers. Isbrandtsen was forced to challenge the pseudo-monopolistic agreement proposed by the conference.

In *Isbrandtsen*, the U.S. Supreme Court, in a split decision, affirmed the Court of Appeals but ambiguously skirted the lower court's per se holding. Rather, the Court ruled that under section 14's prohibition against "discriminating or unfair methods" the Maritime Board had no authority to rule on the dual-rate system at issue.[60] This landmark decision made three important contributions to judicial review of Maritime Commission decision making:

> (1) It clearly established that the purpose of the Shipping Act was to prevent monopolistic practices, not sanctify them;
>
> (2) That to accomplish this purpose the courts can redefine the governing statute by reasoning from the statute and its legislative history; and
>
> (3) That the antimonopolistic intent of the Act served to protect independent nonconference carriers, as well as shippers, from the abuses of the conference system.[61]

In so deciding, the Court overturned the Maritime Board's approval of the conference's dual rate agreement by citing anticompetitive motive.[62] The purpose of the Shipping Act, the Court reasoned, was not only to permit conference agreements, but to eliminate conference abuses as well.[63] By holding that the Act was designed to eliminate anticompetitive activities and discrimination by the conferences, the Court re-established the guidelines of the Shipping Act. Protection against such unfair business practices was to be afforded independent as well as conference shippers. "The Court suffered little embarrassment in augmenting the Act to preclude dual rate contracts, a device which Congress itself had not expressly prohibited."[64]

In essence, the Supreme Court outlawed exclusive patronage contracts, ruling that the language of section 14 of the Shipping Act, which prohibited "resort to other discriminating or unfair methods" to hinder outside competition, permitted an antitrust exemption only for expressly

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60. Fawcett & Nolan, *supra* note 13, at 547. The Court stated:

> Since the board found that the dual-rate contract of the Conference was "a necessary competitive measure to offset the effect of non-conference competition" required to meet the competition of Isbrandtsen in order to obtain for its members a greater participation in the cargo moving in this trade, it follows that the contract was a "resort to other discriminatory or unfair methods" to stifle outside competition in violation of § 14 . . . .

356 U.S. at 493.

61. Pansius, *Plotting the Return of Isbrandtsen, The Illegality of Interconference Rate Agreements*, 9 TRANSP. L.J. 337, 340 (1978). *See generally* Auerbach, *The Isbrandtsen Case and Its Aftermath*, 1959 WIS. L. REV. 223.

62. 356 U.S. at 493; Pansius, *supra* note 71, at 341.

63. 356 U.S. at 488-93.

64. Pansius, *supra* note 71, at 342-43.

enumerated practices.[65] Congress later circumvented *Isbrandtsen* by once again exempting the activities at issue from the antitrust laws,[66] at the same time providing that conference agreements could be approved by the FMC only if it was determined that they were not inconsistent with the "public interest."[67]

In overturning *Isbrandtsen*, however, Congress did not reject the procompetitive policies upon which the Court had relied in barring dual rate contracts. To date, this procompetitive policy is still available to the courts for once again redefining the Shipping Act.[68]

Following the Supreme Court's decisions in *Cunard* and *Far East*, the law appeared settled that the antitrust statutes were inapplicable to agreements of shipping conferences within the purview of the Shipping Act, whether approved or not, and that the remedies for violating section 15 of the Shipping Act were to be found within the provisions of that Act itself. In distinguishing *Cunard* and *Far East*, the Supreme Court broadened the authority of the federal courts beyond what Congress intended by mandating to the FMC exclusive jurisdiction only where such is necessary to avoid conflict between the two factions.[69] This legal presumption was quickly exploded by the Supreme Court's decision in *Carnation Co. v. Pacific Westbound Conference*.[70]

Carnation resulted from a conflict between a shipper of dairy products and two steamship conferences, both of which were serving the Philippine Islands market. Carnation challenged the legality of an agreement between the two conferences and alleged that as a result of a clandestine rate-fixing agreement between the two, its rate requests had been improperly refused.[71]

The federal district court dismissed the complaint on the grounds that it was without jurisdiction to entertain the suit because the Shipping Act provided the exclusive remedy for the wrongs alleged. On appeal by Carnation, the Ninth Circuit Court of Appeals affirmed the lower court.[72] The

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65. 356 U.S. at 493-95.

