COMMENT & ANALYSIS

AMENDMENTS TO THE US *SHIPPING ACT OF 1984*. HOW DO THESE REFORMS COMPARE TO THE EXISTING PROVISIONS IN *THE SHIPPING CONFERENCES EXEMPTION ACT, 1987*? IS THERE NEED FOR CHANGE?

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Over the last few years, debate about the usefulness of exempting shipping conferences from the Competition laws and the need for reform has occurred several times in Canada. The matter was partially put to rest with the recommendations of the Standing Committee on Transport in June 1993,[1] when it recommended that no action be taken until the US government removes the anti-trust immunity of shipping conferences. The US government has now made its move, and as usual, questions arise as to what implications these reforms have for Canada. Will such reforms make shipping more attractive to U.S. ports? Is there need for similar reforms in Canada?

The purpose of this note is to briefly review the major amendments to the US *Shipping Act of 1984*. It will also compare the US reforms with similar provisions in the *Shipping Conferences Exemption Act, 1987* ("SCEA, 1987"), examine if these reforms have any implications for Canada and inquire if there is need for change? Finally, a few concluding remarks are offered.

AMENDMENTS TO THE US *SHIPPING ACT OF 1984*

Attempts to reform the US *Shipping Act of 1984* began in the early 1990s. This led to the report of the Presidential Advisory Commission in 1992 which introduced no reforms.[2] This was followed by several other attempts: the Thomas R. Carper Bill of 1992, the H. Metzenbaum Bill of 1993, the National Industrial Transportation League Bill of 1995, the House Transportation Committee Bill of 1995, the Senate Bill of 1995, and the Senate Bill of 1997. All these proposed Bills ultimately were rejected. However, a way out of the impasse finally appeared in 1998 with the general acceptance of a modified version of the final Bill.

On April 21, 1998, the U.S. Senate passed Bill S.414 entitled 'An Act to amend the Shipping Act of 1984 to encourage competition in international shipping and growth of United States exports, and for other purposes by a vote of 71 to 26. The short title of the Bill is 'Ocean Shipping Reform Act'. The Bill was

sent to the House of Representatives, approved by it with one minor change and returned once again to the Senate for approval. The Senate approved the amendment on October 1, 1998. The Bill is expected to be signed by U.S. President Bill Clinton by the end of October 1998 and will take effect on May 1, 1999.[3]

The key features of the Bill are: the FMC is retained as an independent agency; tariff filing at the FMC is eliminated[4] and is replaced by electronic publishing[5]; conferences are prohibited from restricting independent action of individual carriers and the notice period required for independent action has been reduced to 5 days from 10 days[6]; confidential contracting between individual lines and shippers are allowed[7]; information on dock movement of cargo in conference contracts will be made available to longshore unions[8]; shipping lines cannot discriminate against shipper associations or freight intermediaries by refusing to deal with them[9]; and freight forwarders must continue to publish tariffs. The Bill does not extend confidential contract rights to non-vessel operating common carriers.[10]

A BRIEF COMPARISON OF THE US REFORMS AND THE EXISTING PROVISIONS IN SCEA, 1987

Tariff filing: Tariff filing provisions are contained in section 6 of the SCEA, 1987. It requires all members of shipping conferences to file a copy of their contracts and agreements or interconference agreements including a description of oral agreements, a copy of every service contract, changes in membership, tariffs, a copy of each loyalty contract and amendment to loyalty contracts in considerable detail with the Agency.[11] In the US, tariffs (together with other written and oral ocean carrier agreements) are covered under section 8 of the US *Shipping Act of 1984*. Not only had the tariffs to be filed (excepting products other than bulk cargo, forest products, recyclyed metal scrap, waster paper and paper waste) with the Federal Maritime Commission but they were also enforced. As a result, it was different from the Canadian provision.[12] The US reforms now not only eliminate tariff filing but also enforcement.

The notice period required for independent action: Independent action is defined in section 2 of SCEA, 1987. It means the right of a member of a conference to establish rates and/or services that differ from the tariffs established by the conference or the provision of a service by a member which is not provided for in the tariff. Since, independent action permits carriers to offer different rates than those set by the conference, it was seen as a measure that introduced competition among conference members and consequently acted as a threat to conference rate making and the stability of the conference. Independent action however, could not be taken without notifying the conference members 15 days before it was taken. Further, according to subsection 4(3)(a) this does not apply to service contracts. In the US, a 10 day notice period is required under section 15 of the US *Shipping Act of 1984*, this was not applicable to service contracts. The US reforms will now reduce the notice period to 5 days and it will apply to service contracts as indicated hereafter.

