The Honorable Michael A. Khouri
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Thank you. I sincerely appreciate your kind invitation to join you today and share some of my thoughts and views concerning the Federal Maritime Commission – where we started some ninety-seven years ago, what we are involved in today, and a view of what the future may hold for the Commission. Today's remarks solely reflect my personal views. They are not offered as the official position of the Federal Maritime Commission.

A number of years ago, there was a regular talk show on Washington DC local radio called "Name that Agency." For each show, the head of one of the "alphabet soup" of Federal agencies would come on to describe and discuss his agency for the listening audience. In early summer, I called a MLA member and asked – "Tell me, in three sentences, what does the FMC do?" He acquitted himself - modestly.

Recognizing that all of you have spent your careers deeply involved in one aspect or another of maritime law, I suspect that many of you have had only occasional, if any, opportunity to practice before the Commission. For those seasoned FMC practitioners in the room, I hope I do not send you into deep REM sleep too quickly.

The Commission – Past to Present

To begin to understand what the FMC does today, we need to start at the turn of the 20th century. The Interstate Commerce Commission was thirteen years old and getting its hands around the task of regulating the growing railroads. The Sherman Antitrust Act was ten years old and those regulators were just beginning to reign in big business. The Federal Trade Commission Act came in 1914 with more focus on consumer protection.

Then Congress brought us the Shipping Act of 1916. It was an attempt to provide an antitrust and regulatory regime that addressed the unique nature of the international ocean shipping industry. Various foreign governments were interested in the building, manning, operating and, where desirable, subsidizing of national flag fleets.

The United States was in full accord with these efforts to support a U.S. shipbuilding and domestic flag fleet for national defense purposes as well as commercial and economic security. The original U.S. Shipping Board was succeeded by the United States Maritime Commission in 1936 with the Honorable Joseph P. Kennedy as its first Chairman. In 1961, Congress decided that the pure industry promotion functions should be separated from the regulatory and judicial functions.

The Maritime Administration was placed within the Department of Commerce and handed responsibility for promotional programs such as Construction Differential Subsidies, Operating Differential Subsidies, federal loan guarantee programs and the Maritime Academies. MarAd was later assigned to the Department of Transportation.

The FMC was established as a fully independent federal agency and tasked with the Shipping Act, together with a few other statutes to administer. The original Shipping Act was intended as one part maritime antitrust regulation and one part enforcer of maritime common carriage.

The ocean freight world consisted of a cargo classification; for example, manufactured iron products, moving over a trade route; for example, England to U.S. Atlantic ports, and controlled by a conference agreement among the carriers operating in that cargo classification and trade route. They would agree on a freight rate and all other terms of carriage. Such conferences often enjoyed 90% or more of a trade route market share. The Shipping Act brought about some antitrust constraints that prohibited various forms of discrimination as to ports or shippers and enforced some level of rate reasonableness. As part quid pro quo, the carriers had to publish their rates in a public tariff and provide such common service to all shippers.

The Commission reviewed and approved all conference agreements, administered the rate regulation provisions and served as the judicial body to review "presiding officer" or ALJ initial decisions in private complaint cases and bureau of enforcement actions.

Federal transportation policy began to change in the late 1970's. Regulatory reform continued in the 80's and 90's. The Railroad Revitalization and Regulatory Reform Act of 1976 was a first step. The Staggers Act followed in 1980, freeing the railroad industry to negotiate freight contracts directly with shippers. The Motor Carrier Act of 1980 deregulated trucking. The Civil Aeronautics Board closed its doors in January, 1985. The Interstate Commerce Commission, established in 1887, was the very first independent federal regulatory agency. The ICC Termination Act of 1995 closed out their 108 year

history, transferring the remaining limited regulatory assignments to the Surface Transportation Board.

The innovations of ocean containerized cargo and Malcolm McLean's vision of intermodal trans-ocean and trans-continental transportation brought significant changes to the ocean carrier industry. The 1984 revisions to the Shipping Act, Pub. L. 98-237, cited as the "Shipping Act of 1984", began a process of addressing those changes. Our principal international trading partners were adopting new transportation policies and carrier conference rate agreements were becoming broader in terms of cargo and geographic scope.

