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# United States Ocean Shipping: The History, Development, and Decline of the Conference Antitrust Exemption

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*David C. Nolan\*\**

*Since the beginning of this century, the United States has attempted to regulate the shipping industry through governmental oversight. In this article, Messrs. Fawcett and Nolan examine the Shipping Act of 1916, and consider whether it has been misinterpreted by recent judicial interpretations. The authors conclude that the courts' application of United States antitrust laws to the activities of shipping conferences is contrary to congressional intent and the best interests of the industry and American commerce.*

The passage of the Shipping Act of 1916<sup>1</sup> manifested the intention of the United States Congress to treat the foreign waterborne commerce of the United States differently from other businesses and trades subject to the antitrust laws of the United States. For a full half-century after that enactment, it remained a matter of general acceptance that the antitrust statutes were inapplicable to agreements and activities of shipping conferences within the purview of the Shipping Act. In the course of major amendments to the Act in 1961, Congress unequivocally reaffirmed this determination. Almost immediately on the heels of this reaffirmation, however, there commenced a chain of administrative and judicial "reinterpretations" of the statute, by which its exemption from the antitrust laws has been increasingly eroded. By 1979 this

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<sup>1</sup> Ch. 451, 39 Stat. 728 (1916) (current version at 46 U.S.C. §§ 801-842 (1976)).

reversal of express congressional intent had reached near-crisis proportions.

The perilous state into which the U.S. regulated shipping industry has thus been placed has, in the current year, finally begun to receive the close attention of Congress itself. On July 9 and July 12 of this year, respectively, bipartisan measures were introduced into both the United States Senate<sup>2</sup> and House of Representatives,<sup>3</sup> in greater or lesser degree calling for major revision of the Shipping Act. High on the list of priorities for change is a reinstatement of an absolute anti-trust exemption.

The new statutory proposals are complex and, with hearings on them even now in progress, will certainly undergo change before any enactment. It is not the purpose of this article to evaluate those measures, or how well or ill their proposed solutions actually meet the critical antitrust problem. What we seek to do here is to outline just what that problem is, and how it came to be.

Because this article may be read by persons not generally familiar with ocean shipping, it may be helpful to begin with a few basic definitions. Liner shipping can be defined, in general terms, as a transportation service by a regularly scheduled ocean carrier sailing on an established route. While at times schedules and routes may vary, the additional attribute of "holding out" to perform transportation for any party requesting it clearly distinguishes liner carriage from tramp and private carriage.<sup>4</sup> Liner shipping is further distinguished by service which accepts less-than-shipload commodities of all types. By holding themselves out to provide service for all shippers, liner carriers in the United States are considered "common carriers imbued with the public interest" and therefore subject to governmental oversight.

Liner, or common, carriers operate either as independents or as members of one or more shipping conferences. A shipping conference is a voluntary association of ocean carriers operating on a particular trade route between two or more countries. The purpose of a shipping conference is the self-regulation of price competition, primarily through the establishment of uniform freight rates and terms and con-

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<sup>2</sup> Ocean Shipping Act of 1979, S. 1460, 96th Cong., 1st Sess. (1979); Bilateral Liner Shipping Act of 1979, S. 1462, 96th Cong., 1st Sess. (1979); Shipping Reform Act of 1979, S. 1463, 96th Cong., 1st Sess. (1979).

<sup>3</sup> Omnibus Maritime Regulatory Reform, Revitalization and Reorganization Act of 1979, H.R. 4769, 96th Cong., 1st Sess. (1979).

<sup>4</sup> Tramp carriers have irregular routes and schedules, sail only when sufficient cargo is available, and generally carry goods moving in quantities sufficient to fill the cargo holds. Private carriers exclusively carry the property of the carriers' owners and operators.

ditions of service between the member shipping lines. Although only infrequent in the U.S. trades, conferences generally govern specific sailing schedules and often cargo or revenue shares assigned to each member line. By operating within an internally regulated conference, carriers seek mutual restraint from the pursuit of sharp business practices and rate tactics that result in unstable economic consequences.<sup>5</sup> In U.S. trades, conferences are expressly permitted by and regulated under section 15 of the Shipping Act of 1916.<sup>6</sup>

Conferences are, in terms of membership, either open or closed. In the open conference system, essentially unique to the U.S. trades,<sup>7</sup> any shipowner may become a member if he has the intent and ability to offer liner service and agrees to abide by the terms of the conference agreement. Closed conferences differ substantially in that the entry of a new competitor depends on the concurrence of the existing members.<sup>8</sup> Closed conferences, by limiting the amount of conference shipping service to be provided to a given trade, act as a restraint on supply with the design and effect of limiting empty cargo space—"overtonnaging"—and thus provide a curb against uneconomic sailings which in turn can result in overall lower-cost shipping.

The most often discussed attribute of a conference system is its collective control over rates. Generally, conference members are required by their conference agreements to charge uniform rates established by the vote of the membership. Conferences, however, often provide for "open rates" on specified commodities, which allow individual carriers to negotiate rates with the shippers without consideration of a conference-prescribed rate. Commodities subject to open rates are most often those subject to strong tramp competition and those involving circumstances such as new manufacturers, new trade commodities, or other flux conditions.

In order to protect their operations from economic attack by non-

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<sup>5</sup> Non-conference liners are shipping companies offering a liner service on a regular or spot basis independent of any agreement with competing ocean carriers. Non-conference liners usually operate at rates discounted by a given percentage from the prevailing conference rates, and characteristically solicit only the higher-paying types of commodities, in order to insure sufficient financial returns to offset rates below the prevailing conference rates. In "good times," however, *i.e.*, when available cargo exceeds available carrying capacity in the trade, the non-conference line is apt to be quick to come into parity with the conference liner rates.

<sup>6</sup> Ch. 451, § 15, 39 Stat. 733 (1916) (current version at 46 U.S.C. § 814 (1976)).

<sup>7</sup> In the United States, entry into a conference is open to any carrier able to satisfy minimal requirements. 46 U.S.C. § 814 (1976); 46 C.F.R. § 523 (1978).

<sup>8</sup> Closed conferences, which are prohibited in the United States but are the rule in most of the world, occasionally accept new members. The Far East Freight Conference, which serves the Far East-Europe trade on a closed basis, has admitted more than seven new members in the last five years.

members, and thus to assure their members of a sufficient supply of cargo to sustain their long-term commitment to the particular trade, conferences typically employ shipper loyalty mechanisms, such as dual rate or deferred rebate systems, which tie shippers to the services provided by the conference members. Under the dual rate system, a shipper agrees to give all or some fixed portion of its patronage to the contracting conference carriers, in return for which the shipper is granted a percentage discount, commonly fifteen percent, from the rates applicable to those shippers which do not enter into such an agreement. A shipper who fails to abide by its exclusive-patronage agreement with the conference members and utilizes a non-conference carrier in violation of the conference shipper contract is subject to damages, and often to loss of contract privileges. Under the deferred rebate system, a shipper who ships exclusively by members of a conference is given a lump-sum discount following the conclusion of a given period of time, generally one year. Customarily, payment of the rebate is deferred beyond the specified shipping period involved in its computation, *e.g.*, for an additional three months, and the shipper is only entitled to the rebate if he has continued his exclusive use of conference members during this additional period of deferral.<sup>9</sup>

#### EARLY GOVERNMENTAL INVESTIGATIONS INTO SHIPPING CONFERENCES

The economic power at least theoretically reposed in steamship lines operating in shipping conferences has impelled various governments to analyze thoroughly both the philosophy and the practice of conference systems. In the early part of this century, two major governmental investigations were undertaken: the United Kingdom's Royal Commission on Shipping Rings, conducted from 1906 to 1909,<sup>10</sup> and the U.S. House of Representatives' Investigation of Shipping Combinations, conducted from 1912 to 1914.<sup>11</sup> The latter investigation is commonly known as the "Alexander Committee," named after Representative Joshua M. Alexander, then Chairman of the House Commit-

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<sup>9</sup> The use of deferred rebates in U.S. trades has been prohibited since 1916. *See* Ch. 451, § 14, 39 Stat. 733 (1916) (current version at 46 U.S.C. § 812 (1976)). To our knowledge the only country to follow the U.S. in the outright prohibition of the deferred rebate system is Japan. Maritime Transportation Law, Law No. 187 of 1949, art. 28.

<sup>10</sup> ROYAL COMMISSION ON SHIPPING RINGS, REPORT, CD. NOS. 4668-70, 4685-86 (1909) [hereinafter cited as ROYAL COMMISSION].

<sup>11</sup> REPORT ON STEAMSHIP AGREEMENTS AND AFFILIATIONS IN THE AMERICAN FOREIGN AND DOMESTIC TRADE, 4 HOUSE COMM. ON MERCHANT MARINE AND FISHERIES, PROCEEDINGS IN THE INVESTIGATION OF SHIPPING COMBINATIONS UNDER H. RES. 587, 63d Cong. (1913) [hereinafter cited as ALEXANDER REPORT].

tee on Merchant Marine and Fisheries. These investigations, while analyzing the same problems and factual situations, resulted in completely dissimilar recommendations that have led to the present-day dissimilarities between the conference systems of the United States and those of the United Kingdom and the rest of the world.

*The United Kingdom's Commission on Shipping Rings*

At the conclusion of its investigation, the Royal Commission split into majority and minority positions. Having heard extensive arguments concerning the advantages and disadvantages of the conference system, both groups came out strongly in favor of the system's continuation.<sup>12</sup> In addition, there was general opposition to detailed legislative solutions; instead, both groups supported the acceptance of collective bargaining agreements between shippers and shipowners.<sup>13</sup> The majority, however, urged the public filing of conference agreements and tariffs, and further recommended legislation providing for the limited vesting of power in a governmental entity authorized to hold inquiries if there were grounds to believe that the national interest was being adversely affected by any particular conference system.<sup>14</sup> The minority, in contradistinction, was of the view that alternatives to government interference should be explored before even limited governmental interference was adopted.<sup>15</sup> Specifically, it recommended that, prior to the enactment of laws affording any such governmental supervision, an opportunity should be given to the conference lines and their shipper customers, through organized associations, to establish a system of consultation and conciliation.<sup>16</sup>

Consideration of the Royal Commission's reports was interrupted by the outbreak of war in 1914, and Britain's solution to potential shipping conference problems was delayed until the early 1920's. Upon the conclusion of World War I and after further investigation, the British government established a purely advisory body known as the Imperial Shipping Committee, authorized to inquire into ocean freight transportation when it received complaints from parties whose interests in the matter under dispute were serious and considerable.<sup>17</sup> The Committee, an informal tribunal which relied upon the voluntary appearance and cooperation of those whose testimony and evidence was relevant to the

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<sup>12</sup> ROYAL COMMISSION, *supra* note 10, at 78 and 114.

