# Plotting The Return of *Isbrandtsen*: The Illegality Of Interconference Rate Agreements

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A steamship conference is a voluntary agreement between ocean common carriers "formed so that the members may agree upon rates and certain other competitive practices."[1] Private conference agreements arose in the late 1800s when ocean carriers came to realize that survival under a purely competitive environment was far too demanding to be further tolerated.[2] To eliminate such competition conference members not only agreed upon rates, but also frequently allocated sailing times, and on occasion even pooled earnings. The agreements permitted the conference members to dominate the relevant trade,[3] control if not eliminate competition, and insure that each member received a reasonable profit on its operations.[4]

Although blatantly anticompetitive, conference proponents did and do argue that the conferences benefit the immediate consumer, the

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1. SENATE COMMITTEE ON COMMERCE, STEAMSHIP CONFERENCES AND DUAL RATE CONTRACTS, S. REP. NO. 860, 87th Cong., 1st Sess. 4 (1961) [hereinafter cited as ENGLE REPORT].

2. Llorca, *Anti-trust Exemption of Shipping Conferences*, 6 J. MARITIME L. & COM. 287, 288 (1975).

3. In fact the Commission defines a conference to include "an agreement which will or could reasonably be expected to cause the parties to become a dominant force in the trade covered by the arrangement." 46 C.F.R. § 522.2(1) (1976). See UNITED STATES DEPARTMENT OF JUSTICE, REPORT ON THE REGULATED OCEAN SHIPPING INDUSTRY 25-27 (1977) [hereinafter cited as OCEAN SHIPPING].

4. Llorca, *supra* note 2, at 287-91.

importer/exporter who ships goods on the member lines. Because demand for tonnage can vary but the supply of that tonnage in the short term is relatively fixed, conferences were considered necessary to eliminate "cut-throat competition." During periods of slack demand, unrestrained competition destroys weaker lines, thereby creating a shortage of supply when demand later picks up. This continuing boom-to-bust cycle subjects shippers to widely varying rates and unpredictable sailing schedules, injuring a shipper's efforts to maintain predictable stable business relationships with his customers overseas.[5] Although many observers have criticized this economic model justifying the conference monopoly,[6] Congress at least has accepted it.[7]

Congress did not, however, accept the anticompetitive abuses which resulted from the unrestrained use of the private conference system.[8] In its review of the conference system in 1914, Congress' Alexander Committee cited and condemned such conference abuses as discriminatory pricing between shippers, "deferred rebate" plans designed to force shippers to use conference lines exclusively, and "fighting-ships"—a conference-subsidized "loss-leader" whose function was to eliminate nonconference competition by charging abnormally low rates on the nonconference line's routes.[9] These abuses presented Congress with a dilemma: Should the antitrust laws be applied with full vigor to the conferences? Banning the conferences from U.S. foreign commerce would eliminate the abuses, but presumably the benefits of stability in the maritime industry would be eliminated as well.

Seeking the best of both worlds, Congress passed the Shipping Act of 1916[10] in order to grant antitrust immunity to the ocean conference system, as well as to subject the conferences to a regulatory scheme

5. ENGLE REPORT, *supra* note 1, at 5; HOUSE COMMITTEE ON MERCHANT MARINE & FISHERIES, PROVIDING FOR THE OPERATION OF STEAMSHIP CONFERENCES, H.R. REP. NO. 498, 87th Cong., 1st Sess. 4 (1961) [hereinafter cited as BONNER REPORT]; HOUSE COMMITTEE ON MERCHANT MARINE & FISHERIES, REPORT ON STEAMSHIP AGREEMENTS AND AFFILIATIONS IN THE AMERICAN FOREIGN AND DOMESTIC TRADE, H. DOC. NO. 805, 63d Cong., 2d Sess. 295-303 (1914) [hereinafter cited as ALEXANDER REPORT]; Llorca, *supra* note 2. *See also* Gordon, *Shipping Regulation and the Federal Maritime Commission*, 37 U. CHI. L. REV. 90, 92-93 (1969).

6. McGee, *Ocean Freight Rate Conferences and the American Merchant Marine*, 27 U. CHI. L. REV. 191 (1960); Saxner, *On Troubled Waters: Subsidies, Cartels, and the Maritime Commission, in* THE MONOPOLY MAKERS, 103 (M.J. Green ed. 1973). *See also* Bennathan & Walters, *Shipping Conferences: An Economic Analysis*, 4 J. MARITIME L. & COM. 93 (1972).

7. See note 5 *supra*.

8. ANTITRUST SUBCOMMITTEE OF THE HOUSE COMMITTEE ON THE JUDICIARY, REPORT ON THE OCEAN FREIGHT INDUSTRY, H.R. REP. NO. 1419, 87th Cong., 2d Sess. (1962). [hereinafter cited as CELLER REPORT].

9. ALEXANDER REPORT, *supra* note 5, at 304, 307, 313.

10. Ch. 451, 39 Stat. 728 (1916).

that would eliminate anticompetitive conference abuses.[11] Through section 15 of the Shipping Act an agreement between carriers approved by the Federal Maritime Commission would not be subject to antitrust attack.[12] Such immunity, however, was granted upon the condition that cited abuses would be properly controlled. The principal purpose of the Shipping Act was not to immunize the ocean carrier industry from the antitrust laws, but rather to create a mechanism whereby antitrust policies could be practically applied to what Congress considered to be the unique economic circumstances of the maritime industry. The Act requires the Federal Maritime Commission to enforce antitrust purposes;[13] and thereby in effect creates a partnership between the Commission and the courts for the purpose of subjecting the conferences to appropriate antitrust restrictions.[14]

What specific antitrust restrictions are considered appropriate is of course subject to varying opinion. The Commission's view of what anticompetitive practices are permissible under the Shipping Act may deviate from the intent of the drafters. The Commission's attitude frequently favors anticompetitive carrier policies.[15] The Shipping Act, on the other hand, protects shippers, not carriers, and was designed by Congress to create and preserve a competitive ocean carrier environment. The courts also have demonstrated sensitivity to the need for regulated but competitive transportation industries.[16] Where Commission practices create unwarranted immunity from competition, the courts, in the exer-

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11. "Even granting the advantages claimed for steamship conferences and agreements, all may be withdrawn in the absence of supervisory control without the shippers having any redress of protection." ALEXANDER REPORT, *supra* note 5, at 304. *See* text accompanying notes 42-46 *infra*.

12. 46 U.S.C. § 814 (1970).

13. FMC v. Seatrain Lines, Inc., 411 U.S. 726 (1973).

14. "[A]gencies and courts together constitute a 'partnership' in furtherance of the public interest, and are 'collaborative instrumentalities of justice.'" Greater Boston Television Corp. v. FCC, 444 F.2d 841 (D.C. Cir. 1970). Theoretically both agency and court work toward the same goal within their spheres of relative competence. Thus, the Federal Maritime Commission "operates within the framework of the act, applying its specialized competence to an analysis of industry practices, while the court, with its broader range of experience, works toward a proper integration of the regulatory scheme with overall national policy." Fremlin, *Primary Jurisdiction and the Federal Maritime Commission*, 18 HASTINGS L.J. 733, 733 (1967).

15. How ironic it is that, even today, there are those who would argue for further limiting the antitrust exemption in the Shipping Act, when it should be clear by this time that many of the problems arising in our ocean transportation system stem from having allowed antitrust considerations to dominate our thinking . . . . We all can agree that the present system is not working well, but, whereas the Department of Justice believes that the existing immunity should be further restricted, I personally believe that it may have to be expanded.

Address of Karl E. Bakke, Chairman, Federal Maritime Commission, Containerization Institute National Conference, Washington, D.C. (May 4, 1977).

16. Latin America/Pacific Coast Steamship Conf. v. FMC, 465 F.2d 542 (D.C. Cir.), *cert. denied*, 409 U.S. 967 (1972). See Bowman Transportation Inc. v. Arkansas-Best Freight

cise of their partnership role, should redefine the Act for the Commission in order to preserve competition within the industry.

To this end the analysis below examines the antitrust standards required by the Shipping Act in terms of one specific conference practice: interconference rate agreements. The analysis maintains that the Commission has improperly favored such anticompetitive arrangements, and raises the spectre that *Isbrandtsen* may yet return.

## THE *ISBRANDTSEN* DECISION

The landmark decision *Federal Maritime Board v. Isbrandtsen, Inc.*[17] 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.

Despite the 1961 Shipping Act Amendments[18] which overturned the *Isbrandtsen* decision, with the possible exception of the antitrust rights of nonconference carriers,[19] the basic principles of *Isbrandtsen* remain in force today.

Isbrandtsen was an independent nonconference carrier[20] serving the Japan-Atlantic trade in competition with the Japan-Atlantic and Gulf Freight Conference. By the early 1950s, through a practice of consistently undercutting Conference rates, Isbrandtsen had captured 30% of the trade.[21] The Conference was forced to retaliate. Initially the Conference cut its own rates; but Isbrandtsen only followed suit[22] riding under the

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System, Inc., 419 U.S. 281 (1974); FMC v. Seatrain Lines Inc., 411 U.S. 726 (1973); Pan American World Airways, Inc. v. CAB, 517 F.2d 734 (2d Cir. 1975).

17. 356 U.S. 481 (1958).

18. Pub. L. No. 87-346, 75 Stat. 762 (1961).

19. See discussion of the 1961 Shipping Act Amendments at text accompanying notes 49-53 *infra*.

20. Isbrandtsen later joined the Conference coincident with the 1961 Shipping Act Amendments. Senator Engle pointed to this act to bolster his arguments in favor of his pro-conference version of the Bill, 107 CONG. REC. 19333 (1961); See ENGLE REPORT, *supra* note 1, at 23. Senator Kefauver, fighting for firmer antitrust measures, implied that Isbrandtsen was coerced into joining the Conference, 107 CONG. REC. 19333 (1961). Isbrandtsen's actions were deemed important by Congress because until its "defection," Isbrandtsen was the only American Flag line operating outside the conference system, *Id.*

21. Federal Maritime Board v. Isbrandtsen, 356 U.S. 481, 485 (1958).

22. *Id.* at 486.

