STATEMENT OF MR. MICHAEL BERZON

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on behalf of

THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE

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Before the

MARITIME AND COAST GUARD SUBCOMMITTEE OF THE

COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE

UNITED STATES HOUSE OF REPRESENTATIVES

Regarding

THE FEDERAL MARITIME COMMISSION MANAGEMENT AND

REGULATION OF INTERNATIONAL SHIPPING

June 19, 2008

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Chairman Cummings, and members of the subcommittee, I am Michael Berzon, President of Mar-Log Inc., located in North East, Maryland. My company provides consulting services to shippers in the area of logistics and supply chain. Prior to establishing Mar-Log, I was employed by the E.I. DuPont de Nemours and Company for 27 years. At DuPont, I held a number of different positions involving the management of DuPont's maritime transportation services procurement and responsibility for marketing in Latin America.

I am here today representing The National Industrial Transportation League ("League"). The League is the nation's oldest and largest association of companies interested in transportation. The League's more than 600 members range from some of the largest companies in the nation to much smaller enterprises. The League's members primarily include companies that move their products through our country's transportation network and are engaged in the movement of goods both domestically and internationally. These members ship their products via all modes of transportation, including ocean transportation, and they export and import

products to and from points all over the world. League members also include carriers and transportation intermediaries that arrange transportation services. Therefore, our members are greatly affected by our nation's maritime policy. However, most of our members are customers of the ocean liner carriers.

I am the Chairman of the League's Ocean Transportation Committee, which is composed of League members concerned with transportation of goods via vessel carriers, including the ocean liner carriers that are regulated by the U.S. Federal Maritime Commission.

I. INTRODUCTION

The League is pleased to have been invited to present testimony on the regulation of international shipping and the oversight of that industry by the Federal Maritime Commission. Our organization is no stranger to this issue. We actively supported and participated in prior initiatives to reform U.S. regulation of international shipping that led to the adoption of the Shipping Act of 1984 and, more recently, the Ocean Shipping Reform Act of 1998 (OSRA). Our objectives then are no different than our objectives today—we support an international maritime system that is competitive, robust and delivers timely and efficient ocean transportation services to U.S. industries that rely on imports and exports. It has long been the policy of the League to support transportation policies which promote competition among carriers and the forces of supply and demand to determine the rates and charges assessed to the carriers' customers.

A. U.S. Businesses Require Competitive and Efficient International Ocean Transportation Services to Compete in Today's Global Marketplace

More than at any time in our history, American companies are required to compete in a global marketplace. Competition from China, India, and other regions of the world is fierce and the world-wide marketplace is more complex than that which existed when the 1984 reforms and 1998 reforms to our international shipping regulation were adopted. U.S. businesses that rely on

imports and exports strive continually to improve their competitive position. International ocean transportation costs and reliable services are important factors in their success.

The League strongly believes that the regulation of the U.S. ocean transportation industry must advance a competitive, market-driven system, in which the ocean liner carriers price their services individually based on the free market. OSRA's contracting reforms have assisted in stimulating competition among the foreign ocean liner carriers that serve the U.S. trades. However, the League believes that the continuation of antitrust immunity for ocean liner carriers remains a barrier to achieving an even more robust, competitive and efficient maritime industry. Accordingly, we believe it would be appropriate for the Congress to review the existing international shipping regulatory structure to determine if additional reforms would result in even greater benefits to U.S. businesses that use ocean liner carriers to transport their goods and materials around the world.

B. U.S. Shipping Regulation Must Be Responsive to Changing Market Conditions

The maritime industry is required to operate in a dynamic economic environment and needs the flexibility to adapt to changing market conditions. For most of the past decade, U.S. imports have far exceeded exports resulting, in some cases, in limited capacity on vessels during peak seasons for inbound cargo and added equipment repositioning costs for outbound cargo. More recently, with the decreased value of the U.S. dollar, among other factors, the demand for our exports has grown significantly, creating vessel capacity and equipment shortages which are preventing many exporters from getting their goods into foreign markets in a timely manner.[1] Just as market conditions fluctuate, creating both new opportunities and challenges for shippers

[1] Where's the Beef? Shortages of Containers, Space on Ships May Frustrate U.S. Exporters for Years, *American Shipper*, June 2008, at 80-85; Coming Up Empty, Exporters Have Problems Finding Containers for Their Cargo,

and carriers alike, the League believes that the regulation of the international shipping industry must evolve to ensure that it will meet, and is meeting, the pro-competitive policies of the free market economy in the U.S.