<sup>13</sup> *Id.* at 85, 114.

<sup>14</sup> *Id.* at 89.

<sup>15</sup> *Id.* at 114.

<sup>16</sup> *Id.*

<sup>17</sup> D. MARX, JR., INTERNATIONAL SHIPPING CARTELS 68 (1953).

inquiry at issue, had no real enforcement powers, but instead depended upon public exposure and its persuasive abilities to reach collectively bargained solutions. After two decades of operation, the Imperial Shipping Committee reported in 1939 that shipping conferences had managed to resolve amicably most serious disputes, and that the system of collective bargaining between shippers and carriers was essentially one of fair dealing all around.<sup>18</sup>

*The Alexander Committee and the U.S. Shipping Act of 1916*

The Alexander Committee heard arguments similar to those presented to the Royal Commission concerning the perceived advantages and disadvantages of the conference system. While the Alexander Committee also found conferences necessary as a means of restricting competition to a level which would ensure adequate service and a healthy shipping industry, it did not share the Royal Commission's opposition to legislative and institutional solutions. The Alexander Committee instead concluded that "the disadvantages and abuses connected with steamship agreements and conferences as now conducted are inherent, and can only be eliminated by effective governmental control."<sup>19</sup> This recommendation of governmental control was enacted into law as the cornerstone of the 1916 Shipping Act.

The Alexander Committee's Investigation of Shipping Combinations culminated in an historic four-volume report that has become known as the "Alexander Report."<sup>20</sup> The essentials of the Committee's findings and recommendations, as contained in the report, provided the blueprint for the Shipping Act of 1916,<sup>21</sup> and thus are critical to an understanding of the history of today's U.S. shipping laws as they pertain to shipping conferences.

Practically all who testified before the Alexander Committee maintained that if shippers were to be assured of adequate cargo space and efficient, frequent, and regular service at reasonable rates, shipping agreements and conference relations were a necessary fact of international shipping.<sup>22</sup> It was repeatedly pointed out that conference agreements were as much a protection to shippers as to shipowners.<sup>23</sup> The

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<sup>18</sup> *Id.* at 83.

<sup>19</sup> ALEXANDER REPORT, *supra* note 11, at 418.

<sup>20</sup> *See* note 9 *supra*.

<sup>21</sup> ALEXANDER REPORT, *supra* note 11, at 415-24.

<sup>22</sup> *See, e.g.*, 2 HOUSE COMM. ON MERCHANT MARINE AND FISHERIES, PROCEEDINGS IN THE INVESTIGATION OF SHIPPING CONFERENCES UNDER H. RES. 587, 63d Cong. 355-58, 801-14, 1367-68 (1913) [hereinafter cited as PROCEEDINGS].

<sup>23</sup> *See, e.g.*, PROCEEDINGS, *supra* note 22, at 374-81.

carriers benefitted because conference rates tended to secure a dependable return on investment, allowing for the construction of new facilities for the trade. Shippers benefited from the insured stability of rates and the elimination of secret arrangements and under-the-table deals with competitors. Furthermore, insofar as agreements provided a means for aiding weaker conference members which could not survive under unrestricted competition, conferences avoided a "survival of the fittest" war of competition that would ultimately end in near or total monopoly. Hence, the Alexander Committee concluded, contrary to the views espoused by some commentators, that a healthy conference system was affirmatively conducive to the preservation, not the termination, of competition.<sup>24</sup>

In brief, the principal advantages in the preservation of the conference system and other cooperative understandings between liner companies, as perceived by the Alexander Committee, were as follows:

- a) regularity and dependability of service;
  - b) greater security in capital investment;
  - c) relative stability and dependability of rates;
  - d) uniformity of rates to all shippers similarly situated, regardless of economic strength;
  - e) preservation of service competition by avoidance of an inevitable "survival of the fittest" result from unrestricted rate competition;
  - f) reduction in cost of service by regulating tonnage and sailing;
- and
- g) development of the overall trade by encouraging a wider range of ports to be served and commodities to be carried.<sup>25</sup>

To be sure, some testimony opposing the conference system was received by the Alexander Committee. A number of objections were theoretical in nature, opposing as much in principle as on any developed facts, the inherently oligopolistic nature of the system;<sup>26</sup> others, with more specificity, pinpointed certain abuses, either actual or potential, arising out of the concept.<sup>27</sup> The latter concerns included the use of "fighting ships," a device whereby all conference members jointly shared the cost of one or more vessels deployed specifically to engage in head-to-head rate competition with an intruding "outside" line; the departure from the premise of equal treatment for all similarly-situated users; and what were perceived to be excessive exercises of monopolistic power, to wit, the closed-conference system and the deferred-rebate

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<sup>24</sup> ALEXANDER REPORT, *supra* note 11, at 416.

<sup>25</sup> *Id.* at 295-303.

<sup>26</sup> *See* PROCEEDINGS, *supra* note 22, at 953, 957, 1289.

<sup>27</sup> *Id.* at 995-99.



system. In the Shipping Act of 1916 which followed, all of these pinpointed objections were expressly prohibited.

The most commonly-voiced objection to the conference system lodged during the course of the Alexander Committee investigation was the perceived secrecy in which the conferences maintained their agreements and their operations.<sup>28</sup> Again in response to the criticism, the Committee recommended, and Congress ultimately enacted as part of the focal section 15 of the Shipping Act,<sup>29</sup> the creation of a supervisory administrative agency with which all such carrier arrangements should be filed. The agency, a distant forerunner of the present Federal Maritime Commission, was given the authority to disapprove any agreement which it found: (1) to be "unjustly discriminatory or unfair as between carriers, shippers, exporters, importers or ports, or between exports from the United States and their foreign competitors," (2) to "operate to the detriment of the commerce of the United States," and/or (3) to be "in violation of this Act."<sup>30</sup> Absent any one of these findings, the agency was directed to approve "all other agreements."<sup>31</sup> Penalties were provided for failure to file and for carrying out an unapproved or disapproved agreement.<sup>32</sup>

Thus as early as 1916, two divergent approaches to conference shipping, represented on the one hand by the United States and on the other by the United Kingdom, had begun to take clear form. The British Royal Commission perceived the necessity of permitting closed conferences with strong shipper loyalty agreements, and was opposed to injecting governmental power into a complex multinational industry.<sup>33</sup> It recommended only the reservation of an unspecified role for governmental oversight and investigation in the event shipping conferences reached a point where important national interests were being threatened.<sup>34</sup> The American approach, reflecting the strong antitrust attitude of the Sherman Act, followed the model of prior legislation that created the Interstate Commerce Commission. It was to be U.S. policy to prohibit closed conferences, to prohibit the most effective shipper loyalty device, *i.e.*, the deferred rebate, and to create a direct

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<sup>28</sup> ALEXANDER REPORT, *supra* note 11, at 417.

<sup>29</sup> Ch. 451, § 15, 39 Stat. 733 (1916) (current version at 46 U.S.C. § 814 (1976)). The United States Shipping Board was created by Ch. 451, § 3, 39 Stat. 729 (1916).

<sup>30</sup> Ch. 451, § 15, 39 Stat. 734 (1916).

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> ROYAL COMMISSION, *supra* note 10, at 81-84.

<sup>34</sup> *Id.* at 89.

governmental supervisory role over the operation of conferences.<sup>35</sup> Nevertheless, and notwithstanding the substantial infusion of governmental oversight, the U.S. Congress made plain its rejection of traditional American antitrust principles as applied to the foreign waterborne commerce of the nation.<sup>36</sup> Agreements among carriers had to be filed and approved, but the agency was directed to approve them unless adverse consequences were proven to exist.<sup>37</sup> Moreover, and though subject to the Shipping Act's own sanction for failure of filing and/or approval, such agreements were exempt from the operation of the Sherman Act and any other supplementing antitrust acts which might follow.<sup>38</sup>

INTERPRETATION OF THE SHIPPING ACT TO 1958:  
*CUNARD THROUGH ISBRANDTSEN*

The first major litigation concerning section 15 of the U.S. Shipping Act reached the Supreme Court in the early 1930's. In *United States Navigation Co. v. Cunard Steamship Co.*,<sup>39</sup> the U.S. Navigation Company sought injunctive relief against the Cunard Steamship Company and its fellow conference members. It was alleged, *inter alia*, that the conference, through the use of exclusive patronage (dual rate) contracts with certain shippers, had entered into and engaged in a conspiracy to restrain trade in violation of the Sherman and Clayton Antitrust Acts.<sup>40</sup> The activities complained of had not been submitted to nor approved by the Shipping Board, the then-extant predecessor of the present Federal Maritime Commission. The district court dismissed the case,<sup>41</sup> holding that the matters complained of were within the exclusive jurisdiction of the Shipping Board, thus barring any suit based upon the antitrust laws.<sup>42</sup>

Following affirmance by the Court of Appeals for the Second Circuit,<sup>43</sup> the Supreme Court accepted a petition for writ of certiorari.<sup>44</sup> The Court, in unanimously affirming the lower courts, declared that section 15 of the Shipping Act requires that:

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<sup>35</sup> Ch. 451, §§ 14-15, 39 Stat. 733-34 (1916).

<sup>36</sup> Ch. 451, § 15, 39 Stat. 734 (1916). This section specifically excepted lawful agreements made under this section from antitrust liability.

<sup>37</sup> Ch. 451, § 14, 39 Stat. 734 (1916).