One example of the new regulatory order – under the 1916 Act, such cooperative conference agreements required the carriers to justify the agreement terms and then the Commission would vote to approve or disapprove each agreement. Under the 84 Act, the agreements no longer needed prior Commission approval, but would automatically go into effect after 45 days unless the staff required additional information or, the Commission moved for an injunction in federal district court claiming the agreement was likely, by a reduction in competition, to produce an unreasonable reduction in transportation service or an unreasonable increase in transportation cost. Section 6(g), 46 U.S.C. Section 41307 (b)(1)

More importantly, the 84 Act began to dismantle the old world ocean common carriage model with the introduction of service contracts. A central feature of the new law allowed carriers to negotiate one-on-one with shippers on freight rates and other terms. The 84 Act's half way compromise was the "me too" provision wherein the service contract terms had to be published and then, a shipper could claim that they were "similarly situated" and thus entitled to the same terms and rates – a common carriage holdover.

An often used and mildly misleading phrase is that the Shipping Act grants "antitrust immunity" to the ocean carriers operating within these discussion agreements. A far more accurate description is the Shipping Act is an alternate and co-equal antitrust regulatory regime focused on the international containerized trades – including the carriers and the ports. Section 10, Prohibited Acts, 46 U.S.C. Sections 41101-41109, include many provisions found in the Sherman Act, Robinson-Patman Act and other antitrust regimes. The Shipping Act provides that – if you "color inside the lines" of the Shipping Act, then the other federal antitrust statutes will not apply. 46 U.S.C. Section 40307

Obviously, allowing a group of competitors to meet and openly discuss commercial topics, like freight rates, presents concerns to consumers. In our Pacific trade area, the Transpacific Stabilization Agreement (TSA), the principal Asia to US West coast rate discussion group recently merged with the Westbound Transpacific Stabilization Agreement (WTSA), the US West coast to Asia discussion group.

In similar fashion, allowing competitors to enter into joint vessel operating agreements, such as the recent G6 alliance, which combined the Grand Alliance carriers (Hapag-Lloyd, NYK Line and Orient Overseas Container Line) with the New World Alliance carriers (American President Line, Hyundai Merchant Marine and Mitsui OSK Line) and the newly proposed P3 alliance of Maersk, Mediterranean Shipping and CMA-CGM all present different but real concerns. While these operating alliances expressly prohibit joint rate discussion or joint sales/marketing activity, they still have some potential to influence capacity decisions and resulting service levels on trade routes.

In any other industry, rate discussions – regardless of the proscription surrounding such activity – would be a violation of the Sherman Act. Joint vessel operating agreements such as the G6 or P3 would be subjected to review under the DoJ/FTC joint venture guideline procedures. In both cases; however, the FMC takes a distinctive two step approach.

First, the Commission reviews the business arrangement for potential anti-competitive effects on transportation costs or service levels – the Section 6(g) review mentioned earlier. Second – and this is where the Commission and its role is substantively different from the Department of Justice or the Federal Trade Commission – the FMC sets up, on the front end, a monitoring program and then continues to regularly check and re-determine whether or not anti-competitive behaviors or market results are raising to the surface. If so, the Commission will then go into federal district court to enjoin the activity within the discussion agreement or the joint carrier operating agreement.

The second round of ocean carrier deregulation did not arrive until 1998 with the Ocean Shipping Reform Act (OSRA), Pub. L. 105-258. OSRA's primary objectives were to provide the ocean container liner industry and its customers with more flexibility in conducting daily business, remove regulatory restrictions and to promote U.S. international liner trade by promoting greater reliance on the marketplace.

That last point – greater reliance on the marketplace – was reflected in several new provisions in the Shipping Act that:

- ended the liner conference authority to regulate and enforce their conference member's service contract terms, rates or other provisions
- revised the publication requirements for a service contract – now the line-haul rate, the origin and destination points, the service commitment level, and the nonperformance damage, or take or pay provision were all confidential
- mandated that the Commission keep all such contract information confidential
- from the previous point – the "me too" provision for "similarly situated" shippers was eliminated
- gave the Commission greater flexibility and authority under Section 16, 46 U.S.C. Section 40103, to grant exemptions from application of any provision of the Act to any regulated or covered party if the Commission found that such exemption would not result in substantial reduction in competition or be detrimental to commerce.

