Before the

SUBCOMMITTEE ON COAST GUARD AND MARITIME TRANSPORTATION

Hearing on

FEDERAL MARITIME COMMISSION MANAGEMENT

and

REGULATION OF INTERNATIONAL SHIPPING

JUNE 19, 2008

Testimony of

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I INTRODUCTION

Mr. Chairman and distinguished members of the Subcommittee, I want to thank you for inviting me to testify on this important issue of the Federal Maritime Commission Management and Regulation of International Shipping. My name is Win Froelich, and I am the general counsel to the National Association of Waterfront Employers (NAWE).

NAWE is a not-for-profit trade association organized under section 501(c)(6) of the tax code. NAWE represents the United States private sector marine terminal operators (MTOs) and stevedores. NAWE member companies load and unload vessels at the vast majority of the general cargo and container terminals along the Great Lakes, East Coast, Gulf Coast, West Coast, Alaska, Hawaii, and the territories and commonwealths of the United States.

The ports of the United States handle approximately 15% of the U.S. Gross Domestic Product (GDP), and NAWE member companies handle the majority of this cargo. The national and world economies are dependent upon the efficient flow of commerce through NAWE member facilities.

My objective today with this written testimony is to provide the Subcommittee with background on the legal and factual structure of the U.S. maritime industry. I believe that it is important for the Committee to understand three facts:

1. The United States is a maritime nation dependent upon maritime commerce for survival.
2. The U.S. Constitution assigns responsibility for regulating the maritime commerce to the federal government exclusively, and removes regulatory power from states and local authorities.
3. Private sector marine terminal operators are increasingly being called upon to help solve public policy problems—congestion, pollution, security, safety—that will be difficult to solve without the antitrust immunity provided in federal law.

Let me address each of these points in order.

2 MARITIME COMMERCE

The United States is dependent upon maritime commerce for its survival. The starting point of this discussion should be geography. The United States has land connections with only two countries—Canada and Mexico—and has no direct land connections with Alaska, Hawaii, Puerto Rico and the territories. Furthermore, most of the states have no direct coastal outlet to world maritime commerce. Instead, most states are dependent on the ports in their sister states for access to world markets.

The U.S. is the world's principal maritime country with 20% of the world's maritime volume coming either to or from the U.S. Roughly 15% of the U.S. GDP—approximately $2.5 trillion in commerce—flows into or out of our ports. The 15% of commerce that flows through our ports only scratches the surface of the impact maritime commerce has on the U.S. economy. For each ton of maritime commerce that flows through the ports, scores of U.S. jobs are created in every sector of the economy: jobs that are dependent on imports and exports. I believe, but cannot point to a study to substantiate it, that more than half of the U.S. GDP is directly or indirectly dependent upon maritime commerce.

Much of this commerce now moves through containers. In 2006, U.S. maritime commerce required more than 27 million TEU containers. Cargo volume has grown 10% annually for most of the recent past, and there is no reason to believe that there will not be significant growth well into the future.

Fortunately, the U.S. has significant natural and man-made resources available to it to handle this maritime commerce. The U.S. has 25,000 miles of waterways and 1,000 harbor channels that contain more than 350 ports with more than 3,700 marine terminals. These marine terminals handle more than 65,000 port calls of vessels over 10,000 DTW (2006) and 110,000 commercial and recreational fishing vessels. One hundred thirty million passengers move by ferry each year, and there are more than five million cruise ship passengers.

While the U.S. has natural and man-made maritime resources, increasingly, the flow of maritime commerce is concentrated in a few "super ports." LA/Long Beach and New York/New Jersey are at the top of the list. Of the 27 million TEU containers that entered the U.S. in 2006, 14 million TEUs, or slightly over half, went through these two ports. More importantly, from an economic standpoint, the most valuable commerce tends to flow through these two ports. If you measure cargo by value instead of volume, roughly 5% of the GDP flows through LA/Long Beach and roughly 5% flows through New York/New Jersey. The remaining 5% flows through all the rest of the U.S. ports.

Most of the cargo flowing through a port—usually well over 66%—is going to or coming from states other than a port state. As mentioned earlier, most states today have no direct coastal outlet to the world's markets.

Let me give you a practical example of how this maritime commerce system works. On Friday, a 6,000 TEU vessel containing approximately $5 billion of commerce—food, clothing, auto parts, furniture and other essential goods—will arrive in LA/Long Beach. That vessel represents just 6,000 of the approximately 30 million TEU that will be transported this year.

That ship will be unloaded over the weekend, and by Monday the offloaded cargo will be enroute to various distribution centers across the nation. It takes approximately 60 trains each and every day, each train more than a mile long, plus tens of thousands of trucks to move cargo to and from LA/Long Beach. By the following Wednesday, that ship will be reloaded with billions of dollars of US exports and on its way to foreign ports.

Within one week, the cargo from that ship arriving Friday will be in the distribution centers of this nation. Within two weeks, the cargo will be on retail store shelves and in factories. The food, clothing, and other goods will be on our retail shelves in large and small towns across the country. The auto parts will be going into cars in assembly plants in Michigan, Tennessee, Alabama and other states. Some of the cargo arriving Friday will already have been sold two weeks from now, and the export goods that were loaded on that ship will have been unloaded in some distant port.

This is the modern just-in-time delivery system that is now the basis of the entire U.S. and world economy. The ships and marine terminals of today are the warehouses of yesterday. When the flow of maritime commerce stops, the U.S. and world economies stop. U.S. factories close and grocery shelves and retail stores start to empty within weeks of a disruption in the flow of maritime commerce.

Any disruption in the maritime commerce system has an immediate and measurable impact on the economy. The Nation saw this during the short lockout on the West Coast several years ago. The Nation had months of advance notice that a strike or lockout might occur. Many businesses tried to stockpile critical parts and supplies in anticipation of such a strike or lockout. Nonetheless, within a week of the lockout, plants started to close and goods started to disappear from store shelves.