Confidential contracting between individual lines and shippers: Service contracts are agreements between a shipper and a conference for the transportation of a minimum quantity or a proportion of a shipper's goods, over a specified period of time, at a specified rate and level of service. In Canada, filed service

contracts between conferences and shippers are exempt from the provisions of the *Competition Act*. Service contracts are for a minimum quantity in Canada and conferences determine the terms and conditions of service contracts. Further, since, a service contract is between the conference and a shipper, independent action on service contracts is not permitted. In other words, service contracts between an individual shipping line of a conference and a shipper is not permitted. Furthermore, service contracts in Canada are confidential.[13] Under the present US *Shipping Act of 1984*, the conference is permitted to regulate or prohibit the use of service contracts. In other words, service contracts are only permitted between a conference and a shipper or shippers (i.e., service contracts between an individual line and a shipper are not permitted or independent action on service contracts is not permitted).[14] Futhermore, service contracts are not confidential. The U.S. reforms will now permit service contracts between an individual line and a shipper, further these contracts will be confidential.

Shipping lines cannot discriminate against shipper associations or freight intermediaries by refusing to deal with them: Section 21 of SCEA makes provision for a shipper group (i.e., the Canadian Shippers' Council designated by the Minister of Transport). The purpose of this group was to represent the bargaining position of shippers vis-à-vis the conferences.[15] Members of a shipping conference were obliged to meet with a shipper group when requested in writing and to provide information sufficient for the satisfactory conduct of the meeting.[16] Under subsection 10 (13) of the present US law, conferences or common carriers are prohibited from refusing to negotiate with a shippers' association (defined as a group that consolidates or distributes freight on a non-profit basis for its members to secure volume rates). Under the proposed US reforms, shipping lines cannot discriminate against shipper associations or freight intermediaries by refusing to deal with them. It is claimed that the new reforms will have a more positive impact on shippers associations that non-vessel-operating common carriers.[17]

DO THESE REFORMS HAVE ANY IMPLICATIONS FOR CANADA?

Tariff filing: The basic argument for filing tariffs in Canada is to make them available for inspection by potential shippers. However, it does not appear that this is sufficient justification for its retention. First, filing imposes a cost to the industry, in the US the FMC has estimated that it imposes a cost of $7 million to the industry. Second, the Agency does not enforce the filed tariffs, consequently there does not appear to be any reason for filing. Third, since under section 18 of SCEA, members of a conference have to maintain an office in Canada and make available for inspection and purchase all documents, it would appear that potential shippers could satisfy their need for inspection through this alternative. The present US reforms are expected to eliminate unnecessary costs to the industry and the government and to introduce potential benefits to consumers. While all these gains may not flow to Canadians even if they adopted similar provisions, because tariffs are not enforced by the Agency, it will nevertheless bring about a more efficient conference system by eliminating unnecessary costs to the industry. Even if Canada does not adopt a similar provision, it is unlikely that the present Canadian provision will lead to any diversion of traffic to US conferences.

The notice period required for independent action: The basic reason for a reduction in the notice period was 'to encourage more carriers to set independent rates', this will not only lead to increased intra-conference competition but also to more competitive rates.[18] Accordingly, the National Transportation Act Review

Commission (i.e., NTARC), a body which reviewed the Canadian transportation legislation in 1993, recommended that the notice period be reduced from 15 days to 10 days.[19] The reasoning of the NTARC was based on studies done in the US which showed that the shorter the notice period the less likely will the conference be able to dissuade its member liners from taking such action. As a result, more independent actions would result. Further, the choice of a 10 day period rather than some other period was based on the current notice period in the US *Shipping Act of 1984*. With the notice period in the new US shipping act being reduced to 5 days, it would appear more appropriate that the notice period in Canada should also be reduced to 5 days instead of 10 days as recommended by the NTARC. However, it is unlikely that maintaining a 10 or 15 day notice period will lead to any diversion of trade between Canada and the US

Confidential contracting between individual lines and shippers: The potential benefits of service contracts have been highlighted in previous studies,[20] and it is likely that individual service contracts will have the same effect. In the past, conferences have strongly opposed such contracts indicating that it would lead to a weakening of the conference system and ultimately to its breakdown. Individual service contracts appear to be an effective method of bringing about increased competition among conference members while at the same time improving the service to shippers. The NTARC in its proposals indicated that it would therefore be appropriate for Canada to adopt a provision that allows independent action on service contracts.[21] While it is impossible, to predict with certainty whether this provision will lead to any diversion of traffic between the two countries, it is likely that it could lead to some diversion. Finally, since service contracts are at present confidential in Canada, this aspect of the US reform will not have any effect in Canada.

