

**PACIFIC COAST COUNCIL OF CUSTOMS BROKERS & FREIGHT FORWARDERS ASSN.**

**ROBERT COLEMAN, CHAIRMAN**

**BEFORE THE  
JUDICIARY COMMITTEE, U.S. HOUSE OF REPRESENTATIVES**

**HR 1253, FAIR MARKET ANTITRUST IMMUNITY REFORM (FAIR) ACT OF 2001**

**JUNE 5, 2002**

Good morning, my name is Robert Coleman, President of Total Logistics Resource, and speaking as President of the Pacific Coast Council of Customs Brokers & Freight Forwarders Association. The PCC is the organization that represents the independent customs brokers, freight forwarders and NVOCC's along the West coast. We are comprised of five local associations: San Diego, Southern California, Northern California, Columbia River and Washington State. In total, we represent 8,000 individuals engaged in facilitating international trade along the nation's largest trade gateway.

I am also speaking today on behalf of the National Customs Brokers & Forwarders Association of America and the New York/New Jersey Foreign Freight Forwarders and Brokers Association. My biography and statement that neither my company nor these organizations received federal grants, contracts, or subcontracts, is attached to this statement. I am pleased to appear before this Committee again, for the first time under your Chairmanship, to endorse your legislation which would level the playing field, and help assist US manufacturers and farmers be competitive in the global marketplace, by eliminating ocean carrier antitrust immunity. This is not just theoretical. Your bill would have measurable benefits.

The global and US economy is weak, and the US dollar remains strong relative to foreign currencies; thus demand for US exports remains weak, and American consumer demand has not yet recovered. Further, the ability of US industry/agriculture to sell into foreign markets is severely constrained by the high value of the US dollar, making it difficult for US exporters to offer a competitive landed cost. To the extent that ocean transportation is a very significant component of the landed cost, it is incredibly important that US ocean transportation services be as competitive as possible. I'm not just talking about the price of those services, but their predictability and stability. We believe that HR 1251 if enacted, would go far to assure that ocean transportation services serve the best interest of the overall US economy.

**NEW DEVELOPMENTS**

Mr. Chairman, there are a number of developments which have occurred since the previous hearing on this legislation.

First, the Organization for Economic Cooperation and Development (OECD) issued a report, just this spring, which urges member countries to review the ocean carrier antitrust laws and seriously questions their value, specifically making the recommendation that the antitrust immunity be lifted.

Second, the European Community has continued to limit the exemption from antitrust laws for ocean carriers serving Europe. Ocean carriers can no longer collectively set rates for European inland cargo movements. In the past, one of the arguments for maintaining ocean carrier antitrust immunity here in the US was that we wanted to assure that our laws were compatible with those of our trading partners. Well, it appears that our trading partners are moving forward, without us, to protect their own manufacturing and agriculture industries and their consumers, from the collective ocean carrier pricing.

Third, the carrier's have once again abused the antitrust immunity for discriminatory purposes. The Transpacific Stabilization Agreement is a cooperative working agreement among 14 ocean carriers serving the inbound transpacific trades covering in excess of 80% of the capacity in the east bound trade, which is America's primary import trade lane. These carriers are protected by the antitrust immunity. Under cover of that protection, they have determined to arbitrarily discriminate in their service contract agreements between cargo owners and NVOCCs. They have done this by assessing NVOCCs two surcharges totaling more than \$300 a container while allowing cargo owners to sign similar service contracts without these surcharges. Some NVOCCs ship far higher volumes of containers than the cargo owners but they are still being assessed the two surcharges.

The National Customs Brokers and Freight Forwarders Association and International Association of NVOCCs, Inc. have formally petitioned the Federal Maritime Commission to investigate and take action against this collusive activity.

Fourth, we have seen here in this country what I would frankly consider a really poorly conceived scheme which demonstrates why the injuries to US industry and agriculture which collective carrier actions are contrary making can impose. Simply put, while this country is trying to work its way out of a recession, largely by producing and exporting more products, the ocean carriers developed a scheme which would punish any carrier which increased the amount of US refrigerated exports it would carry.

