



Analysis and Comments on H.R. 6167

October 2010

This paper sets forth the views of the World Shipping Council (WSC) on H.R. 6167, the “Shipping Act of 2010.”¹ That bill proposes to substantially change the way that the international liner shipping industry is regulated in U.S. foreign trades. The bill would have three major effects if enacted:

- The bill would eliminate the limited antitrust immunity currently available for rate discussion agreements filed with the Federal Maritime Commission (FMC).
- The bill would – through a combination of definitional changes, changes in agreement processing procedures, and outright prohibitions on certain activities – make the vessel sharing agreements that underlie most services to and from the United States today virtually impossible to continue to operate.
- The bill would interject the FMC into a far more intrusive regulatory role with respect to what are today market-based commercial business-to-business relationships between shippers and carriers.

The cumulative effect of enacting H.R. 6167 would be to destabilize the industry at a time when the U.S. economy requires the continued investment in liner shipping assets, supported by a predictable and efficient regulatory regime.

While WSC recognizes that some shippers may take a different view, it does not recommend H.R. 6167’s proposed repeal of ocean carrier rate agreement authority for the reasons set forth in more detail in this paper. The effects of the bill’s additional proposed amendments curtailing vessel sharing agreements would likely result in immediate reductions

¹ *The views and comments in this paper have been reviewed and unanimously approved by the World Shipping Council’s Board of Directors. This paper is not intended to provide a comprehensive analysis or an exhaustive list of comments on the bill, but rather to discuss the more salient issues that the bill raises.*

in the frequency, variety, and geographic scope of ocean transportation services available to shippers. Finally, the introduction of intrusive economic regulation of the relationships between shippers and carriers would undermine efforts currently underway between shippers and carriers to re-define their commercial arrangements to better meet the needs of U.S. international commerce, and are flatly inconsistent with the bill's stated objective of seeking to rely on market forces to set fair and efficient rates. Service and price issues should be left to the carrier and the shipper to agree upon, not layers of new government regulation.

This paper first discusses these three major issues of carrier rate antitrust immunity, vessel sharing agreements, and re-regulation of commercial contracts, in that order. It then addresses several less structural, but still important, issues in the bill.

1. Elimination of Ocean Carrier Agreements' Authority to Discuss Rates

H.R. 6167 was introduced as a response to service disruptions that occurred in early 2010, mostly in the Trans-Pacific trade, when cargo volumes rebounded unexpectedly after an unprecedented reduction in demand in 2008 and 2009. The disruptions in ocean carriers' 2010 service performance had purely economic causes; the U.S. regulatory regime had nothing to do with them. Notwithstanding that fact, we recognize that some shipper trade associations in their frustration have expressed support for legislation to amend the Shipping Act and to change the U.S. regulatory system for liner shipping, and in particular to repeal ocean carriers' rate discussion authority. The question for policymakers is whether the legislative response reflected in H.R. 6167 would effectively address the economic disruptions that gave rise to the bill in the first place or produce a superior regulatory system. We believe it would not for the reasons set forth in this paper.

The Shipping Act allows carrier agreements filed with the FMC to have limited antitrust immunity to discuss rate guidelines and trade forecasts. We acknowledge that Congress can change this policy, and we acknowledge that the European Union has eliminated shipping conferences in European trades. WSC does not believe, however, that elimination of this limited rate discussion authority as currently embodied in the Shipping Act would be beneficial to U.S. international commerce. We therefore do not recommend this change. It is the ocean carriers' expectation that the repeal of rate discussion authority would lead to greater rate volatility and less predictable and less stable markets. Greater rate instability is unlikely to be in the interests of shippers or in the interests of carriers that must continue to make billions of dollars of investment in the capacity needed to serve American commerce efficiently.

What should not be lost in a review of the Shipping Act is the fact that ocean carriers have invested many billions of dollars years in advance to meet container trade growth that has been

three to four times GDP growth over the past 20 years. With the exception of the first part of 2010, when the industry was recovering from the worst economic crisis of its existence after losing \$15-20 billion in 2009, American importers and exporters have been accustomed to numerous liner shipping companies, offering many efficient and competitive services, backed by a continuous flow of investment capital which has generally resulted in shipping capacity staying ahead of shipper demand. Investments of this scale and duration need some measure of assurance and predictability. If adequate investments are not made in advance of when the capacity is actually needed, cargo transportation service will suffer. The stakes in this debate are significant, because if there is a shortfall in investment, there is no quick fix.