66. Act of Oct. 3, 1961, Pub. L. No. 87-346, § 1, 75 Stat. 762 (codified at 46 U.S.C. § 813a (1982)).

67. *Id.*; Hanson, *Regulation of the Shipping Industry: An Economic Analysis of the Need For Reform*, 12 L. & POL'Y INT'L BUS. 973, 983-84 (1980).

68. *See* Pansius, *supra* note 71, at 340, 343.

69. *See* S. REP., supra note 20.

70. 383 U.S. 213 (1966).

71. Id.

72. 336 F.2d 650 (1964). The court held, *inter alia*:

> In dismissing the action, the court below relied on the decision in the cases of *U.S. Navigation Co. v. Cunard Steamship Co.* and *Far East Conference v. United States*. It seems plain to us that both of these decisions support and require the action of the court below . . . . [W]e think that appellant's efforts to assert the lack of the continuing authority of *Cunard* and *Far East* is entirely fallacious and altogether unsupportable.

Supreme Court, however, was far more sympathetic than the lower courts had been. In issuing the opinion of the Court, Chief Justice Earl Warren struck down fifty years of legal precedent.[73] Warren held that because the FMC was directed by the Shipping Act of 1916 not to approve agreements which would violate the Act, conference action found to be in violation thereof could not receive section 15 exemption from antitrust laws.[74] *Carnation*, in one fell judicial swoop, thus revoked the antitrust immunity Congress had intended for shipping conferences under the 1916 Act, and ignored the rule preventing treble damage actions against regulated conferences. *Carnation* thereby placed antitrust penalty exposure on top of the Shipping Act penalty exposure.[75]

Under *Carnation*, a shipper may therefore sue for treble damages when a conference agreement violates antitrust laws and is implemented without FMC approval. Prior approval by the FMC is necessary for antitrust immunity.[76] The *Carnation* rationale permits a court to impose antitrust sanctions when the defendant's conduct clearly violates the Shipping Act. However, where a presumption of legality exists, the court must suspend any adjudication on the antitrust claim until the close of the FMC's investigation.[77] *Carnation*, in short, not only drastically reduced antitrust protection but subjected the regulated conference carriers to treble damage liability under the antitrust statutes.

The decision in *FMC v. Aktiebolaget Svenska Amerika Linien*[78] represents the most severe restriction on conference immunity from antitrust regulation.[79] *Svenska*'s lengthy litigation began when the FMC, after receiving a complaint from the American Society of Travel Agents, began an investigation into previously submitted and approved conference agreements. The case involved two passenger steamship conferences whose members served the passenger market of the Atlantic. The Supreme Court upheld the FMC's consideration that the "public interest" standard created the presumption that a conference restraint which interferes with the policies of antitrust laws is "contrary to the public interest"

Id. at 653, 657.

73. Fawcett & Nolan, *supra* note 13, at 553.

74. 383 U.S. at 219-20. The Court distinguished *Far East* and *Cunard*, and stated that "those cases merely hold that courts must refrain from imposing antitrust sanctions for activities of debatable legality under the Shipping Act in order to avoid the possibility of conflict between the courts and the Commission." 383 U.S. at 220. "In light of the language used in *Cunard* and *Far East* and of the dissent's exception to the majority's holding in *Far East*, it is clear that *Carnation* created a distinction where none existed before." Fawcett & Nolan, *supra* note 13, at 649.

75. Fawcett & Nolan, *supra* note 13, at 554.

76. Note, *supra* note 12, at 649.

77. *Id.*

78. 390 U.S. 238 (1968).