This exemption authority was recently used to waive requirements for ocean transportation intermediaries (OTIs) to publish tariffs and further granted OTIs more freedom to use service contract types of business arrangements. More needs to be done in this area to expedite business transactions.

All of the current Shipping Act provisions can be found in 46 U.S.C. Sections 40101 – 41309.

The Commission also administers other maritime statutes. One area that has been in the news over the last year is financial responsibility requirements for passenger vessel operators. Public Law 89- 777, Financial Responsibility for Death or Injury to Passengers and for Nonperformance of Voyages, 46 U.S.C. Sections 44101 – 44106 provides, by a statutory formula, for minimum bond levels to cover an event of passenger injury or death. The law also provides for the Commission to determine the proper amount of bond or other evidence of financial security, to cover reimbursement to passengers who have their cruise vacation cut short or cancelled by the cruise operator.

It is this second area that has received some renewed scrutiny with the recent travails of Carnival Cruise Line and Royal Caribbean Cruise Line. In fact, both cruise operators went well above and a league beyond their legal and contractual obligations in those incidents. They provided full ticket reimbursements, steep discounts on future cruises, hotel accommodations and other customer benefits. Last, the regulations covering all of these financial responsibility and bonding requirements have gone through a recent review and amendment rulemaking process and are now in their implementation phase.

Two statutes that were born out of long ago anticompetitive activity remain in the Commission's portfolio, but have limited current relevance. Section 19 of the Merchant Marine Act of 1920, 46 U.S.C. Sections 42101-42109, was designed to address foreign government or carrier practices that adversely affect the operation of US carriers in US ocean trades where such practices do not exist in the US for foreign carriers of that country. If such condition is found to exist, the Commission has the authority to place limits on such foreign carrier's US ports of call or type of allowed cargo, suspension of tariffs or service contracts, or a fee not to exceed $1 million per voyage.

In the mid 1990's, this statute was used to "persuade" the Japanese port authorities to treat US carriers on an equal and non-discriminatory basis as they did with their Japanese flagged carriers. Continuing Commission oversight of that matter was recently terminated.

The Controlled Carrier Act of 1978, now referenced as Section 9 of the 84 Act, 46 U.S.C. Sections 40701 – 40706, is focused on foreign flag carriers that are controlled by their flag country and, simply put, undercutting the market in a predatory manner. During the Cold War, FESCO was controlled by the Soviet Union and was allegedly cutting rates to attract business and hard foreign currency. Today, as you look at the container freight rate structure on virtually any trade route, I believe we can all agree that this statute will not be pulled off of the shelf in the foreseeable future.

The Foreign Shipping Practices Act of 1988, 46 U.S.C. Sections 42301 – 42307, was part of a Congressional effort by some stalwart Congressional supporters of the U.S. maritime industry to support and encourage the growth of a U.S.-flag fleet. No cases or enforcement actions have ever been brought under this statute.

The Commission's Role Today and Into the Future

First and foremost, the Commission is an economic regulator for a specific industry – containerized cargo moving into and out of the United States. The regulated parties are the vessel owner common carriers, the non vessel owning common carriers (NVOCC), freight forwarders, and the public ports.

The vessel owner companies have long operated within rate discussion cooperative structures. Those agreements are now primarily within the broad trade lanes between the US West Coast and Pacific ports; however, South American trade and associated discussion agreement activity has continued to increase. All of the European trade

partner ports with US trade routes are now off limits due to the EU's elimination of discussion agreement immunity in October, 2008. The more relevant economic regulatory task for the Commission will be monitoring the new generation of vessel operating agreement, also called a consortia.

Such consortia are larger and more complex than prior vessel or slot sharing agreements. While the agreements expressly prohibit joint pricing, marketing or similar commercial joint activity, their potential to effect capacity is a matter that requires a watchful eye. It is worth a comment that, on one hand, all of the ocean carrier industry is widely known for its keen competition; however, these consortia are bringing together corporate organizations with strong and very diverse cultures. These are companies that would not – according to industry experts – ever agree to traditional corporate mergers. However, they are finding ways to cooperate, and indeed cooperate on a global operating basis.