Conference rate "umbrella" and thereby maintaining its competitive price advantage.[23] In response the Conference proposed a dual rate agreement as a means of fighting off Isbrandtsen.[24] The Conference hoped that the dual rate contract would force shippers to use Conference lines exclusively. Isbrandtsen naturally challenged (before the Commission and before the courts)[25] the proposed agreement creating dual rate contracts. The culmination of the litigation, if not the dispute, was the *Isbrandtsen* decision.[26]

Citing anticompetitive motive, the *Isbrandtsen* Court overturned the Maritime Board's approval of the Conference's dual rate agreement.[27] The purpose of the Shipping Act, the Court reasoned, was to permit conference agreements but to eliminate conference abuses as well.[28] Although competition between conference members could be limited within the scope of the Act, "practices designed to destroy the competition of independent carriers" were "flatly outlaw[ed]"[29] by Congress. The Court cited section 14(3) of the Shipping Act which barred the conferences from resorting to "other discriminating or unfair methods."[30] This provision represented a catchall restriction created to prohibit any conference device aimed at stifling independent carrier competition.[31] Not-

23. Auerbach, *The Isbrandtsen Case & Its Aftermath*, 1959 WIS. L. REV. 223, 369, 395.

24. A dual rate contract is essentially an exclusive dealing-tying arrangement in violation of the antitrust laws. In exchange for signing a contract in which the shipper pledges to ship only on conference lines, the conference grants the shipper a special discount "contract" rate which is below the normal rates charged the shipper who occasionally employs nonconference vessels. The sole purpose of the dual rate contract is to combat, and quite possibly eliminate, nonconference carrier competition by removing the rate umbrella, the unified rates that nonconference competitors can undercut. Few, if any, independents have sufficient sailings to serve all the needs of their shipping customers. Thus the shipper must always use some conference capacity. By signing the dual rate contract the shipper is assured that all shipments will be at a "discount." By not signing the dual rate contract only shipments made on the independent lines will receive "discounts." Unless the independent can offer such a substantial discount to its shippers so as to offset the "penalty" the shipper incurs when he must employ conference capacity, the independent will not be able to successfully compete. *See* American Export Isbrandtsen Lines, Inc. v. FMC, 380 F.2d 609, 617-18 (D.C. Cir. 1967); Dodds, *Legality of Shipper Tying Arrangements in Ocean Commerce*, 23 U. PITT. L. REV. 933 (1962).

In the Isbrandtsen case the proposed contract rate for exclusive patronage offered a 9 1/2 percent discount, roughly equal to the margin at which Isbrandtsen had been undercutting the conference. FMB v. Isbrandtsen Co., Inc., 356 U.S. 481, 483, 485 (1958).

25. For a brief history of the litigation, see ENGLE REPORT, *supra* note 1, at 8-9; Dodds, *supra* note 24, at 945-48.

26. Legislation was passed to forestall the impact of *Isbrandtsen* until Congress could address the dual rate issue. Act of August 12, 1958, Pub. L. No. 85-626, 72 Stat. 574, followed by Pub. L. No. 86-542, 74 Stat. 253 (1960); Pub. L. No. 87-75, 75 Stat. 195 (1961).

27. 356 U.S. at 493.

28. *Id.* at 488-93.

29. *Id.* at 492-93.

30. *Id.* at 493.

31. *Id.* at 492.

ing the close similarity between the dual rate contract at issue and deferred rebates[32] specifically outlawed by the Act,[33] the Court held the agreement unlawful because it constituted a dual rate contract "employed as a predatory device[]."[34]

The Court argued that its ruling did not make dual rate contracts illegal per se; only those contracts which were designed to inhibit outside competition were illegal. The Court pointed to the Board's own findings approving the conference's dual rate agreement:

> 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 discriminating or unfair methods" to stifle outside competition in violation of § 14 [para. 3]. . . .[35]

If a dual rate contract were designed without anticompetitive intent, it would be permitted.[36]

Although commentators recognize the Court's intent to avoid a per se holding, in practical effect the Court barred all dual rate contracts.[37] Every dual rate contract has the purpose of combating or "stifling" competition by nonconference lines.[38] Thus under the Court's test it would have been hard to create a dual rate contract that would survive the Court's standard of legality.

In this manner the Court's decision broadly redefined the Shipping Act. The Court first determined that the Act was designed primarily to eliminate anticompetitive and discriminatory abuses within the confer-

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32. Deferred rebates are similar to dual rate contracts except that the shipper gets his exclusive dealing discount in the form of a later rebate rather than a direct price reduction at the time of sale. Since the conference pays the rebate only after the shipper has demonstrated compliance with the contract over a certain length of time, the penalty for failure to comply, the accumulated rebate owed to the shipper, can become so prohibitive that a free choice by the shipper has been lost. *See* FMB v. Isbrandtsen Co., Inc., 356 U.S. at 493-95; McGee, *supra* note 6, at 232-36. *See also* note 9 *supra*.

33. Ch. 451, § 14(1) (1916) (current version at 46 U.S.C. § 813 (1970)).

34. 356 U.S. at 499.

35. *Id*. at 493.

36. *Id*. at 495.

37. Auerbach, *supra* note 23, at 245-51, in highlighting the Court's express forbearance of a per se rule, nonetheless states that the Court's distortion of the Maritime Board's findings may amount in fact to a per se rule. Similarly, Justice Frankfurter, who argued that the Court's holding was barred by the doctrine of primary jurisdiction, based his argument on the premise that the Court had outlawed dual rate contracts per se. FMB v. Isbrandtsen Co., Inc., 356 U.S. at 517 (Frankfurter, J., dissenting).

38. "[E]very effective dual-rate contract used by a conference is intended, and reasonably likely and tends to cause nonconference lines either to join the conference using the contract or to leave the trade for happy hunting elsewhere." ENGLE REPORT, *supra* note 1, at 21.

ence system. This protection was to be afforded nonconference competitors as well as shippers. The Court suffered little embarassment in augmenting the Act to preclude dual rate contracts, a device which Congress itself had not expressly prohibited.

Spurred by the outraged conferences,[39] Congress stayed,[40] and then in 1961 overturned, *Isbrandtsen*.[41] Congress, did not, however, reject the procompetitive policies upon which the Court had relied in barring dual rate contracts. These procompetitive assumptions remain available to future courts for future redefinitions of the Shipping Act. With the exception of the specific *Isbrandtsen* holding concerning dual rate contracts, the broad procompetitive principles of *Isbrandtsen* continue intact because these principles are founded upon the original Shipping Act itself.

## THE SHIPPING ACT AND THE 1961 AMENDMENTS

Although the Shipping Act of 1916 granted conferences a limited immunity from the antitrust laws, it did so for the purpose of protecting American shippers from the abuses of the ocean monopoly system as it then existed.[42] The Act represented a trade-off: limited antitrust immunity was permitted so that the conferences could be regulated.[43] The fundamental purpose of that legislation remained antimonopolistic: it was designed to protect the shippers from cartel malpractices.[44] Although protecting carriers from competition to a limited extent by permitting

39. "The Isbrandtsen case was a shock for the conference interests," particularly because the new test was designed to protect nonconference lines and thereby threatened the whole conference system. Lowenfeld, "*To Have One's Cake . . .*"—*The Federal Maritime Commission and the Conferences*, 1 J. MARITIME L. & COM. 21, 35 (1969). As the Senate Report states: "The Supreme Court in deciding Isbrandtsen thus cast substantial doubt on the legality of the thousands of dual-rate contracts then being used by more than half the 113 inbound and outbound conferences serving U.S. ports." ENGLE REPORT, *supra* note 1, at 9.

40. *See* note 26 *supra*; Gordon, *supra* note 5, at 96 n.20; Dodds, *supra* note 24, at 948-49.

41. For a review of the legislative history of the 1961 Amendments see Lowenfeld, *supra* note 39, at 34-40; Gordon, *supra* note 5, at 95-99; Dodds, *supra* note 24, at 949-56.

42. Gordon, *supra* note 5, at 92-94. The Alexander Committee believed that authorizing conferences was the only means of preserving "competition." ALEXANDER REPORT, *supra* note 5, at 416; text at note 150 *infra*.

43. BONNER REPORT, *supra* note 5, at 4-5; Gordon, *supra* note 5, at 94-95; Lowenfeld, *supra* note 39, at 26. The ALEXANDER REPORT clearly stated that conferences would be permitted only so long as their abuses were controlled: "the Committee is not disposed to recognize steamship agreements and conferences, unless the same are brought under some form of effective government supervision." ALEXANDER REPORT, *supra* note 5, at 417.

44. "The Committee believes that the disadvantages and abuses connected with steamship agreements and conferences as now conducted are inherent, and can only be eliminated by effective government control; and it is such control that the Committee recommends as the means of preserving to American exporters and importers the advantages enumerated, and of preventing the abuses complained of." ALEXANDER REPORT, *supra* note 5, at 418.

conferences to operate, the principal goal of the 1916 Act was to "condemn[] in no uncertain terms a long line of anticompetitive practices" engaged in by the shipping cartels.[45] Thus, in granting the conferences antitrust immunity, "Congress intended to tolerate only the minimum anticompetitive behavior necessary to preserve an essentially competitive structure in the maritime industry . . . ."[46]

The 1961 Amendments did not alter the basic purpose behind the Shipping Act—to prohibit monopolistic abuses. Rather, the Amendments were designed to preserve only that limited monopoly expressly permitted by the 1916 Act, the conferences themselves. The basic premise of the 1961 legislation was that without the dual rate contract the conferences could not survive,[47] and without the conferences the shipping industry would turn to chaos, injuring American shippers.[48]

The debate in the Senate over the proper phrasing of the dual rate amendments illustrates Congress' concern for the survival of the conferences. The original House Bill's dual rate provision permitted dual rate contracts only "if the Board finds that the proposed conference system is not intended, and will not be reasonably likely to cause the exclusion of other carriers from a given trade."[49] In effect the House Bill endorsed the *Isbrandtsen* decision.[50] The Senate Commerce Committee deleted this provision, arguing that every dual rate contract has the intent of excluding nonconference competition.[51] When Senator Kefauver, through an amendment on the Senate floor, attempted to reinstate the House language, Senator Engle responded as follows:

> The Kefauver Amendment would take us up the hill, we would authorize these conference systems, and then we would turn around, march down the hill, and deauthorize them. In my opinion, under this language, it would be impossible for any honest Commissioner of the Federal Maritime Commission to authorize a conference system at all. He simply could not do it with that language in the bill.[52]

As Senator Engle phrased it, the issue was whether or not the Congress

45. CELLER REPORT, *supra* note 8, at 381.

46. Seatrain Lines, Inc. v. FMC, 460 F.2d 932, 940 (D.C. Cir. 1972), *aff'd*, 411 U.S. 726 (1973).

47. BONNER REPORT, *supra* note 5, at 3-4. "Most shippers agreed with the position of the Alexander committee and the present Merchant Marine Committee that conferences were desirable and that a tying device such as the dual rate system was necessary to preserve their integrity." *Id*. at 4.

48. ENGLE REPORT, *supra* note 1, at 6-8, 10; BONNER REPORT, *supra* note 5, at 12; 107 CONG. REC. 19305 (1961) (Statement of Sen. Engle).