This spring we encountered an example of the threat to dependability of US ocean transportation services posed by collective activities of ocean carriers. The Westbound Transpacific Stabilization Agreement proposed to manipulate the availability of containers carrying refrigerated products to foreign markets. The export of refrigerated products such as beef, grapes and tree fruit, processed foods such as frozen french fries, is critical to sustaining our economy and bringing us out of the current recession. The ocean carriers which control most of the container space for US shipments destined for Asian markets formulated a scheme to reduce growth in export

capacity. Specifically, carriers which had invested in new equipment to more efficiently carry US exports would be penalized in the amount of \$1,000 per container for every container they carried in 2002 above the containers carried in 2001. Carriers which reduced their carriage of refrigerated exports would be financially rewarded. I know this sounds amazing, but its true. The WTSA's proposal was in fact submitted to the Federal Maritime Commission and I ask that it be included in the record of this hearing.

If we are to bring this country out of recession, we need to do it through international trade and by exporting MORE. I thought that in the current debate over Trade Promotion Authority, everybody, including those who voted against TPA believed that the US industry and agriculture should be able to export and sell MORE US products overseas. How does penalizing a carrier which invests in new equipment so that it can more effectively carry more US exports, serve the interests of this country? This is the kind of collective manipulation of the marketplace that we find so contrary to this country's interest. This collective carrier activity will not be possible once your legislation is enacted.

The Committee should recognize that I am representing organizations comprised overwhelmingly of small businesses. Our companies are almost all based here in the U.S. and owned by U.S. citizens. Our business is the facilitation of international trade, particularly for the U.S. importers and exporters who are themselves small businesses and do not have the volume or wherewithal to employ their own in-house export or import departments. We as freight forwarders serve essentially as the export department for most U.S. small business exporters. Transportation is a huge component of the landed cost of U.S. products sold abroad. We are the ones who negotiate on behalf of U.S. exporters for transportation arrangements which will allow them to sell competitively abroad. If we as forwarders and NVO's are not able to successfully negotiate or arrange international transportation, then many U.S. exporters are locked out of foreign markets.

## CARRIERS USE ANTITRUST IMMUNITY TO INJURE U.S. SMALL BUSINESS

We should *emphasize* that we *see* no *problem* with *continuing the antitrust* immunity accorded to port authorities and marine terminal operators. We appreciate the fact that your legislation distinguishes between port authorities and ocean carriers and would maintain the antitrust immunity for port authorities.

In contrast, antitrust immunity for ocean carriers is simply bad for the economy of the United States. We know, because we are engaged in facilitating virtually all import and export transactions to and from this country. I am not speaking about a hypothetical problem. There are many many instances which demonstrate that the ocean carriers can and do use their antitrust immunity in a manner which is detrimental to the U.S. economy, and to the thousands of small businesses I am representing here today.

## Collective Carrier Actions To Deny Freight Forwarding Services To Small U.S. Exporters

For example, utilizing their antitrust immunity, the ocean carriers during the early 1980's agreed upon and set rates of compensation for ocean freight forwarders at levels sufficiently low as to literally drive some companies out of the export business. The carriers' presumption, I take it, was that by cutting out the freight forwarder, the exporter would deal directly with the steamship line. The difficulty is that the small U.S. exporter does not have the capability of learning about ocean transportation, of determining the optimal routing, of deciding whether cargo should go by air or ocean, whether it should go by break bulk or containerized vessel, who should make arrangements for trucking and warehousing, how to handle documentation, and how to have the product delivered to the customer on the other end. And the small shipper who calls the conference carrier, may or may get a return phone call, particularly if the customer only has one or two containers to ship.

