

Y4
. C 73/7
96-107

1041

9634
C 73/7
96-107

GOVERNMENT
Storage

AMEND THE SHIPPING ACT, 1916

DOCUMENTS

SEP 23 1980

FARRELL LIBRARY
KANSAS STATE UNIVERSITY

HEARING

BEFORE THE

SUBCOMMITTEE ON MERCHANT MARINE AND TOURISM

OF THE

COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION

UNITED STATES SENATE

NINETY-SIXTH CONGRESS

SECOND SESSION

ON

H.R. 6613

TO AMEND THE SHIPPING ACT, 1916, IN ORDER TO PROHIBIT
REGULATION OF COLLECTIVE BARGAINING AGREEMENTS BY
THE FEDERAL MARITIME COMMISSION

JUNE 4, 1980

Serial No. 96-107

Printed for the use of the
Committee on Commerce, Science, and Transportation

KSU LIBRARIES



5E6696 006TTV
A 11900 969935



7/27 9.
701-08
AY

COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION

HOWARD W. CANNON, Nevada, *Chairman*

WARREN G. MAGNUSON, Washington
RUSSELL B. LONG, Louisiana
ERNEST F. HOLLINGS, South Carolina
DANIEL K. INOUE, Hawaii
ADLAIE STEVENSON, Illinois
WENDELL H. FORD, Kentucky
DONALD W. RIEGLE, Jr., Michigan
J. JAMES EXON, Nebraska
HOWELL HEFLIN, Alabama

BOB PACKWOOD, Oregon
BARRY GOLDWATER, Arizona
HARRISON H. SCHMITT, New Mexico
JOHN C. DANFORTH, Missouri
NANCY LANDON KASSEBAUM, Kansas
LARRY PRESSLER, South Dakota
JOHN W. WARNER, Virginia

AUBREY L. SARVIS, *Staff Director and Chief Counsel*

EDWIN K. HALL, *General Counsel*

JOHN D. HARDY, *Merchant Marine and Tourism Counsel*

WILLIAM M. DIEFENDERFER, *Minority Staff Director*

PHILIP M. GRILL, *Minority Staff Counsel*

SUBCOMMITTEE ON MERCHANT MARINE AND TOURISM

DANIEL K. INOUE, Hawaii, *Chairman*

WARREN G. MAGNUSON, Washington
RUSSELL B. LONG, Louisiana

JOHN W. WARNER, Virginia
BOB PACKWOOD, Oregon

CONTENTS

	Page
Opening statement by Senator Inouye	1
Text of H.R. 6613.....	3
Agency comments: Department of Commerce	8

LIST OF WITNESSES

Archer, John J., director of logistics, Crown Zellerbach Corp.; accompanied by Paul Donovan, counsel	45
Prepared statement	49
DeMember, Raymond P., executive vice president and general counsel, International Association of NVOCCS; and Gerald Ullman, general counsel, National Customs Brokers Forwarders Association of America, Inc.....	81
Prepared statement of Mr. DeMember	82
Questions of the committee and the answers thereto	83
Prepared statement of Mr. Ullman	89
Questions of the committee and the answers thereto	91
Dickman, James, president, New York Shipping Association; and Thomas W. Gleason, president, International Longshoremen's Association, AFL-CIO, CLC; accompanied by Peter Lambos, counsel.....	19
Prepared statement of Mr. Dickman	23
Questions of the committee and the answers thereto	30
Prepared statement of Mr. Gleason.....	33
Flynn, Edmund, president, Pacific Maritime Association; accompanied by Hal Mesirov, counsel	69
Prepared statement	71
Questions of the committee and the answers thereto	74
Answers to additional questions.....	75
Herman, James R., president, International Longshoremen's and Warehousemen's Union	76
Prepared statement	80
Kauffman, John, vice president, transportation, Weyerhaeuser Co	51
Prepared statement	52
Questions of the committee and the answers thereto	54
Lenahan, Daniel W., counsel, Boston Shipping Association, Inc	56
Prepared statement	58
Questions of the committee and the answers thereto	59
Letter of June 10, 1980.....	61
Moakley, Thomas F., Vice Chairman, Federal Maritime Commission; accompanied by Charles Haslup, legal assistant	10
Prepared statement	14
Skerritt, Dan, counsel, Master Contracting Stevedore Association of the Pacific Coast, Inc.....	38
Prepared statement	40
Questions of the committee and the answers thereto	42
Letter of June 17, 1980.....	43
Vierengel, Ed, director, international logistics, New York Chamber of Commerce	63
Prepared statement	67
Questions of the committee and the answers thereto	68

ADDITIONAL ARTICLES, LETTERS, AND STATEMENTS

Agman, Robert S., and Talmage E. Simpkins, co-directors, Labor-Management Maritime Committee, letter of April 1, 1980	95
---	----

IV

	Page
Brand, Herbert, president, Transportation Institute, letters of:	
May 5, 1980.....	99
June 23, 1980.....	109
Calder, Robert M., executive director, Boston Shipping Association, Inc., letter of June 19, 1980.....	108
Calhoun, J. M., president, National Marine Engineers' Beneficial Association, letter of May 7, 1980.....	100
Coyne, Robert T., president, Boston Consolidation Service, mailgram of May 14, 1980.....	101
DeMember, Raymond P., executive vice president, general counsel, International Association of NVOCCS, letter of June 19, 1980.....	107
Denison, Ray, director, department of legislation, American Federation of Labor and Congress of Industrial Organizations, letter of May 19, 1980.....	102
Drozak, Frank, executive vice president, Seafarers International Union of North America, AFL-CIO, letters of:	
April 28, 1980.....	96
June 23, 1980.....	110
Gregoire, Jerome D., vice president, ITT Rayonier Inc., letter of June 2, 1980...	104
Hiltzheimer, C. I., chairman, Sea-Land Industries, Inc., letter of June 3, 1980...	105
Howell, James G., president, New Orleans Steamship Association, letter of April 29, 1980.....	97
Inouye, Hon. Daniel K., Chairman, and Hon. John W. Warner, ranking minority member, Subcommittee on Merchant Marine and Tourism, U.S. Senate, letter of June 14, 1980.....	106
International Organization of Masters, Mates & Pilots, ILA, AFL-CIO, statement.....	110
Leggett, Robert L., president, Joint Maritime Congress, letter of May 5, 1980...	99
Lidinsky, Richard A., Jr., director of tariffs and national port affairs, Maryland Department of Transportation, letters of:	
April 21, 1980.....	95
June 20, 1980.....	109
May, Albert E., executive vice president, Council of American-Flag Ship Operators, letter of May 5, 1980.....	98
Mosher, Sol, vice president, Crown Zellerbach, letter of June 19, 1980.....	106
Neuhauser, C. William, executive secretary, National Maritime Council, telegram of May 6, 1980.....	100
Payne, Al., secretary, International Traffic Committee, New York Chamber of Commerce, telegram of June 20, 1980.....	109
Pilsch, Martin C., Jr., director, Port of Boston, letter of April 29, 1980.....	97
Skerritt, Daniel H., Lindsay, Hart, Neil & Weigler, letters of:	
June 2, 1980.....	103
June 19, 1980.....	109
Stryker, Dan E., president, Powell River-Albarni Sales Corp., letter of May 12, 1980.....	101
Swider, Eric, president, New England Council, Inc., letter of April 29, 1980.....	96
Tavrow, Richard L., senior vice president, American President Lines, letter of June 4, 1980.....	105
Ullman, Gerald H., general counsel, National Customs Brokers & Forwarders Association of America, Inc., letter of June 19, 1980.....	107

AMEND THE SHIPPING ACT, 1916

WEDNESDAY, JUNE 4, 1980

U.S. SENATE,
COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION,
SUBCOMMITTEE ON MERCHANT MARINE AND TOURISM,
Washington, D.C.