49. BONNER REPORT, *supra* note 5, at 2-3.

50. Gordon, *supra* note 5, at 97.

51. ENGLE REPORT, *supra* note 1, at 20-23.

52. 107 CONG. REC. 19420 (1961).

wanted a conference system at all, for without effective dual rate contracts the conferences would not survive.[53]

Consequently, the 1961 Amendments never deviated from the traditional antitrust policies implicit in the 1916 Shipping Act. As Senator Engle himself stated: "While we rejected certain proposals made by the Department of Justice, we did so with the conviction that their rejection worked no harm whatever to important principles of sound antitrust doctrine."[54] The House Bonner Committee Report strongly implied that the only exception to the antitrust laws permitted by the Act is the conference itself: "The conference . . . is permitted to exist only as an exception to the antitrust laws of the United States, and such exception is granted only because of the peculiar nature of ocean transportation, and provided certain conditions are met."[55] The antitrust immunity granted by the Amendments was only that minimum necessary to preserve the conference system.[56] Although overturning *Isbrandtsen*, the 1961 Amendments in effect reinacted the procompetitive, proshipper, policy of the original 1916 Shipping Act.[57] Designed to preserve only the conference system, the ultimate rationale was the protection of the American shipper.[58] Although a study of the legislative history also reveals a distinct emphasis on preserving the profitability of American flag vessels,[59] this policy too is grounded on a desire to protect the American shipper.[60]

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53. 107 CONG. REC. 19420, 19333 (1961) (Statements of Sen. Engle); ENGLE REPORT, *supra* note 1, at 22. In fact Senator Engle criticized the Justice Department's support of the Kefauver "exclusion" Amendment as a plot to eliminate the conferences:

> The Justice Department does not support conference arrangements. It is against conference arrangements. The language proposed by the Justice Department would defeat conference arrangements and would make it impossible to have conference arrangements. That is the reason I said in my opening remarks, as well as in the remarks made to my committee: We must decide whether or not we want a conference system, we must not do things which will deauthorize the conference system and destroy it.

107 CONG. REC. 19333 (1961).

54. 107 CONG. REC. 19305 (1961).

55. BONNER REPORT, *supra* note 5, at 5.

56. Latin America/Pacific Coast Steamship Conf. v. FMC, 465 F.2d 542, 551-52 (D.C. Cir.), *cert. denied*, 409 U.S. 967 (1972).

57. Thus, after analyzing the 1961 Amendments, the District of Columbia Circuit determined that the new dual rate provisions did not bar a shipper from seeking a volume discount. In upholding a U.S. Government provision requiring competitive bidding for certain of its shipments, the court dismissed the carriers' argument that this system would unduly injure the carriers. "On this premise we are confronted only with hobgoblins conjured up by an industry that is subsidized yet seeks to avoid the impact of effective competitive bidding." American Export Isbrandtsen Lines, Inc. v. FMC, 380 F.2d 609, 620 (D.C. Cir. 1967).

58. Gordon, *supra* note 5, at 90, 99.

59. The basic argument advanced by conference supporters was that with Isbrandtsen's defection to the conferences, every American flag carrier would be operating within the conferences. These U.S. carriers needed the conferences as, despite their subsidies, the costs

Illustrative of the continued concern over anticompetitive abuses, the Amendments added a number of provisions with the express purpose of protecting the shipper. The Amendments require the prior publication of rates,[61] notice of change of those rates,[62] and conference adherence to published rates.[63] Significantly the Amendments gave the Commission authority to disapprove rates which "it finds to be so unreasonably high or low as to be detrimental to the Commerce of the United States."[64] And finally, dual rate contracts, like all other agreements, were subjected to the demand that they not be "unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors."[65] As one commentator stated: "In language and impact, the Bonner Act amendments of 1961 are surely the most explicit congressional statement to date of the identity of the national interest with the interests of American exporters and importers."[66]

### THE PUBLIC INTEREST AND SERIOUS TRANSPORTATION NEED

The courts' interpretation of another provision added by the Amendments reiterates the legislators' concern for the shippers. The 1961 Bill expressly incorporated "the public interest" into those factors which the Commission must consider in determining whether or not to approve an

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for the U.S. carriers was so high that they required the protection of the conference in order to survive against low-cost nonconference competitors. Therefore, to protect the conferences was to protect the U.S. lines. ENGLE REPORT, *supra* note 1, at 2-3; 107 CONG. REC. 19306, 19421 (1961); FEDERAL MARITIME COMMISSION, STAFF ANALYSIS OF STUDY OF THE REGULATED OCEAN SHIPPING INDUSTRY CONDUCTED BY THE ANTITRUST DIVISION OF THE DEPARTMENT OF JUSTICE 13 (1977) [hereinafter cited as STAFF ANALYSIS]. It has been argued, however, that it makes more sense to increase the subsidy and use American vessels as a tool to break-up the high priced conference cartels. McGee, *supra*, note 6, at 309-13.

60. The theory is that the presence of American flag lines protects American shippers from discrimination at the hands of foreign flag interests, 107 CONG. REC. 19426 (Statement of Sen. Engle).

This is the only rationale for protecting American flag lines that makes sense given the economics of the ocean carrier industry which penalizes operators with high labor costs. As Gordon states: the United States is much more a nation of shippers than a nation of steamship operators—this is the only conception of the national interest which is capable of providing a meaningful rationale for American shipping policy." Gordon, *supra* note 5, at 92. Senator Kefauver attacked this rationale on the Senate floor, arguing that since the bulk of the conferences are foreign dominated, the American minority will lack sufficient clout to exert any influence on behalf of U.S. shippers. 107 CONG. REC. 19359, 19425 (1961).

61. Pub. L. No. 87-346, § 4(b)(1), 75 Stat. 762 (1961) (codified at 46 U.S.C. § 817(b)(1) (1970)).

62. *Id.* § 4(b)(2), 75 Stat. 762 (1961) (codified at 46 U.S.C. § 817(b)(2) (1970)).

63. *Id.* § 4(b)(3), 75 Stat. 762 (1961) (codified at 46 U.S.C. § 817(b)(3) (1970)).

64. *Id.* § 4(b)(5), 75 Stat. 762 (1961) (codified at 46 U.S.C. § 817(b)(5) (1970)).

65. *Id.* § 1, 75 Stat. 762 (1961) (codified at 46 U.S.C. § 813b (1970)).

66. Gordon, *supra* note 5, at 99.

agreement.[67] The courts have interpreted this provision as *requiring* the Commission to consider antitrust policies when assessing a proposed conference agreement.

*Volkswagenwerk Aktiengesselschaft v. FMC*[68] first articulated the public interest—antitrust equation. In *Volkswagenwerk* the Court addressed the issue of the applicability of section 15—concerning conference antitrust immunity—to an agreement designed to enforce a labor contract. The agreement at issue allocated between shippers the costs of payments to the Union's mechanization fund.[69] Volkswagen claimed that the agreement discriminated against it, and should have been approved by the Commission before it was implemented. The Commission had declined to take jurisdiction over the agreement.

In requiring the Commission to review the agreement the Court relied upon the Commission's duty to apply the antitrust laws under "the public interest" standard of section 15. The Commission had argued that by passing on the mechanization fund agreement it would give that agreement unwarranted immunity from the antitrust laws. The Court disagreed: "[I]n deciding whether to approve an agreement, the Commission is required under section 15 to consider antitrust implications."[70] This affirmative antitrust interpretation of the public interest standard was repeated later in *FMC v. Seatrain Lines, Inc.* to support the Court's argument that the Shipping Act granted only minimum antitrust immunity to the conferences.[71]

The Court's holding that the "public interest" standard commands Commission consideration of antitrust policies raises the question of whether the Court can also use the "public interest" to substantially reconstruct the Shipping Act—as the *Isbrandtsen* Court had done with dual rate contracts and the "other discriminating or unfair methods" language of the old statute. To date the Court has applied the public interest rule only in primary jurisdiction cases. In both instances the Court used the antitrust requirement to insure that the agreements at

67. Pub. L. No. 87-346, § 2, 75 Stat. 762 (1961) (codified at 46 U.S.C. § 814 (1970)).

68. 390 U.S. 261 (1968).

69. The agreement was designed to alleviate the hardship on the labor force resulting from the reduction in jobs caused by mechanization of the industry. *Id.* at 264-65.

70. *Id.* at 273-74. In the view of Chief Justice Burger, whenever a statute grants an industry antitrust immunity, the regulators of that industry are required to consider antitrust policies when granting that immunity. Hughes Tool Co. v. Trans World Airlines, Inc , 409 U.S. 363, 389, 407 (Burger, C.J., dissenting).

71. "We have construed the 'public interest' standard contained in the Act as requiring the Commission to consider the antitrust implications of an agreement before approving it." 411 U.S. 726, 739 (1973). Seatrain applied this test to determine that the Shipping Act did not grant the Commission jurisdiction to approve merger agreements between carriers. *See* text accompanying notes 148-151 *infra*.

issue would receive maximum feasible antitrust review. In *Volkswagenwerk*, the Court subjected to the Commission's antitrust inspection a labor-related agreement which otherwise may have escaped antitrust scrutiny altogether.[72] In *Seatrain* the Court used the rule to deny the Commission jurisdiction over carrier mergers, specifically subjecting such mergers to the full impact of section 7 of the Clayton Act.[73] These holdings only follow the modern trend limiting immunity from the antitrust laws to the narrowest extent possible.[74] The question of the impact of the public interest—antitrust standard on the scope of the Court's ability to restructure the operation of the Shipping Act, rather than to merely define the outer limits of that Act, remains unanswered by the Court.

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72. "While the paths of antitrust and the Shipping Act policies have sometimes diverged, those of labor and antitrust have consistently collided head-on." Pacific Maritime Ass'n v. FMC, 543 F.2d 395, 401 (D.C. Cir. 1976), *cert. granted*, 97 S.Ct. 1172 (1977). The Pacific Maritime court went on to distinguish Volkswagenwerk, holding that a mech fund agreement established by collective bargaining was not subject to Maritime Commission jurisdiction. Volkswagenwerk was intended to cover an agreement between employers, not an agreement between employees and their employers.

73. *See* text accompanying notes 148-152 *infra*; Hill, *The Diminishing Power of the FMC in the Aftermath of Seatrain*, 9 TEX. INT'L L.J. 359 (1974).

74. For example, Carnation Co. v. Pacific Westbound Conference, 383 U.S. 213 (1966) held that ratemaking agreements not submitted to the Commission for approval were subject to the antitrust laws. Pacific Westbound, one of the defendants in the treble damages action, argued that the Shipping Act of 1916 "repealed all antitrust regulation of the rate-making activities of the shipping industry." *Id*. at 216. The Court rejected the argument, stating that the Act extended immunity only to rate agreements actually approved by the Commission; unapproved agreements would be subject to antitrust attack:

> We have long recognized that the antitrust laws represent a fundamental national economic policy and have therefore concluded that we cannot lightly assume that the enactment of a special regulatory scheme for particular aspects of an industry was intended to render the more general provisions of the antitrust laws wholly inapplicable to that industry.

*Id*. at 218. The circuit court had ruled that two earlier Supreme Court decisions, Far East Conference v. United States, 342 U.S. 570 (1952) and United States Navigation Co. v. Cunard Steamship Co., 284 U.S. 474 (1932), had granted to the Maritime Commission exclusive jurisdiction over the legality or illegality of shipping rate agreements. Since the Shipping Act gave the Commission a remedy to deal with unapproved agreements, the circuit court determined that that remedy must be exclusive. 336 F.2d 650 (9th Cir. 1964). *See* Latta, *Primary Jurisdiction in the Regulated Industries and the Antitrust Laws*, 30 U. CINN. L. REV. 261, 266-67 (1961); Fremlin, *Primary Jurisdiction and the Federal Maritime Commission*, 18 HASTINGS L.J. 733, 753-69 (1967).

