ANTITRUST LAW DEVELOPMENTS (FOURTH)

Volume II

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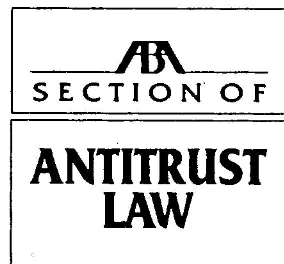

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4. *Ocean Shipping*

The activities of ocean common carriers in the foreign commerce of the United States, and the shipping conferences that many of the ocean shippers join, are regulated by the Federal Maritime Commission (FMC) pursuant to the Shipping Act of 1984 (1984 Act).[1582]

Section 7(a)(2) of the 1984 Act immunizes activity from the operation of the federal antitrust laws so long as it is undertaken pursuant to a filed agreement (or provided that the agreement is not required to be filed).[1583] Section 7(c)(2) precludes private parties from suing for treble damages or injunctive relief under the antitrust laws with respect to conduct prohibited by the 1984 Act.[1584] In place of

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1580. 115 S. Ct. at 823-24 (footnote omitted).

1581. *Id.* at 824 (quoting Brief for United States as Amicus Curiae).

1582. 46 U.S.C. app. §§ 1701-1721 (1994). An "ocean common carrier" is defined as "a vessel-operating common carrier." *Id.* § 1702(18). The 1984 Act defines a "common carrier" as a

> person holding itself out to the general public to provide transportation by water of passengers or cargo between the United States and a foreign country for compensation that (A) assumes responsibility for the transportation from the port or point of receipt to the port or point of destination, and (B) utilizes, for all or part of that transportation, a vessel operating on the high seas or the Great Lakes between a port in the United States and a port in a foreign country, except that the term does not include a common carrier engaged in ocean transportation by ferry boat, ocean tramp, or chemical parcel-tanker.

Id. § 1702(6). A "conference" is defined as "an association of ocean common carriers permitted, pursuant to an approved or effective agreement, to engage in concerted activity and to utilize a common tariff; but the term does not include a joint service, consortium, pooling, sailing, or transshipment arrangement." *Id.* § 1702(7).

1583. *Id.* § 1706(a)(2).

1584. *Id.* § 1706(c)(2). The prohibited acts are enumerated in § 1709. Other provisions grant immunity to agreements or activities relating to transportation within or between foreign countries, or relating to wharfage, dock, warehouse or other terminal facilities provided outside the United States. *Id.* § 1706(a)(3), (5).

private antitrust action, the 1984 Act establishes an administrative complaint process adjudicated by the FMC.[1585] The FMC is the exclusive forum for claims based on such prohibited conduct.[1586] The 1984 Act also prescribes a regulatory scheme for liner carriers in foreign trade.[1587]

a. REGULATION OF ENTRY AND EXIT

The FMC has no direct authority to regulate entry or exit. Carriers are free to commence liner operations in U.S. foreign commerce without agency approval, and they are assured of the right to join conferences (groups of carriers that propose, inter alia, rates and terms for shipping) by Section 5(b)(2) of the 1984 Act.[1588] That section requires that each conference agreement "provide reasonable and equal terms and conditions for admission and readmission to conference membership for any ocean common carrier willing to serve the particular trade or route."[1589] Further, pursuant to Section 5(b)(3), each conference agreement must also "permit any member to withdraw from conference membership upon reasonable notice without penalty."[1590] In furtherance of this open entry policy, FMC regulations require conference agreements to "[s]pecify the terms and conditions for admission, withdrawal, readmission and expulsion to or from membership in the agreement, including membership fees, refundable deposits, and other fees or charges associated with membership."[1591]

1585. 46 U.S.C. app. § 1710(a) (1994).