Shipping lines cannot discriminate against shipper associations or freight intermediaries by refusing to deal with them: A similar provision does not exist in Canada as conferences in Canada are obliged to deal only with the shippers' body designated by the Minister of Transport. However, this provision has not been very successful due to the unwillingness of conferences to negotiate and provide transparency in the information necessary for the conduct of meetings as can be seen in the numerous complaints filed by the Canadian Shippers' Council.[22] As a result, it has advocated an end to antitrust immunity by revoking the exemption to conferences. In light of this, the NTARC recommended that section 20 (concerned with Meetings with Shippers' Council) be expanded and clarified as to the nature of the information that conferences must supply at meetings with designated shipper groups. Further, the merits of requiring audited financial data should be evaluated. It is unlikely that this US reform will have any impact in Canada.

Overall, the US reforms are likely to have a minimal impact on Canada. It will undoubtedly make shipping conferences in the US more efficient and more competitive than their Canadian counterparts. This, however, is unlikely to lead to a significant diversion of cargo from Canada to US ports or make US ports more attractive to shipping.

IS THERE A NEED FOR CHANGE?

Based on the above implications, it seems unlikely that the US reforms will provide the push to introduce amendments to SCEA, 1987. So far three attempts have been made to review SCEA, 1987, without resulting in any amendments.

First, an Industry Advisory Group conducted hearings on SCEA, 1987. The major issues recurring through the majority of the submissions submitted to the Group were: 1. Is there need for conference exemption from the *Competition Act*? and 2. What are the major difficulties with SCEA? The majority of submissions indicated that SCEA had little or no impact and that the potential repercussions do not provide any convincing reasons for the retention of the exemption. The discussion on the major difficulties with SCEA focused on: the interpretative difficulties of the *Act* pertaining to definitions, the ineffectiveness of the Canadian Shippers' Council, the dispute mechanism provision, the notice period provision and how SCEA should be interpreted in a changing environment? The roles and responsibilities of the National Transportation Agency and Industry Canada were also raised.

Second, in March 1993, the NTARC made three recommendations and a few proposals on conference liners.[23] The Commission noted that the exemption runs counter to the general policy of encouraging competition. In principle, opposition was expressed regarding the intent of SCEA as it is clearly in conflict with the competitive thrust of the *NTA, 1987*. Due to the possible uncertainty and the need for international action the Commission recommended that "the Minister of Transport introduce legislation to repeal SCEA at such time as United States antitrust immunity for shipping conferences is withdrawn". On the issue of multimodal rates, the Commission indicated that conferences should be allowed to negotiate with inland carriers for through freight rates. To encourage more carriers to set independent rates, the Commission recommended that "the federal Cabinet reduce to ten days the notice period for independent action by shipping conference members." The Commission also listed a number of other proposals for considerations.[24]

Third, the Standing Committee on Transport in June 1993[25] commented on the recommendations of the Commission. The Standing Committee agreed with two of the recommendations of the NTARC: to shorten the notice period to 10 days; and to permit intermodal conference contracts for 'through freight rates for precarriage or onward land carriage'. Regarding the NTARC's recommendation to repeal SCEA when the US repeals its legislation, the Standing Committee recommended that "That the Minister of Transport not accept the NTARC's recommendation to automatically repeal the SCEA when the U.S. government removes anti-trust immunity of shipping conferences, but undertake a review of the legislation at that time and refer it to the Standing Committee on Transport."[26]

Since then, no further attempts at legislative reforms on conference legislation have been undertaken in Canada. Nevertheless, we believe that the time has come to eleminate the privilege of antitrust exemption that conferences have enjoyed for nearly half a century, should SCEA, 1987 be amended. Facilitating and

encouraging the role of market forces by eliminating the exemption could lead to greater competition among ocean liner carriers and ultimately to increased efficiency, lower prices, improved services and perhaps greater international trade. It will also bring about greater equity in the treatment of shipping versus other transport subsectors and other industries in the economy. However, if amendments continue to include the exemption, the other amendments should at least proceed along some of the lines suggested by the NTARC with a few modifications to reflect the changing environment.