The doctrine of primary jurisdiction was probably first expressed in Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co., 204 U.S. 427 (1907). The doctrine has been applied in a number of instances to preclude antitrust suits challenging regulated activity, *see, e.g.*, Hughes Tool Co. v. Trans World Airlines, 409 U.S. 363 (1973); McLean Trucking Co. v. United States, 321 U.S. 67 (1944). However, as with the Carnation case above, the courts consistently limit antitrust immunity to the narrowest practicable under the regulatory scheme. "Repeals of the antitrust laws by implication from a regulatory statute are strongly disfavored, and have only been found in cases of plain repugnancy." United States v. Philadelphia National Bank, 374 U.S. 321, 350-51 (1963). *See, e.g.*, Otter Tail Power Co. v. United States, 410 U.S. 366 (1973); Silver v. New

In an effort to develop a likely answer one must initially examine *FMC v. Aktiebolaget Svenska America*.[75] *Svenska* involved in part the validity of the Commission's own antitrust test expressed in the decision from which *Svenska* appealed, *Investigation of Passenger Travel Agents*: "The parties seeking exemption from the antitrust laws for their agreement must demonstrate that the agreement is required by a serious transportation need, or in order to secure important public benefits."[76] The Court found this construction of the statute entirely reasonable:

> By its very nature an illegal restraint of trade is in some ways "contrary to the public interest," and the Commission's antitrust standard, involving an assessment of the necessity for this restraint in terms of legitimate commercial objectives, simply gives understandable content to the broad statutory concept of the public interest.[77]

Consequently, a determination that a proposed agreement violates antitrust laws is in itself substantial evidence warranting denial of the agreement as contrary to the public interest. It is incumbent on the agreement proponents to overcome this presumption by demonstrating a serious transportation need for the agreement.[78]

Clearly *Svenska* granted the Commission broad authority to disapprove agreements when they violate antitrust laws.[79] Does the *Svenska* decision, when read in conjunction with the public interest—antitrust requirement, also limit the Commission's authority to *approve* agree-

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York Stock Exchange, 373 U.S. 341 (1963); California v. FPC, 369 U.S. 482 (1962); United States v. Radio Corp. of America, 358 U.S. 334 (1959). *See also* Aloha Airlines Inc. v. Hawaiian Airlines, Inc., 489 F.2d 203 (9th Cir. 1973). *Cf.* Nader v. Allegheny Airlines, Inc., 426 U.S. 290 (1976) (Federal Aviation Act does not require that a common law claim of fraudulent misrepresentation concerning regulated airline practices be heard first before the Civil Aeronautics Board).

75. 390 U.S. 238 (1968).

76. 10 F.M.C. 27, 34-35 (1966).

77. FMC v. Aktiebolaget Svenska Amerika Linien, 390 U.S. 238, 244 (1968).

78. *Id.* at 245.

79. According to the Supreme Court an antitrust violation is itself substantial evidence warranting determination that the agreement is contrary to the public interest. "[O]nce an antitrust violation is established, this alone will normally constitute substantial evidence that the agreement is 'contrary to the public interest,' unless other evidence in the record fairly detracts from the weight of this factor." *Id.* at 245-46.

Compare the above language with the circuit court's determination of the substantial evidence required: "We do not read the statute as authorizing disapproval of an agreement on the ground that it runs counter to antitrust principles . . . ." An antitrust violation alone cannot support a finding that the agreement is contrary to the public interest. 351 F.2d 756, 761 (D.C. Cir. 1964).

Since, under the Supreme Court's rule, the antitrust violation itself creates its own substantial evidence that the public interest is harmed, the Commission's discretion to enforce antitrust policies is virtually unfettered. Note, *Accommodations of Antitrust Law and Ocean Shipping*, 4 Tex. Int'l L. Forum 393 (1968). *See* Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc., 419 U.S. 281 (1974).

ments when they violate the antitrust laws? Must the Commission apply its transportation need test to *all* agreements infringing the antitrust laws?

Normally all that is required to support the Commission's approval of an agreement is substantial evidence that the agreement complies with the Shipping Act.[80] However, that finding must be applied against the proper statutory principle.[81] If the Shipping Act requires that the Commission examine antitrust policies, is not the Commission's serious transportation need test required by the statute as well?[82]

The *Svenska* decision, in holding that the Commission *could* employ its antitrust test, did so by ruling that the Commission *could* consider antitrust standards.[83] However, the Commission *must* apply antitrust standards.[84] The Commission itself apparently views its test as required by the public interest element of the statute. In the *Mediterranean Pools Investigation*, the forerunner to *Travel Agents*, the Commission stated:

> [T]he question of approval under section 15 requires (1) consideration of the public interest in the preservation of the competitive philosophy embodied in the antitrust laws insofar as consistent with the regulatory purpose of the Shipping Act . . . . [P]resumptively all anticompetitive combinations run counter to the public interest in free and open competition and it is incumbent upon those who seek exemption of anticompetitive combinations under section 15 to demonstrate that the combination seeks to eliminate or remedy conditions which preclude or hinder the achievement of the regulatory purposes of the Shipping Act.[85]

Given that the *Seatrain* Court, subsequent to *Svenska*, determined that the public interest standard requires the Commission to apply antitrust policies, and that the Commission views antitrust policies as requiring some affirmative showing of regulatory need, is not the Commission's need test thereby required by the statute itself?

The Commission's consistency supports the hypothesis that the Shipping Act requires the serious transportation need test. The Commis-

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80. The need to demonstrate substantial evidence is set out at 5 U.S.C. § 706(2)(E) (1970). Substantial evidence requires only "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938). See Consolo v. FMC, 383 U.S. 607 (1966); American Export-Isbrandtsen Lines, Inc. v. FMC, 389 F.2d 962 (D.C. Cir. 1968). *See also* Anglo-Canadian Shipping Co. Ltd. v. FMC, 310 F.2d 606 (9th Cir. 1962).

81. Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 412-13 (1971); Appalachian Power Co. v. Train, 545 F.2d 1351 (4th Cir. 1976); Papercraft Corp. v. FTC, 472 F.2d 927 (7th Cir. 1973). *See* Schwartz, *Legal Restriction of Competition in the Regulated Industries: An Abdication of Judicial Responsibility*, 67 HARV. L. REV. 436 (1954).

82. *See generally* United States v. First National City Bank, 386 U.S. 361 (1967).

83. *See* text at note 77 *supra*.

84. *See* text accompanying notes 68-71 *supra*.

85. The Mediterranean Pools Investigation, 9 F.M.C. 264, 290 (1966).

sion has repeatedly adopted and applied the specific language quoted by the *Svenska* court.[86]

Agreements would be contrary to the public interest and therefore unapprovable unless they are "required by a serious transportation need, necessary to secure important public benefits or in furtherance of a valid regulatory purpose of the Shipping Act."[87] "Valid regulatory purpose" defines what may constitute a permissible "transportation need" or "public benefit."[88] In stressing the demanding nature of its test, the Commission has stated:

> It is not enough that there exists some transportation need or some public benefit, there must exist a *serious* transportation need or an *important* public benefit. Further, in addition to the existence of a serious transportation need or an important public benefit, the agreement proferred for Commission approval must be *necessitated* by *that* serious transportation need or *necessary* to secure *that* important public benefit. (emphasis in original)[89]

This statement by the Commission of its serious transportation need test strongly implies that a conference not only must demonstrate a serious transportation need, but also must demonstrate that its agreement is the least anticompetitive alternative available to meet that need.

Consequently, even if not required by the statutory public interest standard itself, the Commission's own precedential authority may have established "serious transportation need" as an unalterable standard of agency review. Normally agencies are not governed by stare decisis;[90] however, when an agency deviates from prior policies and standards that transgression will be examined closely to insure that the agency's new direction is in compliance with the applicable law.[91] In particular, once an agency has developed its interpretation of a statute, it cannot ignore that interpretation to the detriment of the antitrust laws.

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86. The *Svenska* Court consolidated somewhat the language of *Passenger Travel Agents* before it appeared in published form. The *Svenska* language is what the Commission generally cites in its opinions. *See* text at note 87 *infra*.

87. Canadian-American Working Arrangement, No., 75-56, slip op. at 2 (Federal Maritime Commission 1976); Puerto Rico Trades—1968, 17 F.M.C. 251, 256 (1974); *In re* Agreements Nos. T-2108 and T-2108A, 13 F.M.C. 110, 116 (1968).

88. *See* Canadian-American Working Arrangement, No., 75-56 (Federal Maritime Commission 1976); Investigation of Passenger Travel Agents, 10 F.M.C. 27 (1966); Mediterranean Pools Investigation, 9 F.M.C. 264, 290 (1966).

89. Canadian-American Working Arrangement, No. 75-56, slip op. at 3-4 (Federal Maritime Commission 1976). The Commission has even formulated its antitrust test into a proposed rule that would establish the burden of proof for agreement proponents. Proposed Rule 46 C.F.R. § 522.5, 41 Fed. Reg. 51623 (1976).

90. *See, e.g., In re* Permian Basin Area Rate Cases, 390 U.S. 747 (1968).

91. Marine Space Enclosures, Inc. v. FMC, 420 F.2d 577, 584-86 (D.C. Cir. 1969). Similarly, if the Commission has consistently viewed a certain procedure as violating the Shipping Act the court will give weight to that fact in upholding the Commission's denial of an agreement. Pacific Coast European Conference v. FMC, 537 F.2d 333, 338 (9th Cir. 1976). *See*

For example, in *Continental Air Lines, Inc. v. C.A.B.*,[92] the court held the Civil Aeronautics Board to its prior rule that certification of a competing carrier is required by the Aviation Act when sufficient traffic exists to support the increased competition. In so ruling the court stated:

> We place substantial reliance on this view of the role of competition both because of the particular respect due a "contemporaneous construction of a statute by men charged with the responsibility of setting its machinery in motion" and because the Board "has from the outset consistently taken" that position.[93]

The Maritime Commission has contemporaneously and consistently interpreted the public interest standard as requiring the "serious transportation need" test.[94] Arguably Commission precedent alone has established "serious transportation need" as a virtual rule of law.

Judicial review of other C.A.B. and I.C.C. decisions illustrates the process whereby what begins as a discretionary transportation need test can solidify into a mandatory rule of law. *United States v. C.A.B.*[95] addressed a Justice Department attack on the C.A.B.'s antitrust standard,[96] the original version of the Maritime Commission's own antitrust "need" test.[97] The Justice Department argued that an agreement could not be in the public interest unless "the end sought cannot be achieved at all in a less competitive way."[98] The court upheld the Board's standard citing *Svenska*'s approval of the Maritime Commission's test.[99] However, the court remanded the dispute to the C.A.B. because it failed to follow the evidentiary requirements embodied in its antitrust—serious transportation need—test: "[I]t is essential in the face of an antitrust claim that the Board's approval (pursuant to section 412(b)) rest upon a sufficient justification for tolerating the restraint."[100]

In an earlier decision cited by *United States v. C.A.B., American Importers Ass'n v. C.A.B.*[101] voiced the same requirement. The American Importers Association challenged an order of the C.A.B., granting approval to an agreement filed by the International Air Transport Association. In remanding the issue to the Board for a more detailed assessment

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International Union, United Automobile, Aerospace and Agriculture Implement Workers of America v. NLRB, 459 F.2d 1329 (D.C. Cir. 1972).

