U.S. SHIPPING CONFERENCE POLICY DEVELOPMENTS: IMPLICATIONS FOR CANADA

by

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Canadian policy under the Shipping Conferences Exemption Act, 1979, (SCEA)[1] provides a relatively unconstrained environment for ocean liner cartels (conferences). In particular, (i) exemption from the Combines Investigation Act[2] is not conditional on prior approval of conference agreements by the Canadian Transport Commission (CTC), subject to a public interest test;[3] (ii) 'closed conferences' (conference regulation of membership) are allowed;[4] (iii) there is no legislative guarantee of a "right of independent action" (internal rate competition) within conferences; and (iv) 'rationalization' of liner services, including allocation of ports between carriers, co-ordinating scheduling, and cargo and revenue sharing, is permitted.[5]

This policy is currently undergoing an inter-departmental review process - with a view to possible changes when the Act expires in March 1984. Before implementing significant legislative changes, it is appropriate to examine United States policy toward conferences, since, however desirable a more pro-competitive policy may be, in practice it would be difficult for Canada to impose on conferences composed primarily of foreign based ocean carriers a radically more stringent policy than that of the U.S.

It is important in particular to consider impending changes in U.S. policy, since enactment of either of two bills now before Congress would significantly alter the U.S. policy environment - partly in ways that are favourable to conferences - and it is expected that one of them will pass within the year. This note examines the two bills in the context of existing U.S. policy, and then considers their implications for Canada. It argues that (i) the major 'deregulatory' thrusts of the two bills do not preclude a more pro-competitive Canadian policy toward conferences; and (ii) even if current Congressional proposals are enacted, U.S. policy will impose significant pro-competitive requirements on conferences that are not present under Canadian law. Similar requirements, it is argued, are realistic options for Canadian policy.

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(1) Existing U.S. policy

Existing policy under the Shipping Act, 1916,[6] while providing limited antitrust immunity for shipping cartel practices, also provides important constraints on conferences, designed to protect U.S. shippers and consignees from the exercise of monopoly power. In particular:

a) Antitrust immunity for conference agreements is contingent on their prior approval by the Federal Maritimes Commission (FMC);[7]

b) FMC approval in turn is subject to a 'public interest' test, and the onus is on the conferences to show that the test is met. More specifically, the conference must sustain the burden of showing that an agreement that would otherwise violate the antitrust laws is justifiable in view of "serious transportation need, important public benefit, or (the need for) compliance with a valid regulatory purpose."[8]

c) The Shipping Act requires free entry and exit to and from conferences for qualified carriers in all conferences serving U.S. trade routes (the requirement of 'open' conferences). Open entry, though criticized by some because of the alleged tendency it creates for excess capacity, at least facilitates new entry when rates rise significantly above costs. Moreover, implicit in freedom of exit is a right of penalty-free independent action for conference members.

In short, the United States has traditionally pursued a much more interventionist policy toward conferences than has Canada, with a strong emphasis on protection of shippers from monopoly power. Judicial decisions have significantly narrowed the availability of antitrust immunity.[9] One additional aspect of government involvement is actual FMC enforcement of tariff rates.[10] In Canada, the Shipping Conferences Exemption Act merely requires filing of rates, with the onus for enforcement left entirely to the conferences.

(2) Current Congressional Proposals

In recent years a number of proposals for changing the existing pro-competitive U.S. maritime policy have surfaced in Congress.[11] The proposed measures have arisen for a variety of reasons, including (i) a perception by certain industry commentators that the system of open conferences with relatively narrow antitrust immunity was encouraging excess capacity;[12] (ii) a corresponding perception within the shipping industry of a need for 'rationalization' of resources; (iii) uncertainty of the status of individual shipper agreements under changing antitrust exemption; (iv) frustration with time-consuming FMC review procedures; and (v) a desire for enhanced harmony

of U.S. policy with trading partners, most of whom allow closed conferences and relatively unconditional antitrust immunity.

Two bills in particular have now received Committee approval: the Gorton bill (S.1593), approved by the Senate Commerce Committee in May 1982; and the Biaggi bill (H.R. 4374), approved by the House Maritime and Fisheries Committee in June 1982. (Note: H.R. 4374 must be distinguished from a separate bill sponsored by Representative Biaggi, H.R. 3637. This legislation, aimed at regulatiNG "diversion" of U.S. origin cargo through Montreal, would extend FMC jurisdiction to certain carriers of U.S. cargo in foreign trade routes.[13] It is not expected to pass for the present).

A primary thrust of both the Gorton and Biaggi bills is to facilitate 'rationalization' of liner services by extending relatively 'blanket' antitrust immunity to a broad range of agreements and conference practices, including collective rate setting, allocation of ports, co-ordinated scheduling, and pooling of cargo and revenue.[14] In effect, the contingency of antitrust immunity on prior FMC approval under the public interest test would be over-ruled. Certain extreme monopolistic practices would be expressly prohibited under the Gorton or Biaggi bills themselves (not simply left unexempted from the antitrust laws as is the case in Canada), but immunity from the antitrust laws would in no way depend on FMC approval, and the actual FMC review procedures would be streamlined and made subject to statutory time limitations.[15]

Nothwithstanding this apparently anti-competitive common thrust, the Gorton and Biaggi bills themselves, as approved by the respective Congressional committees, both contain important legislative constraints on conference power. Moreover, the two bills differ in significant respects. For these reasons, it would seem worth highlighting the bills' key similarities and differences:

(a) Removal of Contingency of Antitrust Exemption on FMC Approval and the Public Interest Test.