1586. *See, e.g.*, Seawinds Ltd. v. NedLloyd Lines, B.V., 80 Bankr. 181 (N.D. Cal. 1987), *aff'd*, 846 F.2d 586 (9th Cir.), *cert. denied*, 488 U.S. 891 (1988). When a liner service is engaged in both common carrier trades and non-common carrier trades, it may face parallel litigation before the FMC and federal district court. In American Ass'n of Cruise Passengers v. Cunard Line, 31 F.3d 1184 (D.C. Cir. 1994), a cruise line was sued in federal court for alleged violations of the 1984 Act arising out of common carriage and violations of the Clayton Act arising out of non-common carriage. All claims arose out of a common set of facts. The district court dismissed the entire case because the common carrier issues over which the FMC had exclusive jurisdiction were predominant. The court of appeals held that the claims asserting violations of the 1984 Act should be dismissed in favor of an FMC proceeding, but that the district court should nevertheless retain jurisdiction over the Clayton Act claims.

1587. The Shipping Act of 1984 gives the FMC authority to regulate only common carriers. 46 U.S.C. app. § 1702(6) (1994). The agency cannot regulate either contract carriers or ocean tramp carriers (i.e., carriers that do not hold themselves out to the general public on fixed routes or schedules). *See, e.g.*, Grace Line v. FMB, 280 F.2d 790 (2d Cir. 1960), *cert. denied*, 364 U.S. 933 (1961); Carrier Status of Containerships, Inc., 9 F.M.C. 56 (1965); Philip R. Consolo v. Grace Lines, 4 F.M.C. 293, 300 (1953). The Intercoastal Shipping Act, 46 U.S.C. app. §§ 843, 847 (1994), applied most provisions of the Shipping Act to intercoastal shipping (i.e., common and contract carriers by water that transport passengers or property between any two states of the United States by way of the Panama Canal), except for certain provisions with respect to rates, fares and charges, but the ICCTA repealed the Intercoastal Shipping Act effective October 1, 1996. 49 U.S.C.A. § 10101-16106 (West 1997).

1588. 46 U.S.C. app. § 1704(b)(2) (1994); *see also* 46 U.S.C. § 814 (agreement between carriers in domestic offshore commerce).

1589. 46 U.S.C. app. § 1704(b)(2) (1994); *see also* H.R. REP. NO. 98-600, at 33 (1984) (any conference agreement must include "provisions that require open membership"); H.R. REP. NO. 98-53, at 14 (1983) (the Act requires "that conference membership not be restricted").

1590. 46 U.S.C. app. § 1704(b)(3) (1994); H.R. REP. NO. 98-53, at 14 (1983); *see also* 46 U.S.C. app. § 814 (1994) (carriers in domestic offshore commerce).

1591. 46 C.F.R. § 572.501(b)(7) (1996); *see also id.* § 560.501(b) (domestic offshore commerce).

The open entry policy of ocean shipping regulation is subject to two qualifications. First, neither "subsidized ships"[1592] nor vessels operating under foreign flags may operate in the U.S. intercoastal trade.[1593] Second, an "ocean freight forwarder"[1594] is required to obtain a license from the FMC.[1595]

b. REGULATION OF RATES AND REBATES

Each common carrier or conference operating in the U.S. foreign commerce is required to file tariffs with the FMC[1596] showing all of its "rates, charges, classifications, rules and practices between all points or ports on its own route and on any through transportation route that has been established."[1597] However, the FMC has little authority to regulate the level of rates filed by common carriers and conferences in the foreign trades.[1598] No longer may the FMC disapprove any rate that it finds to be unreasonably high or so low as to be detrimental to the commerce

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1592. Subsidized ships are U.S. flag carriers that receive operating-differential subsidies from the U.S. Maritime Administration, an agency of the Department of Transportation. *See* 46 U.S.C. app. §§ 1171-1183a (1994).

1593. *Id.*

1594. The 1984 Act defines an "ocean freight forwarder" as a "person in the United States who dispatches shipments from the United States via common carriers, books or otherwise arranges for space for those shipments on behalf of shippers" and "processes the documentation or performs related activities incident to those shipments." *Id.* § 1702(19).

1595. *Id.* § 1718; *see* 46 C.F.R. § 510.3 (1996). The FMC will issue a license to an applicant that it determines to be qualified by experience and character to render forwarding services, and that furnishes a bond in a form and amount determined by the FMC to insure financial responsibility that is issued by a surety company found acceptable by the Secretary of the Treasury.