The subcommittee met at 2 p.m., in room 235 of the Russell Senate Office Building; Hon. Daniel K. Inouye (chairman of the subcommittee) presiding.

OPENING STATEMENT BY SENATOR INOUE

Senator INOUE. Today the subcommittee holds hearings on H.R. 66313, a bill to amend the Shipping Act of 1916 in order to prohibit regulation of collective bargaining agreements and activities arising out of or based upon these agreements. This legislation passed the House by a vote of 358 to 2.

Section 15 of the Shipping Act requires FMC approval of certain agreements, and it is unlawful to implement them without such approval.

Sections 16 and 17 prohibit common carriers and other persons subject to the act from engaging in any activity which is unjustly discriminatory or unduly prejudicial to shippers, ports, and other shipping interests.

Sections 14, 16, and 18(a) of the 1916 Shipping Act and section 4 of the Intercoastal Shipping Act of 1933 prohibit tariff rules which unfairly or unjustly discriminate among shippers.

Finally, sections 22 and 32 of the 1916 act give the Commission authority to award reparations for injuries caused by violations of the act and to assess the civil penalties prescribed for violations of the act.

As a consequence of Supreme Court decisions, collective bargaining agreements and related agreements among multiemployer bargaining associations which implement those collective bargaining agreements are now considered agreements which must be filed with the FMC for approval. The FMC may also impose penalties and award reparations against individual members of these multiemployer associations for practices arising out of or based upon collective bargaining agreements if the FMC finds the practice in question to be in violation of any provisions of the 1916 act.

Presently the FMC does not require section 15 filings for collective bargaining agreements and relies upon its general exemption authority in the Shipping Act as the basis for doing so. The agency has said, however, that specific statutory authority to exempt collective bargaining agreements is preferable.

Those who support enactment of this bill, H.R. 6613, urge that collective bargaining in the maritime industry has been seriously disrupted by the Supreme Court decisions interpreting the shipping laws, and that the maritime industry has been singled out as the only industry in the United States which is to be deprived of the benefits of the express national policy of free and unfettered bargaining without governmental intervention.

On the other hand, those who oppose H.R. 6613 urge that its enactment would strip the FMC of jurisdiction to assure equal treatment on shippers, cargoes, and localities, and to prevent abuses made possible by concerted activity of carriers and others.

Less than 24 hours ago, the subcommittee staff was informed by some of the major supporters and opponents of H.R. 6613 that they were on the verge of reaching a tentative compromise which they felt recognized the express national policy of free and unfettered bargaining and also provided adequate protection for shippers and ports under the Shipping Act.

Legislation, of course, is the art of compromise. And in that spirit, late yesterday afternoon the subcommittee requested the FMC to review the tentative compromise and address it in its testimony today. The Commission's prepared testimony on H.R. 6613 will also be made part of the hearing record.

Just now, however, the subcommittee has learned that the parties have been unable to agree on a compromise. The subcommittee has instructed the staff to draft an amendment to this bill, H.R. 6613, which would be based on the proposed compromise. The committee staff draft will be available to all interested parties no later than 1 week from today, and the record will remain open for comments until June 25.

I should like to emphasize, however, that no further hearings are planned on this legislation because of the lateness of the legislative session.

Insofar as possible, the subcommittee will appreciate it if today's witnesses will address themselves to the compromise that is now being discussed.

[The bill and agency comments follow:]

96TH CONGRESS
2D SESSION

H. R. 6613

IN THE SENATE OF THE UNITED STATES

APRIL 16 (legislative day, JANUARY 3), 1980

Read twice and referred to the Committee on Commerce, Science, and
Transportation

AN ACT

To amend the Shipping Act, 1916, in order to prohibit regulation of collective bargaining agreements by the Federal Maritime Commission.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 (a) That section 1 of the Shipping Act, 1916 (46 U.S.C.
4 801), is amended by defining the term "other person subject
5 to this chapter" to read as follows:

6 "The term 'other person subject to this chapter' means
7 any person not included in the term 'common carrier by
8 water', carrying on the business of forwarding or furnishing

1 wharfage, dock, warehouse, or other terminal facilities in
2 connection with a common carrier by water: *Provided, how-*
3 *ever,* That any multiemployer bargaining group when it nego-
4 tiates or administers collective bargaining agreements with a
5 labor organization representing employees in the maritime or
6 stevedoring industry shall not be deemed a common carrier
7 by water or other person subject to this chapter without
8 regard to whether membership of said multiemployer bar-
9 gaining group includes any 'common carrier by water' or
10 'any other person subject to this chapter'."

11 (b) That the first paragraph of section 15 of the Ship-
12 ping Act, 1916 (46 U.S.C. 814), is amended to read as
13 follows:

14 "Every common carrier by water, or other person sub-
15 ject to this chapter, shall file immediately with the Commis-
16 sion a true copy, or, if oral, a true and complete memoran-
17 dum, of every agreement with another such carrier or other
18 person subject to this chapter, or modification or cancellation
19 thereof, to which it may be a party or conform in whole or in
20 part, fixing or regulating transportation rates or fares; giving
21 or receiving special rates accommodations, or other special
22 privileges or advantages; controlling, regulating, preventing,
23 or destroying competition; pooling or apportioning earnings,
24 losses, or traffic; allotting ports or restricting or otherwise
25 regulating the number and character of sailings between

1 ports; limiting or regulating in any way the volume or char-
2 acter of freight or passenger traffic to be carried; or in any
3 manner providing for an exclusive, preferential, or coopera-
4 tive working arrangement. The term 'agreement' in this sec-
5 tion includes understandings, conferences, and other arrange-
6 ments: *Provided, however,* That collective bargaining agree-
7 ments and all provisions thereof, between a common carrier
8 by water, other persons subject to this chapter or a multiem-
9 ployer bargaining group and a labor organization represent-
10 ing employees in the maritime or stevedoring industry, and
11 any agreements preparatory thereto among members of the
12 multiemployer bargaining group, and any provisions for the
13 implementation of the collective bargaining agreement, in-
14 cluding the means and method of raising the moneys for
15 wages, fringe and other employee benefits provided in the
16 collective bargaining agreement, shall not be deemed either
17 an agreement or a cooperative working arrangement subject
18 to the filing provision herein: *And provided further,* That said
19 collective bargaining agreements and agreements preparatory
20 to, and for the implementation thereof, shall not be subject to
21 Commission jurisdiction for any purpose under any other pro-
22 vision of this chapter including, but not limited to, Sections
23 16, 17 and 22 thereof."

24 (c) The first paragraph of section 16 of the Shipping Act
25 (46 U.S.C. 815), is amended to read as follows:

1 "It shall be unlawful for any shipper, consignor, con-
2 signee, forwarder, broker, or other person, or any officer,
3 agent, or employee thereof, knowingly and willfully, directly
4 or indirectly, by means of false billing, false classification,
5 false weighing, false report of weight, or by any other unjust
6 or unfair device or means to obtain or attempt to obtain
7 transportation by water for property at less than the rates or
8 charges which would otherwise be applicable: *Provided, how-*
9 *ever,* That any charge, tax or assessment imposed upon cargo
10 or any shipper or ocean carrier to fund the fringe benefit
11 obligations under a collective bargaining agreement shall not
12 be deemed a charge within the meaning of this section."