As indicated, both bills share this feature. Antitrust immunity would extend clearly to cover 'rationalization' of liner services, including coordinated scheduling, port allocation, and cargo and revenue sharing, as well as more conventional conference practices such as rate fixing and the use of dual rate shipper loyalty contracts.

(b) Closed vs Open Conferences

The Gorton bill would now retain the requirement of open conferences; the Biaggi bill would allow closed conferences with respect to non-U.S. flag carriers, but would require admission of qualified U.S. carriers to all conferences serving U.S. trade routes.[16]

(c) Mandatory Right of Independent Action

Both the Gorton and Biaggi bills would require all conferences employing loyalty contracts to allow their members a form of penalty-free independent action - i.e., members wishing to deviate from conference rates could so so, subject to prescribed conditions.[17] It is considered that mandatory independent action "injects competitive influences into the monopolistic unity of conference rate-fixing".[18] The rationale is that, where independent competition is excluded by loyalty contracts, intra-conference competition must be encouraged, to protect shippers.

(d) Service Contracts

Both the Gorton and Biaggi bills would affirm the right of ocean carriers to set aside conference tariffs and sell reserved ship space "slot charter" to shippers at 'open' rates.[19] The House Committee on Merchant Marine and Fisheries, in particular, considers this provision may inject an important new competitive element into the conference system.[20]

(e) Shippers' Councils

The Gorton bill would reverse traditional U.S. policy by authorizing and extending antitrust immunity to shippers' councils (a mechanism of countervailing power); the Biaggi bill would not.[21]

Additional Provisions

The Gorton and Biaggi bills also provide a potential solution to an emerging 'problem area' in Canadian policy: the question of whether the antitrust exemption for liner conferences should extend to cover collective setting of multimodal 'through' rates - i.e., single rates quoted for combined ocean and inland service. These rates, made possible by the container revolution, offer great convenience to shippers. But it would seem important not to allow ocean freight conferences to extend their monopoly power to surface transport, possibly distorting further the allocation of economic resources.

The Canadian law is confused, at best, on this point.[22] The general solution to be adopted under the Gorton and Biaggi bills is to specify that conferences may agree among themselves on multimodal through rates, without showing the 'break-down' of the rate between water and inland segments.[23] However, the negotiation of charges paid by ocean carriers to surface carriers for inland transport may only be negotiated by ocean carriers acting as

individuals.[24] This qualification is based on the view that allowing collective negotiations would conflict with "domestic surface transportation objectives".[25] In keeping with the authorization of multimodal rate setting, the bills also allow shipper loyalty contracts to apply to multimodal movement of goods.[26]

Finally, both bills would (i) authorize a form of volume discount rates;[27] and (ii) continue the practices of filing tariffs with the FMC and FMC tariff enforcement.[28]

(3) Implications for Canada

It should be apparent from the foregoing that in important respects - notably the extension of unconditional antitrust immunity for a broad range of conference practices - the enactment of either the Gorton or the Biaggi bill would represent a strengthening of the current comparatively weak system of conferences operating in U.S. trade routes. Moreover, the Biaggi bill would go further in this direction than the Gorton bill, in that it would authorize 'closing' of U.S. conferences to 'foreign' carriers, and, unlike the Gorton approach, would not authorize formation of shippers' councils.

Before placing too much significance on this 'pro-conference' trend, however, important qualifications should be noted. To begin with, it is worth emphasizing that in obviating the contingency of antitrust immunity on prior FMC approval, the bills would be doing away with an aspect of U.S. shipping policy which has never been a feature of Canadian law. There is, therefore, no reason whatsoever for Canada to undertake similar 'deregulation'.

Second, it is clear that, far from "closing the door" on competition, both bills seek to protect the users of liner services by injecting important new forms of competition within the conferences. These include (i) the mandatory right of independent action, which facilitates rate cutting within conferences if tariff rates are set above costs; and (ii) the express authorization of service contracting, which would make more space available on liners under negotiable terms, outside the normal conference tariffs. The significance of these pro-user measures should not be underestimated; and at a minimum it would seem worthwhile to consider incorporating similar provisions into Canadian law.

Finally, and more generally, as Canada reconsiders its policy towards shipping conferences, it would seem worth keeping before us the simple fact of the continuing United States policy of intervention and enforcement of a minimum degree of competition, in the interest of U.S. shippers. It has not been the intention of this note to argue that Canada need adopt the U.S. approach in its entirety; obviously, we need to evaluate the specific applicability of measures such as the right of independent action to the Canadian scene, and we may wish to adopt new measures of our own.