<sup>38</sup> See note 36 and accompanying text *supra*.

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

<sup>40</sup> 15 U.S.C. §§ 1-7, 15, 26 (1976).

<sup>41</sup> *United States Nav. Co. v. Cunard S.S. Co.*, 39 F.2d 204 (S.D.N.Y. 1929).

<sup>42</sup> *Id.* at 207.

<sup>43</sup> 50 F.2d 83 (2d Cir. 1931).

<sup>44</sup> 284 U.S. 605 (1931).

agreements between carriers, or others subject to the act, . . . shall be filed immediately with the board; and that the term "agreement" shall include understandings, conferences, and other arrangements. Thereupon, the board is authorized to disapprove, cancel or modify any such agreement, "whether or not previously approved by it," which it finds to be unjustly discriminatory or unfair as between carriers, shippers, etc., "or to operate to the detriment of the commerce of the United States or to be in violation of this Act." But failure to file such an agreement with the board will not afford ground for an injunction under § 16 of the Clayton Act at the suit of private parties, whatever, in that event, may be the rights of the government, *since the maintenance of such a suit, being predicated upon a violation of the anti-trust laws, depends upon the right to seek a remedy under those laws, a right which, as we have seen, does not here exist.*<sup>45</sup>

Exactly twenty years after *Cunard*, the Supreme Court was presented with the reserved issue of whether the United States could do what a private litigant could not do, namely, enjoin under the antitrust laws conference agreements that had not been submitted to the Federal Maritime Board for approval. In *Far East Conference v. United States*,<sup>46</sup> the Supreme Court, in a majority opinion by Mr. Justice Frankfurter, held that the government's plea for injunctive relief fared no better than a private party's, and that any such action under the antitrust statutes was barred under the rationale of *Cunard*.

For the next fifteen years, the lower federal courts, following *Cunard* and *Far East*, uniformly held that the antitrust statutes were inapplicable to shipping conferences and their agreements and that the remedies for unapproved activities within the purview of section 15 of the Shipping Act of 1916 must be found within the provisions of the Act itself.<sup>47</sup> The first case to be decided by the Supreme Court involving the Federal Maritime Board's specific approval of the use by a conference of exclusive patronage contracts with shippers was *Federal Maritime Board v. Isbrandtsen Co.*<sup>48</sup> This culmination of lengthy litigation resulted from an order of the Federal Maritime Board which, pursuant to section 15, had approved a dual-rate system proposed by the Japan-Atlantic and Gulf Freight Conference.<sup>49</sup> Upon petition for review of the Board's decision brought by the Isbrandtsen Line, an in-

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<sup>45</sup> 284 U.S. 474, 486 (emphasis added).

<sup>46</sup> 342 U.S. 570 (1952).

<sup>47</sup> See, e.g., *United States v. Borax Consol., Ltd.*, 141 F. Supp. 396 (N.D. Cal. 1955); *American Union Transp., Inc. v. River Plate & Brazil Conferences*, 126 F. Supp. 91 (S.D.N.Y. 1954), *aff'd per curiam*, 222 F.2d 369 (2d Cir. 1955); *United States v. Alaska S.S. Co.*, 110 F. Supp. 104 (W.D. Wash. 1952).

<sup>48</sup> 356 U.S. 481 (1958).

<sup>49</sup> In re Statement of Japan-Atlantic and Gulf Freight Conference, 4 Dec. Fed. Mar. Bd. 706 (1955).

dependent carrier in the trade, the Court of Appeals for the District of Columbia Circuit held that the subject system of dual rates was illegal *per se*.<sup>50</sup> The Supreme Court, in a split decision, affirmed the court of appeals but ambiguously skirted the lower court's *per se* holding.<sup>51</sup> Instead, the Court held that the Maritime Board was without power to approve the particular dual-rate system involved, under section 14's prohibition against "discriminating or unfair methods."<sup>52</sup> The Court stated:

Since the Board found that the dual-rate contract of the Conference was "a necessary competitive measure to offset the effect of non-conference competition" required "to meet the competition of *Isbrandtsen* in order to obtain for its members a greater participation in the cargo moving in this trade," it follows that the contract was a "resort to other discriminating or unfair methods" to stifle outside competition in violation of § 14 . . . .<sup>53</sup>

#### THE CONGRESSIONAL RESPONSE TO *ISBRANDTSEN*

The Supreme Court's decision in *Isbrandtsen* raised serious doubts as to the legality of any of the exclusive patronage/dual rate contract systems then being used by over 113 conferences serving U.S. ports. In response to the serious concerns that were created by the Court's decision, Congress enacted a succession of moratoria expressly authorizing the continuation of existing dual rate systems while it studied the problem,<sup>54</sup> and undertook a new, detailed investigation of the conference system and its regulation by the Federal Maritime Board.<sup>55</sup> After three years of hearings and studies, the House Merchant Marine and Fisheries Committee, under the chairmanship of Congressman Herbert Bonner of North Carolina, produced its report<sup>56</sup> and accompanying proposed remedial legislation. Slightly less than three months later, the

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<sup>50</sup> *Isbrandtsen Co. v. United States*, 239 F.2d 933 (D.C. Cir. 1956).

<sup>51</sup> 356 U.S. at 495 n.15, 497-98.

<sup>52</sup> 46 U.S.C. § 813 (1976).

<sup>53</sup> 356 U.S. at 493 (footnote omitted). In a blistering dissent for himself and two others, 356 U.S. at 500, Justice Frankfurter, viewing the majority's holding on the merits against the procedural backdrop of *Cunard* and *Far East*, accused the majority of making a "mockery" of the administrative process. *Id.* at 519.

<sup>54</sup> Pub. L. No. 85-626, 72 Stat. 574 (1958), as extended by Pub. L. No. 86-542, 74 Stat. 253 (1960) and Pub. L. No. 87-55, 75 Stat. 195 (1961).

<sup>55</sup> Prior to the investigation impelled by *Isbrandtsen*, two major U.S. government reports had concluded that the conference system, including dual rate/exclusive patronage contracts, was absolutely necessary to insure a stable and efficient steamship industry. See A. SANDERSON, CONTROL OF OCEAN FREIGHT RATES IN FOREIGN TRADE, A WORLD SURVEY (1938); INTER-AMERICAN MARITIME CONFERENCE, REPORT OF THE DELEGATES (1940).

<sup>56</sup> HOUSE COMM. ON MERCHANT MARINE AND FISHERIES, PROVIDING FOR THE OPERATION OF STEAMSHIP CONFERENCES, H.R. REP. NO. 498, 87th Cong. 1st Sess. (1961) [hereinafter cited as H.R. REP. NO. 498].

Senate Commerce Committee followed with its complementary report,<sup>57</sup> and its own proposed remedy.

More or less contemporaneously with these two Committee investigations, the Antitrust Subcommittee of Congressman Celler's powerful House Committee on the Judiciary also conducted hearings concerning steamship line practices.<sup>58</sup> The Celler Subcommittee, although conducting extensive hearings into perceived abuses by the conference system and perceived failures of government regulatory efforts, did not lead to the enactment of any legislation. Nevertheless, both the House Merchant Marine Committee and the Senate Commerce Committee clearly were aware of the Celler Committee's views of the applicability of the antitrust laws to the shipping industry, and, indeed, both gave express recognition to the Antitrust Subcommittee's "assistance."<sup>59</sup> It is also clear, however, that the legislative history of the 1961 legislation and congressional will concerning the applicability of the antitrust laws to the conference system is not to be found in the voluminous—and predictably anti-conference—Celler hearings and report, but rather in the reports of the two Committees charged with the duty of overseeing the administration of the Shipping Act.

### *The Bonner Committee*

On February 15, 1961, after three years of extensive hearings throughout the United States, H.R. 4299, a bill which was aimed primarily at permanently establishing the legality of the conference dual rate system, which had been placed in doubt by *Isbrandtsen*, was introduced into Congress.<sup>60</sup> While the first drafts of H.R. 4299 contained no specific statement regarding the interplay thought to be proper between the Shipping Act and the antitrust laws, certain language in some of the early revisions rather unmistakably pointed in the direction of having the Shipping Act supplement rather than supplant existing statutes. In section 2 of an early Committee print of H.R. 4299, section 15 of the Shipping Act would have been amended by the addition of the following introductory clause:

*In addition to the penalties provided by the antitrust laws and any other*

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<sup>57</sup> SENATE COMM. OF COMMERCE, STEAMSHIP CONFERENCES AND DUAL RATE CONTRACTS, S. REP. NO. 860, 87th Cong., 1st Sess. (1961) [hereinafter cited as S. REP. NO. 860].

<sup>58</sup> *Monopoly Problems in Regulated Industries: Hearings Before the Antitrust Subcomm. of the House Comm. on the Judiciary, Ocean Freight Industry*, 86th Cong., 1st & 2d Sess. (1959-60).

<sup>59</sup> See, e.g., S. REP. NO. 860, *supra* note 57, at 10.

<sup>60</sup> The history of H.R. 4299 and its successor H.R. 6775 is given in SENATE COMM. ON COMMERCE, INDEX TO THE LEGISLATIVE HISTORY OF THE STEAMSHIP CONFERENCE/DUAL RATE LAW, S. DOC. NO. 100, 87th Cong., 2d Sess. (1962) [hereinafter cited as LEGISLATIVE INDEX].

laws, whoever violates any provision of this section shall be liable to a penalty of not more than \$1,000 for each day such violation continues, to be recovered by the United States in a civil action.<sup>61</sup>

In subsequent draft revisions, however, this antitrust language was omitted. H.R. 4299 was later amended and was reported out of the Committee as H.R. 6775, containing no reference whatsoever to antitrust liability.<sup>62</sup> Throughout the subsequent legislative history of H.R. 6775, H.R. 4299's specific antitrust language never reappeared.

Notwithstanding the Committee's rejection of explicit antitrust language, H.R. 6775 as passed by the House did contain some provisions which, while not specifically referring to the antitrust laws, sounded in antitrust philosophy.<sup>63</sup> Moreover, the tenor of the new express legitimization of the dual-rate system was distinctly colored and narrowed by an antitrust presumption against easy approvability.