79. Note, *supra* note 12, at 651.

and, therefore, invalid. The Court ruled that such a conference agreement would be approved only if the members could rebut the presumption by making a prima facie showing that the restraint is required by "a serious transportation need, necessary to secure important public benefits, or in furtherance of a valid regulatory purpose of the Shipping Act."[80] This presumption greatly altered antitrust considerations in section 15 proceedings by attaching to them a substantial degree of significance.[81]

In so ruling, the Supreme Court shifted the burden of proof to the conferences in determining whether FMC reliance on antitrust policy as justification for disapproving conference agreements was proper. The Court found that the 1961 amendment[82] expanded FMC authority to disapprove agreements.[83] The "*Svenska* presumption" has become a balancing test, with the degree to which the conference agreements impede free trade tipping the scales against the benefits.[84] This has the effect of not only limiting antitrust exemption, but also serves to postpone FMC action by creating a standard which has become the basis for frequent intervention by the Department of Justice in FMC review proceedings.[85]

Although in deciding *Swenska* the Supreme Court granted FMC power to consider antitrust implications of an agreement, it later qualified that language by stating that the FMC was required to do so. The *Carnation (Sabre)* rationale on antitrust penalties and the *Svenska* interpretation of "the public interest" have operated to reduce the one-time congressional mandate for antitrust immunity to a forgotten promise.[86]

Two years later, *Sabre Shipping Corp. v. American President Line, Ltd.*[87] expanded the effect of the antitrust regulations on the supposedly exempt ocean shipping conferences. In *Sabre*, the FMC determined that the rates of the conferences had a predatory effect on the independent

80. 390 U.S. at 243.

81. S. REP., *supra* note 20, at 6. *See also* Hanson, *supra* note 77, at 984.

82. The 1961 amendments to the Shipping Act added a fourth test to section 15, requiring that an agreement be disapproved where it was found to be "contrary to the public interest." *See* S. REP., *supra* note 20, at 6.

83. Note, *supra* note 12, at 650.

84. Hanson, *supra* note 77, at 984.

85. *See id.* In addition to the *Svenska* requirement of considering the anticompetitive effect of an agreement, the FMC is obligated to go beyond notice and comment when a competitor raises antitrust issues in objecting to a filed agreement. In Marine Space Enclosure, Inc. v. Federal Maritime Comm'n, 420 F.2d 577 (D.C. Cir. 1969), the court held that § 15 requires the FMC to provide a hearing unless the FMC has already determined that the agreement is routine or that the impact on commerce is de minimis. 420 F.2d at 584. The FMC continues to operate under the structures imposed by this case. *Closed Conferences and Shippers' Councils in the U.S. Liner Trades: Hearings on H.R. 11422 Before the Subcomm. on Merchant Marine of the House Comm. On Merchant Marine and Fisheries*, 95th Cong., 2d Sess. 29-32 (1978) (statement of Ky. P. Ewing, Jr., Deputy Att'y Gen., Antitrust Division, Dep't of Justice).

86. Note, *supra* note 12, at 651; Fawcett & Nolan, *supra* note 13, at 563-64.

87. 285 F. Supp. 949 (S.D.N.Y. 1968).

carrier, Sabre Line, and the conference rates were therefore "so unreasonably low as to be detrimental to the commerce of the United States" within the meaning of section 18(b)(5) of the Shipping Act. Sabre sued for treble damages under the antitrust laws. The court applied the rationale that even though the rates of the defendant conferences were FMC approved, the anti-Shipping Act practices violation stripped the conferences, ex post facto, of section 15 antitrust immunity for those "unlawful" activities. As a result, the treble damage claim was valid.[88]

To summarize these holdings, notwithstanding the clear intention of Congress in enacting the Shipping Act of 1916, subsequent case law has effectively pulled the full antitrust exemption out from under the shipping conferences. *Carnation* was the first case to decisively strip away the defense of exemption from the antitrust laws. Later, *Svenska* placed the burden of proof of a conference acting within the provisions of the 1916 Act on the conferences themselves if their agreements or actions were challenged. Finally, *Sabre* completed the erosion by holding that even though an agreement may have been approved by the FMC, the finding of a violation would strip the conference of their approved immunity. It is this erosion of antitrust immunity which established the need for strong legislation reaffirming the antitrust environment initially established in 1916.