92. 519 F.2d 944 (D.C. Cir. 1975), *cert. denied*, 424 U.S. 958 (1976).

93. *Id.* at 954-55.

94. The transportation need test arose in 1966 (see text at note 76), five years after the words "public interest" were amended into the Shipping Act (see text at note 67).

95. 511 F.2d 1315 (D.C. Cir. 1975)

96. Local Cartage Agreement Case, 15 C.A.B. 850, 853 (1952).

97. Investigation of Passenger Travel Agents, 10 F.M.C. 27, 35 n.7 (1966).

98. 511 F.2d at 1320.

99. *Id.* at 1322.

100. *Id.* at 1324-25, *quoting* American Importers Ass'n v. CAB, 473 F.2d 168, 172 (D.C. Cir. 1972).

101. 473 F.2d 168 (D.C. Cir. 1972).

of anticompetitive factors the court cited the precedential authority of the C.A.B.'s serious transportation need test, and the Supreme Court's approval of that similar test in *Svenska*.[102] The court concluded that, in effect, the C.A.B. was required to follow its serious transportation need test: "In view of [past Board action], it is essential in the face of an antitrust claim that the Board's approval rest upon a sufficient justification for tolerating the restraint."[103]

Litigation over the competition policies to be applied by the I.C.C. in granting new certificates of public convenience and necessity exhibits a similar solidification into law of agency antitrust standards. In upholding I.C.C. action granting new certificates the courts have consistently held that an existing carrier cannot prevent new competition by demonstrating that the shipping public was already adequately served, if the Commission finds that new capacity would nonetheless be in the public interest.[105] A recent Texas district court decision now interprets this rule as *requiring* a showing of transportation need by the existing operators in order for a certificate application to be *denied*. "The presumption that competition will aid in the attainment of the objectives of the National Transportation Policy must be 'overridden by other interests.'"[106]

## INTERCONFERENCE RATE AGREEMENTS

The assessment of the legal significance of the serious transportation need test is more than an academic exercise. The *Travel Agents*—serious transportation need test is used by the Maritime Commission to judge the validity of agreements under the requirements of section 15. Since all agreements subject to Commission approval under the Shipping Act must meet section 15 standards[107] once the transportation need test attains a legal status, every express requirement of the Ship-

102. *Id.* at 171-72.

103. *Id.* at 172.

104. 49 U.S.C. § 307 (1970).

105. Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc., 419 U.S. 281 (1974); Midwest Coast Transport, Inc. v. ICC, 536 F.2d 256 (8th Cir. 1976); Hilt Truck Line, Inc. v. United States, 421 F. Supp. 308 (N.D. Tex. 1976); Johnston's Fuel Lines, Inc. v. United States, 407 F. Supp. 1231 (D. Wyo. 1976).

106. Trans-American Van Service, Inc. v. United States, 421 F. Supp. 308, 323 (N.D. Tex. 1976). The court in essence makes mandatory the discretionary rule expressed at text accompanying note 105 *supra*.

In 1940 Congress amended the Interstate Commerce Act to include a preamble entitled "National Transportation Policy," Transportation Act of 1940, Pub. L. No. 76-783, 54 Stat. 899. Among the policy directives is "to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers . . . ." Trans-American Van states: "The courts have generally construed this policy to mean that, absent contraindicative factors, competition is to be considered a healthy and desirable feature even in regulated industries." 421 F. Supp. at 321.

107. 46 U.S.C. § 814 (1970).

ping Act must be read in conjunction with the additional requirement of demonstrating a serious transportation need. In the case of interconference rate agreements the resulting burden of proof on the conferences becomes so great that in practical effect interconference rate agreements become illegal per se, or at least nearly so.

Interconference agreements obtain particular importance because very often they effectively eliminate the last vestiges of competition in a given shipping market. A conference agreement normally is limited to a single trade, with traffic in one direction between groups of geographically proximate ports.[108] Although a conference agreement eliminates competition between conference members in the trade covered by the agreement, it does not eliminate all competition between conference lines. To the extent that a shipper has the option of using multiple trades, for example shipping from a Gulf port instead of an East Coast port, the conferences serving each of those areas must compete for that shipper's business. An interconference rate agreement eliminates this conference competition in the broad shipping market.[109]

The amended Shipping Act permits interconference agreements only to the extent that each conference preserves a right of independent action:

> [N]o agreement between carriers not members of the same conference or conferences of carriers serving different trades that would otherwise be naturally competitive, shall be approved, nor shall continued approval be permitted, unless in the case of agreements between carriers, each carrier, or in the case of agreements between conferences, each conference retains the right of independent action.[110]

If interconference agreements must embody a real, practical right of independent action, then these agreements must preserve practical incentives to file independent rates. If an agreement must maintain such incentives to "defect", how can the agreement also be so essential to the conferences that it satisfies the Commission's requirement that "it be

108. *See* Gordon, *supra* note 5, at 104; Note, *Rate Regulation in Ocean Shipping*, 78 HARV. L. REV. 635, 635 (1965).

109. Through the coordination of conference actions, shippers may be precluded from obtaining rates which reflect natural geographic advantages; rates may remain abnormally high, in the absence of independent competition, and further, fail to respond promptly to economic changes; large lines with multiconference representation may exert undue influence over rates and other matters by virtue of multiple participation in such agreements; concentration of power in the hands of common chairmen may put shippers at tremendous disadvantage in the bargaining process over rates and other conditions of carriage; and regulation may be rendered more difficult because the close relationship fostered by interconference arrangements have [sic] encouraged informal understandings that have not been filed with or approved by the Commission, as well as other violations of the shipping laws.

CELLER REPORT, *supra* note 8, at 153.

110. 46 C.F.R. § 529.1(a) (1976). *See* 46 U.S.C. § 814 (1970).

*necessitated* by [a] serious transportation need or *necessary* to secure [an] important public benefit"?[111] Or, conversely, if an agreement performs such a valuable function as to be required by a serious transportation need, realistically it must be so rigid that any practical right of independent action has been lost.

The extent to which the combined impact of the serious transportation need test and the independent action requirement foreclose interconference rate agreements turns on what is in fact required by "independent action." At present interconference rate agreements receive no extraordinary scrutiny only because the Commission has consistently failed to attach significant meaning to independent action. Should the Commission begin to follow the actual intent of Congress and apply independent action as the antimonopolization weapon it was designed to serve, an opposite result will be reached.

Essentially there are three possible interpretations of independent action:

(1) Independent Action embodies only the bare legal right of one conference to set a rate independent of another conference, even though the conferences have agreed to set rates jointly.

(2) Independent Action requires the same as (1) above with the added provision that one conference cannot coerce the compliance of the other.

(3) Independent Action requires the same as (1) and (2) above with the added requirement that the economics of the market place cannot be such that it precludes the exercise of a conference's independent action right. In other words if an interconference rate agreement results in monopolization so complete that neither conference would face a situation that would prompt the adoption of an independent rate, then independent action has been lost just as surely as if the words had been physically stricken from the agreement.

The Senate debates during consideration of the 1961 Shipping Act Amendments apparently would indicate that the toothless standard of paragraph (1) represents the true meaning of independent action. The senators read the words "independent action" in their literal sense, thereby interpreting the requirement as granting only a legal right not to agree in all decisions that were to be made jointly.[112] In campaigning for a total prohibition of interconference agreements, Senator Kefauver rightly pointed out that such a bare legal requirement offered no deterrent whatsoever to monopolistic combinations by conferences: "All 110 of the cartels in the Shipping of the United States could, under the bill,

111. *See* text at note 89 *supra*.

112. *See* ENGLE REPORT, *supra* note 2, at 16-17.

join together in a supercartel to fix rates for all foreiqn commerce."[113] Senator Engle, the principal advocate of conference policies and floor leader of the Senate version of the 1961 Amendments, really did not address this criticism. In Senator Engle's view the independent action requirement would not necessarily control the abuses of interconference agreements; rather the general public interest standards which section 15 applies to all conference agreements would serve this function.[114] Rather than viewing independent action as a restraint on the conferences, Senator Engle saw the clause as authorizing interconference practices in the nature of those that had been approved by the old Maritime Board.[115]

Fortunately, Senator Engle's view represents a gross distortion of the true intent of the entire Congress. Unfortunately, the Commission has adopted the Senate's interpretation of independent action.[116] Such attention to the Senate history is misplaced; it was the House, not the Senate, that drafted the independent action clause.[117] It was substantially the House language of this clause that emerged from the joint committee.[118] Therefore it is the events in the House, the events which prompted the clause, not the overheated Kefauver-Engle debates, that define independent action.

The House drafted the independent action requirement expressly to curtail the abuses of interconference agreements. The House worked on the premise that interconference agreements are presumptively not preferred by the Shipping Act: "Under the Shipping Act as originally enact-

113. 107 CONG. REC. 19413 (1961).

114. Senator Engle cited the newly amended section 15 as the tool by which joint conference agreements were to be controlled. Should abuses surface, "the Commission has the right to disapprove of the conference and not permit the conference to operate. Joint conferences as well as single conferences must operate under these rules." 107 CONG. REC. 19414 (1961).

115. "As of October 1959, there were nine interconference agreements approved by the Board and its predecessors. We are not seeking to authorize something new. We simply refuse to deauthorize something which has been going on over a great number of years." 107 CONG. REC. 19412 (1961).

116. *See* text accompanying notes 167-68 *infra*; United States Mediterranean Trades Agreement, 11 F.M.C. 188, 194 (1967).

117. BONNER REPORT, *supra* note 5, at 40.

118. The House bill stated that no conference contract could be approved by the Commission which authorized agreements between carriers or conferences of carriers serving different trades that would otherwise be naturally competitive unless in the case of agreements between carriers, each carrier, or in the case of conferences, each conference retains the right of independent action. The Senate struck out this provision. The Senate receded from its position with an amendment, accepted by the House conferees, limiting the prohibition on carrier agreements to carriers not members of the same conference.

H.R. REP. NO. 87-1, 87th Cong., 1st Sess. 8 (1961). This last amendment only clarifies a statement in the House Bonner Report that the independent action requirement does not apply to agreements between carriers of the same conference. BONNER REPORT, *supra* note 5, at 10.

ed, it was never contemplated that conferences would be permitted, directly or indirectly, to form superconferences that, by cartelizing the cartels could completely negate geographic advantages of industry and even eliminate competition offered by alternative routings."[119] Nonetheless, there were at least 25 such agreements operating at the time that the 1961 legislation was considered.[120] It was to at least limit these agreements, if not to abolish them altogether, that the interconference independent action requirement was passed:

> One reason for the insertion of this provision is the present situation existing in the operation of the joint agreement between the Pacific Westbound and Far East Conference whereby each conference exercises, *in effect*, a veto power over action by the other conference on specific rate applications by shippers.[121]

By expressly condemning the Pacific Westbound/Far East Conference, Agreement No. 8200, as violating the independent action requirement, the House mandated that the clause be employed to curtail, not sanction interconference agreements. Independent action therefore demands investigation of the practical realities of the operation of the joint agreement, not just the legal right not to participate in a given monopoly rate. To construe the clause otherwise is to frustrate its stated purpose of eliminating interconference abuses.