The monitoring of these rate discussion agreements and the vessel operating agreements, such as the G6 (Hapag-Lloyd, NYK Line, Orient Overseas Container Line, American President Line, Hyundai Merchant Marine and Mitsui OSK Line) and the P3 (Maersk Line, Mediterranean Shipping Company and CMA CGM) will be a central function for the Commission.

The ocean transportation intermediary industry – the NVOCCs and freight forwarders – are becoming much more complex, diverse and dynamic on one hand while the Commission is also seeing many more license applications for smaller OTI companies. New and updated Commission regulations are currently in the works. The comment period on an Advanced Notice of Proposed Rulemaking closed at the end of August and staff is working through that public input and, frankly, criticism. We expect to entertain another full round of comments at the next phase of this rulemaking.

Two issues that have rattled around at the Commission over the last two years and continue to surface in the trade press on occasion – looking for oxygen – are, [1] Harbor Maintenance Taxes and, [2] a Commission compiled container freight index. Both of these issues are far removed from the purposes that Congress gave to us in the 84 Shipping Act's Declaration of Policy, 46 App. U.S.C Section 1701.

The Study of U.S. Inland Containerized Cargo Moving through Canadian and Mexican Seaports was both a distraction and a poor allocation of the Commission's resources. The project began with a foundational conclusion – that the US Harbor Maintenance Tax was causing containerized cargo that was ultimately destine for the middle United

States to instead enter North America via Canada, primarily, or Mexico. The Study's fifty-nine pages failed to document the opening conclusion. The Study's press release put forward the best face possible when it weakly asserted that cargo may be vulnerable to Canada routing.

The Container Freight Index issue is more hotly contested. Vessel operators that want to serve the U.S. trades must be registered at the Commission. While tariff rates are public, well over ninety per cent of all container traffic moves under service contracts. The 84 Shipping Act requires the vessel operators to file those service contracts with the Commission and also requires the Commission to maintain all rate information as confidential. Further, unlike the Department of Labor's Bureau of Labor Statistics, Congress has not given any authority or even a hint of interest for the Commission to engage in such activity. Many commentators have expressed their views that when the US marketplace wants a container freight index, the market will create that index. The Baltic Dry Index has been around for a long time without any government agency involvement.

While the Canadian / HMT study and the freight index issues create or cause concern in that they indicate a Commission initiative to expand the agency's footprint, there are two other matters that are more troubling. As mentioned earlier, Section 10 of the 84 Act sets out numerous do's and do not's for common carriers, freight forwarders, ports, and, in some situations, shippers and related maritime stakeholders.

Section 10(a)(1) provides that:

> No person may knowingly and willfully, directly or indirectly, by means of false billing, false classification, false weighing, false report of weight, false measurement, or by any other unjust or unfair device or means obtain or attempt to obtain ocean transportation for property at less than the rates or charges that would otherwise be applicable. 46 U.S.C. Section 1709

A troubling new principal was quietly established in a recently decided case that, over four years, appeared to both befuddle and bedevil the Commission's staff and judicial corps. (Mitsui O.S.K. Lines LTD. v. Global Link Logistics, Inc., et al, Docket No. 09-01(Initial Decision July 31, 2013)). Mitsui, the ocean carrier, filed a complaint against Global Link, a licensed non vessel operating common carrier, alleging that Global Link had violated Section 10(a)(1) over a period of time.

The Mitsui complaint alleged, *inter alia*, the following elements:

- Global Link and Mitsui were operating under a service contract, in force during all relevant time periods, for container shipments from Asia to the US.
- the service contract listed various "door points" as final destinations in the US.
- Global Link would change the destination door point after the container arrived in the US and "split route" the shipment to another destination, most often within the same general geographic area.
- Global Link would issue new shipping documents for the delivering truck carrier.
- Global Link concealed this "split routing" or diversion scheme from Mitsui.
- the split routing scheme was carried out "with the full knowledge and participation of" named respondents, including Global Link's former officers, directors and shareholders, including two shareholder parties that were investment funds, each with a designated board member.