### *The Senate Commerce Committee and Congressional Enactment*

When H.R. 6775 came before the Senate Commerce Committee, the antitrust philosophy was totally rejected.<sup>64</sup> For example, in the House bill a critical clause prohibiting agency approval of dual-rate contracts which would "be reasonably likely to cause the exclusion of any other carriers from the trade" was deleted upon the sensible determination that inclusion of this clause would have effectively eviscerated the entire legislation.<sup>65</sup> In the words of Federal Maritime Board<sup>66</sup> Chairman Clarence Morse, "the purpose and intent of a dual-rate system is to drive out non-conference competition"<sup>67</sup> by forcing the

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<sup>61</sup> *Id.* at 78 (emphasis added).

<sup>62</sup> See 107 CONG. REC. 10,065 (1961) (remarks of Rep. Celler). The Department of Justice's antitrust-oriented opposition to the bill did not fare much better. The report stated:

The Department of Justice testimony on the legislation was generally unfavorable. While its position is consistent with the antitrust policy of the United States, it fails to take into account the peculiar nature of the particular business involved. The ocean steamship industry is unique among transportation services in a number of respects.

The hearings of the committee have made it quite clear that our traditional antitrust concepts cannot be fully applied to this aspect of international commerce. . . . [A]ny attempt to effect regulation of this commerce in a measure comparable to that applied to our domestic commerce would be highly detrimental to our essential American-flag merchant marine.

H.R. REP. NO. 498, *supra* note 56, at 12-13.

<sup>63</sup> *E.g.*, H.R. 6775, §§ 1, 2, 5. See LEGISLATIVE INDEX, *supra* note 60, at 99-106, 109-10; 107 CONG. REC. 10,063 (1961).

<sup>64</sup> S. REP. NO. 860, *supra* note 57, at 23.

<sup>65</sup> *Id.*

<sup>66</sup> The Federal Maritime Board was replaced in 1961 by the Federal Maritime Commission. Reorg. Plan No. 7 of 1961, 3 C.F.R. 875 (1959-63 Compilation), *reprinted in* 5 U.S.C. app., at 784 (1976).

<sup>67</sup> S. REP. NO. 860, *supra* note 57, at 21.

outside line either to join the conference or to leave the trade altogether. It is abundantly clear, from this and numerous other actions in a similar vein, that in the Senate, a balance was being struck in favor of the interests of conference members.

During the floor debate, Senator Kefauver, leading the Senate antitrust proponents, offered certain amendments that would have reinstated many of the House provisions deleted by the Senate Commerce Committee.<sup>68</sup> Respecting the "exclusion of other carriers" issue, Senator Russell Long of Louisiana expressed the majority view:

Senators must realize that the pattern that is necessary to engage in ocean commerce does not fit into the pattern of our Antitrust Division, composed of lawyers who would like to regulate a farm cooperative as though it were the Standard Oil of New Jersey. . . .

. . . .

Now it is proposed by one of the Kefauver amendments that action cannot be taken by a conference if the total effect would be reasonably likely to cause the exclusion of any other carrier from the trade.

Yet the whole idea of the bill is to let those people get together on rates and compete with the people who are not in the agreement. If one fellow will not join and will not participate, the others are by necessity in price competition with him. He is trying to put the other fellows out of business. What is wrong with the other fellows trying to put him out of business?<sup>69</sup>

A similar and parallel action taken by the Senate Committee and ultimately passed by the full Senate reversed the presumption of the House-passed bill which would have placed the burden of establishing affirmative need for an exclusive patronage system on its proponents as a prerequisite to agency approval.<sup>70</sup> In the Senate, this "public interest" verbiage simply was tagged onto the pre-existing standards for disapproval after notice and hearing.<sup>71</sup> The Senate Report, discussing the change, noted:

In addition to eight specific safeguards which must be in each dual-rate contract, the bill as it passed the House would require the Commission to find that the contract was (1) not intended to or reasonably likely to cause the exclusion of any other carrier from the trade, (2) not detrimental to

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<sup>68</sup> LEGISLATIVE INDEX, *supra* note 60, at 3.

<sup>69</sup> *Id.* at 420-21.

<sup>70</sup> H.R. REP. NO. 498, *supra* note 56, at 18; S. REP. NO. 860, *supra* note 57, at 23.

<sup>71</sup> Thus, section 15 was amended to read, in pertinent part:

[The Commission] shall, after notice and hearing, disapprove, cancel or modify any agreement . . . that it finds to be discriminatory or unfair . . . , or to operate to the detriment of the commerce of the United States, or to be contrary to the public interest, or to be in violation of this Act, and shall approve all other agreements. . . .

The phrase was given similar treatment in the new section 14b. LEGISLATIVE INDEX, *supra* note 60, at 188, 190.

the commerce of the United States, and (3) not contrary to the public interest.

Your committee concluded that in order for the Commission to make these additional findings, the parties applying for permission to use dual-rate contracts would have to build extensive records before the Commission, even though there might be no opposition to the contracts, and even though they might clearly contain the eight matters expressly required by statute.

. . . .

We believe that any contract which contains the eight safeguards expressly required by the amended bill makes out a *prima facie* case that the contract is not detrimental to our commerce, or contrary to our public interest, or unjustly discriminatory or unfair.<sup>72</sup>

Following the Senate vote on H.R. 6775, the two Houses met in Conference Committee, and adopted the Senate version essentially verbatim.<sup>73</sup>

Thus, as of October 3, 1961, when H.R. 6775 was enacted as Public Law 87-346, it was unmistakably clear that Congress had squarely reaffirmed the Alexander Committee's determination that it was, and is, in this nation's affirmative best interests to remove the steamship conference system from the reach of the U.S. antitrust laws and to continue to place regulation and oversight of the industry with a regulatory body. Equally clear was the fact that Congress intended any conference-shipper dual rate system to be approved "unless", after hearing, it was found to be "detrimental to the commerce of the United States, contrary to the public interest, or unjustly discriminatory or unfair as between shippers, exporters, importers, or ports."<sup>74</sup> In other words, the presumption was to be in favor of dual-rate agreements, with the burden upon opponents to prove that they should not be approved.

While it is plain from the legislative history of the 1961 amendments to the Shipping Act that the antitrust advocates had lost the battle, events subsequent to 1961 have clouded that certainty to the point where a contemporary observer might well believe that just the opposite had happened. The remaining sections of this article will trace the administrative and judicial actions and decisions by which an unparalleled reversal of a clearly expressed Congressional intent has come to pass.

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<sup>72</sup> S. REP. NO. 860, *supra* note 57, at 23. The report also includes a letter from then Deputy Attorney General, now Supreme Court Justice, Byron White recognizing and, from his antitrust position, critically commenting on this major change. *Id.* at 30, 33-34.

<sup>73</sup> LEGISLATIVE INDEX, *supra* note 60, at 440-46.

<sup>74</sup> 46 U.S.C. § 813(a) (1976); LEGISLATIVE INDEX, *supra* note 60, at 210.



THE EROSION OF THE CONFERENCE SYSTEM: JUDICIAL AND  
ADMINISTRATIVE INTERPRETATION SINCE 1961

*The Loss of the Antitrust Exemption*

As discussed above, following the Supreme Court's decisions in *Cunard* and *Far East Conference* the law appeared settled that the anti-trust statutes were inapplicable to agreements of shipping conferences within the purview of the Shipping Act, whether approved or not, and that the remedies for violating section 15 of the Shipping Act were to be found within the provisions of that Act itself.<sup>75</sup> In an exhaustive opinion issued in 1964 on a shipper's antitrust treble-damage claim against two conferences, the U.S. Court of Appeals for the Ninth Circuit solidly reaffirmed this legal certainty.<sup>76</sup> These bedrock legal assumptions, however, were suddenly shattered when the Supreme Court, taking review of the case, issued its decision in *Carnation Co. v. Pacific Westbound Conference*,<sup>77</sup> flatly reversing the Ninth Circuit decision.

*Carnation* arose in a suit filed by a shipper of dairy products, which alleged that it had been damaged by virtue of an unlawful combination by two steamship conferences to fix rates for products shipped to the Philippine Islands. Although both conferences had express Federal Maritime Commission approval for fixing rates by their respective member lines in their respective trades, and although they had additionally filed for and received approval of an interconference agreement providing for the joint setting of rates by both conferences, *Carnation* alleged that the conferences had met and set rates in a manner not covered by their approved agreements. Thus, *Carnation* alleged that as a result of additional "secret" rate-fixing procedures of the two shipping groups, its rate requests had been refused improperly.

Acting upon a motion for dismissal filed by the defendant conferences, and also supported by the Federal Maritime Commission, the federal district court dismissed the complaint on the grounds that it was without jurisdiction to entertain the suit, because the Shipping Act provided the exclusive remedy for the wrongs alleged.<sup>78</sup> On an appeal

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<sup>75</sup> The Act makes it a violation of section 14b, which expressly authorizes the use of exclusive patronage contracts, and of section 15 to carry out any such agreement or contract system without the prior approval of the Federal Maritime Commission, or after such approval has been withdrawn. The Act then provides for civil penalties of "not more than" \$1000 per day for each day of violation. 46 U.S.C. § 814 (1976). See note 47 and accompanying text *supra*.

<sup>76</sup> *Carnation Co. v. Pacific Westbound Conference*, 336 F.2d 650 (9th Cir. 1964), *rev'd*, 383 U.S. 213 (1966).

<sup>77</sup> 383 U.S. 213 (1966).

<sup>78</sup> 336 F.2d at 653.

brought by *Carnation*, the Ninth Circuit, in a seventeen-page opinion affirming the lower court, stated, *inter alia*:

In dismissing the action, the court below relied on the decision in the cases of *U.S. Navigation Co. v. Cunard Steamship Co.*, 234 U.S. 474, and *Far East Conference v. United States*, 342 U.S. 570. It seems plain to us that both of these decisions support and require the action of the court below.

. . . .