When the Congress deregulated domestic aviation and trucking, there were many new entrants into those businesses and substantial, resulting reductions in transportation costs to users. Those experiences are not applicable to international liner shipping, and similar results should not be expected to occur in this industry if this bill were enacted. The reason is straightforward. It was government regulation of aviation and trucking that had created market barriers to entry and had artificially regulated rates, through the Interstate Commerce Commission and the Civil Aeronautics Board. When those rate regulations and barriers to entry were removed, new entrants came into the industry, with new cost bases and pricing flexibility, and the market was restructured.

International liner shipping, in contrast, has never had barriers to entry, and there is no government rate regulation. Any party with a string of ships can start a liner shipping service to and from the U.S., and this frequently happens. Today, rates rise and fall based on market conditions of supply and demand. It is a cyclical, capital intensive, highly competitive business, with historically poor returns on capital investment. Carriers perceive that rate discussion agreements filed with the FMC can help mitigate, albeit with limited effect, some of the volatility in the market. Elimination of carrier rate discussion agreements will not result in new entrants or new competitors who have been blocked from entering the business (e.g., there are no landing rights that preclude entry as in international aviation). Elimination of the discussion agreements is likely only to increase rate volatility. We cannot predict with certainty that this will result in greater market concentration and fewer carriers, as has occurred in other transportation modes, or less investment in the business; however, we do not see any long-term benefits to either shippers or carriers from a more volatile and less predictable market.

If the Congress were to consider this change in the law, we believe its potentially significant consequences warrant serious study and a determination that the Congress would be comfortable with the market effects that would result from this change.

2. H.R. 6167 Would Create Regulatory Chaos for Ocean Carrier Operating Agreements

Independent of the debate over carriers' limited rate discussion authority under FMC regulatory oversight, we are unaware of any reasonable argument for the bill's proposed treatment of carriers' operating agreements – agreements that underlie the delivery of service to most American exporters and importers. It is simply incorrect to state that the bill would continue to allow them to operate as they do today under the Shipping Act, or that the bill's proposed changes resemble the approach taken by the European Union towards such agreements.

Operating agreements (or vessel sharing arrangements or VSAs) are agreements between or among carriers in which space on vessels is shared in order to provide greater geographic service coverage, greater frequency of service, and more direct services more efficiently and at less cost than if each individual carrier had to provide service only on ships that it operated. Carriers in a VSA compete on price, customer service, equipment availability, intermodal services, IT systems, and other factors; however, the operational cooperation on vessel sharing provides significant efficiencies that benefit both carriers and their customers. These agreements reduce the capital commitment and exposure a carrier must make, allowing a carrier, inter alia, to start a new service or introduce a new loop that is competitive in both service and costs in the market place, where it might not otherwise take the risk if it had to act alone. VSAs also allow the participating carriers to aggregate their volume in order to secure more favorable financial arrangements from terminal operators, further reducing costs to themselves and their customers.

H.R. 6167 would effectively destroy the current system of operating agreements serving America's maritime foreign commerce under the Shipping Act. It would be both procedurally and substantively restrictive, and it would be wholly out of alignment with every other nation's treatment of such agreements. Impairing carrier operating agreements is not an agenda that has been advocated by shippers, nor is it supported by any findings or recommendations from the FMC. The bill would disrupt current services and operations, and it would make cooperative arrangements impractical in the future. We can identify no benefit and many disadvantages for American commerce arising from such a proposal. If enacted, the bill would create an ocean transportation system that would make U.S. trades less efficient and more costly for carriers, resulting in less choice, less capacity, lower service quality, and higher costs for U.S. exporters and importers. Let us explain why.