1596. 46 U.S.C. app. § 1707(a) (1994). This requirement applies equally to ocean common carriers and to non-vessel operating common carriers. The latter is defined in the 1984 Act as a carrier that does "not operate the vessels by which the ocean transportation is provided, and is a shipper in its relationship with an ocean common carrier." *Id.* § 1702(17). The 1984 Act exempts bulk cargo, forest products, recycled metal scrap, waste paper, and paper waste from any tariff filing requirement. *Id.* § 1707(a).

1597. *Id.* The Shipping Act of 1984 has resolved the dispute over whether the FMC has jurisdiction to grant antitrust immunity to collective action by ocean carriers concerning the entirety of intermodal rates. The legislative history of the Act makes it clear that if ocean carriers engage in such collective action pursuant to an agreement on file with the FMC, there is antitrust immunity. *See* H.R. CONF. REP. NO. 98-600, at 34, *reprinted in* 1984 U.S.C.C.A.N. 283, 290.

1598. Although the FMC does not affirmatively approve rates filed in ocean carrier tariffs, ratemaking reflected in tariffs may be protected from antitrust attack by the "filed rate" doctrine enunciated in Keogh v. Chicago & Northwestern Railway, 260 U.S. 156 (1922). The *Keogh* doctrine was reaffirmed by the Supreme Court in the context of motor carrier rates filed with the Interstate Commerce Commission in Square D Co. v. Niagara Frontier Tariff Bureau, 476 U.S. 409 (1986). The application of the *Keogh* doctrine in the ocean shipping context is unclear, but private parties are prohibited by the 1984 Act from recovering treble damages under the Clayton Act for conduct prohibited by the 1984 Act, including collective rate making pursuant to unfiled agreements. There are also some pre-1984 Act indications that the *Keogh* doctrine would appropriately apply. *See, e.g.*, United States Navigation Co. v. Cunard S.S. Co., 284 U.S. 474, 483 (1932), *cited in* Square D Co. v. Niagara Frontier Tariff Bureau, 760 F.2d 1347, 1356 (2d Cir. 1985), *aff'd*, 476 U.S. 409 (1986); *cf. In re* Ocean Shipping Antitrust Litig., 500 F. Supp. 1235, 1241 (S.D.N.Y. 1980) (finding that activities establishing rates filed as tariffs are not immune from antitrust laws).

of the United States.[1599] Now, it is limited to taking action against unfair or unjustly discriminatory rates[1600] or against any rebate, privilege, or concession that is not set forth in a tariff or service contract.[1601] Violations of these provisions are punishable by a civil penalty of up to $5,000 per day for each day the violation continues or, in the case of a violation "willfully and knowingly committed," a civil penalty of up to $25,000 per day, and suspension of tariffs filed with the FMC for up to twelve months.[1602] Continued operation while tariffs are suspended is punishable by penalties of up to $50,000 for each shipment.[1603]

Changes in existing tariff rates that result in decreased costs to shippers may become effective immediately, while new or initial rates or changes in existing rates that result in increased costs do not become effective for thirty days.[1604]

Ocean common carriers or conferences are also required to file service contracts.[1605] Service contracts contain rates and terms that have been negotiated with particular shippers.[1606] Service contracts offer shippers an alternative to tendering cargo under standard tariff terms. Although such contracts are filed confidentially with the FMC, their essential terms are required to be revealed to the public and made "available to all shippers similarly situated."[1607] These contracts must be predicated upon a specific volume commitment by the shipper; a commitment to tender a percentage of its total requirements is not sufficient.[1608]

Except as provided by treaty and in certain other specified circumstances, a carrier whose operating assets are controlled by a government under whose registry the vessels of the carrier operate (a controlled carrier) may not "maintain rates or charges

1599. The FMC did have such authority with regard to rates in the foreign commerce under the Shipping Act of 1916. 46 U.S.C. § 817(b)(5) (1982). However, this authority was revoked by the 1984 Act. *See* 46 U.S.C. app. §§ 1707, 1709 (1994).