We think that appellants' efforts to assert the lack of the continuing authority of *Cunard* and *Far East* is entirely fallacious and altogether unsupportable.<sup>79</sup>

Upon appeal to the Supreme Court, however, *Carnation* found a more sympathetic forum.<sup>80</sup> The opinion by Chief Justice Warren overturned fifty years of legal precedent. In reversing the court of appeals, the Supreme Court majority stated:

The Shipping Act contains an explicit provision exempting activities which are lawful under § 15 of the Act from the Sherman and Clayton Acts. This express provision covers approved agreements, which are lawful under § 15, but does not apply to the implementation of unapproved agreements, which is specifically prohibited by § 15.

. . . .

Respondents contend, nevertheless, that the § 15 exemption does not reflect the true intent of the Congress which enacted it. They insist that the structure of the Act and its legislative history demonstrate an unstated legislative purpose to free the shipping industry from the antitrust laws.

We do not believe that the remaining provisions of the Shipping Act can reasonably be construed as an implied repeal of all antitrust regulation of the shipping industry's rate-making activities.<sup>81</sup>

The majority opinion went on to state that, in the absence of specific statutory language granting total antitrust immunity, the Court would not assume that such immunity was intended by Congress.<sup>82</sup> The same Court's own prior case law was given short shrift:

This Court's decisions in *United States Navigation Co. v. Cunard S.S. Co.* . . . and *Far East Conference v. United States* . . . do not conflict with our interpretations of the Shipping Act. Those cases merely hold that courts must refrain from imposing antitrust sanctions for activities of debatable legality under the Shipping Act in order to avoid the possibility of conflict between the courts and the Commission.<sup>83</sup>

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<sup>79</sup> *Id.* at 653, 657.

<sup>80</sup> The Federal Maritime Commission, which had defended its jurisdiction and the conferences' position in the lower courts, changed sides before the Supreme Court and "confessed error" through the Solicitor General.

<sup>81</sup> 383 U.S. 213, 217.

<sup>82</sup> *Id.* at 219-20 (citations omitted).

<sup>83</sup> *Id.* at 220. The Court in *Carnation* made no mention of its prior statement, made first in *Cunard*, 284 U.S. at 486, and repeated in *Far East*, 342 U.S. at 574, that "the maintenance of such

*Carnation*, by judicial fiat, thus stripped away the antitrust immunity that Congress had plainly intended to apply to regulated shipping companies, and ignored the rule that reparations provisions in regulatory statutes prevent treble-damage actions based on conduct subject to such reparations.<sup>84</sup> Thus the *Carnation* decision placed antitrust penalty exposure on top of Shipping Act penalty exposure, as well as subjecting the regulated ocean shipping industry to potential treble-damage liability under antitrust statutes *and* reparations liability under the Shipping Act.<sup>85</sup>

Following quickly on the heels of *Carnation*, a whole spate of treble-damage actions predictably were filed in various courts throughout the nation. Plaintiffs alleged that particular steamship lines had caused injury through the carrying out of unapproved section 15 agreements.<sup>86</sup> One of these cases, *Sabre Shipping Corporation v. American President Lines*,<sup>87</sup> broadly expanded on *Carnation* and demonstrated with unmistakable clarity the extreme exposure to which, at least in the mind of one court, steamship conferences were now to be subjected.

In *Sabre*, a Federal Maritime Commission Hearing Examiner had determined that the concerned conferences' rates had been progressively lowered to meet the lower rates of the Sabre Line, a non-conference new entry into the trade. By reason of this "predatory" effect on Sabre, the rates were held to be "so unreasonably low as to be detrimental to the commerce of the United States,"<sup>88</sup> within the meaning of

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a suit . . . depends upon a remedy under those [antitrust] laws, a right which, as we have seen, does not here exist."

<sup>84</sup> See, e.g., *S.S.W., Inc. v. Air Transp. Ass'n of America*, 191 F.2d 658 (D.C. Cir. 1951), *cert. denied*, 343 U.S. 969 (1952).

<sup>85</sup> In addition to the civil penalty provision contained in section 15 of the Shipping Act, note 75, *supra*, section 22 of the Act authorizes private suits for damages for "any violation of" the Act. 46 U.S.C. § 821 (1976). It should be noted that under the Interstate Commerce Act rail and motor carriers are not subject to regulatory penalties or recoveries for failure to file for and/or receive I.C.C. approval of their tariff bureau agreements. Under the Civil Aeronautics Act, complainants against air carrier rate-setting must pursue treble-damage actions since that Act does not provide for reparations.

<sup>86</sup> See, e.g., *Sabre Shipping Corp. v. American President Lines*, 285 F. Supp. 949 (S.D.N.Y. 1968), *aff'd sub nom. Japan Line, Ltd. v. Sabre Shipping Corp.*, 407 F.2d 173 (2d Cir.), *cert. denied*, 395 U.S. 922 (1969); *Pacific Seafarers, Inc. v. Pacific Far East Lines*, 404 F.2d 804 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1093 (1969); *Sapphire S.S. Line v. Atlantic & Gulf Am. Berth Operators*, No. 2130-66 (D.D.C., filed Mar. 11, 1974); *Transmarine Contract Carriers v. Pacific Coast European Conf.*, No. 45938 (N.D. Cal., filed Jan. 31, 1967); *Continental Nut Co. v. Pacific Coast River Plate Conf.*, No. 42426 (N.D. Cal., filed Dec. 7, 1967).

<sup>87</sup> 285 F. Supp. 949 (S.D.N.Y. 1968), *aff'd sub nom. Japan Line, Ltd. v. Sabre Shipping Corp.*, 407 F.2d 173 (2d Cir.), *cert. denied*, 395 U.S. 922 (1969).

<sup>88</sup> This conclusion, of course, was quite antipodal to the force and logic of Senator Long's remarks on the 1961 legislation. See text accompanying note 68 *supra*.

section 18(b)(5).<sup>89</sup> Sabre then sued for treble damages.<sup>90</sup> The district court held that, even though the rates of the defendant conferences had been set pursuant to duly approved section 15 agreements, the finding of a Shipping Act "violation"<sup>91</sup> operated to strip the conferences, retroactively and *pro tanto*, of the section 15 antitrust immunity for those "unlawful" activities.<sup>92</sup> Hence, it held a treble-damage claim would properly lie.<sup>93</sup>

Under *Carnation* and *Sabre*, conference lines now find themselves in a perilous dilemma. On the one hand, conferences are invited and indeed encouraged to act collectively, in ways which, but for section 15, would be contrary to the antitrust laws; they are, on the other hand, in constant danger of retroactive exposure to significant penalties under those antitrust laws, if (a) under *Carnation*, a practice, which all had reason to believe was covered by existing section 15 authority, is at some later date held to be a "new" section 15 agreement, and thereby one requiring separate section 15 approval; or if (b) under *Sabre*, a rate or other practice, believed to be proper, is held to be violative of any one or more of the Shipping Act's substantive provisions, subsequent to a hearing of some years' duration. The problem is exacerbated because, as shown elsewhere in this article, redefinition and reclassification by the Commission of what constitutes a "new" and "unapproved" section 15 agreement is a prevalent, on-going, and quite unpredictable Commission habit.<sup>94</sup> In addition, the *Sabre* theory of "retroactive disapproval" is also still very much alive.<sup>95</sup>

It is difficult indeed to believe that Congress intended the shipping industry to function in such a hazardous guessing-game atmosphere of internally-conflicting regulatory commands. To the contrary, in light

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<sup>89</sup> This section was added to the Shipping Act by the 1961 Amendments. Pub. L. No. 87-346, 75 Stat. 762 (1961) (codified at 46 U.S.C. § 817(b)(5) (1976)). It reads in pertinent part: "[T]he Commission shall disapprove any rate or charge filed by a common carrier by water in the foreign commerce of the United States or conference of carriers which, after hearing, it finds to be so unreasonably high or low as to be detrimental to the commerce of the United States." *Id.*

<sup>90</sup> 285 F. Supp. 949 (S.D.N.Y. 1968).

<sup>91</sup> Actually, section 18(b)(5) is incapable of being "violated". This legal nicety, however, did not deter the district court.

<sup>92</sup> 285 F. Supp. at 956.

<sup>93</sup> *Id.* at 957.

<sup>94</sup> See note 132 and accompanying text *infra*.

<sup>95</sup> The initial Decision of Administrative Law Judge Seymour Glanzer, FMC Docket No. 72-35 (filed August 15, 1977), is currently on appeal to the Court of Appeals for the District of Columbia Circuit from the Commission's reversal, 19 SHIP. REG. REP. (P&F) 19 (Mar. 9, 1979), on the asserted ground that the Commission was "irrational" in overturning its law judge's holding on this point. *National Ass'n of Recycling Industries, Inc. v. Federal Mar. Comm'n*, No. 79-1267 (D.C. Cir., appeal docketed Mar. 12, 1979).

of the conscious elimination in the early stages of the 1961 legislation of a clause which would have added language expressly subjecting the industry to antitrust as well as Shipping Act penalties,<sup>96</sup> it seems clear that Congress had just the opposite intent.

*The Loss of the Presumption of Approvability*

Congress, in enacting the 1961 amendments, rejected the theory that proponents of dual rate contract systems should bear the burden of affirmatively proving their need. Instead, as proposed by the Senate Committee, Congress put the presumption squarely in favor of approvability of such systems—just as already existed for Section 15 agreements. Approval was to be given unless, after notice and hearing, adverse factual findings, warranting disapproval, could be mustered.<sup>97</sup>

The antitrust forces, having lost the battle in the 1961 legislation, had not, however, given up the crusade. The first and stage-setting scenes were played, as with the earlier Celler hearings, before a congressional committee favorable to the antitrust precepts but lacking any maritime oversight responsibilities. In this instance the forum was the Joint House-Senate Economic Committee, then chaired by Senator Paul Douglas of Illinois.

*The Douglas Committee, 1963-1966.* In May of 1963, the Joint Economic Committee initiated what was termed an "investigation of the effects of ocean freight rates on the international balance of payments."<sup>98</sup> This investigation lasted until 1966 and resulted in two reports,<sup>99</sup> both of which contain statements apparently aimed at directing the Federal Maritime Commission to act in a manner totally in conflict with congressional intent as expressed in the 1961 amendments.