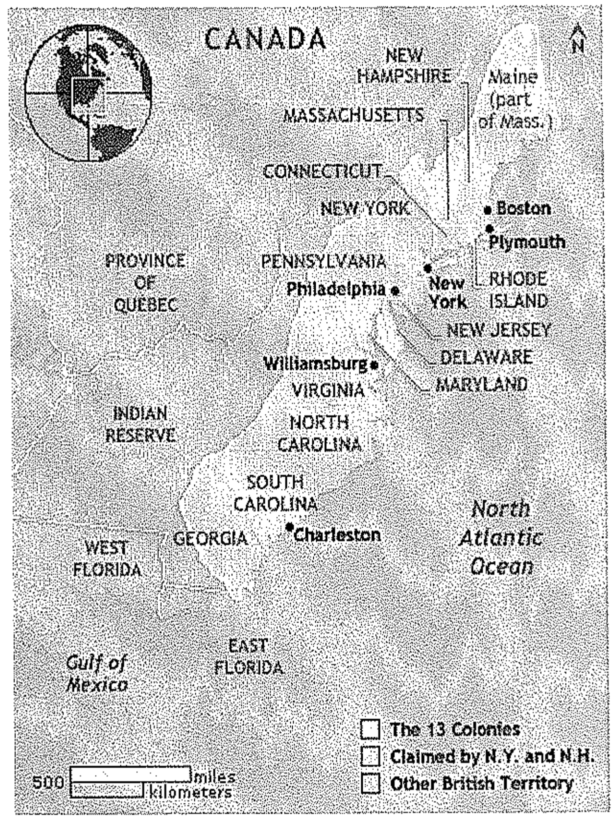
Furthermore, it takes a long time to recover from any disruption in the maritime commerce system. The Department of Transportation estimates that recovery from a one-day disruption takes one month. Recovery from a week-long disruption takes six months.

The maritime commerce system has to work, and it has to work smoothly. As the Committee considers changes to the Nation's laws governing maritime commerce, NAWE looks forward to working with the Committee to make sure that changes improve the reliability and efficiency of the system.

3 FEDERAL RESPONSIBILITY

The above example brings me to my second point which is that the regulation of maritime commerce is exclusively a federal responsibility. Let me again start with geography. The map below is of the thirteen original colonies at about the time the Constitution was adopted.

From its inception, the United States was a maritime nation. Most of the commerce with the world, and between the states, flowed over the navigable waters. Each of the original colonies had direct outlets to the sea to facilitate this commerce. The borders of the original colonies were frequently the major rivers and harbors of the Nation. Not surprisingly, the ports of the Nation were located on these harbors and rivers, and the major population centers were these port cities.



This geography placed each of the original thirteen colonies in a position to interfere with the maritime commerce of the other colonies; and interfere they did. Each of the original thirteen colonies attempted to negotiate its own deals and make its own laws concerning maritime commerce. Virginia for example attempted to require all vessels destined for the Port of Baltimore to first make a port call in Norfolk.

This lack of uniformity and constant interference between the colonies led to the Virginia Resolution on January 21, 1786:

> *Resolved*, That Edmund Randolph, James Madison, jun. Walter Jones, Saint George Tucker and Meriwether Smith, Esquires, be appointed commissioners, who, or any three of whom, shall meet such commissioners as may be appointed by the other States in the Union, at a time and place to be agreed on, to take into consideration the trade of the United States; to examine the relative situations and trade of the said States; to consider how far a uniform system in their commercial regulations may be necessary to their common interest and their permanent harmony; and to report to the several States, such an act relative to this great object, as, when unanimously ratified by them, will enable the United States in Congress, effectually to provide for the same.

The Virginia Resolution called for a meeting of the colonies. The meeting had one purpose, to centralize the control of maritime commerce. The Virginia Resolution led to the Annapolis Convention in September 1786. The Annapolis Convention led to the Philadelphia Convention in May 1787 where our Constitution was written. The Constitution was then ratified in September 1787.

The Constitution reflects the concern over federal regulation of maritime commerce. The Constitution is full of clauses concerning maritime commerce. These clauses can be divided into four categories:

Some clauses grant power to the federal government. Examples of this type of clause include:

- "The judicial Power shall extend . . . to all Cases of admiralty and maritime Jurisdiction," Art. III, § 2 (Admiralty Clause)
- "The Congress shall have power . . ."
- "To provide for the common defense," Act. I, § 8 cl. I
- "To regulate Commerce with foreign Nations, and among the several States," Art. I, § 8, cl. 3 (Commerce Clause)
- "To define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations," Art. I, § 8, cl. 10
- "To declare War, grant Letters of Marque and Reprisal, and Rules concerning Captures on Land and Water," Art. I, § 8, cl. 11
- "To provide and maintain a navy," Art. I, § 8, cl. 13
- "To make rules for the government and regulation of the land and naval forces," Art. I, § 8, cl. 14
- "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the Unites States, or in any Department or Officer thereof," Art. I, § 8, cl. 18

Some clauses restrict the power of the federal government. Examples of this type of clause include:

- "No tax or Duty shall be laid on Articles exported from any State," Art. I, § 9, cl. 5
- "No Preference shall be given by any regulation of Commerce or Revenue to the Ports of one State over those of another; nor shall Vessels bound to, or from, one State, be obligated to enter, clear, or pay Duties in another," Art. I, § 9, cl. 6

Some clauses restrict the power of the state and local governments. Examples of this type of clause include:

- The Admiralty Clause Non-Delegation Doctrine, Art. III, § 2
- Negative Commerce Clause, Art. I, § 8, cl. 3
- "No State shall enter into any Treaty, Alliance, or Confederation," Art. I, § 10, cl. I
- "No state shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing it's inspection laws: and the net produce of all duties and imposts, laid by any state on imports or exports, shall be for the use of the treasury of the United States; and all such laws shall be subject to the revision and control of the Congress," Art. I, § 10, cl. 2
- "No State shall, without the Consent of the Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compacted with another State , or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay," Art. I, § 10, cl. 3

Finally, the Supremacy Clause makes all of this federal maritime and commerce law the supreme law of the land, overriding any state or local laws that might conflict.