Global Link alleged, *inter alia*, in its counter-complaint and crossclaim the following:

- Mitsui officials were fully aware of split routing and expressly condoned the practice.

The alleged "knowledge and participation" was never described in pleadings, briefs, affidavits, or offers of proof with any level of specificity. Further, there was never any pleading or argument by the claimants concerning a piercing of the corporate veil. In addressing the words and elements of the statute, the administrative law judge found that a "person" is defined in 1 U.S.C. Section 1, and each of the party respondents fit that definition. Further, the complaint alleged that each party respondent was acting as a "shipper" in obtaining or attempting to obtain transportation. So, the conclusion followed that all such parties are properly subject to the jurisdiction of the Commission and these provisions of the 84 Shipping Act.

In an interlocutory order, dated August 1, 2011, a three member majority of the Commission embraced this new concept that knowledge and participation by an NVOCC's officers, directors and shareholders could bring such individuals within the jurisdiction of the Commission and the 84 Shipping Act. The question was remanded, without instruction or guidance; to the ALJ for additional discovery and a finding on whether such parties,

> ". . .engaged in the requisite participation – as individuals or entities rather than mere shareholders of Global Link – in Shipping Act violations to warrant holding them separately liable for. . ." the alleged violations.(Mitsui, *supra*, 34)

The case was reassigned on remand to a different ALJ and his decision was handed down in July where he found that, indeed, a Mitsui official and another employee were informed and aware of the split routing practice. Having found that there was no concealment, he dismissed all claims. Unfortunately, this concept of knowledge and "requisite participation" has now been planted in the Commission's Section 10(a)(1) jurisprudence. Quite arguably, a claimant may no longer need to either plead or prove the normal elements to pierce a corporate veil. Knowledge and participation by officers, directors or, perhaps, authorized employees of the offending entity – be it shipper, NVOCC, VOCC or freight forwarder – may be swept up in a Section 10(a)(1) violation matter. [Exceptions to the Initial Decision, dismissing the matter were due to be filed on the date of transmittal of this paper. Update to be added at the October meeting]

A more troubling enlargement of the 84 Shipping Act's reach and scope in seen in a recent sequence of cases involving Section 10(d)(1) of the Act.

Section 10(d)(1) provides:

> No common carrier, ocean transportation intermediary, or marine terminal operator may fail to establish, observe and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property. 46 U.S.C. Section 41102(c)

This statutory language was first used in the Interstate Commerce Act of 1887 (ICA), Ch. 104, 24 Stat. 379 (1887), then again in the Shipping Act of 1916 and, once again in the Packers and Stockyards Act of 1920, 7 U.S.C. Sections 181-229(b). All of the jurisprudence over some ninety years viewed the respective statutes from the perspective that the alleged unjust or unfair activity had to also be the normal and regular "practice" of the offending regulated party. A single infraction or isolated and episodic infractions simply did not fit within the proscription of the statutory language or intent.

In the early 1990's, a Commission ALJ departed from the well traveled road and issued a series of cases that set the foundation for a substantial expansion of Section 10(d)(1). He found that a failure or breach of a common law duty or a duty established by statute could form the basis for a Section 10(d)(1) violation. See Adair v. Penn-Nordic Lines, Inc., 26 S.R.R. 11 (ALJ 1991), Tractors and Farmers Equipment v. Cosmos Shipping, 26 S.R.R. 78, (ALJ 1992), and Hugh Symington v. Euro Car Transport, 26 S.R.R. 871 (ALJ

1993). None of these cases were formally reviewed or commented upon by the full Commission.

Jumping forward to 2010, the Commission took up an informal proceeding, also known as a small claim case, and issued a *de novo* decision that brought into fuller view this statutory expansion. See Houben v. World Wide Moving Services, Inc., 31 S.R.R. 1400 (FMC 2010). I regretfully joined the Houben majority, but found my sea legs and a more proper compass heading with the Kobel case this past summer. Yakov Kobel, *et al* v. Hapag-Lloyd A.G., *et. al.*, Docket No. 10-06, (FMC July 12, 2013) (Order Vacating Initial Decision In Part and Remanding For Further Proceedings).