II. CHANGES SINCE THE PASSAGE OF OSRA WARRANT A REVIEW OF U.S. INTERNATIONAL SHIPPING REGULATION

The reforms brought forth by OSRA in 1998, most significantly, confidential contracting between shippers and individual ocean liner carriers, have resulted in commercial benefits for both carriers and shippers and have improved relations between them as well. The League strongly supported the passage of OSRA and is pleased to report that its members overwhelmingly engage in confidential contracts with the ocean liner carriers. Without question the contractual freedoms established by OSRA have worked well to the benefit of both shippers and carriers, as well as other industry stakeholders.

However, since OSRA's adoption nearly ten years ago changes in commercial practices and, in particular, the deregulation of the maritime industry in Europe, have led the League to conclude that now is an appropriate time for Congress to once again review the Shipping Act to determine whether additional reforms can bring about even further improvements to the competitiveness of our maritime system. The answer to that question will have profound consequences for those U.S. industries that depend on ocean shipping for the efficient movement of their goods.

A. Commercial Practices Have Changed Since the Passage of OSRA

Since OSRA was passed, business practices in the liner shipping industry have changed significantly. As noted, both shippers and carriers have enthusiastically embraced contracting on

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Journal of Commerce, January 21, 2008, at 14-15; Exporters' Beef, Weak Dollar, Full Vessels Send Perishables Shippers Scrambling, Commonwealth Business Media, Spring 2008, at 8-14.

an individual basis, and confidential service contracts are now the preferred business arrangement. The desire of both shippers and carriers to negotiate one-on-one relationships led quickly to the demise of many of the carrier liner conferences that once dominated the liner shipping industry and dictated the rates and service terms offered to shippers. Today, competitive forces play a more significant role in the establishment of liner shipping rates and charges.

Despite these benefits that have resulted from OSRA, ocean liner carriers still engage in collective discussions of supply and demand, and still establish freight rates and surcharges on a collective basis in the U.S. trades, primarily through "Discussion Agreements." Although any action taken as a result of collective discussions must be "voluntary" and not mandatory, one cannot always distinguish between the two. In general, General Rate Increases ("GRIs") and surcharges established by Discussion Agreements serve as benchmarks for service contract negotiations. However, some shippers may not have the leverage to negotiate discounts from the collectively established benchmarks. In addition, many shippers question why ocean liner carriers are not required to establish prices based on their individual costs like most other industries that operate on an international basis, but provide services to businesses within the United States. They further question whether there is a compelling need for the carriers to continue to be insulated from the antitrust laws, given the current structure and modern workings of the maritime industry, and whether even greater public benefits would result from removal of the immunity.

In addition, the level of surcharges assessed on ocean transportation movements appears to be particularly influenced by antitrust immunity. In most cases, surcharges that apply to a variety of activities or matters, such as fuel costs, currency adjustment, security compliance, and

documentation charges, among others, are established collectively by the carrier Discussion Agreements. The carriers then seek to apply these jointly established charges to shipments transported pursuant to both tariffs and contracts. Even if a shipper attempts to negotiate the level of the surcharge, the collectively set charges would likely have an influence on the actual charges assessed by the carrier, and that influence is likely to result in prices that are higher than might otherwise be established by negotiation in a purely competitive marketplace.

The carriers' collective activities are not limited to Discussion Agreements but rather extend to vessel sharing, slot-chartering, and other mechanisms to rationalize and promote the efficient utilization of the carriers' assets. The League strongly supports these kinds of efficiency-enhancing activities that do not involve the collective establishment of shipping rates and charges. However, we believe these arrangements should be examined to determine whether these activities would be permitted under the existing antitrust laws or whether a special grant of immunity is required in order for carriers to engage in such activities.

Moreover, the continuation of antitrust immunity has resulted in a regulatory scheme that requires oversight and monitoring of collectively-based actions, at a significant cost. Carrier Conference and Discussion Agreements must be filed and monitored by the FMC. In addition, tens of thousands of service contracts and hundreds of thousands of contract amendments entered into between shippers and carriers are filed electronically with the FMC annually, at a significant cost to the industry. These contracts are stored in an electronic database and the League understands that they are examined only when a complaint is made at the agency. The contracts also may be randomly reviewed when the agency evaluates market trends. However, it is highly questionable whether the practice of filing service contracts continues to make sense from a cost/benefit viewpoint.