- "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding," Art. VI, § 2

The federal focus on maritime issues did not end with the adoption of the Constitution but continued with the first Congress. One of the first acts was the Judiciary Act of 1789, which created the federal courts and included the "saving to suitors" clause which is still part of the admiralty law of the United States. The principal reason for creating the lower federal courts was the need for federal courts to exercise admiralty jurisdiction. The new government also needed a funding mechanism, and, again, the first Congress turned to maritime commerce. The Revenue Cutter Service of 1790 established what is now the Coast Guard to enforce the maritime tariffs that provided the funding source for the new nation.

The new Supreme Court also immediately turned to maritime law issues. The early Supreme Court addressed maritime issues such as insurance for vessels and cargo (*Wallace v. Child and Styles*, 1 U.S. 7 (1763)), the admiralty jurisdiction of the United States (*Montgomery v. Henry*, 1 U.S. 49 (1780)), and prizes taken at high sea (*Talbot v. Commanders & Owners of Three Brigs*, 1 U.S. 95 (1784)).

The regulation of maritime matters by all three branches of the federal government has continued to this day, and it must continue into the future. As we saw mentioned earlier in this text, the reasons for giving power over maritime commerce to the federal government and removing it from the states, is even more compelling today. Most states today do not have direct outlets to the sea. Those non-coastal states must have as much say in how the maritime commerce system works as the coastal states do. Nebraska, South Dakota and Iowa can no more allow California to interfere with the flow of their grain to world markets than could Maryland allow Virginia to interfere with the flow of commerce to the Port of Baltimore back in the 1770s. Since the adoption of the Constitution, the regulation of maritime commerce has been exclusively a federal responsibility.

The loading and unloading of a vessel by MTOs and stevedores is a maritime activity and part of the federal regulatory responsibility to the exclusion of the states. *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917); *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149 (1920); *Washington v. W. C. Dawson & Co.*, 264 U.S. 219 (1924). Virtually every aspect of the work performed by NAWE members is regulated by federal, not state law. The industry's workers' compensation system is federal under the *Longshore and Harbor Workers' Compensation Act*, 33 U.S.C. §§ 901 *et seq.* (LHWCA). The industry's contracts for leasing land are federal contracts regulated by the Federal Maritime Commission (FMC) under *The Shipping Act of 1998*, 46 U.S.C. App. §§ 801 *et seq.* (*The Shipping Act*). The industry's customer contracts for loading and unloading vessels are federal contracts regulated by the FMC under *The Shipping Act*. The industry's tort liability for handling cargo is federal under the *Carriage of Goods by the Sea Act*, implementation codified at 46 U.S.C. §§ 1300, *et seq.* The industry's security is governed by federal law through the Maritime Transportation Security Act, 46 U.S.C. §§ 70101 *et seq.*, and other federal laws.

The same federal admiralty/maritime jurisdiction that gave the federal government authority to regulate every aspect of the MTO/stevedoring industry also protected the industry from conflicting and inconsistent state laws. *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917); *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149 (1920); *Washington v. W. C. Dawson & Co.*, 264 U.S. 219 (1924). While it probably goes too far to say that states have no role when it comes to maritime commerce, it is safe to say that the role of states is minimal at best. Any state regulation of maritime activities is unconstitutional if it:

1. Discriminates against or burdens the maritime commerce of the United States (U.S. Constitution, Article I, Section 8, Clause 3. *Healey v. Beer Institute, Inc.*, 491 U.S. 324, (1989); Hughes *v. Oklahoma*, 441 U.S. 332 (1979)).
2. Works a material prejudice to any characteristic feature of the general maritime law of the United States or interferes with the harmony or uniformity of the maritime law of the United States (U.S. Constitution, Article III, Section 2, Clause 1. *Southern Pac. Co. v. Jensen*, (244 U.S. 205 (1917); *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149 (1920); *Washington v. W. C. Dawson & Co.*, 264 U.S. 219 (1924)).
3. Lays imposts or duties on the maritime commerce of the United States in an amount that is not absolutely necessary for executing state inspection laws. (U.S. Constitution, Article I, Section 10, Clause 2).
4. Taxes the exports of any state (U.S. Constitution, Article I, Section 9, Clause 5).
5. Lays a duty on tonnage (U.S. Constitution, Article I, Section 10, Clause 3).
6. Imposes a tax or fee on the maritime commerce of the United States unless the tax or fee: (i) directly applies to activities with a substantial nexus to the state; (ii) is fairly apportioned between the maritime commerce of the United States and other entities in the state; (iii) does not discriminate against the maritime commerce of the United States when compared to other entities in the state; (iv) is fairly and directly related to the services provided by the state; (v) does not enhance the risk of multiple taxation of the maritime commerce of the United States; and (vi) does not impair federal uniformity in an area where federal uniformity is essential, unless such tax or fee has been expressly approved by Act of Congress. (U.S. Constitution Article I, Section 10, Clause 2. *Washington Rev. Dept. v. Stevedoring Assn.*, 435 U.S. 734 (1978); *Japan Line, LTD. v. County of Los Angeles*, 441 U.S. 434 (1979); *Oregon Waste Systems v. Environmental*, 511 U.S. 93 (1994)).