13 (d) The first paragraph of section 17 of the Shipping
14 Act, 1916 (46 U.S.C. 816), is amended to read as follows:

15 "That no common carrier by water in foreign commerce
16 shall demand, charge, or collect any rate, fare, or charge
17 which is unjustly discriminatory between shippers or ports, or
18 unjustly prejudicial to exporters of the United States as com-
19 pared with their foreign competitors. Whenever the Board
20 finds that any such rate, fare, or charge is demanded,
21 charged, or collected it may alter the same to the extent
22 necessary to correct such unjust discrimination or prejudice
23 and make an order that the carrier shall discontinue demand-
24 ing, charging, or collecting any such unjustly discriminatory
25 or prejudicial rate, fare, or charge: *Provided, however,* That

1 any charge, tax or assessment imposed upon cargo or any
2 shipper or ocean carrier to fund the obligations under a col-
3 lective bargaining agreement shall not be deemed a charge
4 within the meaning of this section.”

Passed the House of Representatives April 15, 1980.

Attest: EDMUND L. HENSHAW, JR.,
Clerk.

By W. RAYMOND COLLEY,
Deputy Clerk.

U.S. DEPARTMENT OF COMMERCE,
THE ASSISTANT SECRETARY FOR MARITIME AFFAIRS,
Washington, D.C., May 30, 1980.

Hon. DANIEL K. INOUE

Chairman, Subcommittee on Merchant Marine and Tourism, Committee on Commerce, Science, and Transportation, Washington, D.C.

DEAR MR. CHAIRMAN: You have asked me, as the Administration's chief spokesman on maritime affairs, to present the views of the Administration on H.R. 6613, legislation which would eliminate the authority of the FMC over maritime labor matters.

Under current law, labor contracts negotiated on behalf of industry by multi-employer bargaining units, including labor contracts which impose direct charges on carriers or cargo, come under the jurisdiction of the FMC. Agreements requiring such direct charges have come into widespread use in recent years as a means of providing funds needed to compensate labor for the massive cuts in employment resulting from the introduction of containerships, RO/RO vessels and other large, fast, and highly productive ships. The result of this involvement by the FMC has been to impede the effectiveness of important labor contracts developed through the process of free collective bargaining. Enactment of H.R. 6613 would eliminate this involvement of the FMC in labor-management relations.

H.R. 6613 would amend the definitions set forth in § 1 of the Shipping Act, 1916, (the "Act") so that any multi-employer bargaining group, while negotiating or administering collective bargaining agreements with labor organizations representing maritime or stevedoring employees, would not be considered as a "common carrier by water" or as an "other person" subject to FMC oversight under the Shipping Act.

H.R. 6613 would also amend § 15 of the Act to exempt any collective bargaining agreement or preparatory agreement between a labor organization representing maritime or stevedoring workers and any common carrier by water, multi-employer bargaining group or other persons subject to the Shipping Act, from the requirements for FMC approval under that section.

Section 16 of the Act now makes it illegal for anyone to seek shipment at less than tariff rates. H.R. 6613 would amend the Act so that any charge imposed on cargo, shippers, on ocean carriers to fund fringe benefits under a collective bargaining agreement would not be subject to that section.

Section 17 of the Act makes it illegal for any common carriers by water in foreign commerce to impose any rate, fare or charge which is unjustly discriminatory between shippers or ports, or which unjustly prejudices U.S. exporters. H.R. 6613 would amend § 17 so that any charge, tax, or assessment imposed on cargo, shippers or carriers to fund a collective bargaining agreement would not be subject to that section.

The Administration supports H.R. 6613, the basic purpose of which is to allow labor and management to negotiate freely in accordance with the procedures and rules in force for all other industries without also being subject to FMC review. To the best of our knowledge, no other federal agency has authority over collective bargaining agreements similar to that conferred on the FMC by the maritime laws, as interpreted by the U.S. Supreme Court. In fact, the Supreme Court has held that the laws administered by the ICC cannot derogate the jurisdiction of the National Labor Relations Board. *Burlington Truck Lines v. U.S.*, 371 US 156 (1962).

The FMC rejected any claim of jurisdiction over labor contracts for many years. The involvement of the FMC in labor-management negotiations only developed in recent years when the courts held that such contracts did, in fact, come within the responsibilities of the FMC under the Act.

The most recent decision was rendered in 1978 by the Supreme Court in *FMC v. Pacific Maritime Assoc.*, 435 US 40 (1978). This case specifically held that collective bargaining agreements as a class are not exempt from the requirements of § 15 of the Act. Prior to that, the Supreme Court held that the FMC should exercise oversight on the assessment of charges under a labor-management agreement under sections 15, 16 and 17 of the Act. *Volkswagenwerk v. FMC*, 390 US 261 (1968).

As you know, H.R. 6613 would, in effect, reverse these decisions. It would therefore restore labor-management relations to the status existing before 1968. We believe this is desirable because, in our opinion, the labor laws and antitrust laws of the U.S. provide other, more appropriate means for regulating maritime labor matters.

Absent the labor exemptions from the antitrust laws, any effort to set industrywide uniform rates, *United States v. Container Corporation of America* 393 US 333 (1969), or to organize any concerted refusal to do business with members of the industry, *St. Paul Fire and Marine Ins. v. Barry*, 438 US 531 (1978), would be illegal per se under the Sherman and Clayton Acts. For an agreement to be valid, absent

any other antitrust exemption, its effect on competition would have to be sufficiently minimal to be lawful.

The issue therefore is when and to what extent the labor laws (and the antitrust laws whenever the labor exemption is inapplicable) would adequately protect the rights of parties. It is important to note that the purposes of the labor laws, antitrust laws and the Shipping Act, especially §§ 16 and 17, are not identical. Accordingly, the nature of the protection afforded by each will be different. Nevertheless, we believe they offer equally secure means of assuring that the results are equitable.

Two major provisions of the labor laws could provide a basis for a cause of action. Section 8(e) of the Labor Management Relations Act prohibits any labor agreement which would require an employer to refuse to deal with another employer. 29 USC § 158(e). Section 8(b)(4)(ii)(B) of that statute also bars any coercion intended to force any employer to cease doing business with another employer.

We defer to the National Labor Relations Board with respect to the full scope of these sections. However, we note that they have already been invoked in litigation over the terms of an existing labor-management maritime contract. *Consolidated Express, Inc.*, 221 N.L.R.B. No. 144 (1975); *International Longshoremen's Ass'n. v. N.L.R.B.*, 537 F2d 706 (2d Cir. 1976), *cert denied* 429 US 1041 *reh denied* 430 US 911 (1977).

In addition, the scope of the permissible activities is restrained by the limits of the nonstatutory labor exemption to the antitrust laws. The courts have recognized that industry-wide labor bargaining requires a "tolerance" for the lessening of business competition resulting from differences in wages and working conditions. *Connell Construction Co. v. Plumbers and Steamfitters*, 421 US 616, 622 (1975). However, this does not extend to any agreement with organized employees which attempts to impose labor standards on employers not covered by an agreement. *United Mine Workers v. Pennington*, 381 US 657 (1965). Furthermore, a labor-management contract would not exempt from the antitrust laws if it sought to impose any conditions on organized employers which are essentially unrelated to the union interest in wages, hours and conditions of employment. *Meat Cutters v. Jewel Tea*, 381 US 676 (1965).

The FMC would still retain residual jurisdiction over charges imposed to fund labor contracts in accordance with § 18(b)(5) of the Shipping Act, 1916. This provision outlaws any charge or rate which is so unreasonably high or low as to prejudice the foreign commerce of the United States. Thus, the FMC could still strike down any charges funding a collective bargaining agreement which placed an excessive burden on international commerce.