While the maritime industry has evolved and prospered under OSRA's reforms, the League believes that even greater benefits could be achieved if competition among service providers is the only factor that determines shipping rates and charges. U.S. businesses that depend upon ocean transportation should not be required to pay higher rates or charges that are derived from collectively established benchmarks, unless there is a compelling need to permit the anticompetitive conduct. Many shippers doubt that such a compelling need exists in today's global market. Accordingly, the League believes that a review of the immunity provided under the Shipping Act should be conducted in order to examine whether any tangible benefits occur from the immunity and, if so, whether those benefits outweigh the costs and competitive detriments that also result from collective discussion by carriers of supply and demand, and the collective establishment of freight rates and surcharges.

B. Elimination of Antitrust Immunity in Europe

Another significant change that occurred since OSRA was enacted is that, on September 26, 2006, the European Union's Competitive Council agreed to repeal Regulation 4056/86 (also known as the "Liner Block Exemption"), which exempted Liner Shipping Conferences from the EU's antitrust laws.[2] The repeal is scheduled to take effect on October 17, 2008. This change by one of our nation's major trading partners to its regulation of international liner shipping is remarkable, since ocean liner carriers were authorized to fix international shipping prices in the European trades since the 1870s. The elimination of antitrust immunity in Europe means that ocean liner carriers will no longer be permitted to jointly establish freight rates or surcharges on shipments transported between Europe and the United States, and other nations.

Charlie McCreevy of the European Commission who was involved in the decision to

[2] Commission Regulation 1419/90, Repealing Regulation 4056, 86, 2006 O.J. (L269)1.

repeal the block exemption summarized the basis for the EC decision as follows: "The European shipping industry will benefit from the more competitive market that will result from the repeal of the block exemption and the EU economy as a whole stands to benefit from lower transport prices and more competitive exports."[3] In addition, the EC determined that "a thorough review of the industry carried out by the Commission has demonstrated that liner shipping is not unique as its cost structure does not differ substantially from that of other industries. There is therefore no evidence that the industry needs to be protected from competition."[4] Thus, the underlying rationale for the repeal of the block exemption in Europe was based on the determination that the ocean liner carriers do not require special protection from competition, as well as the desire in Europe to bring about substantial economic benefits that will result from the elimination of price fixing by the vessel operators. To assist the ocean liner carrier industry in transitioning to a new free-market environment, the EC is in the process of finalizing Guidelines on the application of the competition rules to maritime transport services.

The League believes that the action taken in Europe warrants a timely review of the antitrust immunity granted to ocean liner carriers under the Shipping Act. League members are interested in obtaining the same economic benefits that are expected to occur in Europe as a result of the repeal of the block exemption. Our members are concerned that European businesses may achieve a competitive advantage vis-à-vis U.S. businesses when competing in the global economy.

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[3] Press Release, European Commission, Competition: Commission Welcomes Council Agreement to End Exemption for Liner Shipping Conference, available at http://europa.eu/rapid/pressReleasesAction.do?reference=IP/06/1249&format =HTML&aged=1&language=EN&guiLanguage=en).

[4] Commission Regulation 1419/90, Repealing Regulation 4056, 86, 2006 O.J. (L269)1.

Furthermore, the elimination of antitrust immunity in Europe can be expected to have an impact on shipments moving between the United States and European nations. Indeed, the EC itself has commented that:

> The abolition of the exemption for liner conferences will affect EU and non-EU carriers operating on routes both to and from Europe. The market distorting effects of price fixing will be corrected, and lower prices for sea containers are likely to result.[5]

The approaching incompatibility in the United States and European legal regimes is likely to add costs and inefficiencies to the global supply chains of those companies shipping products in the trans-Atlantic trade, since additional administrative processes may be necessary to ensure compliance with two different legal systems. The removal of antitrust immunity in Europe raises questions as to the carriers' ability to collectively establish and assess GRIs and surcharges on shipments moving between the United States and EU countries. Although we believe that shipments transported between the United States and Europe will be required to comply with the competition laws in Europe, it is not perfectly clear how the ocean liner carriers intend to straddle the different regulatory systems that will exist in the United States and Europe. If the carriers are required to apply the European regime to shipments moving in the trans-Atlantic trade in order to avoid the risk of violating Europe's competition policies, the antitrust immunity granted under the U.S. Shipping Act may longer be used by the carriers. Therefore, this circumstance begs the question whether antitrust immunity should even be retained in the United States.

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[5] Press Release, European Commission, Competition: Commission Welcomes Council Agreement to End Exemption for Liner Shipping Conference, available at http://europa.eu/rapid/pressReleasesAction.do?reference=IP/06/1249&format=HTML&aged=1&language=EN&guiLanguage=en.