First, the bill establishes inappropriate procedural obstacles to such agreements. Today, an operating agreement is filed with the FMC and becomes effective within 45 days, unless the agency identifies problems with the agreement. Section 10 of the bill proposes to require an affirmative vote of the FMC to approve any operating agreement. Although the bill states that the Commission must act on a filed agreement within 90 days, the Commission may delay action if it has questions. In any event, there are no consequences for the Commission failing to act within the statutory period, so the time limits are not binding. The operational agreement cannot become effective until the Commission acts, and there is nothing to prevent extensive delay.

Under the European approach, where no carrier agreements are filed with a regulatory agency, agreements with less than 30 percent market share are regarded as so reliably benign that they all have a blanket exemption from European competition law and are effective immediately. In Europe, operating agreements with more than 30 percent market share are not subject to government filing or affirmative government regulatory approval and are acceptable so long as they comply with competition law.

Section 11 of the bill would require the FMC to reject any agreement that “is not an efficiency and service-enhancing agreement,” which is defined by section 6 as an agreement that “is likely to produce cognizable efficiencies and improve the service and reliability that would be offered individually by each of its members. . . .” Improved efficiency would not be sufficient. A carrier could not be part of a VSA unless the VSA was determined after review by the government to improve each member carrier’s service and reliability. This section of the bill could call into question -- whether a carrier could be part of a VSA if that carrier only maintained its level of service; whether a carrier could be part of a VSA that allowed it to reduce its level of service, but improved its efficiency and profitability; or whether a carrier suffering financial losses could pare back yet continue its service through a VSA.

The combination of a procedural requirement of an affirmative approval by the Commission, with a substantive standard that requires each carrier in a VSA to demonstrate to the FMC what the future efficiency, service improvement and reliability improvement effects of its actions will be, would result in far fewer operating agreements in the future than there are today if these provisions were enacted. These standards and processes are unnecessary and self-defeating. Given that these operating agreements are accepted today worldwide by both shippers and governments as being pro-competitive and beneficial, their continued acceptance under U.S. law should remain, as it is today, a matter of legislative approval, not a series of pointless and protracted individual assessments.

Second, even if an operating agreement could make its way through the new procedures and threshold standards that the bill would impose, the bill's proposed substantive changes to the Shipping Act's treatment of operating agreements would completely disrupt current service arrangements. Section 10 of the bill expressly provides that no ocean common carrier agreement may "allow members of the agreement to discuss or agree on capacity rationalization." Section 6 defines "capacity rationalization" as a "reduction, stabilization, withholding, or other limitation in any manner by ocean common carriers on the size or number of vessels available or space offered collectively or individually to shippers in any trade or service." Ironically, section 9 of the bill purports to expressly allow operational agreements to, among other things, "discuss the number and character of voyages between those ports," an activity that falls squarely within what section 10 prohibits.

What the bill's internally inconsistent provisions fail to consider is what the Shipping Act and other transportation regulatory statutes generally recognize and encourage -- namely, enhanced economic efficiency of operations. This bill would make any capacity reduction or rationalization of any kind illegal per se. No competition law in the world does that. For example, this provision could mean that a VSA could not agree that trade conditions warrant replacing 6,000 TEU ships with 5,000 TEU ships; a VSA could not change a deployed service from 10 ships to 9 ships; a VSA could not drop a port call. Even if a VSA were to try to live with such restrictive handcuffs, it would have no choice but to deploy minimal capacity to serve U.S. commerce, because it would be prevented from having operational flexibility to reduce capacity once it is deployed. This makes no sense, would be a perverse incentive, and would be inimical to shippers' interests.

In addition, the bill proposes that VSAs must allow each member a right to withdraw from the agreement with no penalty allowed. This fails to consider that stable investment decisions and vessel and service deployment decisions require some minimum level of commitment from the parties. They require commitments to charterers, to marine terminal operators, to labor, and to equipment lessors. Minimum levels of commitment by the parties, backed up by reasonable conditions on withdrawal, are not objectionable under any fair analysis.

Finally, the bill provides no grandfathering for any existing carrier agreements; there are hundreds of VSAs that are presently the backbone of service to American importers and exporters via virtually every container port in the country. These proposed statutory requirements would cause every VSA in U.S. international commerce to be reevaluated, many (if not most) to be renegotiated, and some undeterminable number to cease to exist.