Picking up where Congressman Celler had left off, the Douglas Committee, in its 1965 Report, made clear its dissatisfaction with the majority view of Congress, stating "that only in particular circumstances, and only when strictly supervised by Government, should steamship lines be granted antitrust immunity."<sup>100</sup> This message was made abundantly clear in a further passage, several pages later, where the Report noted:

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<sup>96</sup> See text accompanying note 61 *supra*.

<sup>97</sup> See text accompanying note 74 *supra*.

<sup>98</sup> JOINT ECONOMIC COMM., DISCRIMINATORY OCEAN FREIGHT RATES AND THE BALANCE OF PAYMENTS, S. REP. NO. 1, 89th Cong., 1st Sess. 9 (1965) [hereinafter cited as S. REP. NO. 1].

<sup>99</sup> S. REP. NO. 1, *supra* note 98; JOINT ECONOMIC COMM., 89TH CONG., 2D SESS., DISCRIMINATORY OCEAN FREIGHT RATES AND THE BALANCE OF PAYMENTS (Comm. Print 1966).

<sup>100</sup> S. REP. NO. 1, *supra* note 98, at 22.

The Commission must consciously cease to approve agreements merely because nothing appears against them: it must determine to give its approval only where affirmative good cause appears in their form. *Application of a doctrine of presumptive illegality*, conformably with the underlying policy of the United States, *might do much to retard the spread of conference power*.<sup>101</sup>

In the face of Congress' very recent legislation that was expressly and diametrically opposed to this position, one may wonder what the Douglas Committee hoped to accomplish. The answer seems clear enough. In its hearings and its 1965 Report, the Committee, again following after the Celler Subcommittee, took some pains to castigate the newly-organized Federal Maritime Commission and its first Chairman for what the committee perceived to be the lax administration of the Shipping Act, following the 1961 amendments.<sup>102</sup>

The Joint Committee's objective, obviously enough, was to badger the Commission sufficiently so that the agency itself would become the instrument of subverting the congressional intent embodied in the very statute that the agency was established to administer. The Committee had already shown it had political, if not legislative, clout. At its behest, one Commission Chairman had already been removed.<sup>103</sup> In the vacuum created by the apparent lack of concern of the two maritime oversight committees, the House Merchant Marine and Fisheries Committee and the Senate Commerce Committee, the Commission got the message.

*The Commission's Response.* Prior to the 1961 legislation, section 15 had authorized the then-existing Federal Maritime Board to disapprove, cancel or modify any agreement which it found (a) to be unjustly discriminatory or unfair, (b) to operate to the detriment of the commerce of the United States, or (c) to be in violation of the Act.<sup>104</sup> Unless the Board found one or more of these conditions to exist, it was directed to approve agreements submitted to it.<sup>105</sup> The 1961 amendments added a fourth ground, namely "contrary to the public interest,"<sup>106</sup> to the existing three. Just what, if anything, this new phrase meant or was meant to add to the existing section 15 standards,<sup>107</sup>

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<sup>101</sup> *Id.* at 24 (emphasis added).

<sup>102</sup> See, e.g., S. REP. NO. 1, *supra* note 98, at 28 (discussing its successful efforts in having a replacement chairman designated by the President).

<sup>103</sup> *Id.*

<sup>104</sup> See note 30 and 45 and accompanying text *supra*.

<sup>105</sup> See note 31 and accompanying text *supra*.

<sup>106</sup> See note 70 and accompanying text *supra*.

<sup>107</sup> This includes section 14b standards, as well, since the new clause was also included within that section.

was—Senator Douglas' Joint Committee's subsequent view notwithstanding—anything but clear.

As described earlier in this article, the words had originally, in an early House draft, signified the addition of a new though unexplained, affirmative burden of establishing approvability which proponents of section 15 agreements and section 14b contract systems would be obliged to meet.<sup>108</sup> This language of affirmative burden, however, had been substantially softened by the time the bill left the House and was eliminated entirely in the Senate bill which ultimately became the law.<sup>109</sup> In the minds of most contemporary observers, the clause, in light of its form and placement in the statute as enacted, really added nothing of substance. By 1965, however, the Douglas Committee, reaching back in time, had resurrected the discarded concept of "affirmative burden of justification," and telegraphed that view to the Federal Maritime Commission.

The first clear indication of the impact of that instruction to impose an affirmative burden and presumption of illegality upon those seeking section 15 approval came to light in the Federal Maritime Commission's 1966 decision in the *Mediterranean Pools Investigation*.<sup>110</sup> The *Mediterranean Pools* proceeding was instituted on the Commission's own motion to investigate the initial and continued approval under section 15 of five separate agreements providing for "pooling."<sup>111</sup> The Hearing Examiner in his initial decision followed Commission precedent and approved all the involved agreements on the ground that there was no evidence of record that demonstrated that they were contrary to Shipping Act standards.

The Commission, however, in reviewing the initial decision, abandoned its position, which it consistently had held for fifty years, that agreements subject to section 15 were to be disapproved only when they were specifically found to operate in one of the ways set out in section 15, and expressly reversed the Examiner on that point.<sup>112</sup> For the first time, the Commission embraced the "presumptively unlawful" theory long urged, theretofore unsuccessfully, by the antitrust forces in

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<sup>108</sup> See text accompanying note 72 *supra*.

<sup>109</sup> See text accompanying note 74 *supra*.

<sup>110</sup> 9 Dec. Fed. Mar. Comm'n 264 (1966).

<sup>111</sup> As explained in the Commission's decision, pooling involves agreement by the conference members to place their freight revenues into a general fund. From the general fund each member receives a fixed percentage as set by the agreement. The member lines undertake to maintain specified minimum sailing requirements, and some agreements specify an amount of traffic allocated to each member with penalties for overcarriage or undercarriage. *Id.* at 266.

<sup>112</sup> *Id.* at 294.

Congress and the Antitrust Division of the Department of Justice. The Commission explained its new position as follows:

We think it now beyond dispute that "the public interest" within the meaning of Section 15 includes the national policy embodied in the anti-trust laws. . . .

. . . .  
. . . For presumptively, 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 combination 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.<sup>113</sup>

Notwithstanding this announcement of a significant departure from prior law, the Commission held that the proponents of the agreements in question had, with insignificant exceptions, adequately proved their case; hence the agreements were approved and no reason developed for raising any court challenge to the new standard. Such a challenge did come, however, more or less contemporaneously, in the series of appeals culminating in the Supreme Court's decision in *Federal Maritime Commission v. Aktiebolaget Svenska Amerika Linien*.<sup>114</sup>

The lengthy *Svenska* litigation began when the Commission, upon a complaint by the American Society of Travel Agents, commenced a general investigation into the practices and previously approved agreements of two passenger steamship conferences whose member lines provided passenger service across the Atlantic. The proceeding ultimately focused upon two specific provisions of the conferences' agreements: the first, a "tying rule" which prohibited travel agents who booked passage on the conference member lines from selling passage on non-member lines, and the second, the so-called "unanimity rule," which required unanimous action by the conference members before the maximum rate on travel agent commissions could be raised. Following extensive hearings and an initial decision, the Commission held that these two provisions relating to travel agents were contrary to section 15 and must be modified or eliminated.<sup>115</sup>

Upon review by the Court of Appeals for the District of Columbia Circuit, the case was remanded to the Commission. The court held that the Commission had failed to find, as a prerequisite to its order of disapproval, that the agreements had in fact operated in any one of the four ways which Congress had specified as statutory reasons for war-

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<sup>113</sup> *Id.* at 289-90.

<sup>114</sup> 390 U.S. 238 (1968).

<sup>115</sup> Steamship Conferences/Travel Agents Investigation, 7 Dec. Fed. Mar. Comm'n 737 (1967). This decision was not a unanimous one: two commissioners dissented and one dissented in part.



ranting disapproval under section 15.<sup>116</sup> Upon remand the Commission, again by a divided vote, after requesting and receiving briefs and holding an oral argument but not receiving new testimony or evidence, issued its second decision holding that the tying and unanimity rules were presumptively contrary to section 15, and accordingly, in the absence of facts demonstrating that they were required by a serious transportation need, must be disapproved.<sup>117</sup>

Once again judicial review was taken and once again the court of appeals found that the Commission had utterly failed to make any of the requisite findings.<sup>118</sup> This time, however, the court declined to remand, and simply reversed, in light of the Commission's demonstrated unwillingness to follow the court's instructions.<sup>119</sup>

Thus twice rebuffed by the Court of Appeals for the District of Columbia Circuit, the Commission, as with the *Carnation* experience but two years earlier, sought and found a friendlier ear at the Supreme Court level. The Supreme Court reinstated the Commission's decision and approved its application of an antitrust-based "positive benefit" standard, stating:

The Commission has formulated a rule that conference restraints which interfere with the policies of antitrust laws will be approved only if the conferences can "bring forth such facts as would demonstrate that the . . . rule was required by a serious transportation need, necessary to secure important public benefits or in furtherance of a valid regulatory purpose of the Shipping Act." In the present case, but for the partial immunity granted by the Act, both the tying and unanimity rules undoubtedly would be held illegal under the antitrust laws, and respondents failed to satisfy the Commission that the rules were necessary to further some legitimate interest. The Commission found this sufficient reason to disapprove the rules, but the Court of Appeals disagreed. . . .

Insofar as this holding rests on the absence of an explicit antitrust test among the "four ways set out in the section," we think the Court of Appeals was excessively formalistic in its approach to the Commission's findings. 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."

. . . The Commission's approach does not make the promise of anti-

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<sup>116</sup> *Aktiebolaget Svenska Amerika Linien v. Federal Maritime Comm'n*, 351 F.2d 756 (D.C. Cir. 1965).

<sup>117</sup> *Investigation of Passenger S.S. Confs., Regarding Travel Agents*, 10 Dec. Fed. Mar. Comm'n 27 (1966).

<sup>118</sup> *Aktiebolaget Svenska Amerika Linien v. Federal Maritime Comm'n*, 372 F.2d 932 (D.C. Cir. 1967), *rev'd*, 390 U.S. 238 (1968).