This list of constitutional restrictions that directly apply to state regulation of maritime commerce does not include a large number of other constitutional clauses that indirectly apply, e.g., due process, search and seizure and equal protection, and also does not include the countless number of additional statutory restrictions that may directly or indirectly restrict state authority.

There can be no doubt that Congress and the federal government have a constitutional obligation to protect maritime commerce from the interference of state and local governments. It is NAWE's position that the Congress has not done enough to fulfill its constitutional obligation to protect maritime commerce from state and local interference. It is interesting to contrast what this Committee has done for aviation versus maritime commerce. Aviation does not enjoy constitutional protection the way that maritime commerce does. However, when a state or local government takes any action that might interfere with aviation, Congress has established an administrative process for rapidly reviewing that state or local action. There is an officer of the United States, the FAA Administrator, who is responsible for ensuring that no state or local interference occurs. 49 U.S.C. § 40103 Sovereignty and Use of Airspace. No such federal official exists when it comes to maritime commerce.

NAWE respectfully requests that any revisions to *The Shipping Act* include the addition of a statutory provision similar to that contained in the *Federal Aviation Act*. At the very least, maritime commerce should be on the same footing as aviation commerce. NAWE looks forward to working with the Committee as it reviews the maritime commerce laws to further ensure that regulation of maritime commerce remains the exclusive domain of the federal government.

4 ANTITRUST IMMUNITY AND SOCIAL PROBLEMS

NAWE recognizes that this Committee will review the issue of antitrust immunity in light of the recent actions of the European Union. I have attached the NAWE submission to the Antitrust Modernization Commission, which reviews our position in great depth. Let me make a few points here. First, any review of the ocean common carrier immunity should be separate from that of MTOs. The environments in which carriers and MTOs operate are different. The Committee should note that its witnesses by and large are not calling for or addressing the antitrust immunity for MTOs. The legal and economic issues are different when it comes to carriers and MTOs and they must be considered separately.

Second, MTOs are increasingly being asked to solve public policy problems that are not directly within their control and do not lend themselves to market forces. An easy example is the move to truck traffic using night gates in LA/Long Beach. The public wanted more truck traffic to move at night to reduce congestion and pollution. MTOs have no direct contractual relationship with trucks and the customer demand was for the cargo to move during the day. If any MTO had acted unilaterally to force cargo to move at night, the marketplace would have shifted the cargo to a competitor. The only mechanism for moving the cargo to night gates was for all the MTOs to work together. Without the antitrust immunity in *The Shipping Act*, this change never would have occurred.

A second example is some of the cooperative efforts that MTOs have undertaken to improve security. Again, these efforts have involved sharing costs and imposing uniform obligations on the market place so that security is improved for all.

Again, NAWE looks forward to working with the Committee to address the issue of where antitrust immunity is appropriate in the maritime commerce system.

Mr. Chairman and members of the Committee, thank you for your kind attention.

NAWE

NATIONAL ASSOCIATION OF WATERFRONT EMPLOYERS

Submission to the Antitrust Modernization Commission On Behalf of the National Association of Waterfront Employers

1. INTRODUCTION

1.1. Summary of Arguments

The National Association of Waterfront Employers (NAWE) submits this paper to the Antitrust Modernization Commission (Commission) in support of retaining the limited antitrust immunity for the marine terminal operator (MTO) industry contained in *The Shipping Act of 1998*, 46 U.S.C. App. §§ 1701 *et seq.* (*The Shipping Act*). NAWE advances several arguments as to why the limited antitrust immunity should be retained for MTOs:

1. MTOs operate in a sea of antitrust immunity. NAWE members compete with, and operate in, a marketplace where virtually every participant enjoys some degree of antitrust immunity including state entities that operate MTOs, foreign "controlled carriers" (some of whom own and operate MTOs), ocean common carriers and organized labor. NAWE submits that it would be nonsensical to consider repealing the limited antitrust immunity under *The Shipping Act* for MTOs without also considering the other antitrust immunities from other statutory and judicial sources such as the state action doctrine, enjoyed by other participants in the marketplace.

2. Both the carriage of goods by ocean common carriers and the operation of ports are "natural monopolies" as that phrase is defined by economists. Any repeal of the limited antitrust immunity contained in *The Shipping Act* must be evaluated in light of these "natural monopolies" and the potential impact on the maritime commerce and other markets. NAWE submits that repealing the limited antitrust immunity under *The Shipping Act* would result in greater consolidation in the maritime commerce marketplace and, more importantly, less competition in other markets that are more important to American consumers.

3. The MTO market is as far from a "perfect market" as that phrase is used by economists. As a result, the MTO marketplace is not responsive to market forces in the same way that a "perfect market" would respond. The government response to this economic fact has been to heavily regulate the MTO marketplace at the federal level.

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4. Where antitrust immunity has been removed, there is little competition and cost of services is greater. The one area where the limited antitrust immunity in *The Shipping Act* does not apply is in the domestic trade between Hawaii, Alaska and the West Coast and Puerto Rico and the East Coast.

5. MTOs are being asked to solve problems that have nothing to do with meeting the needs of customers, such as increasing security, reducing pollution and reducing highway congestion. In many instances, these problems are not under the direct control of MTOs, are not subject to market forces and cannot be solved without port-wide, state-wide or coast-wide cooperation.

1.2. NAWE Background

NAWE is a not for profit, trade association organized under section 501(c)(6) of the tax code. NAWE represents the United States private sector marine terminal operators (MTOs) and stevedores. A marine terminal operator is a defined entity under *The Shipping Act:*

> (14) *marine terminal operator* means a person engaged in the United States in the business of furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier, or in connection with a common carrier and a water carrier subject to subchapter 11 of chapter 135 of title 49, United States Code.