And, in the end, for what purpose? What VSA has presented or currently presents significant competitive problems? As discussed above, we understand that there is a debate about the Shipping Act's treatment of carrier rate discussion agreements, but that is a separate and distinct issue. The Shipping Act's treatment of ocean carriers' operational agreements provides a predictable regulatory regime facilitating numerous, efficient services from a multitude of ocean carriers. H.R. 6167 would jeopardize that for no reason.

3. Unprecedented and Intrusive Economic Regulation

Section 5 of H.R. 6167 proposes to repeal the existing third purpose of the Act and replace it with a new purpose: "to allow, to the maximum extent possible, competition and demand for services to determine fair and efficient market rates and charges for transportation by common carriers." The operative language of this provision is lifted directly from Subtitle IV of Title 49 of the U.S. Code, 49 U.S.C. § 10101(1), relating to U.S. surface transportation. That subtitle completely removes from Surface Transportation Board jurisdiction issues that are covered by a rail contract. See 49 U.S.C. § 10709. In contrast, H.R. 6167, while stating as its purpose that markets be allowed to function freely, would impose a substantial new layer of FMC regulatory involvement in the details of service contracts (including authority over rates -- authority that the FMC has not had since the Shipping Act of 1984 was enacted). As noted above in the discussion of the bill's treatment of rate agreements, the rationale for much of the Shipping Act's current economic regulation of carriers is that such regulation acts as a counter-balance to rate discussion antitrust immunity. If the bill removes that immunity, then the basis for economic regulation disappears. Notwithstanding that fact, H.R. 6167 proposes to vastly increase, rather than decrease, the scope of FMC economic regulation, and would create substantial concerns. Examples of this include the following:

a. Space

H.R. 6167 proposes to interject the FMC into commercial negotiations about space availability in two ways – through changed statutory definitions, and through a new prohibited act. Section 6 would amend the definition of "service contract" to include a required element of "a defined service level that includes assured space. . . ." Section 26 would make it a violation of the Shipping Act for a common carrier to "refuse or threaten to refuse cargo space accommodations when available." There are two related problems here.

First, carriers are in the business of making their space available to shippers at an agreed price. It is unclear what issue this provision is trying to address, and the concept of when space may be "available" is unclear and problematic. Would it imply a governmental second guessing

of a carrier's determination of the rates at which it is willing to offer space or the revenue adequacy of a shipment? Would it involve governmental second guessing of operational decisions? For example, a service calling on multiple ports may allocate cargo space to the various ports, so that a ship sailing from Hong Kong to Tokyo to the U.S. could limit the space made available in Hong Kong in order to provide space for the Tokyo to U.S. leg of the voyage. The FMC should not be in the business of second-guessing commercial determinations.

Second, the concept of "assured space" is unclear and assumes a mutuality of obligation that does not normally exist in the market today. As matters stand now, carriers will always accept more bookings than there is space aboard a vessel because of the volatility in cargo "no show" factors. If ocean carriers stopped accepting bookings at 100% of vessel capacity, vessels would sail without using all their capacity. That would be economically irrational and would exacerbate space problems in periods of high demand. Carriers must deal with no-show factors that can range from 20-35%. That is a reality that both carriers and shippers must address. If the Congress wants to regulate this issue so that ship space is "assured" or committed for cargo that is booked on a voyage with a carrier, carriers would be very willing to discuss how that could be accomplished, but only with the understanding that shippers would then be obligated to purchase that vessel space upon making the booking, so that there is a mutuality of obligation – a "take or pay" obligation analogous to aviation. Shippers historically have shown little interest in such arrangements as they are reluctant to enter into such a service contract where there is a "take or pay" obligation or "dead freight" clause for no-shows. To the extent shippers would be willing to consider such mutuality of commitment, we believe that they would agree that this is a commercial issue to be addressed by contractual agreement, not government regulation.

b. Equipment

The bill would introduce two new requirements with respect to equipment: one dealing with shipper-owned equipment, and the other dealing with equipment charges. We address them in turn.