Specifically, the House intended the condemned Pacific Westbound/Far East Conference Agreement to define the breadth of independent action. Agreement 8200 was to serve as an anticompetitive model. The House singled out Pacific Westbound and Far East not because those two conferences were the only "wrongdoers" which required restraint, but because Pacific and Far East were the only wrongdoers that the House was then aware of. Focusing more specifically on the dual rate contract, neither the House nor the Senate had made a detailed inquiry into interconference agreements and consequently the House was unprepared at that time to conclusively abolish all interconference agreements.[122] "Since there are some 25 other agreements between the conferences about which no complaint is in the record, it seemed appropriate to the committee to restrict only the abuse reported rather than to strike down other joint agreements that appear to be functioning properly."[123] The general validity of all interconference agreements was appropriate for study by the Maritime Agencies at a later date.[124] Absent such

119. CELLER REPORT, *supra* note 8, at 386-87. *See* text at note 179 *infra*.

120. BONNER REPORT, *supra* note 5, at 10.

121. *Id.* at 9-10 (emphasis added).

122. *See* Gordon, *supra* note 5, at 102-05, commenting on the failure of Congress to establish specific guidelines of legality with respect to independent action.

123. BONNER REPORT, *supra* note 5, at 10.

124. CELLER REPORT, *supra* note 8, at 386. *Cf.* ENGLE REPORT, *supra* note 1, at 17 (advocating such a review by the Commission on a case-by-case basis).

a general condemnation of interconference agreements, the Pacific Westbound/Far East pact nevertheless establishes minimum standards of independent action against which all interconference agreements must be judged.

### THE AGREEMENT 8200 STANDARDS

An examination of Agreement 8200 lays to rest the notion that the mere presence of a legal right to independent action satisfies the statutory prerequisites for interconference agreements. As the House Committee language implies, the Agreement failed to satisfy the needs of independent action because the practical, as distinguished from the legal effect of the agreement gave each conference "a veto power over action by the other conference on specific rate applications by shippers."[125] Legally, no such veto power existed. With some exceptions, each new rate proposed by one conference had to be approved by the other before it could go into effect.[126] However, each conference had the right to institute its own desired rates if it found that conditions required the same.[127] In other words the Pacific Westbound/Far East agreement contained an independent action provision at the time the House condemned the agreement for failing to satisfy independent action requirements.

This result baffled James A. Dennean, Chairman of the Far East Conference. Testifying before the Senate Subcommittee, the Chairman stated:

> This [independent action] provision, we believed, would certainly bring our agreement within the exception to the prohibition of interconference agreements to H.R. 6755. . . .

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125. *See* text at note 121 *supra*.

126. If 70 percent of the traffic to the Orient originates from the ports of the requesting conference, then, with the concurrence of the other conference, that commodity will be a local initiative item not subject to the joint agreement. However, in order for a conference to establish a new rate on the remaining items, the concurrence of the other conference is required. CELLER REPORT, *supra* note 8, at 69-70. *See Hearings Before the Special Subcomm. on Steamship Conferences of the House Comm. on Merchant Marine & Fisheries*, 86th Cong., 1st Sess. 388-90 (1959) (statement of James A. Dennean).

127. Article Second of the Agreement provides in part:

> Anything contained herein or in the rules and regulations adopted at the initial meeting as from time to time amended to the contrary notwithstanding, if either group of lines should determine that conditions affecting its operations require an immediate change in its tariffs, it may notify the other group thereof, specifying the changes which it proposes to put into effect . . . . [Thereafter] the notifying group may . . . make such changes in its tariffs as it may see fit and the action of the groups so taken shall not constitute a breach or violation of this agreement.

CELLER REPORT, *supra* note 8, at 70 n.66; *Steamship Conference/Dual Rate Bill: Hearings Before the Subcomm. on Merchant Marine & Fisheries of the Senate Comm. on Commerce*, 87th Cong., 1st Sess. 298 (1961) (statement of James A. Dennean) [hereinafter cited as *Senate Hearings*].

> Since the House Committee apparently believed that H.R. 6755 would proscribe agreement No. 8200, it must either have considered article Second [the independent action clause] . . . not to amount to a retention by each conference of the right of independent action, or have been unaware that the provisions of article Second were included in the agreement.[128]

The Senate Committee Report as well states that under its interpretation of independent action Agreement 8200 could be permitted.[129]

Did the House condemn Agreement 8200 unaware of its independent action provision? Such an oversight is not likely. Before the report was published the Justice Department had argued to the Committee that the independent action provision would do nothing to prevent interconference agreements such as the outbound Asian trades pact.[130] Moreover, in the final analysis it is immaterial whether the Bonner Committee was actually aware of Article 2 at the time it condemned Agreement 8200. As will be discussed below, the Committee censured the "operation" of the Agreement and the abuses that resulted.[131] The technical legal structure employed to implement such abuses is irrelevant because the Committee intended to proscribe specific conduct. By announcing the abuses of the joint agreement the House precluded any definition of independent action addressed solely to the provisions of the governing joint conference contract.

Quite possibly the House censured Agreement 8200 only because it found that other practices of the two conferences unduly inhibited the use of their independent action clause. Each conference "in effect" held a veto power over the other. Was the independent action provision insufficient to overcome the "coercive" impact of agreement provisions requiring that each conference approve the rate proposals of the other?

The Celler Committee report, which analyzed Agreement 8200 based in part on the House Bonner Committee hearings, gave no indication that there were extraordinary circumstances that would deter either of the conferences from exercising its independent action right *if either had wanted to*. "Section 2 of the agreement, . . . does provide for freedom of action by either of the conferences upon furnishing specific notice to the other although this right has generally not been exercised."[132] The right was not normally used because there was no need to

128. *Senate Hearings, supra* note 127, at 298.

129. ENGLE REPORT, *supra* note 1, at 17.

130. *To Provide for the Operation of Steamship Conferences: Hearings Before the Special Subcomm. on Steamship Conferences of the House Comm. on Merchant Marine & Fisheries*, 87th Cong. 1st Sess., 428-29 (1961). [hereinafter cited as *1961 Hearings*].

131. *See* text accompanying notes 136-143.

132. CELLER REPORT, *supra* note 8, at 70. Presumably the membership vote required to exercise independent action would be no greater than the percentage approval needed to

use it. The Celler Committee cited the testimony of William C. Galloway, Chairman, Pacific Westbound Conference:[133] "In 1958, for example, of 113 requests by Far East for concurrence, 104 were approved by Pacific Westbound. By the same token, 120 out of 130 requests made by Pacific Westbound were concurred in by Far East Conference."[134] Since the two conferences were already in such substantial agreement one would not expect that the independent action provision would be used.[135]

Congress, therefore, must have defined independent action in terms of the market analysis test posited above. Generally, enterprises change rates to maximize profits to the extent permitted by competition. Competition spawns rate innovation. Conversely, monopoly profits deter rate innovation. Therefore the practical independent action test becomes: Given the parties' control of the market would one expect that one conference would defect from a jointly established monopoly rate? Or, given the market impact of the remaining competition, is there an incentive for a conference to establish a rate independent of its partner?

The market dominance definition of independent action emerges from the legislative history itself. If the inquiries of Congressman Drewry can be taken as typical of the concerns of the entire committee[136] the condemned "veto power" was only one aspect of a much broader evil: the combination of the two conferences into a supercartel that dominated the outbound Asian trade. Mr. Drewry focused on the degree to which rate decision making was centralized,[137] the extensive overlap in membership between the two conferences,[138] and the unified ratemaking system which thereby resulted.[139] Exhibiting identical market structure concerns, other members of the Bonner Committee, and later the Celler Committee, criticized the monopoly profits which the joint agreement apparently generated.[140] Similarly, the Justice Department, in de-

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approve the new rate initially before requesting concurrence. The Far East Conference required approval of the majority of its total members in order to decide a rate issue; Pacific Westbound required a 2/3rds vote of its members. *To Provide for the Operation of Steamship Conferences: Hearings Before the Special Subcomm. on Steamship Conferences of the House Comm. on Merchant Marine & Fisheries*, 86th Cong., 1st. Sess., pt. 2, 611 (1959) [hereinafter cited as *Steamship Hearings*].

133. *Steamship Hearings*, pt. 3, *supra* note 132, at 1216-17.

134. CELLER REPORT, *supra* note 8, at 70 n.66.

135. *Id.*

136. *See* questions of Congressman Glenn, *Steamship Hearings*, pt. 2, *supra* note 132, at 405.

137. *Id.* at 412.

138. *Id.* at 414.

139. *Id.* at 412-15.

140. Quoting the testimony of Mr. Finnesey of the American President Lines:

As you are aware, the Joint Agreement between the Far East Conference and Pacific Westbound Conference has been extremely beneficial to members of both coasts in

nouncing Agreement 8200, ignored the so-called "veto power" and instead condemned the supercartel aspect of the Agreement which eliminated competition, thereby eliminating the shipper's freedom of choice.[141] Moreover, in the one instance where a Congressman quizzed one of the two Conferences on the operation of their "veto power", he did so for the purpose of determining if the veto power was in fact only a conference subterfuge to avoid the rate demands of shippers, thereby enforcing monopoly pricing: With the "veto" one conference could approve a lower rate, satisfying its shippers, confident that the other conference would reject that rate.[142] Finally the House Bonner Committee Report itself cited Agreement 8200 as only "one reason" for requiring independent action, thereby indicating that condemned conduct would not be limited to the specific devices employed by Agreement 8200.[143]

The market dominance test of independent action not only conforms to the history behind the Bonner investigation, but also is the only test that meets the broader requirements of the Shipping Act itself. The Shipping Act in general, and the independent action requirement in particular, were designed by Congress to protect the interest of shippers.[144] Congress permitted conferences only to afford the lines some minimum protection from excessive competition.[145] The Alexander Committee never authorized total monopolization of a shipping market. If anything the Alexander Report expressly excoriated such total dominance.[146] The Alexander Committee authorized conferences with the

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> maintaining *the highest level of rates in the history of the conferences*. It is felt by the majority of the memberlines [sic] if we did not have this agreement the present level of rates would be some 25% or more lower than they are today. (emphasis supplied by the Committee)

CELLER REPORT, *supra* note 8, at 71. *See Steamship Hearings*, pt. 3, *supra* note 132, at 1229-30. (questions of Congressman Casey).

141. *Steamship Hearings*, pt. 2, *supra* note 132, at 428-29.

142. Congressman Zincke asked Mr. Galloway, President of the Pacific Westbound Conference, the following question:

> do you have any knowledge of any situations in which action favorable to the shipper was taken by the Westbound Conference and was rejected by the Far East Conference with the common members of each conference voting inconsistently in those conferences?