Because of the protection given to the public interest under the labor laws, the antitrust laws and § 18(b)(5) of the Shipping Act, we can see no reason for not granting the full exemptions from §§ 15, 16 and 17 of the Shipping Act. In fact, to eliminate review under § 15, and thus deprive the industry of the antitrust exemption under the Shipping Act, while retaining post hoc review by the FMC under §§ 16 or 17, would be the worst of both worlds.

You have also asked us to direct our attention to the technical aspects of the legislation. As a result of our review, we have discovered three possible drafting problems. The first concerns the consistency of language in three of the amendments. In the § 15 amendment, the bill uses the phrase "wages, fringe and other employee benefits." The § 16 amendment refers to "fringe benefit obligations" and the § 17 amendment, to simply "obligations." If it is intended that each amendment be coexistent with respect to the coverage of the obligations under the collective bargaining agreements, the same language should be used in each. We would suggest the use of "obligations," at least in the §§ 16 and 17 amendments.

A second possible problem could arise from the use of the word "provisions" in the phrase "any any provisions for the implementation of the collective bargaining agreement" in the § 15 amendment (p. 3, lines 12-13). It is conceivable that this word could be construed as referring only to specific contract provisions actually contained in the collective bargaining agreement because "provisions" is used earlier in the amendment in this more restricted sense (p. 3, line 7). To the extent that an implementing arrangement is not embodied in the collective bargaining agreement, it would remain subject to the § 15 filing and approval requirements. If this is not a desired result and "provisions" is intended by the drafters to be used in the broader sense of arrangements or preparation, we would suggest that "or arrangements" be added after "provisions" on line 12.

Finally, on p. 1, lines 5 and 6, p. 2, lines 7, 10 and 15, and p. 3, lines 8 and 22, H.R. 6613 refers to "this chapter." The word "chapter" should be deleted and replaced by "Act." When first introduced, the bill was drafted as an amendment to the U.S. Code. This was an error because title 46 has not been enacted as positive law. The

correct approach is to amend the appropriate sections of the Act itself. When this error was corrected by the House, they neglected to change the "chapter" references, which are appropriate for the U.S. Code, to "Act."

We have been advised by the Office of Management and Budget that there is no objection to the submission of this report to the Congress from the standpoint of the Administration's program.

If we can offer any assistance to you or your staff, please let me know.

Sincerely,

SAMUEL B. NEMIROW,
*Assistant Secretary
for Maritime Affairs.*

Senator INOUE. Do you have a statement, Senator Packwood?

Senator PACKWOOD. No, Mr. Chairman. I can only stay about 15 minutes, so I will give the witnesses all the time I can.

Senator INOUE. Our first witness is the Honorable Tom Moakley, Vice Chairman of the Federal Maritime Commission. Mr. Moakley, it's always good to have you, sir.

**STATEMENT OF HON. THOMAS F. MOAKLEY, VICE CHAIRMAN,
FEDERAL MARITIME COMMISSION; ACCOMPANIED BY
CHARLES HASLUP, LEGAL ASSISTANT**

Mr. MOAKLEY. Good afternoon, Mr. Chairman. I'm accompanied today by Mr. Charles Haslup, my legal assistant.

Senator INOUE. We have received your statement, Mr. Moakley, and without objection your full statement will be made a part of the record.

Mr. MOAKLEY. Thank you, sir.

As you noted in your opening remarks, I had been prepared to address H.R. 6613 as it was passed by the House of Representatives. And as you just said, my prepared statement will be entered into the record.

Yesterday afternoon, however, I received a copy of Mr. Dickman's supplementary memorandum and revised draft of H.R. 6613. This morning I met with representatives of the NYSA to discuss a compromise that they are proposing to other interested parties. As I understand NYSA's position, they would support legislation which would exempt collective bargaining agreements and agreements among multiemployer groups preparatory to collective bargaining agreements and agreements implementing collective bargaining agreements, with one exception, from all provisions of the Shipping Act.

The one exception would apply to agreements assessing financial obligations of collective bargaining agreements on other than a man-hour basis. Such assessment agreements would remain subject to Shipping Act jurisdiction, but would be permitted to go into effect immediately upon filing with the Commission. And if there were objections to the agreement, it would be handled under an expedited schedule. Disapproval, cancellation or modification could be ordered prospectively.

In our discussion this morning, I came to understand that the NYSA does not propose that Commission jurisdiction over tariff matters be removed or reduced. Their concern is that the Commission not be permitted to review and approve, disapprove or modify collective bargaining and related agreements under any provision of the Shipping Act or related laws.

The Commission wholeheartedly agrees with this position. We do not want to review collective bargaining and related agreements. I hope that was clear from my previous prepared testimony.

We believe that an exemption from section 15 is sufficient to accomplish this end. But to allay the fears and concerns of others, we would not object to language exempting such agreements from other provisions of the act. Thus I believe the Commission and NYSA are in agreement on the essence of the exemption which should be granted to labor agreements.

However, the revised draft of H.R. 6613 proposed by NYSA retains some of the problems discussed in my prepared statement and injects certain other technical problems in the language chosen to implement these ideas. We have already pointed out some of these problems to counsel for the subcommittee and would be pleased to devote as much effort and time as is necessary to work out these areas of disagreement or lack of clarity.

There is still some grey area between the agreements themselves and practices or tariffs of carriers implementing those agreements which remain after our discussion this morning. It is still not clear to me whether NYSA is taking the position that a practice of a carrier which violates the Shipping Act should be excused by virtue of a collective bargaining obligation from which the practice stems.

I would urge the committee to clarify this area before acting on the bill. And quite frankly, I have written my testimony about seven times so far, so at this point, I would be pleased to attempt to answer any questions that may come up, if you would just advise me as to what version of H.R. 6613 we're talking about. Mr. Chairman, I thank you.

Senator INOUE. Before we get to that specific question, what is the FMC's position on having this legislation, or any other succeeding legislation, affecting the outcome of any pending cases before your Commission or before the courts?

Mr. MOAKLEY. It should have no impact upon any proceedings that are now before the Federal Maritime Commission or any decisions that would have been reached.

Senator INOUE. Now, you have indicated that exemption from section 15 filing would be sufficient. Am I correct in that?

Mr. MOAKLEY. I feel that it would be sufficient. But others feel that 16 and 17—that somebody might use 16 and 17. Therefore, I would say that 15, 16, and 17 may offer legal problems as far as labor-management agreements are concerned.

Senator INOUE. I don't know exactly how many collective bargaining agreements have been filed with the Commission pursuant to the law. Do you have any idea?

Mr. MOAKLEY. I don't think—although Mr. Ted Zook, who handles these agreements is here, and if I might be afforded the opportunity, maybe he could tell us.

Mr. ZOOK. Approximately somewhere on the order of 40 collective bargaining agreement packages. These are groups of agreements that include separate agreements for various welfare, pension plans, and so forth. But I approximated about 40 groups of agreements on the west coast, the Atlantic, and also the seagoing unions.

Senator INOUE. Over a period of how many years?

Mr. ZOOK. This is since the Supreme Court's decision, over the past 2 years.

Senator INOUE. Of the 40 or so agreement packages, how many have you rejected?

Mr. ZOOK. None.

Senator INOUE. How many have you modified?

Mr. ZOOK. Certain provisions of the PMA-ILWU collective bargaining agreement were set down for investigation and hearing by the Commission on issues relating to the fairness of the assessment method used. But those provisions were granted interim approval pending the outcome of the proceeding.

Senator INOUE. In your prepared statement, Mr. Moakley, you say that you don't feel it is desirable to place the Commission in the position of having to review collective bargaining agreements to test the defense of a carrier or other person charged with a violation of the act. Under the present law, is the FMC in this position?

Mr. MOAKLEY. No. Under the present law, the tariff stands on its own and must be defended as a tariff.