C. The Antitrust Modernization Commission Has Recommended a Review of Ocean Liner Carrier Antitrust Immunity

Yet another important change that has occurred since OSRA was passed is that the U.S. Antitrust Modernization Commission ("AMC") released a report on April 3, 2007, following a comprehensive 3-year study of the U.S. antitrust laws, in which the AMC made several recommendations, including that antitrust immunity afforded to ocean liner carriers under the Shipping Act "ha[s] outlived any utility [it] may have had and should be repealed."[6] The AMC held a hearing on antitrust immunity provided under the Shipping Act of 1984, on October 18, 2006, for which the League submitted written comments. In general, the League's comments recognized the more flexible and customized shipping arrangements that have occurred as a result of OSRA but we also informed the AMC that it would be prudent to evaluate whether even greater public benefits could be achieved if pricing for international shipping services were established solely by competition among the various individual ocean liner carriers and each of their customers.

The AMC rejected arguments from proponents of the antitrust exemption, finding that the international shipping industry is not so unique that it requires protection from competition when compared to other international industries that are required to make significant investments. In issuing its Report, the AMC specifically analyzed the antitrust exemption provided under the Shipping Act in the following manner:

> A related and equally questionable justification appears in support of the antitrust exemption under the Shipping Act. Although Congress substantially modified the Shipping Act in 1998 to allow individually negotiated rates, which has sharply reduced ocean carriers' use of jointly set "conference rates," proponents assert that an antitrust exemption remains necessary for other purposes. They maintain that carriers need an antitrust exemption to adopt more efficient practices jointly, such as agreements that allow

[6] Statement of Commissioner Jacobson, Joined by Commissioners Valentine and Warden, AMC Report at 422.

> ocean carriers to share certain equipment at ports in order to reduce congestion. Acknowledging the possibility that such agreements could withstand antitrust scrutiny, one witness maintained that the ocean carriers nevertheless would not attempt them absent the certainty that no antitrust liability would result. The witness emphasized the enormous investments of ocean carriers and the need to eliminate even the potential for antitrust liability.
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> However, this reasoning reduced to an argument that ocean carriers should not be subject to the same costs of doing business as other industries. These costs of doing business include managing firms' conduct to comply with antitrust, and many other, laws. *All kinds of businesses across the United States—including firms that make investments comparable to or greater than those of ocean carriers—comply with the antitrust laws as they plan their activities, including joint activities with competitors.* This is not hypothetical economic theory; it is how hundreds of thousands of firms do business every day. Because they must comply with the antitrust laws, these firms structure their activities to avoid anticompetitive effects. This promotes consumer welfare. *There does not appear to be anything unique about ocean carriers that would merit holding them to a lesser standard.*
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> Indeed, contrary to the asserted need for an immunity, ocean shipping provides a good example of an industry that now operates more efficiently with competition than without. An exhaustive survey of ocean shipping has found that:
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>> [t]he steepest declines in observed freight rates have coincided with a generalised decrease in conference power in the face of competition from strong independent operators and the implementation of competition-enhancing legislation in the United States trades . . . . Carriers have delivered better quality and more shipper-responsive services in recent years. This improvement in shipping services has not come about because of price fixing, but, rather, has accompanied a decline in conference power and an increase in competition.[7]

The findings of the AMC provide further support for Congress to initiate a review of the antitrust exemption set forth in the Shipping Act.

[7] AMC Report at 352 (citations omitted) (emphasis added).

D. Elimination of Antitrust Immunity Involving Other Modes of Transportation

In addition to the recent action taken by foreign governments to end antitrust immunity within the maritime industry, the United States Department of Transportation and the Surface Transportation Board have taken measures to end antitrust immunity in other transportation sectors. The United States Department of Transportation's Office of the Secretary issued a Final Order on March 30, 2007, terminating the International Air Transport Association's ("IATA's") antitrust immunity, which permitted joint activities and price-fixing by air carriers pursuant to conference agreements in the airline industry.[8] In May 2007, the Surface Transportation Board eliminated antitrust immunity for motor carrier rate bureaus, pursuant to which trucking companies could collectively establish freight rates for trucking services, and for the National Classification Committee, the trucking industry's classification regime.[9] These recent decisions from U.S. federal agencies with jurisdiction over air carriers and motor carriers demonstrate the lack of a need for continuation of antitrust exemptions in other transportation industries. These decisions at least raise the question as to whether the exemption is necessary in the maritime sector.

III. CONGRESS SHOULD UNDERTAKE A COMPREHENSIVE REVIEW OF THE SHIPPING ACT

Based on the above, the League believes that there are serious questions surrounding whether ocean liner carrier antitrust immunity should be continued in the United States. If antitrust immunity were to be eliminated, it is clear that other reforms would become necessary, since many aspects of the current regulatory regime are based on the need for government

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[8] International Air Transport Association Tariff Conference Proceeding, Office of the Secretary of Transportation, Docket No. OST-2006-25307, March 30, 2007.