C. Consequences of Antitrust Immunity Erosion

Carriers have been forced to operate in the dark, suspended between congressionally enacted antitrust immunity and judicially applied antitrust exposure. From the development of federal case law, the conferences must now prove their practices will not be in violation of the very antitrust laws from which they have been given immunity. In addition, they have become targets of a "Catch-22" situation for Shipping Act violations; civil penalties, criminal sanctions, and private treble damage actions.[89]

Although the original goal of the 1916 Act was to grant the conference system ultimate legality and protect it from the antitrust laws of the United States, this has become a mere apparition due to destructive case law. Today, conferences are forced to act at their own risk when functioning within the very guidelines established for them by Congress in the Act of 1916 (legislation of a type not since duplicated). Even the FMC now views such practices as anticompetitive and dangerous to trade and the public.[90]

The present situation has resulted in major regulatory problems: de-

88. *See generally* Note, *supra* note 12, at 649-50.
89. S. Rep., *supra* note 20, at 13.
90. *Id.* at 6.

lay in the FMC's approval process for section 15 agreements stretching on for years, application of vague standards for approval of section 15 agreements, and resultant loss of predictability in regulatory decision making. Conflicting views of executive branch agencies regarding acceptable conference practices, and shifting decisions by the FMC and courts, have created confusion over the guidelines within which the conferences may operate and the government's regulation of conference activities. This has had a chilling effect on carriers attempting to cooperate in formulating constructive commercial arrangements to improve U.S. participation in the ocean shipping industry, increase operational efficiency, and promote comity with foreign trading partners. These efforts have exposed all parties to the threat of prosecution under the U.S. antitrust laws.[91]

Absent the security of antitrust exemption, carriers will have no incentive to enter into any conference agreement. As established by the Alexander Committee, such a situation will lead to price wars, and ultimately, to monopoly control by the survivors.[92]

IV. SHIPPING ACT OF 1984

A. *NEED FOR LEGISLATION*

The need for new legislation which will reemphasize the guidelines within which the U.S. shipping industry must operate is manifest. The development of case law affecting antitrust immunity has caused the ocean carriers severe problems. Subjection to antitrust laws, coupled with the burden of justification before the FMC and courts, have deprived U.S. ocean carriers from realizing optimal price and cost benefits that could be achieved through the economics of rationalized or joint services.[93] Unlike other transportation modes, the demand for international ocean carriage is an inelastic one. Therefore, the lower prices which competition might ordinarily foster will not generate more cargo in this area.[94]

In a report to the Senate Subcommittee on Commerce, Science and Transportation, it was pointed out that "this uncertainty regarding antitrust immunity inhibits conferences in U.S. trades from agreeing among themselves on the charge to quote shippers . . . for the inland leg of a foreign door-to-door movement and it clearly frustrates the growth of an innovative, efficient, and economical transportation service."[95] This has been a recurring problem since the very first chipping away of antitrust immunity.

91. *Id.* at 6-7.
92. Note, *supra* note 12, at 652.
93. S. REP., *supra* note 20, at 8.
94. *Id.*
95. *Id.* at 10.

The need for Shipping Act reform is undiminished. Several problems currently inherent in the industry cry for renewed legislative assistance. Overtonnaging, and the needs for greater efficiency through rationalization and intermodalism, for certainty as to the applicable law, and for speedy federal Maritime Commission decisions on proposed carrier agreements, are several of the more important issues requiring timely attention.[96] A new statutory framework, outlining a new regulatory philosophy, must be established if carriers and shippers are to conduct international trade in a stable, efficient, and fair manner. Domestic rules of competition may be successful in such an environment; however, they have been proven not to work in international liner shipping.[97] Although American-flag carriers have been among the most innovative in the world, they and their customers have often been unable to fully reap the benefits of their progressive operations. Few, if any, maritime nations have antitrust laws which apply to shipping. When such laws do exist they are not enforced on carriers in the same manner as in this country. This lack of uniformity in philosophy has disadvantaged our carriers and our shippers.[98] We are alone in the world in imposing such a burden on flag companies.