1600. 46 U.S.C. app. § 1709(b)(6), (10) (1994).

1601. *Id.* § 1709(b)(1)-(4), (8).

1602. *Id.* § 1712(a), (b)(1). These civil penalties are covered by the Federal Civil Penalties Inflation Adjustment Act of 1990, Pub. L. No. 101-410, 104 Stat. 890, 28 U.S.C. § 2641 note, as amended by the Debt Collection Improvement Act of 1996, Pub. L. No. 104-134, § 31001(s). The statute requires the FMC to adjust the statutory penalty amounts for inflation. The adjustments were made by agency rule effective November 7, 1996. *See* 61 Fed. Reg. 52704 (1996) (to be codified at 46 C.F.R. § 506).

1603. *Id.* § 1712(b)(3).

1604. *Id.* § 1707(d). Service contracts may become effective upon filing with the FMC. 46 C.F.R. § 581.8(c) (1996).

1605. 46 U.S.C. app. § 1707(c). Non-vessel operating common carriers are not authorized to enter into service contracts with shippers. *Id.* § 1702(21). The same commodities exempt from tariff filing requirements also are exempt from service contract filing requirements. *Id.* § 1707(c).

1606. A "service contract" is defined as a contract between a shipper and an ocean common carrier or conference in which the shipper makes a commitment to provide a certain minimum quantity of cargo over a fixed time period, and the ocean common carrier or conference commits to a certain rate or rate schedule as well as a defined service level, such as assured space, transit time, port rotation, or similar service features; the contract may also specify provisions in the event of nonperformance on the part of either party.

1607. *Id.* § 1707(c).

1608. 46 C.F.R. § 581.5(a)(3)(v) (1996). Stating the minimum volume commitment as a percentage of total requirements would, in effect, turn the service contract into a "loyalty contract" which, for all intents and purposes, is prohibited for conferences. 46 U.S.C. app. § 1709(b)(9) (1994); *see also* 52 Fed. Reg. 23,989, 23,999 (1987); 49 Fed. Reg. 45,366 (1984).

in its tariffs filed with Commission that are below a level that is just and reasonable."[1609] The statute specifies the criteria that are to be applied in judging the reasonableness of controlled carrier rates, including whether they are "below a level which is fully compensatory to the controlled carrier based upon that carrier's actual costs or upon its constructive costs [as defined]."[1610] In the absence of special FMC permission, controlled carrier rates may not be effective until thirty days after filing.[1611] If a controlled carrier's rates appear to be unreasonable, the Commission may issue an order to show cause why the suspect rates should not be disapproved and, pending resolution of the issue, may suspend the proposed rates for up to 180 days.[1612] FMC orders of suspension and disapproval are subject to presidential approval.[1613]

c. REGULATION OF AGREEMENTS

The Shipping Act of 1984 grants the FMC authority to regulate the making and carrying out of a wide variety of agreements in the foreign commerce of the United States that affect competition in the ocean shipping industry. Section 5(a) of the 1984 Act requires that various agreements by or among ocean common carriers, agreements among marine terminal operators, and agreements among one or more marine terminal operators and one or more ocean common carriers be filed with the FMC.[1614] In particular, the agreements subject to this filing requirement include agreements among ocean common carriers to:

> (1) discuss, fix, or regulate transportation rates, including through rates, cargo space accommodations, and other conditions of service;
> (2) pool or apportion traffic, revenues, earnings, or losses;
> (3) allot ports or restrict or otherwise regulate the number and character of sailings between ports;
> (4) limit or regulate the volume or character of cargo or passenger traffic to be carried;
> (5) engage in exclusive, preferential, or cooperative working arrangements among themselves or with one or more marine terminal operators or non-vessel-operating common carriers;
> (6) control, regulate, or prevent competition in international ocean transportation; and
> (7) regulate or prohibit their use of service contracts.[1615]

Similarly, agreements among marine terminal operators to "(1) discuss, fix, or regulate rates or other conditions of service; and (2) engage in exclusive, preferential, or cooperative working arrangements" must be filed.[1616]