The Shipping Act, 46 U.S.C. App. § 1701(14). *The Shipping Act* definition of MTO covers both private sector MTOs and public sector MTOs (port authorities) that are controlled by state governments, local governments and multi-state compacts.

NAWE member companies load and unload vessels at the vast majority of the general cargo and container terminals along the Great Lakes, East Coast, Gulf Coast, West Coast, Alaska, Hawaii, and territories and commonwealths of the United States. The ports of the United States handle approximately 15 percent of the United States gross domestic product and NAWE member companies handle the majority of this cargo. The national and world economies are dependent on the safe and efficient flow of commerce through NAWE facilities.

For example, cargo that is off loaded from a vessel in LA/Long Beach over the weekend may be in Chicago by Friday and on store shelves by the following Monday. If the cargo doesn't move efficiently, the store shelves start to become bare in a matter of days or weeks. The federal government has estimated that a one day shut down of the ports on either coast would take one month to get the system back to where it would have been without the shut down. A one week shut down on either coast would take six months to straighten out the cargo/logistics backup.

NAWE member companies are heavily regulated by the federal government through the admiralty/maritime jurisdiction and commerce powers of the federal government. The industry's workers' compensation law is federal under the *Longshore and Harbor Workers' Compensation Act*, 33 U.S.C. 901 *et seq.* (LHWCA). The industry's contracts for leasing land are federal contracts regulated by the Federal Maritime Commission (FMC) under *The Shipping Act*. The industry's customer contracts for loading and unloading vessels are federal contracts regulated by the FMC under *The Shipping Act*. The industry's tort liability for handling cargo is federal under the *Carriage of Goods by the Sea Act*, implementation codified at 46 U.S.C. 1300. The same federal admiralty/maritime jurisdiction that gave the federal government authority to regulate every aspect of the MTO/stevedoring industry also protected the industry from conflicting and inconsistent state laws. *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149 (1920).

1.3. Regulating Process Versus Outcomes

The Shipping Act granted MTOs limited antitrust immunity for certain activities when conducted in accordance with the requirements of *The Shipping Act*, 46 U.S.C. App. § 1706. In exchange, *The Shipping Act* gives the Federal Maritime Commission (FMC) the right to regulate outcomes. The FMC has the authority to review the terms and conditions of MTO agreements, even after those agreements have been performed, to determine if the terms and conditions conform to the requirements of *The Shipping Act*. The FMC can conduct such reviews on its own initiative or in response to a complaint from an interested person. This approach to the maritime commerce marketplace is the exact opposite of how most other markets are regulated in the U.S.

United States antitrust laws regulate the process of making business decisions, not the end result. Thus, a group of competitors who agree on price may have committed a crime, even if the agreed upon price were extremely low and arguably in the interest of consumers. On the other hand, a single market participant with a natural monopoly who charges "monopoly prices" (a Microsoft or pharmaceutical company, for example), acts lawfully as long as the process through which the monopoly was achieved is legal. Our antitrust laws guarantee individual consumers a fair process, but do not guarantee individual consumer goods or services at fair or reasonable prices. The underlying assumption is that as long as the process of setting terms and conditions of goods and services is fair, the marketplace will protect and benefit consumers.

The federal approach to the maritime commerce system has been different for more than 100 years. While *The Shipping Act* does heavily regulate and supervise the process through which carrier and MTO business decisions are made, *The Shipping Act* also regulates outcomes. Individual consumers are assured the availability of services on terms and conditions that are reasonable without discrimination between customers.

NAWE submits that this system of regulating maritime commerce is justified by the unique aspects of maritime commerce outlined below. As a bottom line, the current system provides more protection for consumers and assures that there are more competitors in the market place than would be the case if the limited antitrust immunity for MTOs were repealed.

2. MTOs OPERATE IN A SEA OF ANTITRUST IMMUNITY.

Any analysis of the MTO antitrust immunity must recognize that MTOs operate in a sea of antitrust immunity. Virtually every participant in the marine transportation system has some antitrust immunity from one or more legal sources. Those participants include the ocean common carriers, port authorities, MTOs and organized labor.

2.1. Ocean Common Carriers

As the Commission is well aware, the ocean common carriers have limited antitrust immunity in the United States under *The Shipping Act*. While NAWE will leave it to others to address the merits of ocean carrier immunity, the Commission should understand that some ocean common carriers are "controlled carriers." Under *The Shipping Act* a "controlled carrier" is an ocean common carrier that is directly or indirectly owned or controlled by a government. The current list of [foreign government] controlled carriers include:

1. American President Lines, Ltd and APL Co., Pte., controlled by the Republic of Singapore
2. Ceylon Shipping Corporation, controlled by the Democratic Socialist Republic of Sri Lanka
3. COSCO Container Lines Company, Limited controlled by the People's Republic of China
4. China Shipping Container Lines Co., Ltd., controlled by the People's Republic of China
5. China Shipping Container Lines (Hong Kong) Company, Ltd., controlled by the People's Republic of China
6. Compagnie Nationale Algerienne de Navigation, controlled by the People's Democratic Republic of Algeria
7. Sinotrans Container Lines Co., Ltd. (d/b/a Sinolines), controlled by the People's Republic of China
8. The Shipping Corporation of India Ltd., controlled by the Republic of India

Because commercial activity is an express exception to the *Foreign Sovereign Immunities Act of 1976* ("FSIA"), 28 U.S.C. § 1605(a)(2), in theory, U.S. antitrust laws could be applied to these ocean common carriers controlled by foreign governments. However, the Commission must recognize that this is both a practical and political impossibility. The

Commission should consider how the United States government might apply its antitrust laws to these [foreign government] controlled carriers.