Senator INOUE. Do you believe that this compromise proposal will put you in such a position?

Mr. MOAKLEY. To a limited degree, it will, because the carrier may well raise the defense, if a complaint comes before the Federal Maritime Commission, that what is in his tariff is a direct result of a labor bargaining agreement. It then will require the Federal Maritime Commission to obtain a copy of the labor bargaining agreement, to analyze and interpret a particular clause, and then rule as to whether it truly arises from a labor bargaining agreement.

Senator INOUE. Do you have any language that will correct that situation?

Mr. MOAKLEY. We are working on that right now and would like to make a later submission to you as a possibility.

Senator INOUE. In your prepared statement, you state that the Sherman Act will likely provide an appropriate remedy for extraneous provisions in a maritime agreement which would be exempt from the Shipping Act scrutiny. However, you also say that in the event exemptions from the Shipping Act extend beyond section 15, it is not at all certain that the antitrust laws would provide a remedy if an individual carrier chose to implement the provision of a collective bargaining agreement in a discriminatory fashion.

Can you explain this distinction?

Mr. MOAKLEY. What I was speaking of in the first case were any extraneous agreements that were reached that could not be directly tied to the labor-management agreement. In that case, if other subjects are discussed, the carrier has needlessly exposed himself to the antitrust laws.

The second instance is I'm not quite certain what the protections are for an individual shipper under the Sherman antitrust law, whether—there's no question in my mind that if the violation can be proven to be in restraint of trade, he has protections there. Whether the Sherman antitrust law addressed itself to actions of

an individual carrier which result in discrimination as between shippers, I am not certain in that area. And this is the area in which I assume that he would revert to common law.

Senator INOUE. Under this compromise which was just rejected, would the FMC retain jurisdiction over the filing of and adherence to tariffs, even if they were based on collective bargaining agreements?

Mr. MOAKLEY. Yes.

Senator INOUE. And that is the language that you would like proposed, clarified?

Mr. MOAKLEY. That's correct, sir.

Senator INOUE. In its comments on behalf of the administration, MARAD states that between them the antitrust laws and the labor laws provide sufficient protection to the shipping industries, and therefore the protections of sections 16 and 17 are not necessary.

How do you feel about this?

Mr. MOAKLEY. I would like probably to defer to their superior knowledge of the labor laws and the antitrust laws. Again, this is in matters dealing strictly with the labor-management agreement, and I concur with the fact that it is sufficient as far as the labor-management agreement. So I would support that position.

Senator INOUE. Under this proposed compromise, is it clear just what activities arising out of collective bargaining agreements would still be subject to FMC's jurisdiction, other than the tariff section?

Mr. MOAKLEY. Activities arising out of a labor bargaining agreement that did not find their way into a tariff of a carrier or a conference would be immunized from the Shipping Act under this. But it again, as my assistant is telling me, it is a grey area, which we would like more definitive language on.

Senator INOUE. As you know, the Supreme Court is now considering whether the 50-mile repacking rule is an unfair labor practice. If the Supreme Court decides that it is an unfair labor practice, would that be an end to that matter as far as you are concerned?

Mr. MOAKLEY. It would be. It would moot out the proceedings, certainly, before the Federal Maritime Commission.

Senator INOUE. Do you believe that with that rule, that the parties would not be able to include that in a collective bargaining agreement?

Mr. MOAKLEY. I would assume that would be the law of the land and they would, yes.

Senator INOUE. In deciding whether an activity which arises out of a collective bargaining agreement is entitled to a labor exemption from the Shipping Act, the FMC has said that:

Ultimately, the relief requested or the sanction imposed for an anticompetitive activity under the Shipping Act must be weighed against its effect upon the collective bargaining agreement.

Under the compromise proposal, would the FMC still have to make this kind of determination?

Mr. MOAKLEY. Again, I assume under the compromise proposal we are dealing with one type of funding agreement that would fall under the Shipping Act; the other type would not fall under the

Shipping Act. Yes, we would still be in a position of looking at the labor agreement.

Senator INOUE. Mr. Moakley, you have been extremely helpful to us in clarifying the FMC's position. I have here several rather detailed questions that I would like to submit to you for your perusal and your response. And if you can get it to us as soon as you can, it would be very helpful.

Mr. MOAKLEY. Thank you, sir. Might I say, Mr. Chairman, that I hope when H.R. 6613 is passed it will contain the plain English language that was so evident in the Shipping Act of 1980.

Senator INOUE. We will do our best.

[The statement follows:]

STATEMENT OF THOMAS F. MOAKLEY, VICE CHAIRMAN, FEDERAL MARITIME
COMMISSION

Good afternoon, Mr. Chairman, I appreciate this opportunity to appear before the Subcommittee to express the views of the Federal Maritime Commission on H.R. 6613, a bill which would exempt collective bargaining and related agreements from Shipping Act regulation.

In my testimony before the House Subcommittee on Merchant Marine on March 11, 1980, I summarized the history of the Commission's exercise of jurisdiction over labor-related matters and I think it would be helpful to reiterate part of that history here today. The essence of this history is that the Commission had never considered labor-related agreements to be within the scope of section 15 of the Shipping Act, 1916, until the Supreme Court decided the Volkswagen case in 1968. In that decision the Court determined that the Commission had too narrowly construed its jurisdiction under section 15 when it refused to assert jurisdiction over an assessment agreement among the members of the Pacific Maritime Association (PMA) which implemented certain funding obligations arising out of their collective bargaining agreement with the International Longshoremen's and Warehousemen's Union (ILWU).

Under this interpretation of the scope of section 15, the Commission then exercised jurisdiction over a similar fringe benefit assessment agreement entered into by the members of the New York Shipping Association (NYSA) following their 1968 collective bargaining agreement with the International Longshoremen's Association (ILA). The main issue which the Commission was asked to consider in both this case and in Volkswagen was whether the assessment formula was unjustly discriminatory or unfair to certain carriers and other persons.

In 1971, the Commission ruled on a petition filed by United Stevedoring Corporation asking the Commission to find the Boston Shipping Association (BSA) in violation of section 15 of the Shipping Act for failure to obtain approval of concerted activities relating to the allocation of stevedoring gangs at the port of Boston, and to certain recall rights. Again, relying on the Supreme Court's decision in Volkswagen, the Commission found that it had jurisdiction over the two agreements among employer members of BSA regardless of the fact that the agreement relating to recall rights was subsequently incorporated into a collective bargaining agreement with the union.

This ruling was remanded to the Commission by the U.S. Court of Appeals for the First Circuit and, on remand, the Commission found that both agreements were entitled to a "labor exemption" from section 15 of the Shipping Act, using essentially the same criteria as the Supreme Court had announced in established a "labor exemption" from the antitrust laws. For the convenience of the Subcommittee these criteria are set forth in an appendix to this statement.

Since the exemption from section 15 established by the BSA case is coextensive with the antitrust exemption granted to labor agreements, the essence of the Commission's exercise of jurisdiction in this area since 1972 has been over those labor-related agreements which would otherwise be subject to scrutiny under the antitrust laws.

Subsequent to the Volkswagen decision and the Commission's exercise of jurisdiction over the NYSA assessment formula arising out of the 1968 collective bargaining agreement, both the East Coast and West Coast longshoremen's unions became more directly involved with the mechanisms used by employers for funding certain benefits. The assessment formula previously found subject to section 15 was made part of the collective bargaining agreement on the East Coast in 1971. On the West

Coast, PMA and the International Longshoremen's and Warehousemen's Union (ILWU) inserted in their 1972 collective bargaining agreement a provision which required employers who were not members of PMA to observe the same terms and conditions of employment that PMA members were obliged by their contract to follow. This provision was designed, in part, to ensure the integrity of the collectively bargained fringe benefit plan.

