

carriers have argued that market changes since OSRA have rendered the level of Monitoring Report data for Class A agreements unnecessary. In Docket No. 98–26, the Commission dismissed the carriers' request noting that "[a]ny modifications in the current agreement monitoring program based on changed market conditions will be considered only after an opportunity to evaluate the competitive effects of OSRA's regulatory changes." See Dkt. No. 98–26, 64 FR at 11240.

2. Changes in Carrier Agreements Since OSRA

The legislative reforms introduced by OSRA have considerably altered the ocean shipping industry in the U.S. trades. OSRA has encouraged carriers to operate more independently in response to competitive market forces. While these changes have improved competition, carriers are still very committed to cooperating in agreements and actively using their agreement authority to pursue and achieve their collective objectives. Thus, under OSRA, carrier agreements still can exert a powerful collective influence over competition in the U.S. trades. The Commission's need for reliable and specific information to evaluate and monitor carrier agreements remains.

Under OSRA, a clear pattern in carrier agreement activity has emerged in most of the U.S. trades. Collective pricing by carriers under conference agreements has declined in favor of voluntary rate authority under discussion agreements.³⁸ In addition, carriers are cooperating more in operational arrangements which can affect rate and service levels in the trades, particularly in agreements with capacity rationalization authority.³⁹

³⁸ The preference for voluntary rate discussion agreements between carriers has evolved in most of the major U.S. trades, except for those trades that include member nations of the European Union ("EU"), where the conference system has remained in place. Conference agreements between ocean common carriers are specifically exempted from the competition laws of the EU, and the European Commission ("EC") opposes other forms of collective pricing outside of formal conference agreements. The effects of conferences, however, have been mitigated under OSRA because most conference carriers heavily engage in individual service contracts to stay competitive in the trades. The EC further restricts conference carriers from adopting voluntary service contract guidelines and disclosing information relating to service contracts negotiated outside the conference system. Nonetheless, conferences still represent the main rate agreements in the U.S./Europe trades, and require close monitoring.

³⁹ The Commission's proposed rule defines capacity rationalization as the concerted reduction, stabilization, withholding, or other limitation in any manner whatsoever by ocean common carriers on the size or number of vessels or available space

Liner cargo in today's trades is predominantly shipped under individual service contracts with independently-negotiated freight rates and terms. While cargo carriage under a common conference tariff has diminished, discussion agreements and the concerted activities of their parties continue to pose significant anticompetitive and statutory concerns under the Shipping Act.

Although compliance is voluntary, discussion agreements contain considerable, broad authority over rate, service contract, and service matters spanning large geographic areas in the U.S. trades. Further, many discussion agreements include most of the major carriers operating within their respective geographic scopes. Thus, discussion agreements generally have high market shares which contribute toward their ability to affect freight rates and competitive conditions. For example, each of the agreement market shares for the Transpacific Stabilization Agreement ("TSA") and the Westbound Transpacific Stabilization Agreement ("WTSA") in the U.S./Asia trades exceeds 70 percent.

OSRA prohibited any mandatory restrictions on individual service contracts, but it allowed agreements to adopt voluntary service contract guidelines applicable to their parties' individual contracts. On a voluntary basis, carriers may collectively set and adhere to rates and terms for their individual service contracts. Thus, while agreement carriers are pricing more independently under OSRA, they still have the power to exert their collective influence over contract rates and terms.

The extent to which voluntary authority and adherence are effective under discussion agreements likely depends on the prevailing and anticipated economic conditions in the respective agreement trades. Such conditions, however, are difficult to discern and even harder to anticipate without reliable agreement and trade information.

Carriers are also relying more heavily on operational agreements to control the supply of excess vessel capacity. These agreements allow carriers to rationalize services and remove excess vessel capacity through vessel-sharing, space or slot chartering, sailing, and/or service arrangements. Operational agreements with capacity rationalization authority raise particular concerns under section 6(g). This concerted authority not only affects the amount of vessel capacity

offered collectively or individually to shippers in any trade or service.

supplied in a trade, but also imposes restrictions on the parties' ability to freely participate in other service arrangements and/or independently operate competing services within the geographic scope of the agreement. Some carriers use this concerted authority to form complex and highly integrated alliance arrangements where the parties fix and allocate their collective vessel capacity on a global scale. Many of these alliances enter into space chartering agreements as a group with other carriers or groups of carriers.

Carriers assert that operational agreements, even those with capacity rationalization authority, produce cost and service benefits for the shipping public. Carriers may use their concerted authority to better align the supply of vessel space with the demand for vessel space in specific trade lanes. In trade lanes burdened with high excess capacity, the coordination of vessel space between carriers can achieve efficiencies by lowering operational costs while still preserving, or even enhancing, the level and frequency of ocean liner services. Alternatively, a concerted reduction in vessel capacity and the restrictions imposed by capacity rationalization authority can result in a shortage of vessel space in a trade causing unreasonable service decreases and/or unreasonable rate increases in violation of section 6(g). Even if a shortage does not occur, a concerted reduction in vessel capacity decreases the amount of market pressure placed on carriers competing to fill excess vessel space. This reduction in competition may be significant enough to enable carriers to increase or maintain rates more easily by discouraging rate discounting.

These concerns are compounded where carrier agreements contain both rate and capacity rationalization authority. Even if these authorities are not in the same agreement, many carriers participate in large rate discussion agreements that cover broad trade areas and also participate in separate agreements with capacity rationalization authority in the same trade areas. These authorities are interrelated and complementary. Carriers may discuss and agree on their overall rate and service objectives under the broad authority of their discussion agreements, and implement and fix their service and capacity levels within the same trade using their capacity rationalization authority contained in separate agreements. Likewise, carriers may collectively fix the supply of vessel capacity in a trade, through their capacity rationalization authority contained in separate agreements, to