<sup>119</sup> 372 F.2d at 934.

trust immunity meaningless because a restraint that would violate the antitrust laws will still be approved whenever a sufficient justification for it exists. Nor does the Commission's test, by requiring the conference to come forward with a justification for the restraint, improperly shift the burden of proof. The Commission must of course adduce substantial evidence to support a finding under one of the four standards of § 15, but once 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. It is not unreasonable to require that a conference adopting a particular rule to govern its own affairs, for reasons best known to the conference itself, must come forward and explain to the Commission what those reasons are. We therefore hold that the antitrust test formulated by the Commission is an appropriate refinement of the statutory "public interest" standard.<sup>120</sup>

*Svenska* was certainly a sharp departure from pre-existing law and from what Congress had seemed quite clearly to be saying and doing in the "Bonner Act" amendments of 1961. But just how far the decision meant to go is at least ambiguous. In a sense it may be read merely as approving the Commission's requirement that the proponents of a section 15 agreement, or at any rate an agreement with antitrust implications,<sup>121</sup> "come forward and explain . . . what [the] reasons are"<sup>122</sup> for seeking such approval or, as in *Svenska* itself, continued approval. Moreover, on careful reading, it seems quite clear that the Supreme Court was not mandating the "antitrust standard" and the resultant reversed burden of proof; rather, *Svenska* simply held that the Commission was "not unreasonable" in adopting such a standard.<sup>123</sup>

Whatever the Supreme Court intended, the aftermath of *Svenska* leaves no doubt that the congressional mandate respecting the approvability of section 15 agreements has been utterly turned upside down. What started in *Svenska* as the Supreme Court's blessing of an agency-created informal rule of procedure now has been converted into a Supreme Court commandment of fundamental statutory imperative.

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<sup>120</sup> Federal Maritime Comm'n v. Aktiebolaget Svenska Amerika Linien, 390 U.S. 238, 243-46 (1968) (citations omitted).

<sup>121</sup> A great many agreements which are now required by the Commission to be filed separately for section 15 approval have no antitrust overtones at all. Moreover—and the authors have not seen this raised in subsequent cases or comments—*Svenska* involved the passenger cruise business, an industry quite commercially distinct from the liner cargo business.

<sup>122</sup> 390 U.S. at 246.

<sup>123</sup> Interestingly, subsequent to *Svenska* the Supreme Court has held that regulatory agencies are *not* to interpret the "public interest" standard in their enabling statutes as including the "public interest" evidenced in the enactment of a different statute. NAACP v. Federal Power Comm'n, 425 U.S. 662 (1976). This holding makes the Federal Maritime Commission's current legal concept of "antitrust administration" even more dubious.

While there were early indications of this development in the first few years following *Svenska*,<sup>124</sup> its culmination was reached in a 1976 Commission decision, *Canadian-American Working Arrangement/Canadian-American Discussion Agreement*,<sup>125</sup> generally known as the "CAWA-CADA" decision. In CAWA-CADA, several conferences had filed for continued Commission approval of limited-term agreements dealing with the stabilization of so-called "cross-border" Canadian-United States traffic. After the Commission, having received a variety of protests, set the matter for formal hearing, the conferences realized that the decisional process would not be completed before the Commission's earlier limited-term approval expired. The conferences therefore filed a petition, supported by a memorandum of justification, requesting interim continued approval, *pendente lite*, the outcome of the formal hearing. The Commission determined that the conferences had failed to demonstrate any "emergency conditions necessitating the approval of these agreements during the pendency of the investigation and hearing instituted,"<sup>126</sup> and thus allowed the agreements to lapse.

In the course of denying the conferences' request for interim approval, the Commission stated its perception of statutory verity as follows:

Approvals, disapprovals, and modifications of agreements submitted to the Commission are effected by an order of the Commission. Orders of the Commission must be supported by substantial evidence. The impact of the holding in the *Svenska* case is to require the Commission to disapprove a price-fixing agreement unless there is before the Commission substantial evidence to support a finding by the Commission that the agreement is justified. This is so, because the Commission is required to disapprove an agreement it finds to be contrary to the public interest, and, when presented with a price-fixing agreement, the Commission has before it, in the agreement itself, substantial evidence that the agreement is contrary to the public interest. The Commission is, therefore, required to so find, unless it has other evidence before it demonstrating a need for the agreement, which need outweighs the anti-competitive effect of that agreement. Thus the burden of going forward with the evidence, that is, the burden of adducing evidence which shows the need for the agreement, is on the proponents of the agreement.

There are several elements essential to any approval of a price-fixing agreement. 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

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<sup>124</sup> See, e.g., Agreements Nos. DC-38 & DC 38-1, 17 Dec. Fed. Mar. Comm'n 251 (1974); Agreement No. 9932, 16 Dec. Fed. Mar. Comm'n 293 (1972); United Stevedoring Co. v. Boston Shipping Ass'n, 16 Dec. Fed. Mar. Comm'n 7 (1972).

<sup>125</sup> FMC Docket No. 75-76, 16 SHIP. REG. REP. (P&F) 733 (Feb. 26, 1976).

<sup>126</sup> *Id.* at 750.

transportation need or an important public benefit, the agreement proffered for Commission approval must be *necessitated* by *that* serious transportation need or *necessary* to secure *that* important public benefit.<sup>127</sup>

The difficulty of the steamship industry's compliance with this new dictate and the corresponding wisdom of Congress in having refused to require it are apparent from the ostensibly explanatory second paragraph, quoted above. It may be going too far to say that the "explanation" is meaningless; it certainly is no exaggeration, however, to say that it affords little insight or meaningful assistance to the industry. Cast in terms such as these, the "antitrust presumption" is nearly impossible to overcome.

*CAWA-CADA*, of course, arose in a rather highly particularized factual setting as, indeed, did *Svenska*. Nevertheless, it today serves as the across-the-board standard, however impenetrable, for all section 15 filings.<sup>128</sup>

The "antitrust presumption of unapprovability" has one further fall-out effect. It has become the automatic talisman for those who would impede or destroy a functioning conference system, an open invitation to protracted, expensive, and aimless hearings, or threats of such hearings, that ultimately result in the talking to death and smothering of worthwhile conference advancements and innovations. Noteworthy, the Antitrust Division of the Department of Justice has discovered in this economic fact of life its most effective tool for the subversion of its ancient arch-foe, section 15 of the Shipping Act. Indeed, today the Antitrust Division is one of the most frequent and vocal participants in any Commission proceeding of any significant consequence.<sup>129</sup>

The combined impact of the *Carnation-Sabre* concept of retroactive application of antitrust penalties, coupled with the *Mediterranean Pools—Svenska—CAWA-CADA* concept of an antitrust presumption

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<sup>127</sup> *Id.* at 736-37 (emphasis in original) (citations omitted).

<sup>128</sup> The Commission is currently considering proposed regulations which would make the adoption of the *CAWA-CADA* standard official. See FMC Docket No. 76-63; 44 Fed. Reg. 36,077 (1979); 41 Fed. Reg. 51,622 (1976). These proposals may have remained pending for an unusually long time partly because of the indirect pressure of shipping bills introduced in Congress. See note 135 and accompanying text *infra*.

<sup>129</sup> Query, however, the propriety of the Department's advocacy program in light of its statutory duty to defend Commission decisions on review. See, e.g., 28 U.S.C. § 2348 (1976). This very point of the Department's—actually the Antitrust Division's—standing to challenge the Commission's decisions is now *sub judice* United States v. Federal Mar. Comm'n, No. 79-1299 (D.C. Cir., appeal docketed Mar. 19, 1979). Very recently the Commission, itself, has begun to take steps against wholesale Antitrust Division intervention in its proceedings. See, e.g., 44 Fed. Reg. 60,996 (Oct. 23, 1979) (new intervention rules). At the same time, the Commission continues to apply the "antitrust presumption."

of what is in "the public interest," have rendered Congress' promise of immunity from the antitrust laws for the conference system, through section 15, a near-total myth. Conferences literally act at their peril in conducting the very activities for which they were organized, *i.e.* "collective action," when the Commission and courts view any such conduct as an "anticompetitive combination" which is presumptively "contrary to the public interest." Thus carriers operating as members of approved shipping conferences must be prepared, prospectively and retrospectively alike, to "prove" that their actions at any given time are affirmatively "in the public interest." This, a difficult burden to meet at best, is a virtual impossibility if the regulators assume that "the public interest" is the very opposite of the nature and function of the conference system.<sup>130</sup>

Heightening and exacerbating the obvious difficulties with this two-fold loss of section 15's antitrust protections has been the increasing tendency of the Commission and its staff both to broaden by interpretation the types of agreements subject to section 15<sup>131</sup> and, concomitantly, to narrow the interpretation of those activities which were intended to be approved under the terms of an existing section 15 agreement. This is particularly acute with respect to conference agreements. Increasingly, conferences are subject to "second-guessing," that is, retroactive determinations by the Commission that some practice or other formerly regarded as routine is suddenly a new section 15 agreement, and therefore outside the scope of the literal wording of the conference basic document.<sup>132</sup> The examples on an informal staff level are, of course, far, far greater both in number and variety. As a natural result, and because the risk of such retroactive second-guessing is so great, many conferences have been filing an increasing number of

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<sup>130</sup> The extremes to which conference lines are exposed in this guessing game is underscored by the recent *nolo contendere* pleas entered following grand jury indictments accusing certain lines in the North Atlantic trades of straying from their "approved" agreements and not keeping accurate minutes. See J. COM., June 8, 1979, at 1 (report on United States v. Atlantic Container Lines, Crim. No. 79-00271, (D.C.D.C., filed 1979)).

<sup>131</sup> Examples include: transshipping agreements, agreements rationalizing inland transportation performed in foreign countries, contracts with self-policing bodies, agreements between foreign principals to enter the United States trades, container interchange agreements, collective bargaining agreements, and agreements to use dockside located equipment.