Mr. Galloway responded that the anonymous voting methods employed by the conferences prevented him from answering the question. *Steamship Hearings*, pt. 3, *supra* note 132, at 1251.

143. *See* text at note 121 *supra*.

144. The BONNER REPORT, condemning the veto power over shipper proposals, indicates as much. *Id.* *See* text accompanying notes 42-46 *supra*.

145. *See* text accompanying notes 54-56 *supra*.

146. ALEXANDER REPORT, *supra* note 5, at 304-07.

> Conference lines are apt to become increasingly powerful within their respective areas, even to the extent of controlling the tramp traffic, until their limited monopoly of to-day will become practically unrestricted. It is argued that this tendency has been

express assumption that the conferences would prevent complete monopolization of the trades. The conferences served to avoid rate wars that "inevitably" would lead to the dominance of the few lines that could survive prolonged and repeated periods of slack demand.[147] Such concern for concentration of the industry demands a test of independent action that focuses on the market dominance of the contracting conferences.

Considering the Alexander Committee's desire to deter monopoly, the market dominance test is only a logical extrapolation of the Supreme Court's *FMC v. Seatrain Lines, Inc.*,[148] decision on interconference agreements. *Seatrain* held that mergers between carriers were not subject to Commission approval, and therefore could not obtain the antitrust immunity which flows from such approval. The case turned principally on the distinction between the ongoing relationships embodied in conference agreements subject to Commission approval, and the permanent integration which results from merger, the latter inappropriate for Commission consideration.[149] However, the rationale employed to reach this result applies to the interconference—independent action question as well. Examining the history of the 1916 Shipping Act, the Supreme Court concluded:

> Thus, the Committee chose to permit continuation of the conference system, but to curb its abuses by requiring government approval of conference agreements. It did so because it feared that if conferences were abolished, the result would be a net decrease in competition through the mergers and acquisition-of-assets agreements that would result from the unregulated rate wars. . . . The Committee gave the Commission power to insulate certain anticompetitive arrangements in order to prevent outright mergers."[150]

Because the Alexander Committee sought to prevent concentration in the industry, the Commission could not be granted authority to approve

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apparent in various trades and that, when the monopoly is complete, the lines will appropriate the advantages gained to themselves.

*Id.* at 306.

147. To terminate existing [conference] 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.

ALEXANDER REPORT, *supra* note 5, at 416; OCEAN SHIPPING, *supra* note 3, at 56. This same desire to *prevent* monopoly was employed by conference proponents in support of the 1961 Amendments: "[H]istory proves that open-rate competition in the international ocean common carrier industry leads to a much more monopolistic situation." 107 CONG. REC. 19308 (1961) (Statement of Sen. Butler).

148. 411 U.S. 726 (1973).

149. *Id.* at 731-36. *See* American Mail Line. Ltd. v. FMC (D.C. Cir.) *cert. denied*, 419 U.S. 1070 (1974). Note, *Maritime Law-Merger Jurisdiction-Federal Maritime Commission*, 43 GEO. WASH. L. REV. 635 (1975).

150. 411 U.S. at 738-39.

mergers and clothe these mergers with antitrust immunity: "We simply cannot believe that Congress intended to require approval of the very arrangements which, as the legislative history clearly shows, it wanted to prevent."[151] If Congress wished to avoid anticompetitive mergers, surely anticompetitive interconference agreements, which arguably result in even greater real economic concentration, must also be viewed with suspicion. The only independent action test that addresses industry concentration is an examination of market dominance, not legal formalisms.[152] Indeed such a practical assessment of the probability of rate initiatives would seemingly be required as well by the Commission's duty to consider antitrust policies when judging an agreement's compliance with the public interest.

Consequently, the legislative history commands that the Bonner Committee's condemnation of "veto power" require more than a provision for the legal right to establish an independent rate; as noted above both conferences had such a legal right anyway.[153] The veto power proscribed by the Committee can only be that veto power which results when dominance of a market becomes so complete that the incentive to compete and establish an independent rate could never outweigh the incentive to cooperate. Once all effective competition has been eliminated, the incentive to exercise independent action has been eliminated as well. Absent competition that would divert traffic, in the long run the mutually determined monopoly rate will always be more profitable than competition.

### THE I.C.C. AND INDEPENDENT ACTION

The experience with the Interstate Commerce Commission's independent action requirement for motor carrier and railroad rate bureaus illustrates the dependence of independent action on practical economic incentives to establish an independent rate. The Reed-Bullwinkle Act had granted antitrust immunity to rail and motor carrier rate bureaus only if these bureaus permitted the member carriers to exercise a right of independent action.[154] To foster this right the courts have narrowly construed any additional legal requirements which would impinge on the exercise of the right of independent action.[155]

151. *Id.* at 739.

152. Traditionally antitrust examinations always require an inspection of the practical impact of a contract, not the technical way in which it is structured. *See, e.g.*, Continental TV, Inc. v. GTE Sylvania, Inc., 97 S. Ct. 2549, 2556 (1977).

153. *See* text accompanying notes 127-129 *supra*.

154. 49 U.S.C. § 5b (1970).

155. Ajayem Lumber Corp. v. Penn Central Transp. Co., 487 F.2d 179 (2d Cir. 1973) (actual notice is all that is required to exercise one's right of independent action; one need not comply with alleged formal prerequisites). *See also* Cincinatti, New Orleans & Texas Pacific Ry.

Significantly, the recent Fourth Circuit decision, *Motor Carriers Traffic Ass'n, Inc. v. United States*,[156] has apparently adopted the general proposition that independent action must be viewed in the light of practical economic incentives to file an independent rate. *Motor Carriers Traffic Ass'n* resulted when, after a broad review of motor carrier rate bureaus, the Interstate Commerce Commission determined that in the future it would not grant antitrust immunity to rate bureaus which protested the independent action rate proposals of any of their member carriers.[157] The plaintiff objected, claiming that the Commission's decision deprived the rate bureaus of its constitutional first amendment right, and their express statutory right, to protest rate filings. Yet, the court ignored the Associations' protests, focusing instead on those circumstances which would retain the individual carrier's incentive to file independent rates:

> To permit a rate bureau to protest the proposals of a member individually so chills the individual proposal that it stands little chance of adoption, while providing the opportunity for misuse of the bureaus as policing agencies against individual action. We agree with the Commission that "it is necessary to limit the bureaus' right to protest in order to foster independent action. The right of independent action is paramount to maintaining the integrity of the grant of antitrust immunity."[158]

This position elicited a dissenting opinion which argued that the outright prohibition of the bureaus' statutory right to protest individual rates was unwarranted given the few protests actually filed by the bureaus.[159]

Although isolating practical economic incentives, *Motor Carriers Traffic Ass'n* does not in itself stand for the market dominance definition of independent action positted for the maritime conferences. To date market analysis has not been needed to insure a practical right of independent action for members of the motor carrier conferences. As Professor Hilton describes the economics of the independent action provision, the incentive to file an independent rate varies directly with the number of members of the rate agreement. The more members in the agreement, the smaller the monopoly gain available to each member and proportionally the greater the potential profits available to a defector willing to undercut the rate bureau.[160] The greater the number of mem-

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v. Chesapeake & Ohio Ry., 441 F.2d 483 (4th Cir. 1971); United Van Lines, Inc. v. United States, 353 F.2d 741 (Ct. Cl. 1965); Baltimore & Ohio R.R. v. New York, New Haven & Hartford R.R., 196 F. Supp. 724 (S.D.N.Y. 1961).

156. No. 76-1329 (4th Cir., filed Jul. 21, 1977).

157. *Id.* at 7.

158. *Id.* at 10.

159. *Id.* at 19.

160. Hilton, *Experience Under the Reed-Bulwinkle Act*, 28 I.C.C. PRAC. J. 1207, 1214-16 (1961).

bers, the more difficult it is for the rate bureau to maintain rate discipline.[161] As one would expect, in his comparison of rail and motor carrier rate bureaus Professor Hilton discovered that motor carrier conferences suffered a proportionally greater number of independent action challenges to their rate proposals than did the rail rate bureaus which had fewer but larger members.[162]

Reasoning from Hilton's finding, if independent action is in fact tied to market analysis of economic incentives, then one would anticipate efforts to stiffen the independent action requirements for railroads. The Railroad Revitalization and Regulatory Reform Act of 1976[163] accomplished this very result. Anticipating the Fourth Circuit's decision with respect to motor carriers, the Act prohibited in part any railroad rate bureau action designed to protest an independent rate.[164] But more importantly, the Reform Act absolutely prohibited a carrier's participation in a rate agreement concerning routes in which that carrier did not actually participate.[165] The Congress drafted these provisions with the intent of fostering actual rate innovation: "[W]e are concerned that the scope of rate adjustments processed through rate bureau procedures has had an inhibiting effect on rate innovation and that measures to encourage initiative in rate making and greater competition among carriers of the same mode are necessary."[166] These Amendments evidence that independent action must be judged in terms of real economic incentives to offer rate innovations, not the bare legal right not to monopolize. If the same market requirements created for the railroads also were applied to agreements between the maritime conferences, every such interconference agreement would be absolutely banned because no conference duplicates the port-to-port traffic of the other.[167]

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161. *Id.* at 1216.

162. *Id.* at 1216-17.

163. Pub. L. No. 94-210, 90 Stat. 31 (1976).

164. *Id.* § 208, *adding* 49 U.S.C. § 5c(5)(a) (West Supp. 1977).

165. *Id. See* Pierce & Clearwaters, *Rate Bureaus and the Railroad Revitalization and Reform Act of 1976—Truman Revisited*, 43 I.C.C. PRAC. J. 482, 497-501 (1976); Note, *Refining the Antitrust Immunity of Railroad Ratemaking: The Railroad Revitalization and Regulatory Reform Act of 1976*, 7 LOY. U.L.J. 733, 745-49 (1976).

166. S. REP. NO. 94-499, 94th Cong., 1st Sess. 15 (1975). As the Conference Report also states, the Bill "reforms the Commission's regulation of rate bureaus . . ., the changes, designed to make the railroad industry more competitive, restrict the types of agreements that can be made by rate bureaus, require Commission approval and periodic review of agreements . . . ." S. REP. NO. 94-595, 94th Cong., 2d Sess. 135 (1976).

167. As the statute requires, no railroad can participate in a rate agreement unless it serves the point to point traffic that the rate covers. 49 U.S.C. § 5c(5)(a) (West Supp. 1977). *See* note 165 *supra*. The similar concept in the maritime industry is the trade, traffic between two groups of geographically proximate ports. The Reform Act, applied to the maritime industry, would therefore bar agreements between trades as those agreements would set rates between carriers not serving the route to which the rate applies. Since conferences rarely duplicate the trades of other conferences, interconference rate agreements would be prohibited entirely.