But customer service is not the first reason ocean carriers form conferences; the reason is clearly to increase revenue. By agreeing to reduce the compensation to the freight forwarder, there was no consideration of the impact on the U.S. exporter, particularly the small companies. In fact, it took an Act of Congress, vigorously opposed by the ocean carriers, to prevent carriers from collectively setting forwarder compensation rates below unreasonable levels. Keep in mind, that at no time did Congress say that an ocean carrier was required to pay a certain amount of compensation to a freight forwarder, Congress only said that the ocean carriers could not act collectively to set rates below reasonable levels. Even so, carriers fought hard against this provision.

## Collective Carrier Actions To Discriminate Against The Small U.S. Exporter/Importer

The ocean carriers have used their antitrust immunities to injure American business in ways that are quite subtle. For example, NVOCCs have experienced blatant discrimination, which hurt not only our own businesses, but the relatively smaller U.S. importers that we assist. NVOCCs acquire cargo space from the carriers and then resell portions to the small importer or exporter. These importers and exporters come to us, because the big steamship lines are not interested in selling 1/4 or even 1/8 of a container load. So we do that. If we did not, these small importers and exporters simply could not engage in international trade.

Relatively recently, the carriers, even though required by law to treat all shippers equally and not to discriminate, imposed an unwritten policy charging NVOCCs \$250 per container more than if they sold the container space to the cargo owner. In other words, a large importer, say a national discount chain, which imports numbers of container loads, could negotiate a low per-container price directly with the steamship lines. But the small bicycle shop which only imports enough bicycles to fill half a container requires the service of an NVOCC who, in many cases, offers the ocean

carriers cargo volumes matching - - or exceeding - - those of cargo owners. In this way, both the NVOCC and the small importer were penalized, discriminated against. Who pays for this? The small U.S. business who might lose the ability to import or export profitably, and her customer, the U.S. consumer, pays more. Not every bicycle is sold at chain stores, there are independent bike shops. They are small businesses. The many challenges they face , should not be, in my view, include discriminatory treatment by foreign ocean carriers who are allowed to collectively discriminate against them because Congress has given them immunity from U.S. antitrust law.

### Carriers Collectively Police And Restrict The Rates Paid By Small Shippers

As NVOCCs, we serve the small U.S. exporter and importer. We purchase transportation from an ocean carrier and resell it to the small importer and exporter who does not have the volume or the negotiating clout to interest or attract the attention of the ocean carrier itself. Under the Ocean Shipping Reform Act of 1998, ocean carriers are allowed to negotiate confidential transportation contracts with their shippers customers, and that includes contracts with the NVOCCs. However, we the NVOCC are not allowed to keep the terms of transportation that we are providing to our customers (again generally the smaller importer and exporter) confidential. So while the big shipper can keep its terms confidential, the freight rates paid by small U.S. business are exposed. Once exposed, they become more easily policed by the carrier cartels. All businesses should benefit from confidentiality.

### All Carrier Agreements Requiring Antitrust Immunity Injure U.S. Small Business

Let me note that the carriers do not like the term "cartel," so they use other terms such as "conferences" or "talking agreements" or "stabilization agreements." In fact the objective and impact of these arrangements is always the same: to share pricing information, agreeing on what services will be offered, ports served, commodities carried. But, they do not require antitrust immunity.

We have found that when carriers do not participate in these collective activities, they are much more willing to work with the small exporter and importer, and with the freight forwarder and NVOCC. But when they gather together in these collective arrangements, they become much more adverse to the interests of the small importer and exporter and to the freight forwarder and NVOCC who facilitates their cargo movements. In our view, all carriers should be "independent" just as all our NVOCCs and freight forwarders are independent, just as every domestic and international airline and trucking company, and every U.S. business is today.

Carriers can and do engage in efficiency and enhancing agreements, such as space sharing, slot charters, vessel sharing. We encourage these arrangements. They do not require antitrust immunity. They can be organized much as joint ventures are organized by companies in every other sector of the economy, which must adhere to U.S. antitrust laws.

## ANTITRUST IMMUNITY BENEFITS FOREIGN CARRIERS---SERVES NO U.S. INTEREST

It is devastating to recognize that we have given a complete exemption from U.S. antitrust laws to a handful of foreign companies who control virtually all of the U. S. waterborne import and export shipments. To be captive of foreign companies providing transportation services is one thing, but to grant them an exemption from the rules of competition which control all other components of the U.S. economy (except major league baseball) is quite another.

