

Resonation from a Bygone Era: Few Mourn at Common Carriage's Funeral

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Okay, it's a catchy title but not quite accurate. Common carriage isn't dead. It probably won't, and shouldn't, ever be extinguished as a mechanism to allow occasional and very small shippers to book international freight conveniently.

But with the lion's share (90% by some estimates) of ocean transit moving pursuant to independently negotiated, confidential service contracts, most on the waterfront now think in terms of volume and time commitments. The era of "one price fits all" shipping by government enforced tariffs is pretty much a memory (some might say a "bad dream") – the stuff of cocktail party war stories related by nostalgic transportation executives who predate the Ocean Shipping Reform Act of 1998 (OSRA).

Most everyone spoke in favor of the deregulated environment ultimately graced by Congress' passage of OSRA. Some might have more vocally opposed the legislation were they better focused on its implications, but that's another article. The fact is, market-driven transportation relationships are more realistic and better reflect modern business practices than did virtually mandatory common carriage. Shippers and carriers should be partners, working together to face our industry's unique challenges toward their common goal of maximizing efficiency. The first step in making them partners is to eliminate the government telling them how they have to interact.

But you don't just end over a century of tariff-governed common carriage on the date a statute is implemented. Too much heavily regulated activity was going on for far too long. A fascinating dynamic recently developed in proceedings before the Federal Maritime Commission (FMC) against carrier Sea-Land Service, Inc. It reflects the current bearings of international shipping as an industry; a microcosm of the world OSRA created.

Danish AP Moller Maersk swallowed carrier Sea-Land shortly after OSRA liberated ocean shipping and its players. But in the mid-1990s, Sea-Land apparently engaged in practices which violated the 1984 Shipping Act. Specifically, Sea-Land had charged shippers rates applicable to 20-foot containers, when in fact the carrier had moved those shippers' freight in less expensive 40-footers. Yes, this kind of thing was a big no-no in the olden days, one which could get carriers in trouble with the FMC's Bureau of Enforcement (BOE).

The BOE sought to hold Sea-Land liable for its game of musical containers. But only on March 5, 2002, well after liberation, did an FMC administrative law judge agree with the BOE. The judge socked Sea-Land with a fine exceeding four million bucks (the maximum available under the statute). And you thought parking tickets were costly.

Sea-Land took umbrage at the big fine and wants the FMC to reconsider it – not an unexpected reaction under the circumstances. But the carrier isn't alone in its plea to the feds.

Hold onto your chair: national shippers and intermediary groups are circling the wagons with a steamship line, joining forces with a carrier in its struggle with the FMC. These groups, led by the National Industrial Transportation League (NITL), sought leave to file *amicus curiae* briefs (literally “friend of the court” statements presented to a tribunal by someone not a party to proceedings) supporting Sea-Land. Also hoisting Sea-Land's banner are the National Customs Brokers and Forwarders Association of America, the Transportation Intermediaries Association, and the NVOCC-Government Affairs Conference. The FMC accepted the *amicus curiae* briefs over BOE's largely procedural objections.

Can you believe it? Shippers and forwarders supporting a carrier before the FMC! After the shock subsides, and you consider the evolution NITL and its cousins have undergone post-OSRA, you'll see that this development makes perfect sense.

NITL, once the nation's leading (and largest) shippers trade organization with legendary lobbying power and influence, recently broadened its scope to focus on transportation issues from all perspectives. Carriers, intermediaries and many others now fill NITL's ranks, and the organization is fast becoming a forum for everyone involved in transportation to promote an agenda. That itself is a reflection of our new era of mutually beneficial interrelationships.

Similarly, intermediaries see the advantage of focusing on the warm and fuzzy side of their love-hate relationship with carriers. Like everyone else, those in the middle need to partner up with carriers. A healthy, grateful partner beats one that is oppressed. Besides, some of the issues in Sea-Land's case could directly impact intermediary interests. Whose customers ultimately are going to pay Sea-Land's fine?

Palms up and with barely masked frustration, shippers and intermediaries beg the FMC to consider that the illegal activity for which Sea-Land has been found liable wouldn't be an issue today. Rather, improper billing based on container sizes is an ancient common carriage concept – one we focused on when the government's job was to keep carriers within the strict letter of their tariffs. This is kind of like prosecuting someone in 2003 for illegally selling a Margarita in 1932, before the 21st Amendment made doing so legal in 1933!

In shuffling its container sizes, Sea-Land was actually doing what OSRA is specifically designed to egg on: maximize efficiency. At a minimum, NITL urges in its brief, the subsequent legislation should be consulted in determining whether or how much Sea-Land should pay the piper. Fines are designed to deter, and there can be no deterrent value when the illicit activity at issue has become both legal and encouraged.

But what about the profits Sea-Land was able to reap by its illegal activity? Other carriers didn't get, or take, the benefit of more efficient operations in violation of their tariffs and federal statutes. Whether or not pre-OSRA law was appropriate, it set an even playing field for all carriers. It was the law. Should Sea-Land hold a Get-Out-Of-Jail Free Card (and keep ill-gotten profits), just because its illegal activity took place on the eve of legalization? What kind of precedent would that set? What about all those law-abiding tavern owners who closed their doors – and lost considerable profits – with the advent of prohibition? Wouldn't forbearance to prosecute one be a disservice to the rest, regardless of when the decision is made?

Sea-Land's ultimate punishment, if any, remains to be seen. But here, the choppy seas are more significant than the final port of call. Sea-Land certainly welcomes the support its partners have shown it in this rough and precedential sailing; we should expect, or at least hope for, similar intra-industry cooperation in future voyages.

Ref: NITL's amicus curiae brief, available at www.nitl.org/legjoint11.htm and the FMC's Order available at <http://www.fmc.gov/>