For example, as both a practical and political matter does the U.S. really want to bring civil or criminal charges when two foreign government officials involved with two controlled carriers talk to each other? One can only speculate that such an application of United States law is more likely to be resolved by the State Department than by the Justice Department. Applying U.S. antitrust law in circumstances like these will never happen. Under such circumstances, *The Shipping Act* has two significant advantages over the antitrust laws:

First, *The Shipping Act* requires that minutes of such conversations along with any "agreements" reached must be filed with the Federal Maritime Commission (FMC) for review by the United States government.

Second, and perhaps more importantly, *The Shipping Act* allows the United States government to regulate the results of such conversations—i.e., the reasonableness of the terms and conditions of services of ocean common carriers that operate between United States ports and foreign ports regardless of whether those business practices are the result of individual decisions or collective decisions. Thus, the results are regulated independent of the process.

2.2. Port Authorities

U.S. port authorities are government entities that also have limited antitrust immunity. First, under *The Shipping Act*, when a government port authority either leases land to a private sector MTO or operates the port itself, that port authority is an MTO under *The Shipping Act* because the public port authority is furnishing wharfage, dock, warehouse, or other terminal facilities, in this case to a private sector MTO. Therefore, the public port authorities have limited antitrust immunity under *The Shipping Act*.

Second, under current antitrust law, many port authorities will qualify for state action antitrust immunity under the *Parker v. Brown*, 317 U.S. 341 (1943), line of cases. While we will not attempt to analyze how the federal antitrust laws would or could be applied to the multitude of local, state and multi-state players under the state action doctrine, it is safe to say that any simple repeal of *The Shipping Act* antitrust immunity would result in decades of litigation to sort out the effect on the public port authorities. It is also safe to say that any simple repeal of *The Shipping Act* would leave a major player in the maritime transportation system—the public port authorities—with antitrust immunity.

Third, under the Eleventh Amendment to the United States Constitution, many port authorities enjoy sovereign immunity. *Federal Maritime Commission v. South Carolina Ports Authority*, 535 U.S. 743 (2002). To the extent public port authorities have sovereign immunity today, this immunity would remain after any repeal of *The Shipping Act* antitrust immunity.

2.3. Marine Terminal Operators (MTOs)

Today, MTOs have limited antitrust immunity under *The Shipping Act* for conversation that occurs within a FMC approved discussion agreement. The subject matter of what can be discussed requires prior FMC approval, and the content of all discussions must be filed with the FMC. Any agreement that comes out of such discussions must also be filed with the FMC and published. Any agreement that is reached between MTOs is subject to challenge by the FMC on its own initiative and by any injured party on multiple grounds.

As noted above, MTOs in the U.S. are both privately owned and government owned. Some MTOs in the U.S. are operated by the state or local port authorities. For example, the Commonwealth of Virginia controls the Virginia Port Authority that operates the Port of Norfolk; the South Carolina State Ports Authority operates the Port of Charleston, etc. As noted above, simple repeal of *The Shipping Act* antitrust immunity would still leave these state port authorities with immunity under the state action doctrine and the Eleventh Amendment.

Furthermore, some MTOs are owned or controlled by [foreign government] "controlled carriers." While a simple repeal of *The Shipping Act* antitrust immunity would in all likelihood reach these MTOs, it is not clear that these foreign government owned/controlled MTOs are subject to the same market forces to which privately owned MTOs are subject. Furthermore, these vertically integrated—and in some cases, foreign government controlled MTOs—may be in the position to offer other benefits such as access to government owned ports in foreign countries.

Thus, the simple repeal of antitrust immunity for MTOs under *The Shipping Act* would leave significant competitors in the MTO marketplace with practical and legal antitrust immunity.

2.4. Organized Labor

Organized labor also has antitrust immunity that has both a statutory basis under the *Clayton Act of 1914* and a non-statutory basis though federal case law. For the purpose of this submission, the Commission should be aware that the MTO industry is the only U.S. industry under judicial compulsion to participate in multiemployer bargaining. Thus, many of the terms and conditions of employment are set coast-wide through the collective bargaining process. These terms and conditions of employment frequently have a direct impact on the terms and conditions of service that MTOs can offer their customers. In other words, some of the terms and conditions of service are agreed to and standardized through the collective bargaining process. It also should be noted that these collective bargaining agreements prohibit MTOs from competing on the largest single component of their costs—labor.

Therefore, even if the limited antitrust immunity for MTOs under *The Shipping Act* were repealed, MTOs would still collectively discuss many of the terms and conditions of services that they offer through the collective bargaining process.

3. MTOS OPERATE IN A "NATURAL MONOPOLY."

The maritime transportation system is different from most other U.S. industries in that it is a "natural monopoly." The phrase "natural monopoly" is used here in the economic context to mean that costs per unit of service provided continuously decrease for producers as volume increases. Both the carriage of goods at sea and the operation of ports are "natural monopolies."

3.1. Ocean Common Carriers are "Natural Monopolies."

The carriage of goods by ocean common carriers is a "natural monopoly." There is a reason why ocean common carriers are moving to larger and larger ships: it costs less to operate one larger vessel than it costs to operate two smaller vessels. For example, one study found that the cost of building one 12,000 twenty foot equivalent (TEU) vessel was 16% less than the cost of building two 6,200 TEU vessels and that fuel costs of operating a single 12,000 TEU vessel was17% less. Obviously, crew costs for the larger vessel would be less as well. Therefore, it is not surprising that ocean common carriers are increasingly moving to 8,000 TEU and larger vessels.

As large ocean common carriers move to larger vessels, their cost advantage over small and medium size ocean common carriers only increases. As cargo is consolidated onto larger vessels, the entry barriers for new market entries in a given trade route only increase. The bottom line is that for the foreseeable future, the cost of operating vessels for individual market participants will continue to decrease as cargo volume for that individual market participant increases—i.e., ocean common carriage is what economists call a "natural monopoly."

