Much ado about shipping antitrust immunity

Last week The Journal of Commerce Conferences unit took its show on the road to Chicago. The keynote speaker was Rep. Henry J. Hyde, R-Ill. Not only is Hyde the chairman of the House Judiciary Committee, but his district, which includes O'Hare Airport, contains a great number of ocean transport intermediaries (OTIs); customs house brokers, freight forwarders and non-vessel-operating common carriers (NVOCCs).

Showing that all politics is local, Hyde took the hometown opportunity to announce his proposed legislation, the Free Market Antitrust Immunity Reform Act of 1999 (FAIR), which would abolish ocean carrier antitrust immunity. He took care not to criticize the Ocean Shipping Reform Act of 1998. He recognized it for what it was — a compromise between different factions that allowed an improvement over the existing situation.

There were two significant aspects to this compromise. First, NVOCCs were not allowed to sign confidential contracts with their customers. Additionally, steamship lines were allowed to continue their antitrust immunity.

Antitrust immunity dates back to the Shipping Act of 1916. It was intended to help support the U.S. merchant marine. However, with the sale of APL, Sea-Land’s international services and much of Crowley’s international business, little remains of the U.S.-owned international liner service.

Since OSRA, most conferences have disbanded. Replacing them have been discussion agreements, which have exerted great marketplace power through the imposition of voluntary rate guidelines. As Hyde remarked, “It is arguable whether these type of agreements as they have developed were even contemplated by Congress.”

Discussion agreements are pervasive in the trade. The Trans-Atlantic Conference Agreement (TACA) is seeking rate increases of $600 to $750 per container, plus an equipment-imbalance surcharge. The Trans-Pacific Stabilization Agreement (TSA) says it will raise rates $400 a box effective May 1, 2000, and to maintain a $300 peak-season surcharge. This comes atop an increase of $900 to $1,100 a container this year. The Asian steamship lines of TSA are seeking to establish their own discussion agreement.

TSA is most famous, of course, for its $300-a-box increase of May 1, 1998, which stopped a precipitous decline in rates. Customers responded with allegations of price gouging. This led to a Federal Maritime Commission probe, which still goes on. Its remaining questions seem to revolve around the size and nature of the penalties. (The probe has been led by Commissioner Desmond Won, who also attended the Chicago conference.)

Although their remarks were not coordinated, Hyde and Won struck the same themes. Won was thoughtful yet critical of the current market situation. His message was that silence should not imply consent; the lack of shipper complaints should not be mistaken for legislative success.

OSRA is not deregulation but regulatory reform based upon a greater reliance on the free market. Yet because the ocean transportation industry is still defined by antitrust immunity, the anecdotal evidence of carrier violations defines a murky world where anti-competitive acts could be carried out. For these reasons, Won said he would not consider OSRA a success.

Hyde was more direct. Citing reported abuses of the discussion-agreement system and price increases to small- and medium-sized shippers and OTIs, he asserted that modification of OSRA was necessary.

Furthermore, he argued that the two remaining justifications for antitrust immunity are no longer valid. There is no need to protect U.S.-owned carriers, as they are almost obsolete, he said. And similar immunity elsewhere in the world is increasingly problematic. The European Commission has started to take action and the Organization for Economic Cooperation and Development is calling for complete re-examination of the issue.

In Hyde’s words, “Antitrust immunity now almost exclusively benefits foreign-owned carriers at the expense of American shippers and consumers.”

Legislative hearings on this issue are scheduled for next year. Remaining foreign lines may not be a potent enough force to stop this legislative initiative.

Moreover, confidentiality has destroyed the conferences. Just as lines could make side deals with customers and deny it at conference meetings with impunity, confidentiality will ultimately destroy discussion agreements for the same reason. There is some evidence in the marketplace that this is happening already.

Carrier consolidation will be affected. Without profit-enhancement available through the guidelines, some steamship lines will fail more quickly. This will leave a small group of mega-carriers. These lines will be so large that they will not be allowed to meet with antitrust immunity — even if such immunity remains.

OSRA was developed from shipper outrage at the Trans-Atlantic Agreement, TACA’s predecessor. It would appear that FAIR has similar roots.

It has been a year since the FMC initiated hearings on TSA, and no definitive action has been taken. Justice delayed is justice denied, and the demise of discussion agreements would be strong justice.

Theodore Prince is senior vice president of sales and marketing at Kleinschmidt Inc., an electronic-commerce provider. He can be reached at Ted_Prince@kleinschmidt.com