There are, however, two general exceptions to the filing requirement for the agreements described above. First, "agreements related to transportation to be

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1609. 46 U.S.C. app. § 1708(a) (1994).
1610. *Id.* § 1708(b)(1).
1611. *Id.* § 1708(c).
1612. *Id.* § 1708(d).
1613. *Id.* § 1708(e).
1614. *Id.* § 1704(a).
1615. *Id.* § 1703(a).
1616. *Id.* § 1703(b).

performed within or between foreign countries" need not be filed with the FMC.[1617] Second, an agreement to establish, operate, or maintain a marine terminal in the United States is not subject to filing.[1618]

Moreover, pursuant to Section 16 of the 1984 Act, the FMC is authorized to "exempt . . . any class of agreements between persons subject to this [Act] or any specified activity of those persons from any requirement of this [Act]."[1619] The Supreme Court has acknowledged the FMC's authority "to determine, after appropriate administrative proceedings, that some types or classes of agreements . . . are of such a *de minimis* or routine character as not to require formal filing."[1620] The FMC has exercised its authority to exempt from any filing requirement husbanding agreements,[1621] agency agreements,[1622] equipment interchange agreements,[1623] and agreements between or among wholly-owned subsidiaries and/or their parent.[1624]

For those agreements that are not of a de minimis nature and have not been exempted, filing with and processing by the FMC is required before implementation. However, unlike the approval process that had applied to agreements under the regulatory scheme of the Shipping Act of 1916 (1916 Act), an agreement filed with the FMC under the provisions of the 1984 Act automatically becomes effective unless the FMC acts to prevent or retard its effectiveness.[1625] Only in very few circumstances may the FMC prevent the effectiveness of an agreement. First, the

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1617. *Id.* § 1704(a). There has been considerable uncertainty and dispute as to whether, even though such "foreign-to-foreign" agreements are not required to be filed under § 5(a), they may be filed voluntarily and thereby receive antitrust immunity under § 7(a)(1). On December 8, 1987, the FMC issued a Notice of Proposed Rulemaking that would have explicitly permitted voluntary filing (and immunity) of foreign-to-foreign agreements "where the parties to the agreement deem it to have a direct, substantial and reasonably foreseeable effect on the commerce of the United States." 52 Fed. Reg. 46,501, 46,505 (1987). Section 7(a)(3) of the Act excludes agreements having such effects from its general antitrust immunity for foreign-to-foreign agreements. However, the FMC subsequently withdrew the proposed rule, concluding that the agency was "without jurisdiction to regulate agreements among ocean carriers regarding foreign-to-foreign transportation" even if voluntarily filed. 53 Fed. Reg. 50,264, 50,270 (1988). That ruling was ultimately affirmed in Transpacific Westbound Rate Agreement v. FMC, 951 F.2d 950 (9th Cir. 1991).

1618. 46 U.S.C. app. § 1704(a) (1994). While such an agreement need not be filed, it also enjoys no antitrust immunity.

1619. *Id.* § 1715. The FMC may grant such an exemption if it finds that the exemption will not "substantially impair effective regulation by the Commission, be unjustly discriminatory, result in a substantial reduction in competition, or be detrimental to commerce." *Id.*

1620. Volkswagenwerk v. FMC, 390 U.S. 261, 276 (1968). In *Volkswagenwerk*, the Supreme Court observed that an agreement "levying $29,000,000 over five years, binding all principal [common] carriers [by water], stevedoring contractors, and terminal operators on the Pacific Coast, and necessarily resulting in substantially increased stevedoring and terminal charges—was neither *de minimis* or routine" and held that such an agreement was required to be filed under the 1984 Act. *Id.* at 277; *see also* Sea-Land Serv. v. FMC, 653 F.2d 544, 551 n.20 (D.C. Cir. 1981).

1621. 46 C.F.R. § 572.303 (1996).

1622. *Id.* § 572.304.

1623. *Id.* § 572.305.