Kobel involved a beneficial cargo owner, an unlicensed freight forwarder, a licensed NVOCC and Hapag-Lloyd, the VOCC, all of whom were trying to move a container of products purchased at a "big box" home lumber and supply store, over to the former Soviet Union for resale at new retail plus markup. A Hapag-Lloyd crane operator inflicted minor damage to the shipper owned container at the west coast export terminal. They set the container aside for consultations with the customer. However, upon arrival of the next scheduled Hapag ship a week later, the damaged container was inadvertently loaded and was delivered to the European port of entry. While there was no damage to the cargo, troubles began because drayage trucks would not load the container due to the visible damage. Demurrage accrued, the cargo owner did not pay the freight charge and ultimately the cargo was sold for unpaid charges.

The issue concerning whether a single incident could trigger Section 10(d)(1) together with the scope and reach of the term "practices" was fully joined. The majority opinion embraced several concepts. First, it dismissed all of the pre Adair cases and precedents with a simple statement – they were issued under a "[d]ifferent statutory section with different context and are not directly precedential. . ." [Kobel, *supra,* 35] There is discussion concerning the grammatical construction of the statute – did Congress really mean "establish, observe, and enforce" or, did the legislature mean "establish, observe, or enforce".

The other critical issue, brought over from the Adair case line, concerning exclusive agency jurisdiction, also came into focus. The Adair presiding officer discussed at length the various potential causes of action that the claimant could maintain in a court of common pleas – breach of duty under agency law, contract law, admiralty law and other sources of legal duties. Any one of those duties – if breached – was now cognizable under Section 10(d)(1).

The Kobel majority neatly combines the analysis of [1] where does the Commission look to determine if a "practice" is "just and reasonable" with [2] where does the Commission look to find a "practice" in the first place. The answer is – "the course and conduct (or practices) of the whole industry." (Kobel, *supra*, at 17,18). To complete the logical circle, the just and reasonable practices are all industry responses to the myriad duties imposed by common and statutory law.

The most recent case to further illuminate this line of jurisprudence is Bimsha International v. Chief Cargo Services, Inc. Docket 10-08, 32 S.R.R. 353 (ALJ 2011), (FMC decision pending, August 2013). For those who practice in the commercial area of negotiable bills of lading, you may want to lend an ear. Bimsha involved the mishandling of three negotiable bills of lading, the resulting improper release of cargo and the complainant cargo owner not receiving his due payment for the goods. A straight forward violation of the Federal Bill of Lading Act, 49 U.S.C. Sections 80101-80116, "Pomerene Act") – IF the cargo originated in the US and moved to a foreign port. In Bimsha, the cargo originated in Pakistan and moved to the US. The Commission fills in this gap in the statute and found that a just and reasonable practice would include proper handling of bills of lading for US bound cargo originating in a foreign port. The offending common carrier failed to establish, observe and enforce such just and reasonable practice and therefore violated Section 10(d)(1) of the 84 Shipping Act.

The Commission reached further. The Bishma majority expressly held open the proposition that a single mishandled bill of lading for cargo originating in the US and delivered to a foreign port – a straight Pomerene Act issue – would still be cognizable as a violation of the 84 Shipping Act and not subject to exclusive jurisdiction of the federal courts. Last, the majority cast overboard any remaining vestiges of prior jurisprudence and precedents that held that the proper application of Section 10(d)(1) required the claimant to establish – for example in a Bimsha fact situation – that the normal practice of the respondent was to routinely or regularly mishandle and misdeliver negotiable bills of lading.

I have offered my views, in dissent, that the Commission has become a court of common pleas for maritime issues. The majority simply says – not so! – but offers no reasoned rebuttal. Time will tell, and response from an Article III court of appeals or, alternatively, the Article I legislature should not come as a surprise. For now, with these new and expansive interpretations of the 84 Shipping Act, I fully expect that the Commission will be an interesting and busy venue for our brethren assembled here and throughout the maritime bar.

Thank you for your kind attention and the opportunity to share my thoughts with this august group of maritime legal practitioners.

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