[9] Motor Carrier Bureaus- Periodic Review Proceeding, STB Ex Parte No. 656, et al. (STB served May 7, 2007)(Periodic Review Proceeding), corrected (STB served May 16, 2007).

oversight of collective carrier activities undertaken under the umbrella of antitrust immunity (e.g. the filing of carrier agreements and enforcement of certain prohibited acts). In addition, today, the ocean transportation industry operates primarily under contractual agreements, which are modeled after proprietary relationships which exist in virtually all other U.S. industries, including other modes of transportation.

However, unlike other contracts involving other U.S. transportation modes, service contracts between ocean liner carriers and shippers are required to include certain essential terms and the contracts are filed confidentially with the Federal Maritime Commission ("FMC").[10] Thousands of contracts and contract amendments are filed with the FMC every year. However, the FMC does not have the authority to review and "approve" service contracts. Rather, contracts are required to be filed with the FMC to facilitate the agency's enforcement of certain prohibitions in the Shipping Act and to monitor joint carrier activities, to the extent that multiple carriers participate in a service contract under the protection of the antitrust immunity afforded under the Act.[11] The League understands that, in most cases, the FMC never reviews the contracts that are filed except when a complaint involving a particular contract is registered with the agency.

Moreover, carriers are still required to publish tariffs containing their rates and charges and such rates are enforceable under the Shipping Act.[12] The contract filing and tariff publication and enforcement requirements result in significant administrative costs to the carriers, which ultimately get passed down to shippers. The League believes that it would be appropriate for Congress to review the utility of these requirements, including whether they

[10] 46 U.S.C. § 40502(b)(1).
[11] 46 U.S.C. § 41104; 46 U.S.C. § 41105.
[12] 46 U.S.C. § 41104(1).

should be eliminated, as was previously done in the U.S. domestic motor and rail industries.

Accordingly, the League has identified a number of reforms to the Shipping Act that should be considered by Congress, as well as certain regulations that should be retained and modified or simply retained as they currently exist. These reforms and regulations include:

- Elimination of antitrust immunity for ocean liner carriers but the carriers may continue to perform joint activities (other than collectively establishing or discussing rates and charges) that enhance efficiencies, subject to guidelines issued by the U.S. Department of Justice.

- Elimination of all requirements relating to the filing with the FMC of ocean liner carrier agreements.

- Elimination of the requirement for ocean liner carriers to file service contracts (and for Non-Vessel-Operating Common carriers to file NVOCC Service Arrangements) with the FMC.

- Common carriage should be retained in a limited form, such that ocean liner carriers and NVOCCs should be obligated to provide service to shippers on reasonable request and shall provide to shippers copies of or access to their rates, charges and rules prior to performing the transportation service.

- Elimination of the "filed-rate doctrine" (i.e. enforcement of tariff or contract rates by the FMC) but retention of certain "prohibited acts", such as the restrictions against unreasonable refusals to deal and unreasonable practices by carriers.

- Licensing and bonding requirements for Ocean Transportation Intermediaries should be retained.

- The Controlled Carrier Act and the Foreign Shipping Practices Act should be retained.

- Mergers among ocean liner carriers should continue to be reviewed by the U.S. Department of Justice.

If the above reforms, or similar reforms, were to be adopted in whole or in part, the proper role and structure of the FMC would then need to be considered. However, at this time, the League is not advocating any specific change to the oversight agency. Moreover, the above listed reforms and regulations are intended to serve as a starting point for discussion within the Congress and among the major maritime industry stakeholders.

IV. CONCLUSION

For the foregoing reasons, the League believes that it would be appropriate for the Congress to review the Shipping Act to determine whether additional reforms would result in greater competition, efficiencies, and other benefits to U.S. businesses that depend on international ocean transportation services. Specifically, the League believes that the review should evaluate whether antitrust immunity should be continued in today's modern shipping environment, in which most shipping arrangements are governed by confidential contracts between ocean liner carriers and their customers. Moreover, the decision by Europe to revoke antitrust immunity and the recommendation of the AMC to review the U.S. exemption for the liner shipping industry are also compelling reasons for Congress to analyze whether antitrust immunity should also be repealed in the United States. Finally, the League asks the Congress to consider its proposals of possible reforms that the League believes would result in a more competitive, efficient, and robust maritime industry.

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I would be pleased to answer any questions from the subcommittee.