



**23RD ANNUAL Textile & Apparel Importer
Trade & Transportation Conference**

NOVEMBER 8, 2011 / BRIDGEWATERS SOUTH STREET SEAPORT

BROUGHT TO YOU BY



AISA
American Import
Shippers Association

Legal and Regulatory Developments In Ocean Transportation

**Martin J. Lewin,
Partner, Kalik Lewin**

I have been asked to discuss legal and regulatory developments potentially affecting ocean transportation.

Ocean transportation has always been characterized by a great deal of uncertainty. In recent years, this uncertainty has intensified.

You all know the story. With the collapse of the global economy, ocean transportation rates plummeted in 2009, as shippers and ocean carriers experienced one of the worst years in the more than fifty-year history of international containerized shipping. During this economic downturn, U.S. liner exports fell by 14 percent and imports fell by 16 percent. In addition to plummeting freight rates, carriers laid up more than 500 vessels worldwide, or roughly 10 percent of global fleet capacity.

This meltdown was followed during the fourth quarter of 2009 and early 2010 by an uptick in economic activity. Cargo volumes shipped to the United States from Asia increased; so did demand for export shipments from the United States. As a result, shipping rates increased rapidly. Many shippers complained of having difficulty obtaining vessel space, particularly in the U.S.-Asia trades, and U.S. exporters complained of problems with the distribution and availability of shipping containers for their goods on those same Asian trades.

Two developments grew out of this tumultuous environment.

First, following a series of shipper complaints, in March of 2010, the Federal Maritime Commission initiated a fact finding investigation on vessel capacity and equipment availability in the United States export and import liner trades. The final report of

the FMC's fact finding investigation was issued in December of last year. Among the Report's recommendations, the FMC established rapid response teams to provide prompt solutions for commercial disputes between shippers and carriers under the FMC's consumer affairs and dispute resolution services.

The report also established two working groups within a framework organized by the FMC to develop long-term solutions to the commercial problems experienced by U.S. exporters and importers. The International Ocean Transportation Working Group, comprised of ocean carriers, shippers, and ocean transportation intermediaries was formed to focus attention on the most pressing issues revealed during the FMC's fact finding investigation. The FMC also established an intermodal container

availability working group with various intermodal business groups to review issues relating to container access and availability.

Also arising out of the FMC's fact finding investigation, the FMC issued an order in September of 2010 requiring that the Transpacific Stabilization Agreement and The Westbound Transpacific Stabilization Agreement file verbatim transcripts of certain meetings. This past September, the FMC extended the reporting requirements through April 30, 2012, in the belief that this extension will provide important information as carriers enter the traditional September-October peak season, potentially reduce transpacific capacity in the traditional slack season, and then begin the annual service contract negotiation process.

Whether this flurry of activity by the FMC will have any real impact on ocean shipping is not clear. Again, however, it reflects

an attitudinal shift by the FMC, which historically was viewed as favoring carriers interests over those of shippers.

The second development that grew out of the volatile shipping environment of late 2009 and early 2010 was an effort by certain shippers to remove the limited antitrust immunity that ocean carriers retained after passage of the Ocean Shipping Reform Act of 1998.

Last September, Representative James Oberstar, at the time Chairman of the House Transportation and Infrastructure Committee, introduced a bill that, among other things, would have prohibited Ocean Common Carrier Agreements from allowing their members to discuss, fix, or negotiate any kind of rate or charge with another member of the agreement. The bill also

would prohibit members of agreements discussing or agreeing on capacity rationalization; establishing a joint service, or pool or divide cargo traffic, earnings, revenues, or losses; allocating customers or markets; or discussing or agreeing on any service contract matter.

Congressman Oberstar's Bill did not move forward during the last Congress, and with Congressman Oberstar's defeat in the 2010 Mid-term elections and Republicans gaining control of the House of Representatives, the likelihood of Oberstar-type legislation being enacted in the foreseeable future is very small.

More modest legislation has been circulated this year that would prohibit carrier groups from restricting members negotiating service contracts or requiring that members disclose they are negotiating service contracts or the terms of any service contracts

they negotiate. Unlike the Oberstar Bill, the proposed legislation would allow joint action to implement vessel capacity adjustments “solely for the purpose of, and only to the extent necessary, to meet fluctuations in supply and demand.” However, there appears to be no impetus for introducing this or any similar legislation in the current Congress.

While it looks like no major overhaul of the legal and regulatory framework for ocean shipping is in the works, there is one sleeper issue that could impact ocean shippers. Some of you may have been following the efforts of the Port of Los Angeles to use the Port’s Clean Truck Plan to help the Teamsters organize Port truckers by requiring that harbor trucking companies hire drivers as direct employees. The reason for this is that by law, independent contractors cannot be unionized. Labor unions can,

however, organize direct employees, so the employee mandate in the Los Angeles program was an attempt to pave the way for unionization of port drivers.

What held up implementation of the employee driver mandate at the port of LA was the issue of whether Federal law pre-empted the Port's mandate. The issue finally was resolved in September when the U.S. Court of Appeals for the 9th Circuit struck down the employee driver mandate, while allowing other concession requirements in the Los Angeles Clean-Truck Program that pertain to safety and truck maintenance.

The issue of independent trucking at the ports is not dead, however. The Teamsters and their allies have opened up another front, directly challenging the classification of owner operator port

truckers as independent contractors. Legislation has been introduced in several states, including California and New Jersey, to classify owner operators as employees. Lawsuits also have been brought alleging misclassification of owner operators as independent contractors.

None of this legislation is moving in state legislatures, and it is too early to know whether the lawsuits have any legal substance.

The real sleeper comes with the announcement this past September of the Department of Labor and the Internal Revenue Service signing of a memorandum of understanding to share information and coordinate law enforcement with the goal of ending the business practice of misclassifying employees to avoid providing employment protections. At the same time, labor

commissioners and other agency leaders from seven states signed similar information sharing and coordination memorandums of understanding with the Labor Department. Other states are in the process of entering into similar memorandums of understanding.

With the issue of misclassification of port drivers a Teamsters priority, there is a real possibility that the system of owner operator port trucking will be scrutinized at the Federal level, with support from many state labor and law enforcement agencies.

Whether this will result in a radical change in port trucking operations is unclear, but it bears watching because no new legislation is needed for Government action in this area.