INDEPENDENT ACTION AND THE MARITIME COMMISSION

Despite such clear indications that independent action at minimum requires an examination of the actual operation or potential operation of an independent action provision, the Commission has strictly limited its investigations to legal formalisms. When the Pacific Westbound/Far East Agreement 8200 came before the Commission for approval, the Commission overruled the Hearing Examiner's finding that in practice the Agreement lacked a right of independent action:

> Section 15 provides a standard for approval of agreements based on the contents of the agreements. In the instant case, the agreement creates a "right" of independent action after certain preliminary notices to the other party. The Examiner, however, considered that the facts of the operation of the agreement are controlling, rather than the bare provisions of the agreement, relying on selected excerpts from House Report 498, 87th Cong., 1st Sess., pp. 9-10 which in turn refer to how a joint agreement "has operated." We believe that Congress was only restricting the authority to approve agreements when it enacted P.L. 87-346, and was not establishing standards by which to judge the operations of agreements. Upon an initial examination of an agreement between conferences, we are confined to a determination as to whether or not the agreement provides for the right of independent action. That is all the statute requires. And, Agreement No. 8200 meets the statutory requirement in specific terms.[169]

In this fashion the Commission expressly rejected the weight of authority cited above.

As a result, the Maritime Commission's use of the legal right test of independent action begs for litigation. An example is the Commission's adoption of the Hearing Examiner's endorsement of the United States—Mediterranean Trades Interconference Agreements.[170] In that instance the two contracting conferences, the Gulf and North Atlantic conferences, contained a common membership of 65 and 68 percent, respectively, of the member carriers of each conference.[171] Not even market analysis is required to determine that any right of independent action

168. Joint Agreement Between the Far East Conference and the Pacific Westbound Conference, 8 F.M.C. 553 (1965).

169. *Id.* at 561. The Commission continued on to qualify its statement with the following:

> This is not to say, however, that in the future we would be confined to "the four corners" of an agreement in a subsequent proceeding to determine whether an agreement should be reapproved, modified, or disapproved. It could well be that actual operations under an agreement, subsequent to our initital approval, might show that the agreement was being carried out in a manner as to make it detrimental to the commerce of the United States or contrary to the public interest. Then disapproval would be in order.

*Id.* The Commission will also require that the independent action provision be set out in writing. *In re* Joint Agreement Between Five Conferences in the North Atlantic Outbound/European Trade, 10 F.M.C. 299 (1967).

170. 11 F.M.C. 188 (1967).

171. *Id.* at 190-91.

would be illusory under such conditions of overlapping membership. With the same people controlling two-thirds of each conference it is difficult to imagine how one conference would come to disagree with the other to the extent that it would exercise its right of independent action. In fact, the Examiner pointed to the extensive common membership to support his argument that competition will be changed little by permitting the conferences to do publicly what they probably did covertly already: "The common members of each conference necessarily know everything that has occurred in the other conference, in theory and usually in practice; and it would be absurd to expect any one of them to knowingly and intentionally to compete with itself."[172]

The Examiner summarily dismissed Hearing Counsel's arguments that "the agreement would create a 'super conference' which would 'negate the geographic advantages of industry and eliminate competition.'"[173] The agreement at issue "would create no more of a super conference . . . than any of the 49 all-inclusive conferences already existing."[174]

The point of course is not whether the Mediterranean Trades agreements actually would create a superconference more extensive than any of the others, but whether one legally can create a "superconference" absent a meaningful right of independent action. The Commission itself has held that even within one conference, where ratemaking extends to more than one trade, an independent action provision is required.[175] Therefore it is immaterial whether a superconference is created by internal integration or by interconference agreement. Where more than one trade participates in ratemaking decisions, independent action is required. Whether such independent action exists depends upon whether, after considering the competition so eliminated by the combination of the trades, there remains sufficient competition to spur defections from the pricing decisions of the multitrade alliance.

Anyone aware of the minor impact of nonconference competition on the current conference trades,[176] will readily recognize that a conscien-

172. *Id.* at 197.

173. *Id.* at 196.

174. *Id.*

175. *In re* U.S. Atlantic & Gulf/Australia-New Zealand Conference, 9 F.M.C. 1 (1965). The circuit court later remanded to the Commission stating that it was inconsistent to, on the one hand, permit two trades in one conference and then, on the other hand, to claim that the two trades are distinct for purposes of independent action. In so ruling the court expressly refused to address the scope and definition of the independent action requirement. U.S. Atlantic & Gulf/Australia-New Zealand Conf. v. FMC, 364 F.2d 696 (D.C. Cir. 1966). *See* Latin America/Pacific Coast Steamship Conference and Proposed Contract Rate System, 14 F.M.C. 172 (1970), *aff'd*, Latin America/Pacific Coast Steamship Conf. v. FMC, 465 F.2d 542 (D.C. Cir. 1972) which denied the use of one dual rate contract extending over more than one trade.

176. OCEAN SHIPPING, *supra* note 3, at 190-200.

tious application of the economic incentive test of independent action would prohibit virtually all interconference rate agreements. As noted above, the Commission must apply the serious transportation need test to all agreements, including interconference rate agreements. The need that "justifies" such interconference agreements is the rate stability that results by eliminating competition.[177] However, the independent action requirement prohibits combinations of the trades where the agreement so eliminates competition that the incentive to establish independent rates is lost. Therefore, absent *non*conference competition so significant that the stability of a particular trade is threatened, no interconference rate agreement can simultaneously satisfy the demands of both independent action and serious transportation need.

Conference proponents will protest that surely Congress did not intend to abolish all interconference agreements, otherwise Congress would have passed a provision to that effect. As amply noted Congress did not go that far. However, Congress did intend to prevent interconference agreements where the practical effect is to eliminate all competition. The purpose behind the 1961 Amendments, and its principal provisions addressing the dual rate contract, was not to promote conferences but rather to insure their survival.[178] In examining interconference agreements, the initial reaction of the Bonner Committee was to abolish them altogether. Indeed a preliminary draft of the Bill did just that.[179] With Agreement 8200 serving as a model, Congress required independent action in order to prevent monopolization of a shipping market to the extent accomplished by Agreement 8200 in the outbound Asian trade.

Such a conclusion can hardly be considered extraordinary when viewed in the light of the Railroad Revitalization and Regulatory Reform Act of 1976. Analogizing to the maritime industry, the Reform Act would absolutely prohibit all rate agreements between more than one trade.[180] In other words, had the same rules been devised for the maritime industry, interconference agreements and multiple trade conferences would be banned entirely.

Indeed the basic rationale behind the Reform Act is even more compelling when applied to the maritime industry. The railroad conferences integrate a somewhat limited number of relatively large carriers,

177. *See* Interconference Agreements United States-Mediterranean Trades, 11 F.M.C. 188 (1967); Far East Conference & Pacific Westbound Conference, Agreement No. 8200, 12 F.M.C. 105 (1968); Ocean Shipping, *supra* note 3, at 80. *See also* Canadian American Working Arrangement, No. 75-56, (Federal Maritime Commission, 1976) where agreement proponents failed to demonstrate that instability in rates would arise from failure to approve the joint agreement.

178. *See* text accompanying notes 54-56 *supra*.

179. 1961 HEARINGS, *supra* note 130, at 2.

180. *See* note 167 *supra*.

and thereby demand unusual standards of independent action. The interconference agreements integrate a small number of large *cartels*, not carriers. Whether an intertrade agreement is between conferences or members of the same conference, as far as the individual carrier is concerned there is *never* a right of independent action. Once a conference has set a rate no line can deviate from that rate without suffering penalties or leaving the conference altogether.[181] Considering this absolute restraint on carrier action, one would expect that the Reform Act's ban against rate making by nonparticipating carriers would be even more applicable to the maritime industry, not less so.[182] Although unique foreign policy considerations may require suffering maritime conferences which deny their members independent action rights, international considerations do not demand the complete monopolization which results when the same denial, in a practical sense, is applied to multitrade agreements.

## CONCLUSION

In conclusion recall that the purpose of the Shipping Act is to protect shippers. In the final analysis, therefore, the Shipping Act is designed to encourage predictable, reasonable, and nondiscriminatory rates.[183] To this end Congress granted the Commission the authority to disapprove any rate which "it finds to be so unreasonably high or low as to be detrimental to the commerce of the United States."[184] Unrestrained monopoly pricing cannot yield anything but unreasonable rates detrimental to United States commerce, that is, rates that are detrimental to the United States shipping industry.[185] The Commission has been direct-

181. In fact the Shipping Act requires the conferences to enforce their agreements. 46 U.S.C. § 814 (1970). *See* Outward Continental North Pacific Freight Conference v. FMC, 385 F.2d 961 (D.C. Cir. 1967).

182. To avoid the analogy conference proponents would have to argue that the independent action clauses employed in joint conference agreements have been used with greater procompetitive impact than have the independent action clauses employed in the railroad industry. In defending against the Justice Department's attack on interconference agreements, the Commission has stated:

> The independent action clause is required in any rate agreement between a conference and others and, in the staff's experience, is utilized quite frequently. Thus, the extension of "conference monopoly" through rate agreements is more a theoretical than practical possibility.

STAFF ANALYSIS, *supra* note 59, at 15. Unfortunately, the Commission fails to describe what it means by "quite frequently."

183. "The Commission shall by order . . . disapprove, cancel or modify any agreement . . . that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors . . . ." 46 U.S.C. § 814 (1970).

184. 46 U.S.C. § 817(5) (1970).

185. *See* text accompanying notes 140-142 *supra*.

ed to reject such rates, as well as agreements which yield such harmful conditions.[186] Therefore, to forestall such monopoly pricing independent action must require an examination of interconference domination of the shipping market. Indeed the antitrust immunity conferred by Commission approval of a joint agreement requires no less.[187]

Conscientious application of a market dominance—independent action test will almost certainly cause the death of interconference rate agreements. The antitrust measures of the Shipping Act must be read together. The public interest element of section 15 requires the Commission to apply antitrust policies. As the Commission itself admits, antitrust policies require that advocates of anticompetitive restraints demonstrate a serious transportation need for those restraints. The independent action requirement for interconference agreements forbids agreements which immobilize prices through market dominance. Since the typical rate stability justification for the need requirement is prohibited by the independent action requirement, interconference agreements must be presumptively illegal. This analysis of the antitrust standards of the Shipping Act invites the courts to reapply the methods of *Isbrandtsen* and curtail interconference rate agreements, restraints which the public interest does not need to tolerate.

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186. An agreement cannot "operate to the detriment of the Commerce of the United States . . . ." 46 U.S.C. § 814 (1970).

187. In criticizing the Commission for failing to monitor the reasonability of rates charged by the conferences, Congress noted: "If this immunity is to continue, strict surveillance must be maintained by the Federal Maritime Commission to protect the public interest. If the conference system cannot withstand public scrutiny, it is not entitled to antitrust immunity and should be discontinued." JOINT ECONOMIC COMMITTEE, REPORT ON DISCRIMINATORY OCEAN FREIGHT RATES AND THE BALANCE OF PAYMENTS, S. REP. NO. 1, 89th Cong., 1st Sess. 5 (1965).

For analyses of the failure of the Commission to aggressively address the problem of unreasonable or discriminatory rates *see* Gordon, *supra* note 5; Lowenfeld, *supra* note 39; Note, *Rate Regulation in Ocean Transport: Developing Countries Confront the Liner Conference System*, 59 CAL. L. REV. 1299 (1971).