Because the assessment formula set forth in the 1971 NYSA/ILA agreement was essentially the same as that over which the Commission had exercised jurisdiction previously, we again decided, in 1973, that the formula must be filed and approved under section 15 and that the inclusion of the union as a party to the agreement did not deprive the Commission of jurisdiction. This decision was upheld by the U.S. Court of Appeals for the Second Circuit in 1974.

The 1972 PMA/ILWU agreement was challenged by eight municipal port corporations on the West Coast as unjust, discriminatory and contrary to the public interest, under sections 15, 16, and 17 of the Shipping Act. The Commission decided that it had jurisdiction over the agreement under section 15 because it imposed terms upon parties outside the bargaining unit, one of the BSA criteria, and was ultimately upheld by the Supreme Court in this determination.

In addition to the section 15 questions that have been presented to the Commission in connection with labor-related matters, the Commission, in 1973, suspended and commenced an investigation into the tariff provisions of Sea-Land Service, Inc. in the Puerto Rico trade which were an outgrowth of the so-called 50-mile rule which has appeared in East Coast collective bargaining agreements in one form or another since 1968.

When the Puerto Rico Maritime Shipping Authority took over Sea-Land's Puerto Rican operations in 1974 they incorporated the same provisions into their tariff and these provisions were similarly investigated in a consolidated proceeding. The Commission ultimately determined that these tariff provisions were violative of sections 14 Fourth, 16 First and 18(a) of the Shipping Act, 1933. This determination was based upon the conclusion that the tariff rules created a situation where shippers who are similarly situated in all other transportation respects, are treated decidedly differently, and that the stripping and restuffing of containers was an unreasonable practice. The Commission specifically ruled that the fact that these provisions were founded upon a collective bargaining agreement was not sufficient to justify this disparate treatment. This decision is now on review before the U.S. Court of Appeals for the D.C. Circuit. The proceeding before that Court has been stayed, however, pending a decision by the Supreme Court on the question of the lawfulness of the 50-mile rule under labor law standards. That case was argued before the Supreme Court on April 22, 1980, and an expedited decision has been requested.

Turning now to the provisions of the bill, Mr. Chairman, it appears to be logically divided into three categories:

1. Deletion of collective bargaining and related agreements from the scope of section 15 of the Act;
2. Exclusion of multi-employer groups from the definition of "other person" subject to the Shipping Act; and
3. Miscellaneous other deletions of Shipping Act jurisdiction over labor-related matters.

The Commission would not object to deletion of collective bargaining agreements, agreements establishing multi-employer groups and agreements implementing collective bargaining funding obligations from the scope of section 15 of the Shipping Act. This was the status of such agreements prior to the Volkswagen decision and, candidly, the present Commission would rather that status had never changed.

Subsequent to the Supreme Court's 1978 decision in PMA which announced a broadened scope of Shipping Act jurisdiction over collective bargaining agreements, the Commission established a procedure for interim approval and/or temporary exemption of such agreements to avoid the disruption of labor peace while we could consider some permanent form of exemption of collective bargaining agreements from section 15. There was an internal committee formed within the Commission to consider this question of exemption and, after getting comments from the industry and considering numerous options, the Commission issued its Notice of Proposed Rulemaking in February of this year.

Consistent with its opinion that collective bargaining agreements should not have to be filed and approved under section 15, the Commission's proposal would have exempted all such agreements from filing and approval provided that a certification was filed with the Commission by the parties to the agreement who are subject to the Shipping Act to the effect that they would remedy any injury caused by a provision of the agreement later found to be unlawful. Upon consideration of numerous comments to the proposed rule, the Commission, on April 10, 1980,

promulgated its final rule exempting collective bargaining agreements from the filing and approval requirements of section 15, but deleted the requirement for the certification.

Having chaired the committee that produced that rule and having been a party to the numerous and lengthy discussions within that committee concerning the legal and practical problems inherent in virtually all of the myriad options for exemption that we considered, I can state with conviction that legislation is preferable to a Commission rule exempting these agreements from section 15.

The Subcommittee should be aware, however, that in removing collective bargaining agreements from section 15, the bill would be exposing the parties to such agreements to possible antitrust prosecution. As I outlined earlier, the Commission's exercise of jurisdiction under section 15 has been in those areas where the antitrust "labor exemption" would probably not be applicable.

Turning to the second category of change sought to be made by H.R. 6613, the Commission is of the opinion that an amendment to the definition of "other person" subject to the Act to exclude multi-employer groups is both unnecessary and undesirable. Certainly the legislation can carve out an exemption from section 15 and any other provision of the Act for collective bargaining activities without addressing the definition of "other person subject to the Act."

The existing definition of "other person subject to the Act" contained in section 1 of the Shipping Act does not include multi-employer groups. It is only because the members of such groups have included carriers, terminal operators and others who, as individuals, are subject to the Shipping Act, that the Commission has exercised jurisdiction over their concerned activities in the past. Therefore, an amendment to the definition of "other person subject to the Act" to exclude multi-employer groups would be confusing, at best.

Moreover, possibilities for abuse of this provision, even as amended by the House Committee, are numerous. For example, the language, as presently drafted, could be interpreted to prevent the Commission from exercising jurisdiction over individual members of such multi-employer groups, such as common carriers, for any activities that they may engage in at a time when a collective bargaining agreement is being negotiated. There have been collective bargaining negotiations that have extended for considerable periods of time in the maritime industry. We believe it would be best to delete this provision from the bill.

This brings me to the third category in which H.R. 6613 would impact upon Commission jurisdiction. Amendments are made by sections (c) and (d) of the bill to portions of sections 16 and 17 of the Shipping Act. In addition, the last sentence of section (b) of the bill, amending section 15, indicates that collective bargaining and related agreements "shall not be subject to Commission jurisdiction for any purpose under any other provision of this chapter (sic) including, but not limited to, sections 16, 17 and 22 thereof."

It is not clear whether the intent of this language is to completely divest the Commission of all jurisdiction over activities arising out of or based upon collective bargaining agreements. When this point was raised during my testimony before the House Subcommittee, counsel for the Subcommittee indicated that the intent of the bill was to divest the Commission of all such jurisdiction. However, neither the plain language of the bill, nor the House Committee report, support this conclusion.

For example, when the 50-mile rule was published as a tariff provision by Sealand and PRMSA, the Commission relied upon sections 14 Fourth, 16 First and 18(a) of the Shipping Act, 1916 and upon section 4 of the Intercoastal Shipping Act, 1933 in finding those tariff provisions unlawful. The Commission did not exercise jurisdiction over the agreement between management and labor in that case, but rather over tariff rules of individual carriers. As the Administrative Law Judge said in his initial decision, "A tariff provision is not an agreement; rather it is a unilateral statement of the author of the tariff."

The broad language of section (b) of the bill address only agreements and not tariffs or practices of common carriers or other persons subject to the Act.

The House Committee report does not address the pertinent language of section (b) of H.R. 6613. And, in its discussion of sections (c) and (d) of the bill, the report creates further uncertainty as to how broad an exemption is intended.

If the Committee does intend to exempt all activities in implementation of collective bargaining activities from Shipping Act scrutiny, that intent must be made clear in the bill. I cannot imagine a worse area in which to have a law that is unclear.

At the Subcommittee's request, we have redrafted the bill in an attempt to clarify its language. However, because of our uncertainty as to the intent, we have drafted three alternatives.