Antitrust immunity has done nothing to protect the U.S. flag merchant marine. Antitrust immunity has existed since 1916 and since that time the U.S. ocean liner industry has declined and in the past year has disappeared entirely. The people who will be testifying before you today on behalf of two former U.S. companies, are now employees of Dutch and Singapore companies, which together with a Canadian company now own what is left of the so called U.S. container fleet. Antitrust immunity did not save their companies.

Nor has antitrust immunity, which allows the carriers to jointly set prices, produced any stability. In fact the carriers may even say today that some rates are at an all time low. If that is the case, where is the stability provided by antitrust immunity? We can point out that antitrust immunity has made ocean transportation services less dependable, less predictable and less stable. Even with antitrust immunity many ocean carriers have gone out of business, others have consolidated, and as I have said, there are no U.S. companies left. And the carrier conferences use their antitrust immunity to drive rates through the ceiling, as they have done just recently and in the U.S./South America trade by suddenly announcing a \$1000 price increase for each container moving between the U.S. and South America.

In the future, as there are fewer companies left, their ability to act collusively, to jointly agree on transportation prices and services is made even easier. There are essentially no more (independent) carriers. Those independent carriers in the past were generally more favorably disposed to the *small U.S. importer and exporter and to the NVOCC and freight forwarder who facilitates their shipments.* But even those carriers are now part of these collective carrier groups.

Absent any benefits for U.S. carriers, there are simply no justifiable rationales for retaining antitrust immunity. Many of the arguments you will hear from carrier representatives today will be repeats of the same points made by carrier representatives in the trucking, rail, and aviation industries prior to their deregulation. Yet, each of those industries is far more vibrant, and serves their customers far better, now that they are exposed to the rigors of free market competition, than they were when protected by the dead hand of antitrust immunity. Like other capital intensive industries that survive--and thrive--in the free market, ocean shipping should be released from the failed economic dogmas of the last century.

## Carriers Act Without Restriction--The TSA Experience

History has shown that the law which grants antitrust immunity to the steamship lines has not provided the FMC with the authority or resources to adequately oversee the steamship activity.

While the ink was not yet dry on Ocean Shipping Reform Act (OSRA) the carriers in the Pacific trades, under the TransPacific Stabilization Agreement, engaged in patently anti-competitive abuses and discriminations against smaller shippers and NVOCCs that would in any other industry have resulted in civil and perhaps criminal enforcement actions. Ignoring contracts and tariff obligations, those carriers collusively acted to force shippers and NVOCCs to pay substantially higher rates or face the reality of having their cargo languish on the loading docks in the various Pacific ports. Yet, at the end of its lengthy investigation of the matter, the FMC elected not to proceed against the TSA or the individual carriers nor to take any formal action, other than to levy a nominal \$50,000 fine against the carriers for not having recorded what they were doing in their minutes. The result? This discriminatory activity against NVOCC's continues today.

As noted above, even as I speak, the TSA carriers are engaged in unfairly discriminatory actions against NVOCCs by imposing on them surcharges and rate increases that are not being imposed on cargo owners, some of whom ship even less volumes of cargo than the NVOCCs.

## CONCLUSION

Theoretically, we can do very nice business by keeping our mouths shut and simply booking cargo at the rates set by the carrier cartels, and collect our compensation. But our interests are that of the U.S. small importer and exporter. And we have seen, first hand, that the ocean cartels do not care about the small U.S. exporter and importer; in fact they take every opportunity to put them at a competitive disadvantage, even driving them out of business. Our industry is interested in *maximizing the import and export business opportunities of the U.S. small business* importer and exporter. It is precisely because the ocean carriers using their antitrust immunity act in a manner which is adverse to the interests of U.S. exporters and importers, that we feel compelled to speak today and are united in support of HR 1253, the FAIR Act.