

***WTSA's Reefer Trade Management Program: Creative Cooperation  
or a Can of Worms?***

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The Westbound Transpacific Stabilization Agreement (WTSA), an ocean carrier discussion agreement, recently filed with the U.S. Federal Maritime Commission (FMC) a proposed amendment to its written pact which would implement a "Reefer Trade Management Plan." Carrier agreements, including proposed amendments to them, must be submitted to the FMC for regulatory scrutiny and public review. Uncle Sam's shippers received WTSA's proposed Management Plan about as coldly as the trade it's designed to address, and they wasted little time voicing their request that the FMC reject it.

The Management Plan would work something like this: Carrier members would be subject to defined "quotas" for westbound reefer service, with carriers receiving allocated "shares" of the refrigerated trade. They are "incentivized" to comply with those quotas by enjoying a monetary reward for each "undercarriage" and, yes, having to pay a penalty for any "overcarriage." The overcarriage penalty would be a thousand bucks per TEU; the undercarriage reward would be but two hundred fifty.

The Management Plan would have teeth – each carrier must post a letter of credit to the tune of five hundred grand to ensure payment for any overcarriages. If it looks like half a million might fall short for a given carrier, WTSA could ask its carriers to pony up more. Withdrawal would be prohibited and committees would be set up to ensure all carriers behave. The Management Plan is designed to last a year, but it would renew automatically.

The National Industrial Transportation League (NITL), representing the nation's largest and most influential shippers, suffered immediate heartburn upon learning of WTSA's proposal. Refusing to agree to disagree with the agreement, NITL wrote the FMC's commissioners to argue that the Management Plan would constitute a "rigid long-term division of the market by WTSA carriers." Moreover, it would be, "in purpose and effect, an agreement not to compete among all WTSA members, whose compliance with that non-compete agreement will be closely monitored..." NITL believes this takes the Ocean Shipping Reform Act's perpetuation of carrier antitrust immunity just a bit too far, and violates certain OSRA provisions prohibiting any restriction of carriers' ability to negotiate service contracts independently.

NITL's position vis-à-vis the FMC is largely "I told you so." After deregulation of international shipping passed Congressional muster in 1998, the FMC immediately set about drafting rules to implement legislative intent. Largely at NITL's urging, early drafts of the rules contained specific criteria by which agreements would have to operate, similar to those governing conferences. Ultimately, the FMC elected to regulate

conferences closely, but it trashed proposed guidelines for agreements in favor of an *ad hoc* approach.

NITL never liked that approach, warning of too many potential abuses. The shippers pointed to Europe's general prohibition of agreements altogether on the ground they can act too much like conferences – with the same potentially negative impacts and without regulatory leashes to keep them in line. Now, says NITL, we see a post-deregulation example of an agreement going too far. If the Management Plan is implemented, who knows what carrier agreements might come up with next.

But WTSA sees things differently with its proposed amendment. The carriers argue the Management Plan actually provides stability and “consistent service” to shippers of westbound refrigerated cargo. In fact, the proposed amendment includes a review program to ensure these ends are achieved. Put simply, WTSA believes it's just operating within OSRA's letter and spirit, with a provision that does not differ significantly from other agreement provisions.

Whether the FMC will accept WTSA's Management Plan amendment as good economic policy, or reject it as bad precedent, remains to be seen. NITL is still accumulating its members' comments and the carriers have yet to respond. If nothing else, however, this issue demonstrates the continuing complexity of international shipping economics. The consequences of regulatory action, or inaction, may dictate significant future trends in ocean shipping.

***Ref: the Westbound Transpacific Stabilization Agreement with proposed amendment, FMC Agreement No. 203-011325-027***