The first alternative would legislate an exemption for maritime labor agreements from section 15 of the Act. Maritime labor agreements are defined to include collective bargaining agreements, agreements among maritime employers preparatory to a collective bargaining agreement, and agreements among maritime employers to implement the terms of a collective bargaining agreement. The effect of this alternative would be to permit such agreements to become effective immediately upon agreement between the parties, without the need for filing with and approval by the Commission.

This is the essence of H.R. 6613 and the one area in which there appears to be a consensus. The national policy of free collective bargaining and the public harm which may be caused by delay in implementing labor agreements dictate this exemption.

This exemption from section 15 should be absolute and unqualified, so that the Commission does not feel constrained to examine the agreement in question to determine whether it fits within the exemption. I mention this because the language of the House report would qualify the exemption granted by H.R. 6613 to make it apply only to "bona fide arms length" collective bargaining agreements. We believe it is preferable to exempt all collective bargaining agreements from section 15 and to let the courts decide under the Sherman Act or the NLRB decide under labor law whether the agreement was "bona fide" or "arms length". This is an area in which the Federal Maritime Commission clearly has no expertise.

In a similar vein, the House report indicates at p. 7 that "Portions of agreements not related to the collective bargaining process or to implementing a collective bargaining agreement are still subject to the filing requirement even if they are included in an agreement which would normally be exempt."

While this concept is attractive in that it would preserve Shipping Act jurisdiction over provisions of agreements which do not, by themselves, warrant a "labor exemption", segregation of such provisions from the basic labor agreement would require the Commission to obtain and scrutinize the entire agreement. If the exemption is to have its intended effect of removing uncertainty in the collective bargaining process, then any agreement which meets the definition of a maritime labor agreement should be exempt from Shipping Act scrutiny. If there are extraneous provisions in such agreements that are not properly related to the collective bargaining process, it is likely that the Sherman Act will provide an appropriate remedy.

The second alternative contains the exemption provisions of alternative (1) and, in addition, would exempt charges and assessments which fund the fringe benefit obligations of collective bargaining agreements from regulation under section 16, 17, 18(a) and 18(b)(5) of the Shipping Act, 1916, under section 8 of the Merchant Marine Act, 1920, under sections 3 and 4 of the Intercoastal Shipping Act, 1933, and under section 205 of the Merchant Marine Act, 1936.

This alternative seems closest to the language of H.R. 6613. It would eliminate Commission jurisdiction, except with respect to the filing of and adherence to tariffs, over charges and assessments that have been found discriminatory or otherwise unjust in the past, but it would not address other practices, such as the refusal to provide containers to a particular class of shippers.

Alternative (3) would eliminate all Commission jurisdiction, again with the exception of filing and adherence to tariffs, over labor-related matters, including any and all practices of common carriers when the carrier raises as a defense that the practice is labor-related.

The Commission has some misgivings about the wisdom of exemptions which extend beyond section 15, particularly those contained in alternative (3). The provisions of the Act that would no longer apply were designed to ensure equal treatment of shippers, cargo and localities and to prevent abuses made possible by concerted activity of carriers and others. The question that must be answered before these protections are removed is whether there are other laws which adequately protect these shipping interests absent the Shipping Act. To the extent that other laws protect the interests of shippers, ports and others from unfair treatment, Shipping Act protections could be removed without harm but Congress must ensure such protections exist before pursuing that course.

Whether the antitrust laws would afford sufficient protection to affected parties is a difficult question to answer. Certainly, some protection would be afforded under section 1 of the Sherman Act where the rate, charge or practice was the product of a combination or conspiracy in restraint of trade. However, if an individual carrier chose to implement a provision of a collective bargaining agreement in a discriminatory or unreasonable fashion, it is not at all certain that the antitrust or labor laws would provide a remedy.

There is some possibility that a common law remedy would exist for failure of a common carrier or public terminal operator to live up to its obligations to serve the

public equally. However, in order for any common law rights to be resurrected it would take a very strong and clear statement from Congress to overcome the inference that would be generated by partial repeal of the statutory scheme that was enacted to replace those common law rights in the first place. Moreover, resurrection of such common law rights would simply shift the forum from the agency charged with expertise in shipping matters to a variety of judicial forums.

In addition, alternatives (2) and (3) would place the Commission in the position of having to review collective bargaining agreements to test the defense of a carrier or other person charged with a violation of the Shipping Act unless Congress intends that the mere raising of a labor defense is sufficient to preclude the exercise of Commission jurisdiction. For example, the Commission may be investigating the practice of a carrier of stripping and restuffing containers of several shippers while permitting others to pass through its terminal intact. The carrier may raise as a defense its collective bargaining agreement which contains such a rule. The shippers may counter that that rule does not apply to containers shipped by "beneficial owners" of the cargo. The Commission must not only review the collective bargaining agreement to determine what it says, but must also interpret an important provision of the agreement, a result that I think we all agree is totally unacceptable.

If the mere raising of a labor defense is sufficient to preclude Commission jurisdiction, this legislation may seriously erode the absolute antitrust immunity proposed by the Ocean Shipping Act of 1980. For example, if a conference incorporates a clause in its agreement or tariff which is beyond the jurisdiction of the Commission because it is labor-related, that clause and the activities of the carriers under that clause, would probably be subject to antitrust scrutiny. This would be an unfortunate reversal of a very important element of the Ocean Shipping Act.

In contrast, legislation which would exempt collective bargaining and related agreements only from filing and approval (and obviously disapproval) under the Shipping Act would permit the Commission to refrain from reviewing the agreements entirely. The Commission would not be required to look behind a violation of other sections of the Act to ascertain whether the rate, charge or practice of a carrier was a true reflection of a collective bargaining obligation. Moreover, two carriers would not be treated differently under the law simply by virtue of their collective bargaining obligations.

As I hope this testimony has conveyed, Mr. Chairman, the Federal Maritime Commission has no desire to interfere with the collective bargaining process and supports the central theme of this legislation to exempt collective bargaining agreements from section 15 of the Shipping Act. We agree with those who argue that the prior approval requirements of this section unduly stifle the bargaining process.

Likewise, the Commission does not claim to be the source of all answers on further exemptions of labor-related rates, charges and practices from other provisions of the Act. If regulation of such activities is truly duplicative of other laws, we would support such further exemptions. As previously indicated, however, we are not aware of such duplication in existing laws. We urge that the Subcommittee solicit further input on this question from affected parties such as those who will appear later today.

Thank you. I would be pleased to address any questions you may have and stand ready to work with you or your staff on any further matters pertinent to this legislation.

APPENDIX

Labor-Exemption Criteria Established by *United Stevedoring Corp. v. Boston Shipping Association*, 16 FMC 7, 13 (1972).

1. The collective bargaining which gives rise to the activity in question must be in good faith. Other expressions used to characterize this element are "armslength" or "eyeball to eyeball".
2. The matter is a mandatory subject of bargaining, e.g. wages, hours or working conditions. The matter must be a proper subject of union concern, i.e., it is intimately related or primarily and commonly associated with a bona fide labor purpose.
3. The result of the collective bargaining does not impose terms on entities outside of the collective bargaining group.
4. The union is not acting at the behest of or in combination with nonlabor groups, i.e., there is no conspiracy with management.

In the final analysis, the nature of the activity must be scrutinized to determine whether it is the type of activity which attempts to affect competition under the antitrust laws or the Shipping Act. The impact upon business which this activity has must then be examined to determine the extent of its possible effect upon

competition, and whether any such effect is a direct and probable result of the activity or only remote. Ultimately, the relief requested or the sanction imposed by law must then be weighed against its effect upon the collective bargaining agreement.

Senator INOUE. Next we have the president of the International Longshoremen's Association, Mr. Thomas W. Gleason, and the president of the New York Shipping Association, Mr. James Dickman, appearing as a panel. Mr. Gleason, Mr. Dickman, welcome.