Section 26 of the bill would make it illegal for a carrier to "discriminate against a shipper or ocean transportation intermediary for supplying their own equipment." Based on the traditional interpretation of "discrimination" as making a clear distinction, this would be a bizarre and unworkable provision for several reasons. First, carriers tender empty containers to their customers knowing that they are fit for the purposes they are being provided; a carrier must be able to subject shipper owned containers to different scrutiny for liability and safety reasons. Second, a carrier's pricing of a container movement from Point A to Point B may depend on the availability and use of -- and revenues derived to the carrier from -- that

container's subsequent transportation from Point B to Point C. A carrier does not have control of or revenue from the use of a shipper owned container once it delivers it from Point A to the shipper's Point B destination. This is a substantial economic issue affecting the profitability of a container's movement. Third, containers are fungible assets in a carrier's equipment fleet, meaning that containers at Point B go into a pool that can be used for any purpose the carrier deems most appropriate at Point B. Shipper owned equipment requires a carrier to separately track and handle that equipment because it is not free to use it as it sees fit, even though it may occupy space on the carrier's ship and in its facilities. This affects the cost of handling and administering such equipment.

Committee staff has stated that this provision should not be of concern to carriers, because: 1) it does not require the rate charged to be the same for shipper owned equipment, and 2) because the return of the equipment to the shipper is the shipper's responsibility and not the carrier's. A different rate, however, is discrimination, unless the legislation explicitly provides otherwise.

Second, Sections 13 and 14 of the bill propose that every transportation arrangement between an ocean carrier and a shipper (whether under tariff or contract) must, as a matter of law, separately state the charges by the carrier for providing equipment. First, there are many kinds of equipment involved in the transportation of goods, from containers, to chassis, to flat racks, to cargo securing equipment, to liner bags, to generators for refrigerated containers, to trucks -- with the equipment being handled at various different points in the movement of the goods. Second, most shippers do not seek to have such charges broken out as a separate line item in their contracts; however, this bill would require that this be done, even if the carrier's customer agrees that it is unnecessary or undesirable. This is truly excessive government intervention in consensual business-to-business contracting. Moreover, if carriers were required to break out these charges from the base freight, this bill could be interpreted as providing that such charges would become "surcharges," as defined in the bill, and subject to the requirement that they relate to specific costs. Aside from potentially being at odds with the intent of the contracting parties, this requirement would invite endless and meaningless disputes over underlying costs. There are many costs that go into the provision and handling of equipment, including, but not limited to: container purchase price, container lease rates, the mix of owned and leased boxes, equipment turn time, chassis costs, trucking rates, rail rates, container yard storage costs, longshore labor costs, marine terminal rates, and container flows. Some of the expenses are dynamic and vary significantly and would be highly impractical to calculate as a line item charge in a contract, and may not even be known with confidence at the time the transportation contract is entered into. Third, some of these expenses are confidential (e.g., truck and rail rates for transporting containers, container lease rates, etc.), and it would

be inappropriate for the Congress to require their disclosure or examination in a public dispute. This is a poorly conceived and unworkable proposal, which would serve no purpose if it were implemented. WSC strongly opposes this form of rate regulation.

c. Surcharges

Section 6 would add a new term to the Shipping Act, “surcharge,” which is defined as “an amount charged by a common carrier related directly to a particular expense or cost incurred by the common carrier that is not included in the basic freight rate.” Section 26 would make it a violation of the Shipping Act for any common carrier to “impose a surcharge that is unreasonable or does not comply with the requirements of this part.” Such transportation rate regulation has been discredited by Congress and by experience over the past three decades, and has no place in a regime where shippers and carriers rely on contracts to make commercial arrangements. Moreover, the rate regulation concept would make little practical sense because it appears intended to apply to only a portion of the total charges that a carrier would charge a shipper.

d. Service Contract Breach as Shipping Act Violation

Section 26 states that it is a violation of the Shipping Act for a common carrier to “engage in deceptive or fraudulent practices *including unreasonable failure to provide transportation services as agreed to in the contract.*” This provision is objectionable for several reasons.