Not surprisingly, in today's market, the largest ocean common carrier has more cargo handling capacity than the second and third largest ocean common carriers combined. The ongoing consolidation is further evidence of the economies of scale in the industry.

A pure free market in ocean common carriers should result in a "race to the bottom of the cost curve." In other words, the ocean common carrier with the highest volume that can use the largest number of large capacity vessels will have the lowest costs and be in the best position to compete for additional business. The end result would be significant consolidation of the market. If the market were allowed to run its natural course, a pure free market confronted with this natural monopoly should ultimately lead to a handful of ocean common carriers.

From a political standpoint, the Commission should address the question of whether it is the foreign government controlled ocean common carriers or the privately owned ocean common carriers that would be in a better position to take advantage of the pure free market in maritime commerce and what the implications are for the United States.

In the current regulatory environment, the industry has used the limited antitrust immunity to address this economic reality while benefiting consumers. The industry has increasingly entered into load sharing agreements, especially among medium sized carriers. A load sharing agreement works by having several competing carriers enter into an agreement to jointly operate one or more large vessels. Each participant in the agreement is then responsible for selling and filling some percentage of the vessel's capacity.

With load sharing agreements, a smaller carrier that might only be able to sell 1000-2000 TEUs/week over a trade route can still enjoy the cost savings afforded by an 8,000 TEU vessel because other competitors are also selling capacity on that vessel. Consumers benefit from these load sharing agreements both in the short run and in the long run. In the short run, consumers have benefited because the load sharing agreements have increased the rate at which larger/lower cost vessels enter trade routes. In the long run, consumers will benefit because there are more carrier choices in the market place.

If *The Shipping Act* antitrust immunity were repealed, these load sharing/cost sharing agreements between competitors would be at risk. The end result would be further concentration of capacity in the industry.

3.2. Ports are "Natural Monopolies."

Ports/MTOs are also "natural monopolies." Cargo handling in the United States continues to become more and more concentrated into essentially two ports: (1) LA/Long Beach and (2) New York.[1] As mentioned, the roughly 15% of the U.S. GDP flows though the ports of the United States. Approximately one-third of the cargo by value (5% of the U.S. GDP) is handled by the Port of New York and a little over one-third of the cargo by value (5.5% of the U.S. GDP) is handled at the Port of LA/Long Beach. The remaining 30% of the cargo (4.5% of the U.S. GDP by value) is handled by the remaining 300+ U.S. ports.

The concentration of cargo handling capacity has continued to become more and more concentrated over the last 60 years because the ports are a "natural monopoly." As vessels get larger, the number of port calls actually falls, while the volume of cargo increases. A modern port requires deep water, high volume rail connections, high volume road connections, a large skilled work force, special cranes and other cargo handling equipment, warehouses and other cargo distribution capacity, etc. The public and private capital investment to efficiently operate a modern port is in the hundreds of billions of dollars.

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1 While the cargo handled has continued to increase in most of the ports of the United States, the relative percentage of cargo handled by LA/Long Beach and New York has increased relative to the other ports for most of the last fifty years.

But more importantly, the cost of moving cargo once this infrastructure is in place continues to drop as the volume handled increases. There is a reason why cargo is becoming more and more concentrated in the two large ports of the United States—cargo handling is a "natural monopoly."

3.3. Summary

It is in both the economic and security interests of the United States to try and maintain some diversity in both the ocean common carrier and port capacity of the United States. Fully applying the antitrust laws of the United States, i.e., moving to a pure free market system, will result in accelerating consolidation and concentration of assets in the maritime transportation system.

4. MTOS HAVE NO DIRECT RELATIONSHIP WITH THE ULTIMATE PAYER.

To understand how a pure free market might impact consumers, it is important to understand how maritime transportation services generally, and MTO services specifically, are contracted. The mechanism through which maritime cargo shipment is contracted can vary widely.

4.1. Stevedoring Versus MTO Services

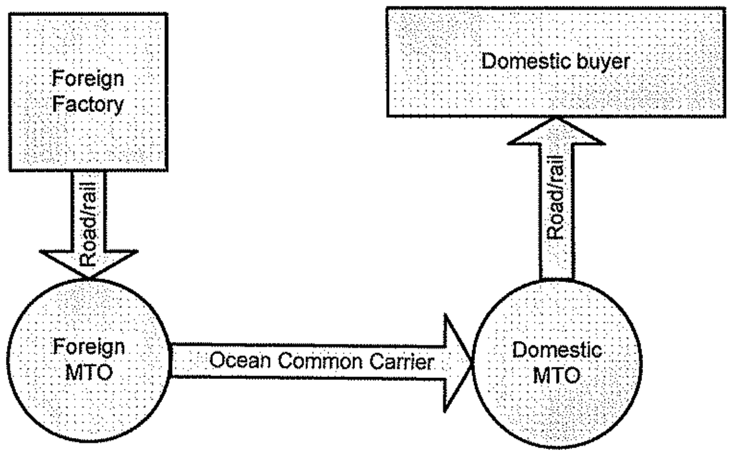
We need to distinguish between two types of services: (1) the stevedoring services which consist of loading and unloading the cargo from the vessel and (2) the MTO services which involve a wide range of services provided to the cargo while the cargo is on the terminal.

Stevedoring services are charged against every piece of cargo that is loaded and unloaded from a vessel. The stevedoring services are typically negotiated directly between the ocean common carrier and the MTO. The costs of the stevedoring services are typically included in the price charged by the ocean carrier.

The MTO services, on the other hand, are typically charged directly against the cargo. The MTO services can vary widely from one piece of cargo to another. Some cargo can leave a marine terminal without any MTO charges, while other cargo may be assessed MTO charges that are ten or more times the stevedoring charge. Examples of MTO services include storage of the cargo for periods longer than the grace period, moving cargo for the purposes of customs inspections, and hooking up refrigerated containers to power.