<sup>132</sup> See, *e.g.*, Cancellation of Consolidated Allowance Rule 20 Dec. Fed. Mar. Comm'n 858 (1978) (tariff rules granting consolidation allowances held non-cancellable); Disposition of Container Marine Lines, 11 Dec. Fed. Mar. Comm'n 476 (1968) (intermodal rates); Persian Gulf Outward Freight Conference, 10 Dec. Fed. Mar. Comm'n 61 (1966) (two-tier rates); North-Atlantic-Mediterranean Frt. Conf. and United Arab Co., 9 Dec. Fed. Mar. Comm'n 431 (1966) (so-called "requirements contracts"); PCEC — Port Equalization Rule, 7 Dec. Fed. Mar. Comm'n 623 (1963) (port equalization).

amendments to their basic conference agreements, seeking Commission sanction to engage in activities heretofore thought either fully authorized by section 15, or conversely, not even remotely subject to it.<sup>133</sup>

The history of less than two decades of administrative and judicial interpretation has led to a double-barreled subversion of clearly-expressed congressional intent of unprecedented proportions. The deletion of language that would have expressly made antitrust sanctions applicable to section 15 violations, in addition to the civil penalties already contained in that section, points to a result exactly opposite to that reached by the courts in *Carnation* and *Sabre*. In addition, the fully conscious removal of the affirmative-showing requirement of the "public interest" clause of section 15 also clearly contradicts the "anti-trust presumption" represented by the *Mediterranean Pools—Svenska—CAWA-CADA* trilogy.

### *The Failure of the Dual-Rate System*

As both House and Senate Reports recognized in formulating the 1961 amendments, and as the Alexander Committee had squarely recognized nearly fifty years earlier, the only means to a successful conference system is the assurance of an effective shipper tying device. Congress, striving for a balanced approach, felt it had created such a "fair and effective" loyalty device in section 14b of the 1961 amendments.<sup>134</sup> The results, however, have not borne out the promise, and, in supreme irony, the most focused point of the 1961 legislation has failed.

Although a discussion of the reasons for this failure are largely beyond the scope of this article, the fact of the failure is sufficiently widespread and notorious that in the two most recent sessions of Congress, respected congressional leaders, knowledgeable in maritime matters, have begun to suggest seriously its replacement with a forthrightly legalized deferred rebate system.<sup>135</sup> Beyond the several major substan-

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<sup>133</sup> Examples include conference office housekeeping rules, steamship agency contracts, "agreements" to discuss possible further trade-stabilizing mechanisms, and agreements to place a gate on a pier facility. On a particular day in May of 1977 the Commission's "Sunshine Meeting" agenda included section 15 filings for (a) a "husbanding agreement" between two steamship lines; (b) a "discussion agreement" between two terminal associations and (c) a "technological assistance agreement" between a port city and a terminal operator. 42 Fed. Reg. 23,223 (1977).

<sup>134</sup> S. REP. NO. 860, *supra* note 57, at 1.

<sup>135</sup> See, e.g., H.R. 11,422, 95th Cong., 2d Sess., 124 CONG. REC. H1909 (daily ed. Mar. 9, 1978) (to authorize the formation and implementation of closed conferences in U.S. foreign commerce); H.R. 9518, 95th Cong., 1st Sess., 123 CONG. REC. H10,877 (daily ed. Oct. 12, 1977) (to amend the Shipping Act to provide for a three-year period to reach a permanent solution of rebate practices). The bills, both introduced, with bipartisan support, by Rep. John Murphy, Chairman of the House Committee on Merchant Marine and Fisheries, failed to survive the 95th Congress. In the

tive deficiencies in the contract system as currently administered, if not perhaps, as actually enacted in section 14b, the antitrust-based "reversal of presumptions" has taken its toll here, just as with section 15. Congress's intention, in 1961, was clear. The Senate Committee report explained:

[A]ny contract which contains the eight safeguards expressly required by the bill makes out a prima facie case that the contract is not detrimental to our commerce, or contrary to our public interest, or unjustly discriminatory or unfair.<sup>136</sup>

Notwithstanding this seemingly unequivocal statement of congressional will, in less than two decades the Commission and the appellate courts have succeeded in turning it completely inside out, and, as with section 15, *Svenska* now rules supreme.

*Latin American/Pacific Coast Steamship Conference*<sup>137</sup> was the first major decision involving the extension of the antitrust concept of "public interest" and the resultant reversal of the congressionally-intended presumption of approvability to a section 14b situation. Although the proceedings had commenced some ten years earlier, the final agency decision was decided purely on *Svenska* and the *Svenska*-born test of "unwarranted invasion of the antitrust laws."<sup>138</sup> On appeal, the circuit court whose knuckles had been so severely rapped by the Supreme Court in *Svenska* refused to see any distinction between section 14b and section 15. The court affirmed the Commission, solidly on the precedent of *Svenska*.<sup>139</sup>

A 1977 order handed down by the Commission, conditionally disapproving an application of the North Atlantic Israel Eastbound Freight Conference for permission to institute a dual-rate contract system, is a good example of the extent to which the whole "antitrust presumption" concept now controls both this area of section 14b contracts and section 15.<sup>140</sup> The conference was comprised of two steamship lines, American Export Lines and Zim Israel Navigation Company, each providing regular service to Israel. No non-conference service ex-

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first session of the 96th Congress, bills providing for the substantial overhaul of the current administration of the Shipping Act have been introduced in both Houses. See notes 2 and 3 and accompanying text *supra*. Although legalization of the deferred-rate system has been eschewed in all such measures, the concept continues to emerge as a distinctly "thinkable thought."

<sup>136</sup> S. REP. NO. 860, *supra* note 57, at 23. See also note 72 and accompanying text *supra*.

<sup>137</sup> Agreement No. 8660—Latin American/Pacific Coast S.S. Conf., 12 Dec. Fed. Mar. Comm'n 149 (1969), *on rehearing*, 14 Dec. Fed. Mar. Comm'n 172 (1970).

<sup>138</sup> 12 Dec. Fed. Mar. Comm'n at 153.

<sup>139</sup> *Latin American/Pacific Coast S.S. Conf. v Federal Mar. Comm'n*, 465 F.2d 542 (D.C. Cir.), *cert. denied*, 409 U.S. 967 (1972).

<sup>140</sup> \_\_\_ Dec. Fed. Mar. Comm'n \_\_\_, *reprinted in F.M.C. Disapproves N. Atl. Israel Eastbound Freight Conference Exclusive Patronage Application*, CONG. INFO. BUREAU, May 6, 1977, at 20.

isted in the trade, nor had it for a number of years; however, one other steamship operator, the Puerto Rico Maritime Shipping Authority (PRMSA), notified the Commission by letter that it was thinking about instituting such a service. With extraordinary concern for this wholly conjectural "independent competitor," the Commission based its disapproval upon the following reasoning:

If the Conference implements an exclusive patronage contract system in the U.S. North Atlantic to Israel trade, a trade in which it has a virtual monopoly, it could effectively preclude PRMSA from independent[ly] competing in that trade. This is so because the level of service which PRMSA could possibly offer in that trade with one vessel could not serve the needs of shippers sufficiently to entice those shippers to ship a portion of their cargo aboard PRMSA's vessels a portion of the time, even at rates 30 percent below the noncontract rates of the Conference, because the remainder of the time those shippers would have to pay the non-contract rates of the conference, which would be 15 percent higher than the rates which the competitors of those shippers would enjoy by reason of signing the exclusive patronage contract of the Conference.

The facts alleged would not constitute the kind of severely adverse disruption in service to Israeli ports necessary to justify the anticompeti[tive] effects of an exclusive patronage contract system in that trade.

Consequently, . . . the Agreement is contrary to the public interest. As such, it must be disapproved.<sup>141</sup>

In light of Congress' frank recognition when it expressly authorized the contract system that its very purpose was precisely to allow conferences to eliminate nonconference competition,<sup>142</sup> the Commission's solicitude for a *non-existent* competitor seems remarkable indeed. Equally remarkable, in light of the Senate Committee's language,<sup>143</sup> is the totality of the shift of presumption and burden of proof.

## CONCLUSION

In 1961, Congress legislatively reversed an erroneous judicial interpretation in the *Isbrandtsen* case that had caused the "sudden disruption of international shipping's primary way of doing business."<sup>144</sup> Today, largely, although unintentionally, as a result of that 1961 legislative action, international shipping to and from the United States is at an even more perilous crossroads. It is again imperative that Congress act, not only to correct the judicial-administrative interpretations which

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<sup>141</sup> *Id.* at \_\_\_, CONG. INFO. BUREAU, May 6, 1977, at 22.

<sup>142</sup> See text accompanying notes 63 and 66 *supra*.

<sup>143</sup> See note 136 and accompanying text *supra*.

<sup>144</sup> S. REP. NO. 860, *supra* note 57, at 9.



have so thoroughly distorted the congressional intent clearly expressed in 1961, but to prescribe a shipping policy for the 1980's and beyond.

Within the past several years, Congress has considered a number of measures for amending the Shipping Act to strengthen the conference system, and has passed a few of them. It is only now, however, beginning to give sufficient attention to what we believe is the central, all-pervasive source of the system's malaise, namely the subordination of this internationally recognized system to parochial views of domestic antitrust dogma.<sup>145</sup>

In its legislative efforts, Congress should act on the premise that the "public interest" of the United States in international liner commerce is the policy of the Shipping Act, and not the policy of the Sherman and Clayton Acts. *Svenska* must be reversed. Consistent with this step, it seems apparent that Congress must also reaffirm its intent that violations of the Shipping Act shall carry the penalties and sanctions, and those only, that are set forth in the Shipping Act itself. Finally, a tying device that will assure stability and equal treatment of U.S. exporters and importers, as well as the survival of U.S. and friendly foreign liner companies, must be developed and sanctioned. Without these essential changes, piecemeal legislative reforms are certain of failure.

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<sup>145</sup> See, e.g., *Equal Access and Pooling Agreements in U.S. Liner Trades: Hearings on H.R. 11,862 Before the Subcomm. on Merchant Marine of the House Comm. on Merchant Marine and Fisheries*, 95th Cong., 2d Sess. (1978).