A FEW CONCLUDING REMARKS

The recent US reforms on shipping conferences are an important attempt to encourage competition in international shipping and to promote the growth of United States exports. It is designed to increase efficiency and competition by placing greater reliance on the marketplace.[27] The two key provisions to encourage competition are a reduction in the notice period for independent action and the provision for confidential contracting between individual shipping lines and shippers. Though these reforms to introduce competition are quite modest, success has not come easily as it took numerous attempts over the last five years to get any reforms approved.[28]

Despite this modest success, the reforms were a disappointment for most deregulators who had expected antitrust immunity for shipping liner conferences to be removed. The exemption was dropped from an earlier version of the Bill, known as the Metzenbaum Bill,[29] due to lack of support for the Bill. However, the new shipping act contains other provisions designed to reduce cost to the industry and to the administration, such as elimination of the tariff filing and enforcement.

In conclusion, we believe that US reforms are likely to have a minimal impact on Canada. However, if the impact of the US reforms begins to have a significant effect in Canada, amendments to SCEA, 1987 should incorporate some of the proposals of the NTARC with appropriate modifications.

Notes

* The views expressed are those of the authors and are not necessarily those of the Competition Bureau or Industry Canada. The authors would like to thank Gwillym Allen from the Competition Bureau and Robert Snider from Transport Canada.

1 *Report on the Recommendations of the National Transportation Act Review Commission,* Report of the Standing Committee on Transport, Robert A. Corbett, M.P. Chairman, June 1993.

2 *Report of the Advisory Commission on Conferences in Ocean Shipping,* April 1992.

3 Sansbury, Tim, "Slater says administration wants House to enact Senate ship deregulation bill," *The Journal of Commerce,* N.Y., Wednesday, May 20, 1998, p. 1A, Roberts, William, "Gilchrest: We're ready to move on ship reform," *The Journal of Commerce,* N.Y., Monday, June 15, 1998, pp. 1A/11A and Roberts, William & Sansbury, Tim, "Senate passes ship reform," *The Journal of Commerce,* N.Y., Tuesday, October 2, 1998.

4 See Section 106 (a) (2) of Bill S.414.

5 Section 106 (a) (3) of Bill S.414.

6 Section 104 (a) (1) of Bill S.414.

7 Section 104 (c) (1) and (2) of Bill S.414.

[8] Section 106 (c) (4) of Bill S.414.

[9] Section 109 (a) (8)-(10) of Bill S.414.

[10] Roberts, William, "Amendment on consolidator contracts fails," *The Journal of Commerce,* N.Y., Wednesday, April 22, 1998, pp. 1A-10A and Sansbury, Tim, "How 2 lawyers pulled the final deal together," *The Journal of Commerce,* N.Y., Wednesday, April 22, 1998, pp. 1A-10A.

[11] See subsection 6(1) of SCEA, 1987. Subsection 6(2) spells out the contents of each tariff: every rate and charge, places to which it is applicable; every rule and regulation determining its calculation or affecting or altering any term or condition; and the address in Canada to which communications regarding the above may be directed.

[12] The basic argument for tariff filing and enforcement (TFE) in the U.S. is that in its absence the Commission would find it difficult to carry out its legislative responsibility. Further, tariff filing and enforcement (TFE) ensures a nondiscriminatory ocean transportation system which in an open conference environment can promote market efficiency, ensure fair treatment of shippers by carriers, and preserve just competition. These views have been strongly opposed. The US Department of Justice (DOJ) is of the opinion that TFE imposes costs without any offsetting economic benefits. See *An Analysis of the Maritime Industry and the Effects of the 1984 Shipping Act*, Report of the Federal Trade Commission, November 1989, p. 7. Also see "Statement of John L. Peterman, Director, Bureau of Economics, Federal Trade Commission," Before the Advisory Commission on Conferences in Ocean Shipping, September 13, 1991, pp. 1-13. *The Department of Justice Analysis of the Impact of the Shipping Act of 1984*, March 1990.

[13] See sections 2(1), 4(1)(c) and 12(a) of SCEA, 1987.

[14] See sections 8(c) and 5(b)(8) of the US *Shipping Act of 1984.*

[15] See Khosla, S. D., and Anderson, R. D., "Canada's New Shipping Conferences Legislation: Provision for Competition within the Cartel System," (1988) 9:1 Can.Comp.Pol.Rec. at 49-67.

[16] See subsection 20 of the *Shipping Conferences Exemption Act, 1987.* A shipper group means an organization or association of shippers designated by the Minister of Transport, see subsection 21. The Canadian Shippers' Council was designated to be that organization.