1624. *Id.* § 572.308. Nonexclusive transshipment agreements need not be filed with the FMC if certain conditions and tariff filing obligations are satisfied. *Id.* § 572.306. Marine terminal agreements must be filed with the FMC but are exempt from any waiting period requirements provided for in § 6 of the 1984 Act, 46 U.S.C. app. § 1705 (1994). *See* 46 C.F.R. § 572.307 (1996).

1625. 46 U.S.C. app. § 1705(c) (1994).

FMC can reject any agreement that, after preliminary review, it finds does not satisfy certain filing requirements.[1626] These filing requirements include a right of independent action for any member of a conference agreement and a right of independent action for each conference in an interconference agreement.[1627] Further, the FMC may seek an injunction to prevent the operation of an agreement that it determines is likely, by a reduction in competition, to produce an unreasonable reduction in transportation service or an unreasonable increase in transportation cost.[1628] In such a suit, the burden of proof is on the FMC.[1629] Finally, the FMC may delay the effectiveness of an agreement by a request for more information.[1630]

Generally, unless rejected by the FMC, an agreement becomes automatically effective on the forty-fifth day after filing or on the thirtieth day after notice of the filing is published in the *Federal Register*, whichever is later.[1631] If additional information is requested, however, the agreement becomes effective forty-five days after such information is received by the FMC.[1632]

The 1984 Act eliminated the widespread confusion with regard to the scope of the antitrust immunity under the 1916 Act. A Senate report on an early version of the 1984 Act described the state of antitrust immunity under the 1916 Act and court decisions construing it as follows:

> The margins of acceptable conduct have been unclear and the protection of the antitrust immunity granted by the Commission tenuous. The chilling effect, the uncertainties, and the inefficiencies forced by antitrust exposure have plagued carriers of all flags serving our foreign trade.[1633]

The limited antitrust immunity afforded by the 1916 Shipping Act[1634] was

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1626. *Id.* § 1705(b).

1627. *Id.* § 1704(c).

1628. *Id.* § 1705(g); *see, e.g.*, United States v. Universal Shippers Ass'n, 61 Fed. Reg. 46,484 (Sept. 3, 1996) (proposed final judgment stipulation and competitive impact statement); United States v. Lykes Bros. S.S. Co., 60 Fed. Reg. 52,208 (Oct. 5, 1995) (proposed consent decree and competitive impact statement).

1629. 466 U.S.C. app. § 1705(h) (1994).

1630. *Id.* § 1705(c)-(d).

1631. *Id.* § 1705(c). An assessment agreement, however, becomes effective immediately upon filing. *Id.* § 1704(d). An assessment agreement is defined as "an agreement, whether part of a collective-bargaining agreement or negotiated separately, to the extent that it provides for the funding of collectively bargained fringe benefit obligations on other than a uniform man-hour basis, regardless of the cargo handled or type of vessel or equipment utilized." *Id.* § 1702(3).

1632. *Id.* § 1705(c).

1633. S. REP. NO. 97-414, at 7 (1982). Under the 1916 Act, the antitrust laws were held to apply to any activities engaged in by common carriers under an agreement that had not been approved by the FMC. *See* Carnation Co. v. Pacific Westbound Conference, 383 U.S. 213 (1966); *see also* Volkswagenwerk A.G. v. FMC, 390 U.S. 261 (1968); Pacific Seafarers, Inc. v. Pacific Far East Line, 404 F.2d 804 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1093 (1969). The 1984 Act sought particularly to eliminate confusion regarding the immunity accorded to agreements and activities undertaken by parties with a good faith belief that they are within the scope of the 1916 Act.

1634. *See, e.g.*, FMC v. Aktiebolaget Svenska Amerika Linien, 390 U.S. 238 (1968); *Carnation Co.*, 383 U.S. 213; Sabre Shipping Corp. v. American President Lines, 285 F. Supp. 949 (S.D.N.Y. 1968) (imposing substantial restrictions on the antitrust immunity conferred by § 15 of the 1916 Act), *cert. denied*, 407 F.2d 173 (2d Cir.), *cert. denied*, 395 U.S. 922 (1969). *Compare* Far East Conference v.

significantly broadened in the 1984 Act. Section 7(a) of the 1984 Act provides that the antitrust laws do not apply to:

> (1) any agreement that has been filed under section 1704 of this title and is effective under section 1704(d) or section 1705 of this title, or is exempt under section 1715 of this title from any requirement of this chapter;
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> (2) any activity or agreement within the scope of this chapter, whether permitted under or prohibited by this chapter, undertaken or entered into with a reasonable basis to conclude that (A) it is pursuant to an agreement on file with the Commission and in effect when the activity took place, or (B) it is exempt under section 1715 of this title from any filing requirement of this chapter;
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> (3) any agreement or activity that relates to transportation services within or between foreign countries, whether or not via the United States, unless that agreement or activity has a direct, substantial, and reasonably foreseeable effect on the commerce of the United States;
>
> (4) any agreement or activity concerning the foreign inland segment of through transportation that is part of transportation provided in a United States import or export trade;
>
> (5) any agreement or activity to provide or furnish wharfage, dock, warehouse, or other terminal facilities outside the United States; or
>
> (6) subject to section 1719(e)(2) of this title, any agreement, modification, or cancellation approved by the Commission before the effective date of this chapter under section 814 of this title, or permitted under section 813a of this title, and any properly published tariff, rate, fare, or charge, classification, rule, or regulation explanatory thereof implementing that agreement, modification, or cancellation.[1635]

The 1984 Act precludes private parties from suing for treble damages or for injunctive relief under the antitrust laws with respect to conduct prohibited by the 1984 Act.[1636] The intent of the 1984 Act was to eliminate the parallel jurisdiction of the FMC and the federal courts under the antitrust laws with regard to claims by

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United States, 342 U.S. 570 (1952) *and* United States Navigation Co. v. Cunard S.S. Co., 284 U.S. 474 (1932), *with* National Ass'n of Recycling Indus. v. American Mail Line, 720 F.2d 618 (9th Cir. 1983) (holding that antitrust immunity for conduct authorized by FMC agreement is not lost even if such conduct were to violate some other Shipping Act provision or other statute), *cert. denied*, 465 U.S. 1109 (1984).

1635. 46 U.S.C. app. §§ 1706(a)(1)-(6) (1994).

1636. *Id.* § 1706(c)(2); *see also* American Ass'n of Cruise Passengers v. Cunard Line, 31 F.3d 1184 (D.C. Cir. 1994). There, the D.C. Circuit rejected the district court's dismissal, on primary jurisdiction grounds, of boycott and conspiracy claims brought against numerous vacation cruise lines. The district court had found that for the vast majority of cruise vacations at issue, the FMC had exclusive jurisdiction over the plaintiff's claims. As for the remaining voyages over which the FMC lacked exclusive jurisdiction, the district court nevertheless concluded that interests of efficiency warranted dismissing the claims pending regulatory review by the FMC. The court of appeals reversed, holding that "federal courts are generally assumed to have a 'virtually unflagging obligation . . . to exercise the jurisdiction given them.'" *Id.* at 1186 (citations omitted). The court found that there were no common regulatory issues between those claims that came under the exclusive jurisdiction of the FMC and those claims that did not. Accordingly, the court concluded that "there is no chance that a cruise line will be subject to different regulations and different sanctions for the same act" if parts of its conduct were scrutinized by the FMC while others were scrutinized by the district court. *Id.* at 1187. Thus, "the district court ought to have retained jurisdiction over that part of the suit within its exclusive jurisdiction." *Id.*

private parties for violations of the 1984 Act.[1637] Those claims must now be presented to the FMC, and reparations may be awarded pursuant to Section 11(g) of the 1984 Act.[1638] The United States can, of course, continue to pursue criminal or civil actions against conduct pursuant to unfiled agreements, and private parties as well can challenge conduct that is not immunized from the antitrust laws and not prohibited by the 1984 Act.[1639]