First, it would establish the FMC as an economic regulator of virtually every aspect of the shipper/carrier relationship. Turning contract breaches into regulatory violations is directly counter to the newly stated purpose of the bill to rely on market forces, and furthermore is inconsistent with carrier and shipper views on this topic over the past several decades. The Shipping Act provides that the judicial system, not the FMC, is where commercial contract disputes should be decided, and we continue to believe that this is a correct approach to commercial disputes.

Second, turning contract breaches into Shipping Act violations creates the possibility for confusion and tremendous litigation expense. Consider the example of a service contract dispute that the parties seek to have adjudicated in court. During the course of that litigation, the FMC brings a complaint against the carrier alleging that it has committed a breach of its service contract that constitutes an “unreasonable failure to provide transportation services” under the same service contract. Does the court transfer the breach of contract action to the FMC under the doctrine of primary jurisdiction? If so, that violates the choice of forum agreement made by the shipper and the carrier, and subjects the shipper to the expense and

disruption of a second proceeding that now has a party (the FMC) that might have different objectives than the shipper. If the court does not transfer to the case to the FMC, then there will be duplicative litigation with the possibility of inconsistent judgments in the court and at the FMC. Neither of these possible outcomes would be rational or desirable.

Third, and most important, if one party to a contract (the carrier) is to be subjected to penalties and attorney's fees by virtue of its contract breaches being deemed to be violations of the Shipping Act, then the same treatment must apply to the other party – the shipper. For the government to provide one party to a private contract with the power to threaten the other party with government sanctions would constitute an unjustified bias and intrusion into commercial affairs. If the Congress were to consider making carriers' contract breaches Shipping Act violations, then equity requires that shippers' contract breaches also be considered Shipping Act violations.

e. Compilation of complaints and service reliability data

The bill proposes in Section 16 to require the FMC to establish and maintain a new data base regarding complaints, and to require carriers to report on delays in shipment and all instances where a booked cargo shipment was not transported on the voyage for which it was booked. The following explains why neither of these proposals should be pursued.

i) Service Complaints: Section 16 i) proposes that the FMC create an annual report of complaints identifying the quantity, region, and resolution, "if appropriate." This effort is vague, burdensome, and would provide little useful information. There is no requirement that the subject matter of the complaint be clearly described. There is no requirement that the complaints reported on be found to have any validity. There is no requirement that the complaint be within the subject matter jurisdiction of the FMC. The FMC is currently empowered to report as it sees fit on complaints that it may receive. There is no reason to enshrine in statute a reporting requirement that would produce information with such limited value.

ii) Reliability Indicators: Section 16 also proposes that carriers should be required "to report frequency and duration of delays in shipments, all instances in which cargo has not been transported on a voyage for which it was booked, and other service or reliability indicators as determined by the Commission to be appropriate."

This would be grossly burdensome, costly, inappropriate, and in the end would be meaningless.

First, it is important to understand that aviation-style service reporting requirements cannot be logically applied to international liner shipping for many reasons. Airline service reporting requirements deal with consumers, not cargo. There is no aviation service reporting requirement for air cargo shipments. Ocean carriers are not dealing with consumers, but with cargo shipments of other businesses, some of whom are much larger companies than the ocean carrier. More fundamentally, aviation consumers have purchased a prepaid service; ocean carrier cargo customers do not prepay for any service. In liner shipping, a booking is a reservation, not a contract. There is no obligation arising from a booking for the shipper to pay or deliver the cargo, or for the carrier to carry the cargo on a particular voyage. Customers can and frequently do place multiple bookings for the same container with different carriers, with regulatory impunity. Ocean carriers would welcome a system whereby shippers prepaid the freight for booked container movements and then paid a penalty when the booked cargo did not show up; however, this is not the commercial reality.

Second, there are many reasons cargo that is booked for a voyage may not make that voyage, including, but not limited to, the following:

- Customers can book the same shipment with multiple carriers
- The truck, train or other conveyance bringing the shipment to the port might be delayed
- The cargo might not be ready (e.g. agricultural commodities might be held up by harvesting delays; manufacturers might have a production delay)
- The customer might request that the shipment be held or moved to another vessel
- The shipper's documentation might not be completed in a timely manner
- The government might hold the container for inspection
- Other shippers might have misdeclared their containers' weight so that the ship has reached its maximum load weight earlier than the vessel stowage plan anticipated
- The container to be used by the shipper might not have arrived in a timely manner for a host of reasons, ranging from the fact that the previous user of the container might have held the equipment longer than anticipated, to bad weather.
- The ship might be delayed and an alternative routing made
- The shipper might have agreed to pay the freight before vessel loading and not done so
- The port's efficiency and productivity might be poor, and the vessel must stop loading in order to leave port on schedule on the high tide.