4.2. MTO Services Are Not Typically Negotiated

MTO services are charged against the cargo, meaning that the cargo is not released to the vessel or the motor carrier until the charges are paid. If sufficient time passes without the charges being paid, the cargo can be liquidated to recover the charges. The cargo is charged for MTO services because the MTO typically does not know or care who actually owns the cargo at the time. The reasons for this fact are many.



First, title to the cargo typically changes at some point during transit. Take for example a shipment of tennis shoes being purchased from a foreign shoe manufacturer by a U.S. retailer. Title to the cargo can change from the manufacturer to the retailer at the manufacturer's door, when the cargo is delivered to the foreign port, when the cargo is loaded on the vessel, when the cargo is received at the domestic port, when the cargo leaves the domestic port or when the cargo is delivered to the retailer's door (or somewhere in between).

Second, the party who contracts to ship the cargo of shoes (typically referred to as the "cargo interest") could either be the foreign manufacturer of the shoe or the domestic retailer who is buying the shoe.

Third, the cargo interest can either contract directly with the ocean common carrier or contract indirectly through an intermediary who arranges shipment. Larger corporations typically contract directly with the ocean carriers, but most entities that ship smaller quantities of cargo typically use third parties who contract with the ocean common carriers.

The end result is that under this system:

(1) the cargo interest typically does not know what MTOs will handle their cargo,

(2) the cargo interest virtually never has an opportunity to negotiate with an MTO before services have been provided, and

(3) the MTO typically does not know who contracted for services and does not know who owns the cargo at the time MTO services are provided.

4.3. MTO Charges are Far From a "Perfect Market."

When economists talk about markets, they preface the discussion by noting that they are talking about a theoretical "perfect market"—i.e.: (a) there is a large number of buyers; (b) there is a large number of sellers; (c) the quantity of goods bought by any individual is so small relative to the total quantity traded that individual trades leave the market unaffected; (d) the units of goods sold by different sellers are the same - the product is homogeneous; (e) there is perfect information, i.e., all buyers and sellers have complete information on the prices being asked and offered in other parts of the market; and (f) there is perfect freedom of entry to and exit from the market.

The MTO "marketplace" violates virtually every aspect of a theoretical "perfect market." Buyers not only do not have complete information and perfect freedom, they have none. Only the largest shippers—the Wal-Marts, Targets and Home Depots—exercise any control whatsoever over choosing and contracting for MTO services. As just noted, the vast majority of the cargo shippers do not know which MTO will be used, nor do they generally have control over which MTO will be used. There is no opportunity to negotiate for services before those services are provided, and there typically is no opportunity to reject services provided.

There simply is no analogy anywhere else in the economy to the way maritime cargo services operate. If the airline industry operated in an analogous manner, most customers would purchase their airline tickets from Expedia without ever knowing what airline they would be flying on or what airports they were going through. Then once they got to their destination, they might be required to pay hundreds or thousands of additional dollars on top of their ticket costs to the airport where they landed before they could leave the airport.

Current federal law recognizes the simple fact that the maritime transportation system is not, never has been, and probably never can be a "perfect market." Instead, the maritime transportation system is heavily regulated at the federal level. MTO and carrier charges are subject to challenge on a number of grounds even after the services have been provided.

5. IMPACT ON CONSUMERS

One of the goals of the current regulatory system for maritime transportation is to eliminate discrimination between shippers of goods. A pure free market in shipping costs might potentially result in some cost savings for some shippers, but would undoubtedly result in a greater difference between the shipping costs of large and smaller shippers.

An issue that should be considered by the Commission is whether increased competition in the maritime shipping market will result in less competition in other markets. To the extent the shipping cost differences between large and small shippers becomes greater, this difference in shipping costs could result in less competition in other markets, an unintended consequence.

NAWE

NATIONAL ASSOCIATION OF WATERFRONT EMPLOYERS

6. MTOS ARE BEING ASKED TO SOLVE PROBLEMS THAT HAVE NO DIRECT BENEFIT TO THE ULTIMATE CONSUMER.

The ports of this nation are a national resource, but some have argued they are a local nuisance as well. The goods and services that enter one of the nation's major ports support the economy of the entire nation. The goods that are dockside in LA/Long Beach on Monday may be in a Chicago distribution center on Friday and on a store shelf in Minnesota or Iowa by the weekend. Clearly, the entire nation benefits from our ports.

On the other hand, the road congestion, noise and other annoyances associated with a modern port are concentrated locally around the ports. This incongruence has increasingly led local communities to ask ports and MTOs to address these local concerns. MTOs are being asked to reduce road congestion, reduce noise, reduce pollution and increase security. It is important to recognize that these changes are not being driven by the marketplace, and in some cases, are opposed by market forces.

For example, market forces would tend to encourage that cargo be delivered from an MTO as quickly as possible, while security concerns may require that cargo be delayed for inspections.

MTOs have been addressing these concerns in innovative ways that benefit both the market place and the local community. In LA/Long Beach, the MTOs came together to require motor carriers to use RFID tags on their tractors. This requirement allowed MTOs to increase security by tying tractors and drivers to databases on business purposes. On the East Coast, MTOs are working together to reduce pollution emissions on a port wide basis. On the West Coast, MTOs "colluded" on terms and conditions of services, including establishing common fees, to coerce a significant percentage of the motor carrier traffic to evening hours, reducing both road congestion and pollution. None of these solutions to local problems would have been lawful under the antitrust laws of the United States.

7. CONCLUSIONS

For all the reasons stated above, NAWE requests that the Commission recommend that the limited antitrust immunity for MTOs contained in *The Shipping Act* be retained.