B. Purpose

When considering maritime reform, the major goal is a balance between carriers and shippers for the improvement of U.S. flag carriers and shippers in foreign commerce. The need for Shipping Act reform is well documented and undisputed. The Shipping Act of 1984 revises the Shipping Act of 1916 to provide an updated, simplified, more efficient, responsive, and effective regulatory scheme for international liner shipping. The paramount objective of this regulatory scheme is to develop and maintain an efficient and flexible ocean transportation system through commercial means, with minimum government involvement.[99] Congress has gone to great lengths to empower the Shipping Act of 1984 to resolve such problem areas as the inefficiency of current U.S. regulation procedures, the disadvantage U.S. carriers are forced to operate under in contrast to their trading partners abroad, the disparity between the treatment of U.S. flag carriers, and foreign flag carriers at the hands of the U.S. government,

96. *Hearings on the Shipping Act of 1983 (H.R. 1878), Maritime Labor Agreement (H.R. 2526), Maritime Services Financial Responsibility Act of 1983 (H.R. 1307), Before the Subcomm. on Merchant Marine of the House Comm. on Merchant Marine and Fisheries*, 98th Cong., 1st Sess. 104 (1983) (statement of Peter M. Klein, V.P. and General Counsel of Sea-Land Industries Investments, Inc.).

97. *See* S. Rep., *supra* note 20, at 12.

98. *See Hearings*, *supra* note 96, at 105 (statement of Albert E. May, V.P., Council of American Flag Ship Operators).

99. S. Rep., *supra* note 20, at 1.

providing all shippers with a viable common carrier service, and maintaining a flexible system with respect to intermodal transportation advancements.[100] The overall purpose of the Shipping Act of 1984 is to improve the international ocean commerce transportation system of the United States.

C. PREDECESSOR BILLS

The Shipping Act of 1984 is the most recent attempt to improve U.S. maritime shipping policy and the ocean liner shipping industry. The Act has its birthright in legislation pondered, reported and debated in Congress for the past five years. The proposed reforms have included formally acknowledging closed conferences and shippers' councils, revising the right of civil litigants to a federal judicial forum, strengthening legal tying arrangements, exempting conference intermodal rates from antitrust restrictions, and promoting basic policy revisions.[101]

The bills to be considered here are the Ocean Shipping Act of 1980 (Inouye bill),[102] the Omnibus Maritime Regulatory Reform, Revitalization and Reorganization Act of 1980 (Murphy bill),[103] the Shipping Act of 1981 (Gorton bill),[104] and the Biaggi bill.[105] The approach of the four bills is similar; each expressly granted antitrust exemption to shippers' councils.

In 1980, S. 2585 unanimously passed the Senate. Similar efforts in the House (H.R. 4769 and H.R. 6899) failed to reach a floor vote during the 96th Congress. The following year, H.R. 4374 was introduced along with a comparable Senate bill, S. 1593. If passed, this legislation would have largely rewritten the 1916 Shipping Act.[106] The House passed H.R. 4374. This act "was the result of a balancing of all interests, the compromise efforts of carriers, the shipping public, the administration and the cooperation of the Merchant Marine and Fisheries Committee and the Judiciary Committee."[107] Also in the 97th Congress was the first concerted effort to produce an effective piece of legislation by adjusting the differ-

100. *Id.* at 1-2.

101. *See* Note, *supra* note 12, at 657.

102. S. 125, 97th Cong., 1st Sess. (1981); this bill is almost identical to S.2585, 96th Cong., 2d Sess. (1980), which also was introduced by Senator Inouye.

103. H.R. 6899, 96th Cong., 2d Sess. (1980).

104. S. 1593, 97th Cong., 1st Sess. (1981). The Gorton bill, unlike the other bills considered here, is restricted to activities of ocean common carriers, without providing for non-vessel-operating common carriers. A nonvessel operating common carrier is a middleman who acts as a carrier by arranging for the consolidation of goods to fill a container. In essence, it is a freight forwarder service. *See* Note, *supra* note 12.

105. H.R. 4374, 97th Cong., 1st Sess. (1981).

106. *See* AST&T Report, *supra* note 11, at 188.