Finally, the 1984 Act expressly provides that voting security or asset acquisitions are not subject to the 1984 Act and therefore cannot be immunized from the antitrust laws by the filing of an acquisition agreement with the FMC.[1640]

d. SHIPPING REGULATION REFORM

In 1995, Congress passed ICCTA.[1641] Among other things, this legislation repealed various provisions of the Shipping Act of 1916 (effective on October 1, 1996), abolished the ICC, and repealed the Intercoastal Shipping Act of 1933. The ICCTA effectively deregulates most domestic water carrier transportation except domestic offshore carriage.[1642] Prior to the ICCTA, the ICC and the FMC shared regulatory authority over domestic offshore carriage. This type of transportation, called "noncontiguous domestic trade" in the ICCTA, includes water carriage between any mainland U.S. port and any ports in Alaska, Hawaii, or U.S. territories.[1643]

Under the old system, the ICC regulated carriage in the domestic offshore trade under intermodal joint motor/water rates, and the FMC regulated transportation between ports.[1644] The ICCTA shifts all regulatory authority over domestic

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1637. *See* H.R. REP. NO. 98-53(I), at 12 (1983), *reprinted in* 1984 U.S.C.C.A.N. 167, 177 ("[T]he Committee intends that violations of this Act not result in the creation of parallel jurisdiction over persons or matters which are subject to the Shipping Act [of 1984]; the remedies and sanctions provided for in the Shipping Act [of 1984] will be the exclusive remedies and sanctions for violation of the Act.").

1638. 46 U.S.C. app. § 1710(g) (1994); *see also* Seawinds Ltd. v. NedLloyd Lines, 80 Bankr. 181, 183 (N.D. Cal. 1987), *aff'd*, 846 F.2d 586 (9th Cir.), *cert. denied*, 488 U.S. 891 (1988). Reparations awarded by the FMC under § 11(g) of the 1984 Act are for actual injury and include interest and reasonable attorneys' fees. 46 U.S.C. app. § 1710(g) (1994).

1639. 15 U.S.C. §§ 1-3 (1994). The Shipping Act of 1984 does not extend antitrust immunity to any "agreement with or among air carriers, rail carriers, motor carriers, or common carriers by water not subject to this chapter with respect to transportation within the United States; to any discussion or agreement among common carriers that are subject to this chapter regarding the inland divisions (as opposed to the inland portions) of through rates within the United States; or to any agreement among common carriers subject to this chapter to establish, operate, or maintain a marine terminal in the United States." 46 U.S.C. app. § 1706(b) (1994).

1640. 46 U.S.C. app. § 1703(c) (1994).

1641. *See supra* note 1367.

1642. The Termination Act vested with the Department of Transportation regulatory jurisdiction over all domestic water carriage. *See* 49 U.S.C.A. § 13521 (West 1997). But the Termination Act provides for substantive regulation of only port-to-port and intermodal domestic offshore carriage and interstate carriage of household goods—two relatively small subsets of the entire domestic market. *See* § 13702. Congress evidently intended the broader grant of jurisdiction to preempt any efforts by states or municipalities to regulate any aspect of interstate water carriage.

1643. *See id.* § 13102(15).

1644. *Id.*; *see also* Noncontiguous Domestic Trade Tariffs, 61 Fed. Reg. 5835 (Feb. 14, 1996) (request for comments on new regulatory scheme and filing requirements).

offshore carriage to the newly created Surface Transportation Board (STB). Under the ICCTA, water carriers engaged in domestic offshore carriage must comply with tariff filing requirements[1645] and thereby become subject to rate regulation by the STB.[1646]

The antitrust immunity protections provided to agreements approved by the FMC under Section 15 of the 1916 Shipping Act (for domestic offshore carriers as well as marine terminal operators with filings dealing with this type of trade) expired on September 30, 1996—the last day of statutory viability before October 1, 1996, the effective date of the repeal of the 1916 Act.[1647] The ICCTA contains no antitrust immunity protection for domestic offshore carriage or for any other kind of interstate water carriage.

1645. 49 U.S.C.A. § 13702 (West 1997).

1646. *Id.* § 13701.

1647. *See* Comments of the U.S. Department of Transportation Before the Surface Transportation Board and the Federal Maritime Commission, STB Docket Ex Parte No. 533, FMC Docket 96-04 (Mar. 11, 1996).