[17] Several reasons are provided for this claim. Freight intermediaries cannot offer service contracts, they will not be able to keep them secret as their rates will have to be published, and fines will be imposed if rates differ from published rates. These requirements will not apply to small importers and exporters who form shippers associations to obtain service contracts from conference carriers. Mongelluzzo, Bill, "Reform bill a boost to shippers associations," *The Journal of Commerce,* N.Y., Monday, August 24, 1998, pp. 1A/15A.

[18] See *Submission to the National Transportation Act Review Commission*, by The Director of Investigation and Research, *Competition Act*, June 30, 1992, p. 28.

[19] *Competition in Transportation,* Policy and Legislation in Review, National Transportation Act Review Commission, Minister of Supply and Services Canada, 1993. See Volume I, pp. 28-29, 106-110, 136-142 and pp. 242-243, and Volume II, pp. 105-121.

[20] For example, see *Export Competitiveness: An Assessment of the Impact of Ocean Service Contracts*, The Conference Board of Canada, Report Prepared for External Affairs and International Trade Canada, May 1991 and National Transportation Agency, *Annual Review 1990*, Ottawa, Minister of Supply and Services Canada, 1990, p. 108.

[21] See Annex D, *Report on the Recommendations of the National Transportation Act Review Commission,* Report of the Standing Committee on Transport, Robert A. Corbett, M.P. Chairman, June 1993, p. 243.

[22] For example, see Khosla, S. D., and Anderson, R. D., "New Canadian and U.S. Legislation to Govern Shipping Conferences," *Canadian Competition Policy Record*, Vol. 5, No. 2, June 1984, p. 20. Also see *Annual Review 1990*, Ottawa, Minister of Supply and Services Canada, 1991, pp. 166-167 and subsequent Annual Reviews.

[23] The recommendations are in line with the proposals put forward by the Director of Investigation and Research other than the one pertaining to conference agreements with other transport modes. Should this latter proposal be accepted by the government it is suggested that certain conditions be attached: the right of independent action with regard to the entire multimodal rate or the inland portion of the rate; and the freedom of shippers to demand carriage by other multimodal modes in the event of any form of ownership of inland modes of transport by the conference. The first condition will ensure that the agreement is the most efficient and shippers will also benefit. The second condition would avoid conferences using their own high cost inland carriers or foreclosing other inland carriers from overseas traffic. Thus eliminating agreements as occurred in the FEFC complaint to the European Commission.

[24] These pertain to a definition of a "conference", "service contract", the nature of the information conferences must supply for the satisfactory conduct of the meeting, and filing of tariffs by non-vessel operating carriers and independent action on service contracts.

[25] *Report on the Recommendations of the National Transportation Act Review Commission,* Report of the Standing Committee on Transport, Robert A. Corbett, M.P. Chairman, June 1993.

[26] *Ibid.* at 16.

[27] The purpose clause has been extended to read 'to promote the growth and development of United States exports through competitive and efficient ocean transportation and by placing a greater reliance on the marketplace.' See Section 101 (4) of Bill S.414.

[28] Beargie, Tony, "Ocean Shipping Reform Act of 1995, 1996, 1997, 1998?," *American Shipper*, December 1997, pp. 10/12.

[29] This Bill known as 'An Act to Restore Competition in the Ocean Shipping Industry,' was named after Senator H. Metzenbaum who introduced it on October 29, 1993.

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With the sending of this issue, we mark the completion of a period of transition at the *Canadian Competition Record*. Commencing with the next issue, the new Editor of the Record will be Jennifer Trent. Jennifer has practised competition law with Fraser Milner since 1992 and will now devote her time exclusively to the Record. David Little is retiring as Associate Editor of the Record and I wish to thank him for his many years of contribution. I will continue to be involved with the Record in the role of Senior Editor.

This period of transition has resulted in considerable delay in the publication of the Record. The enclosed issue of the Record, Winter 1998-1999, is the third issue in Volume 19. A fourth issue in Volume 19 will be sent out shortly. Given the lateness in completing Volume 19 of the Record, we have determined that the first issue of Volume 20 of the Record will be the Spring 2000 issue. Accordingly, any subscription fees received in respect of 1999 will be applied toward the 2000 issues.

We wish to apologize for the recent delays in publication of the Record and assure you that we will be back on track in 2000 with timely and insightful reports, analysis and commentary on competition law and policy developments. We appreciate your continued support.

Yours truly,

Randal T. Hughes
Editor

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