The important point is the clear international precedent, that the

U.S. will continue to set, for a less passive policy toward international shipping cartels than Canada's. With this example before us, we may best undertake to design a policy that serves the interests of Canadian users of liner services.

(Editor's Note: As this article was going to press, it appeared there might be subsequent changes in the Gorton or Biaggi bills. For the latest details, see the Journal of Commerce (daily).)

NOTES

1. S.C. 1978-79, C. C-15.

2. R.S.C. 1970, c. C-23, as amended.

3. SCEA, section 5.

4. SCEA, section 5 (1) (f).

5. SCEA, sections 5 (1) (c), (d) and (e).

6. 46 U.S.C. 801-42.

7. See Carnation v. Pacific Westbound Conf., 383 U.S. 213 (1966).

8. See the Svenska decision, 390 U.S. 238 (1968). For more details, see U.S. Senate, Committee on Commerce, Science and Transportation, Report No. 97-414, the "Shipping Act of 1982", May 25, 1982, pp. 4-7; see also Manual R. Llorca, "Antitrust Exemption of Shipping Conferences" 6 J. Mar. and Com. 287 (1975), at 296-298.

9. The Senate Committee on Commerce, Science and Transportation contends there has been a "chilling effect" on efforts to achieve "rational commercial arrangements" (Report, id., p. 7). See also Fawcett and Nolan, The History, Development and Decline of the Conference Antitrust Exemption," 1 N.W.J. Int'l. Law and Bus 536.

10. U.S. House of Representatives, Committee on Merchant Marine and Fisheries, Report No. 97-611, International Ocean Commerce Transportation, June 16, 1982, p. 27. It should not be assumed, however, that FMC tariff enforcement is designed primarily to protect shippers; many U.S. carriers themselves support the practice to prevent secret rate cutting and rebating within the conferences. (See Report, p. 24).

11. For a useful survey, see L. Jacobs and A. Weintraub, "The Shipping Act of 1916: Proposed Amendments and Their Impact on the U.S. Merchant Marine," 15 J. Int'l. L. and Econ. 639 (1981). For more recent information on currently favoured proposals, see text and legislative reports cited herein.

12. See, for example, Ellsworth, "Competition or Rationalization in the Liner Industry," 10 J. Mar. L. and Com. 497 (1979).

13. U.S. House of Representatives, Committee on Merchant Marine and Fisheries, Report N. 97-1 49 Jurisdiction over Certain common Carriers by Water in Foreign Commerce," December 30, 1981.

14. S. 1593, section 8, and Senate, supra note 8, pp.28,34; H.R. 4374, section 7, and House of Representatives, supra note 10, pp. 22-23, 37-38.

15. S. 1593, section 6, and Senate, supra note 8, pp. 31-32; H.R. 4374, section 5, and House of Representatives, supra note 10, p. 26.

16. S. 1593, section 5 (c), and Senate, supra note 8, p. 11; H.R. 4374, section 4, and House of Representatives, supra note 10, pp. 23,24, 35.

17. S. 1593, section 5, and Senate, supra note 8, p. 30; H.R. 4374, section 4, and House of Representatives, supra note 10, p. 25.

18. House of Representatives, Report No. 935, 1980, p.30.

19. S. 1593, section 9, and Senate, supra note 8, p. 35; H.R. 4374, section 8 (c) and House of Reporesentatives, supra note 10, pp. 25,26.

20. House of Reporesentatives, supra note 10, p. 24. At the same time, the Committee is concerned that excessive service contracting could benefit large shippers, while undermining the common carrier concept of liner transport, to the detriment of smaller shippers. Both bills attempt to preserve an element of common carriage by requiring disclosure of individual contracts' basic elements and availability of similar contracts to all shippers similarly situated. Senate, supra note 8, p. 35: House of Representatives, supra note 10, p. 25, 26.

21. S. 1593, section 4 (c), and Senate, supra note 8, p. 28; House of Representatives, supra note 10, p. 28029.

22. While the Shipping Conferences Exemption Act defines "conferences" in terms of associations of pure "ocean carriers" it refers to conference "tariffs" as specifying rates for "transportation of goods by water and other means," and in fact defines 'transportation of goods' in terms to 'place to place' carriage, not 'port to port'. Whatever the correct interpretation, the Act needs clarification.

23. S. 1593, section 4 (a) (I), and Senate supra note 8, pp. 28, 34, 35; H.R. 4374, section 7, and House of Representatives, supra note 10, p. 23.

24. Senate supra note 8, pp. 17, 34; House of Representatives, supra note 10, p. 23.

25. Senate, supra note 8, p. 17.

26. S. 1593, section 7 (a), and Senate, supra note 8, p. 33; H.R. 4374, section 6, and House of Representatives, supra note 10, p. 37.

27. S. 1593, section 9, and Senate, supra note 8, p. 35; H.R. 4374, section 8 (b), and House of Representatives, supra note 10, p. 38.

28. See Senate, supra note 8, p. 14; House of Representatives, supra note 10, p. 27.