107. *See Hearings*, supra note 106, at 105 (statement of Peter M. Klein, V.P. and General Counsel of Sea-Land Industries Investments, Inc.).

ences between H.R. 4374 and S. 1593, introduced by Senators Gorton, Packwood, Stevens, Kasten and Inouye.[108] A compromise agreement of all U.S. flag carriers and major shippers sought to clarify several sections of the Senate bill, primarily those concerning independent action, loyalty and service contracts.[109] These were incorporated into S. 1593 before the bill was reported out of the Senate Committee on Commerce, Science and Transportation. Unfortunately, however, the legislation never reached the full Senate for its consideration prior to adjournment of the 97th Congress.

The Murphy (H.R. 6899), Gorton (S.1593), and Biaggi (H.R. 4374) bills authorized closed conferences. These three bills were intended to permit a broad range of conference activity with little governmental interference,[110] and ultimately to create the kind of conference structure that operates in foreign nations.[111]

The Inouye bill (S. 125) was more limited in its approach than the other three. It sought to shift the burden of proof for only four classes of conference agreements: those that implement intergovernment maritime agreements, conference agreements that allow a right of independent action, agreements that are endorsed favorably by shippers' councils in the relevant trade, and agreements that relate to technical matters. This bill also would have given the FMC the power to grant temporary approval of an agreement without holding a hearing, but only in extraordinary situations. The bill, in addition, stated that failure of the FMC to approve, disapprove, or modify any agreement within eight months of the date of filing would result in automatic approval.[112]

In contrast, the Gorton bill required the FMC to issue a decision within 180 days after filing. If not issued within this time period, the agreement would go into effect as proposed. The bill also shifted the burden of proof to the opponent of the agreement.[113] Similarly, the Biaggi bill shifted the burden of proof to the opponent of the agreement.[114] In addition, the Biaggi bill required the FMC to take action on any proceeding 30 days after the filing of the agreement and issue a final order 180 days thereafter, much the same as the Gorton bill. Unlike the other bills, however, the Biaggi bill did not provide for automatic approval in the event of FMC delay. Therefore, under Biaggi an agreement would not be lawful after the 180 days had run. In this manner, the Biaggi bill was self-contra-

108. *See* S. REP., *supra* note 20, at 14.
109. *Id.*
110. H.R. REP. NO. 935, 96th Cong., 2d Sess. 69 (1980).
111. Note, *supra* note 12 at 658.
112. *Id.* at 670.
113. *Id.* at 670-71.
114. H.R. 4374, 97th Cong., 1st Sess. § 2 (1981).

dicting. It placed the burden of proof on the opponent, yet provided that if the FMC failed to take action within the requisite time period the agreement would be unlawful.[115]

Another paramount concern in the process of validating conference agreements has been the requirement that the FMC consider the competitive effect before granting approval, a requirement imposed by *Svenska*. The Murphy bill eliminated the public interest test required by *Svenska* and substituted a different set of criteria. The test would require an agreement to be consistent with the mandated policy objectives of promoting U.S. foreign commerce, assuring competitive rates in the international market, and realigning U.S. shipping practices with those of foreign nations.[116] The Gorton and Inouye bills provided for many of the same policy objectives as the Murphy bill. However, like the Murphy bill, neither proposal spoke to the paramount concern for the competitive impact of an agreement, but merely provided for a full exemption from the antitrust laws.[117] Unlike the others, however, the Inouye bill retains the *Svenska* public interest test,[118] but because the majority of the agreements would be exempt from the antitrust laws, this test should not result in the interpretational difficulties experiences under *Svenska*.[119]

Nevertheless, it is generally felt that the Murphy bill was superior to the other bills. By eliminating the public interest standard and granting across the board antitrust exemption, the bill avoids judicial rescission of the exemption. Should the public interest standard be retained, a complainant could be awarded a judgment against a conference carrier for violating the Shipping Act by arguing that the Act incorporated antitrust standards. Taken to its logical conclusion, a complainant could nullify a prior FMC approval.[120] In contrast, the Biaggi bill included concern for the anti-competitive effect of an agreement. Combined with the tenuous limitation of antitrust immunity, this bill would not have been effective in developing and maintaining an efficient, innovative, and economically sound ocean transportation system.[121]