The list could go on. The point is that it is a complex business system with many dependencies that are unique to ocean transportation. Ocean carriers do not control and have no visibility into many of these factors. The assumption that any useful or actionable information could be distilled from compiling lists of such "reliability indicators" when most changes in assigned vessel have nothing to do with reliability, and when the causes of those

booking details cannot be determined in any event, is simply incorrect. This is not a matter that logically lends itself to federal regulation or to airline passenger type reporting requirements.

f. Mandatory Revenue Transfer to Freight Forwarders

The Shipping Act for many years has contained a provision which states that groups of ocean carriers could not agree among themselves to limit compensation to freight forwarders to less than 1.25% of all applicable rates and charges. This was in order to protect forwarders against the possibility that carriers would abuse their rate discussion antitrust immunity.

In contrast, there has never been any requirement that an ocean carrier acting on its own must pay a freight forwarder anything. This is entirely logical because it is the shipper that retains the services of a forwarder, not the carrier. Without any explanation or legitimate reason, Section 23 of the bill proposes to turn this provision of law on its head and, after repealing carriers' rate immunity altogether, then proposes to require carriers to pay forwarders 1.25% of the carriers' revenue. This is unsupportable, overreaching, and completely at odds with a bill that proposes that rates should be determined by market forces. It would also cause carriers to establish a new surcharge on shippers to pay for forwarder services – which is a matter that should be left to the shipper and forwarder to agree upon.

g. Prohibition of joint services, joint service contracts, and equipment pools

Section 10 would prohibit both joint service agreements and joint service contracts. Although these sorts of arrangements are not widespread, they do exist. They are generally regarded as beneficial. In the case of joint service contracts, they are almost universally entered into at the request of shippers, so prohibiting them would reduce shipper choices. Joint service agreements are few in number and provide additional service options to shippers. Section 10's prohibition on pools would also likely apply to equipment pools, which have been used widely to streamline the provision of chassis used to carry containers by truck. Equipment pools reduce costs, reduce storage requirements in ports with limited free space, and improve safety through dedicated maintenance procedures. We can identify no public policy purpose that would be served by prohibiting these sorts of agreements.

4. **Other Provisions of Concern**

We briefly discuss below several additional provisions in H.R. 6167.

a. Office of Dispute Resolution and Customer Advocate

Section 3(a) would establish the above named office. The provision is unnecessary. The FMC already has a functioning Office of Consumer Affairs and Dispute Resolution Services, which can perform the functions described in the bill.

Section 3(b) would establish an “ombudsman of the Commission.” The Commission currently has an Office of General Counsel, a Secretary, an Inspector General, a Managing Director, and various bureaus, and each Commissioner has a staff. We do not understand why the agency would need an ombudsman or what an ombudsman’s functions would be that cannot be carried out within the existing organization.

b. Mergers and Acquisitions

The bill in two places seems to suggest that the FMC would have a role in ocean carrier mergers and acquisitions. First, section 3(b), describing the role of the proposed FMC ombudsman, makes reference to participation in “mergers and acquisitions.” Today, the FMC has no such jurisdiction. Second, section 9 would amend 46 U.S.C. 40103(c) to state that the Shipping Act does not apply to an acquisition of voting securities or assets only to the extent that such acquisition “does not result in a change of control of an ocean common carrier.” Although the provision is stated as a double negative, it could be read as intending to grant merger approval authority to the Commission. Because this provision is placed in a section dealing with the types of agreements that are covered by the Act (and thus that are required to be filed with and approved by the Commission before being implemented), it could be read as requiring affirmative approval by the Commission of a merger. We see no reason to duplicate or usurp the authority of the Department of Justice on such matters.