D. ENACTMENT

At the onset of the 98th Congress, two things occurred which pro-

115. Note, *supra* note 12, at 671.

116. H.R. 6899, 96th Cong., 2d Sess. § 201 (1980).

117. S. 125, 97th Cong., 1st Sess. §§ 101, 316 (1981); S. 1593, 97th Cong., 1st Sess. §§ 1, 8 (1981).

118. S.125, 97th Cong., 1st Sess. § 306 (1981). The Gorton bill does not retain the public interest standard.

119. Note, *supra* note 12, at 671-72.

120. *Id.* at 672.

121. *Id.*

duced an optimistic outlook for much needed new legislation: the Senate passed S. 47 and the House Subcommittee on Merchant Marine began considering H.R. 1878. Senators Gorton, Packwood, Stevens, and Inouye introduced S. 47, with Senators Kasten and Trible joining as cosponsors. As introduced, S. 47 was modeled after S. 1593, but did include provisions which addressed antitrust concerns which had not been incorporated into its predecessor.[122]

A hearing on S. 47 was called in early February, 1983 by the Senate Committee on Commerce, Science, and Transportation. Testifying before the Committee were proponents of the legislation, which included prominent members of the administration, the FMC, and representatives of small and large shippers and carriers. Issues addressed by the witnesses covered a panorama of potential shipping conference problems: the impact of the legislation on competition in general, ports, small shippers, jobs, balance-of-trade, ocean rate levels, and the adequacy of Federal Maritime Commission regulation and enforcement. Opponents of the bill had claimed that its enactment would raise shipping rates by as much as twenty percent. This figure was never substantiated. On the contrary, the Committee received testimony from shippers who would actually have had to pay the tariffs that enactment of S. 47 could well reduce ocean shipping rates.[123] In spite of testimony that the bill might work to the detriment of small shippers, several small shippers testified to their own advantages under S. 47.[124] In support of this, a paper by a representative of American ports refuted claims "that the bill was inimical to ports' interests."[125] Additionally, there was testimony indicating that penalties under the Shipping Act were substantially less and far more equitable than antitrust treble damage penalties. This appeared to be a point in conflict, as subsequent testimony indicated that potential penalties under the antitrust laws were significantly lower than penalties which could be assessed by the FMC under S. 47.[126]

E. Problems With the Act

Interested parties testifying before the committees expressed concern over the provisions granting carte blanche antitrust immunity to the activities and agreements of carriers, while at the same shifting the burden of proof to those challenging the agreements which, absent the immunity, would violate the antitrust laws or the Shipping Act. The consensus of those testifying to this maintained that entities seeking carte

122. S. Rep., *supra* note 20, at 14.
123. *Id.*
124. *Id.*
125. *Id.*
126. *Id.* at 14-15.

blanche immunity from the antitrust laws should at the very least shoulder the burden of justifying their actions and agreements.[127]

The testimony indicated that the burden of proof should remain with the carriers seeking exemption, as "they have the primary knowledge concerning the ocean transportation problem which the carrier proponents of agreements contend requires resolution by such exemption."[128] However, lobbyist representatives of the carriers argued strongly in favor of the Committee placing the burden of proof in a proceeding on the party opposing the agreement, including the Commission."[129] In response to the support this proposed change received, the final draft of H.R. 1878 was modified to read exactly as desired by the conferences in the report to the full House (and consistently with S. 47).[130]

Aside from reaffirming the conference antitrust provisions of the 1916 Act and establishing judicial guidelines within which the shipping conference may operate, the 1983 Act provides for numerous substantial changes to existing law. It places regulation of international liner shipping under a single law, functioning under a clearly established trade policy administered by a single agency. The Act also:

> clarifies and reaffirms the complete antitrust immunity of ocean liner shipping operators engaged in specified collective activities; clarifies authority for conferences of carriers to establish intermodal rates and services and authorizes shippers to form shippers' councils to consult and confer with ocean carriers on general rate levels, rules, practices, or services. Regarding shipping conferences, the Act eliminates preimplementation approval of agreements required to be filed with the FMC. It provides for suspension of agreements, prior to their taking effect, pending review; streamlines procedures for review of agreements. Further, it replaces vague standards of review with a precise list of prohibited acts; sets statutory time limits on Commission action; and places the burden of proof squarely on opponents. In addition, the bill clarifies the authority of carriers to discount rates for shippers moving a specified volume of cargo over a specified period of time and to enter contracts for rates and services subject to common carrier obligations of the Act; and it prohibits certain practices of conferences designed to drive independent carriers from their trades.[131]

F. *Effectiveness*

The prospects for the Shipping Act of 1984 are optimistic. The Act,

127. *Hearings on the Shipping Act of 1983 (H.R. 1878) Before the Subcomm. on Merchant Marine of the House Comm. on Merchant Marine and Fisheries*, 98th Cong., 1st Sess. 190 (1983) (statement of Reynold P. de Membes, Exec. V.P. and General Counsel, Int'l Ass'n of NVOCCs).

128. *Id.* at 3.

129. *Id.*

130. H.R. 1878, 98th Cong., 1st Sess. § 5(f) (1983).

131. S. Rep., *supra* note 20, at 15-16.

like its predecessor bills, attempts to define those activities which many feel deserve antitrust exemption. It also eliminates the ambiguous approval standards of section 15 which currently exist in the 1916 Shipping Act. Additionally, it replaces current approval procedures with specifically prohibited acts, affirmatively preventing anti-competitive practices.[132] The Federal Maritime Commission has openly supported the prohibitions contained in the 1983 Act as being "realistic assessments of harm which might result from abusive collective activity by competing ocean carriers."[133]

V. CONCLUSION

Under the Shipping Act of 1916, collective ratemaking and trade practices of carriers were given legal validity, but today such activities encounter problems with antitrust laws. The Shipping Act of 1984 re-establishes the antitrust exemption of ocean carriers. This was manifested by the necessity for a return to legal certainty and permissible operational guidelines. For too long, the shipping industry, and conferences in particular, have been forced to operate in an environment which has been eroding at an accelerated rate. The U.S. shipping industry has been at an uncompromising disadvantage vis-a-vis its foreign counterparts. In order that it might, once again, establish a viable and competitive service the antitrust exemption must be firmly reinstated. The current administration, consistent with its policy of a laissez faire government, is striving to reduce government involvement in the maritime industry. It desires to reduce antitrust limitations in order to bring America's international trade "more in line with the rest of the world."[134]

Currently, there exists no better means for providing for stability and desired competition in ocean liner shipping than the open conference system.[135] Congress must firmly and expressly sanction adequate protection for this institution through the Shipping Act of 1984, as this is the single most important piece of legislation for the maritime industries of the United States that Congress will deal with for years to come.[136] The proposal is not intended, in one fell swoop, to completely alter the U.S. system. Rather, it is a procedural Act, designed to allow carriers to operate in the manner originally intended by Congress as far back as 1916. Numerous court decisions have limited the functional efficiency of the en-

132. *Hearings on S. 47 Before the Subcomm. on Merchant Marine of the Senate Comm. on Commerce, Science and Transportation*, 98th Cong., 1st Sess. 60 (statement of Alan Green, Jr., Chairman, FMC).

133. *Id.*

134. *See* AST&T Report, *supra* note 11, at 196.

135. *Id.* at 191.

136. *See Hearings*, *supra* note 127, at 224 (statement of Rep. Edwin B. Forsythe (R-N.J.)).

acted regulatory program by imposing costly hearing requirements, both in terms of economics and timeliness. The FMC's attempts to resolve this dilemma have been sorely lacking.[137] Enactment of the Shipping Act of 1984 should realistically remedy the problem of carrier uncertainty with respect to antitrust immunity and laws, and ultimately, serve to balance the U.S. maritime shipping policy against its foreign competitors.

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137. *See Hearings*, *supra* note 96, at 105 (statement of Albert E. May, V.P., Council of American Flag-Ship Operators).