c. Ocean Shipping Advisory Committee

Section 4 would establish an 18 person advisory committee, comprised of persons with “practical experience in their respective ocean shipping operations” to “make recommendations to the Commission.” This provision would be wasteful and unnecessary. The Commission and the various Commissioners are today very open to input and advice from all sectors of the industry. Existing pathways of communication are accessible and function well, and the FMC has a good record of responding to petitions and suggestions. Especially at a time when Congress is sensitive to unnecessary government spending and growth, we can identify

no need for Congress to create yet another advisory committee, with 18 people to be paid at GS-18 compensation rates, plus travel costs.

d. Regulation of Equipment Providers

Section 6(a) of the bill includes a definition of a new term: “equipment provider”, meaning “a person in the United States that rents or leases marine cargo containers, or chassis for marine cargo containers, to shippers or common carriers. . . .” The rest of the bill, however, never uses that term, leaving its intended purpose unclear. We suspect that the intent may be similar to FMC Chairman Lidinsky’s recommendation to create new authority for the FMC to regulate such entities to prohibit “unfair, deceptive, or anticompetitive acts or practices related to ocean transportation.” Such companies are already subject to U.S. antitrust law. We are unaware of any facts that would indicate that such equipment providers need further regulation from an additional federal agency. Furthermore, even if one were to consider regulating such businesses, which we do not advocate, it is unclear why it would make sense to regulate only equipment lessors in the U.S. when the equipment fleet is also provided and served by lessors from outside the U.S.

e. Filing of Service Contracts

The bill proposes to eliminate ocean carrier’s authority to discuss rates and also to “allow, to the maximum extent possible, competition and demand for services to determine fair and efficient market rates and charges for transportation by common carriers.” The bill then proposes to continue to require carriers to file their service contracts with the FMC. This is illogical for several reasons. First, the FMC has already eliminated filing requirements for NVOCCs, recognizing that their costs exceed their benefits. Second, ocean carriers’ rate discussion immunity has been the traditional justification for the contract filing requirement.

f. Arbitration of Disputes

Section 17 of the bill sets forth authority for the Commission to conduct binding arbitration of service contract and other matters. It would appear that 5 U.S.C. §§ 571-584 and the Commission’s regulations at 46 C.F.R. § 502.406 already provide adequate authority for this activity, and therefore we believe that there is no need for legislation on this point. Whether or not new authority is necessary, we note that the current regulations, unlike the bill, do not provide for Commission review of arbitration orders. That is how it should be. Undermining the finality of arbitrations through Commission review would eliminate any efficiency that might be gained through arbitration. In addition, the arbitration language in the bill refers to arbitration over “service expectations” or any other extra-contractual matters, which are not

suitable for arbitration. If the parties have service or other expectations that they wish to be binding, they should put them in their contract.

Conclusion

Trade volumes dropped by unprecedented amounts in 2009 because of the global recession, and liner shipping companies cut costs, laid up capacity, delayed further capital expenditures, and took extraordinary measures in order to survive that market crash and avoid financial ruin. Even with these measures, all carriers saw extraordinary deterioration in corporate equity, large increases in debt, and in some cases major liner companies were pushed to the brink of bankruptcy. It will be years before these losses are recovered.

During the first half of 2010, there was a rapid, unexpected and unforecasted rebound in trade volumes. Shippers and carriers alike had difficulties dealing with these swings in demand, and we fully recognize that shippers experienced difficulties during the period when demand for service exceeded industry carrying capacity. None of these market swings were the result of or related to the U.S. regulatory system for shipping.

If the Congress wishes to undertake a review of the Shipping Act and consider whether and how to design a different regulatory system for America's international maritime commerce, the liner shipping industry is prepared to discuss the issues and the best way to address them with shippers, ports, labor and the Congress. Such a discussion should be a transparent, open and careful process. The objective should be an efficient liner shipping transportation system for international commerce, in which carriers will continue to have an incentive to invest the many billions of dollars required of this capital intensive and cyclical business. For the reasons set forth in this paper, the World Shipping Council does not believe that H.R. 6167 is a sound or appropriate approach to address such questions.