STATEMENTS OF JAMES DICKMAN, PRESIDENT, NEW YORK SHIPPING ASSOCIATION; AND THOMAS W. GLEASON, PRESIDENT, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, CLC; ACCOMPANIED BY PETER LAMBOS, COUNSEL

Mr. DICKMAN. Mr. Chairman, I'm very happy to be here, and more importantly I'm very happy to hear Vice Chairman Moakley's remarks. In the interest of moving this along, I would just like to say, I am the president and chief negotiator for the New York Shipping Association, and we are a multiemployer bargaining association of almost every major carrier, terminal operator, and stevedore serving the commerce of the United States.

I am here today with Thomas W. Gleason, president of the ILA and our respective counsel to express our strong support of H.R. 6613.

Mr. Chairman, as you are aware and your staff is, we have been down here for a few days now trying to work out an agreement. I have had counsel with me talking to your staff, and if I may, sir, I should like to ask counsel, Mr. Lambos, to express to you what we thought was our compromise agreement, if that would be all right with you?

Senator INOUE. Fine, sir.

Mr. Lambos?

Mr. LAMBOS. Mr. Chairman, my name is Peter Lambos, and while I'm counsel for the New York Shipping Association, today I speak with the full knowledge and authority of Mr. Gleason, who is president of the ILA. His counsel, unfortunately, Mr. Thomas W. Gleason, Jr., was ill today and wasn't able to attend, but I kept him fully advised yesterday and the day before when we began to have various conversations leading to what I thought would be a just and equitable compromise.

I would like to spend a moment or two of the committee's time, if I might, Mr. Chairman, describing what that compromise would be and why we thought it was just, equitable, and in the public interest.

What that compromise sought to do was to place the maritime industry in exactly the same position as any other industry in its labor relations, and it reversed what we thought were decisions that impaired the ability of the parties to negotiate.

In 1977, when this industry had a strike which lasted approximately 60 days, one of the issues then and in prior negotiations had to do with the extent of the jurisdiction of the Federal Government over collective bargaining. In 1977, the industry agreed on a job security program, the likes of which does not exist in any other industry and of which Mr. Gleason and Mr. Dickman must be justly proud, since it provides for the fiscal stability of pension and

welfare funds in 34 ports in which the ILA is the collective-bargaining representative.

One of the provisions in that agreement which we drafted—management drafted—stated that that provision would be subject to the approval of the Federal Maritime Commission, and we said to him—and he's here now—Teddy, we can't put this into effect until and unless the Maritime Commission first approves it. And at that point, Teddy said to us, "Fine. You take it up with the Maritime Commission, and when you've gotten its approval, you come back to us and we will talk about ending the strike. In the meantime, the strike will continue."

Well, we took that provision out of the agreement, and happily I must commend the Federal Maritime Commission because within 11 days thereafter we were able to get the approval and go back to Mr. Gleason. This time we thought we could avoid this by the provisions of H.R. 6613, and in finding that there was certain opposition, we said that one of the things that we really object to, Mr. Chairman, is that there could not be implemented immediately any provision of the collective-bargaining agreement without having an agency look at it after there was a protest by some other body.

We think, therefore, that while all provisions of collective-bargaining agreements, except for those providing for the assessment of fringe benefit costs on other than an hourly basis, should be exempt from sections 15, 16, and 17 jurisdiction. We also say that assessment agreements which seek to assess on some different method than the traditional hourly method of assessment should be filed with the FMC and that on such filing, such agreements should be deemed immediately approved. It should be granted immediate approval, which approval should continue until such time as the Commission, after notice and hearing, shall by prospective order—that is, an order effective in futuro—cancel, modify, or disapprove any such assessment agreement.

And we finally also provided, because it was felt by your staff and by both majority and minority counsel that one could not be expected to wait endlessly for such a determination, that it ought to be—that the Commission ought to be required to make a determination within some limited period of time, such as perhaps 180 days.

We made that proposal. We would have hoped that it would have been offered. We think it is a just and equitable proposal.

Unfortunately, there are those who believe that there are things that are wrong with it. There's absolutely nothing wrong with it. We commend it to the chairman and this committee as we have presented it to the staff of this committee, and we think that it will result in a fair and equitable result.

We also, of course, thank Vice Chairman Moakley of the Federal Maritime Commission, who, I must say, from the very beginning has worked so arduously and so hard with all parties, both labor and management, to obtain an answer in this most difficult problem. And of course, we also pointed out to the chairman that Mr. Nemirow, in the letter he wrote expressing the views of the executive departments of the United States, indicates full and complete support for H.R. 6613 in its present terms.

We would have preferred H.R. 6613 in its present language. We understand some of the difficulties that have been expressed by the opponents of the bill, and I think that both Mr. Gleason and Mr. Dickman have moved tremendously to try to find an answer to those problems that have been expressed, and we think they have gone quite far in that direction.

Thank you, Mr. Chairman.

Senator INOUE. Mr. Lambos, I am sure you are aware of the present status of the so-called compromise. Can you explain to this committee your views as to why this compromise was not accepted?

Mr. LAMBOS. Well, I could explain why I was told it was not accepted, and I think that the reason for it is that the compromise would provide that the assessment agreement would become effective in accordance with its term from the date that it was agreed to, that if the Commission ultimately determined that the agreement should be modified or changed, that the change would then be effective from the date of the Commission's order—namely, 180 days later—and the people whom we talked to have expressed dissatisfaction with that. They say we ought to go back—that we ought not to go forward, but we ought to go back and seek to unscramble the eggs.

In that regard, Mr. Chairman, we point out that these funds are not funds that the carriers hold in their hands or that the stevedores hold in their hands. They put them in pension funds; they put them in welfare funds; they put them in medical and clinical funds; they put them in the supplemental unemployment benefit and GAI funds. And once the deposits of those funds have been made, it is most difficult and in some situations almost impossible to redo it.

We have had the experience under a case before the Commission—namely, 69-57—where a litigation started in 1969 has continued through 1980 with an argument before the Court of Appeals for the District of Columbia, I think on May 7, if I remember correctly, 1980, you know, for things that took place in the contract of 1968 to 1971 to unscramble those eggs, which have not only been thoroughly digested, but have been forgotten about, is an undue burden to place upon the industry.

And even if the period of time were less than 180 days, once we have met our commitments to these fringe benefit funds, it creates labor unrest—to have to say to Mr. Gleason, well, we're maybe going to have to come back to you and tell you we're going to redo it in some other manner.

I think that we had a difficult enough time convincing Mr. Gleason that it might be that we might have to make a change in the future because the Commission had found something that would be done offended the spirit of the Shipping Act, but to also go back we found would be most difficult.

Second, those who seem to say that we ought to pay some sort of reparation for what might have been done, it should be remembered that these are not commercial exercises that the carriers are engaged in. What we're talking about is pure collective bargaining, a payment to an employee for his work by way not only of wages but of fringe benefits, of pensions and wages and so on. These contributions are paid into the funds.

If a change should be made, we feel it ought to be made in the future. We feel in the meantime that we ought to have antitrust protection, and we feel that the position of the opponents to our compromise is not well taken.

Senator INOUE. In terms of dollars, what would be involved during a period of 180 days?

Mr. LAMBOS. Well, in New York last year, just one port, we put into the various fringe benefit funds \$160 million, so I suppose we're talking about having paid out in benefits \$80 million, and I would assume that going down to Mr. Gleason and saying, "Can we get some money back from your men," might not be met with his normal Irish humor.

Senator INOUE. He won't stand for that, will he?

Well, I thank you very much, Mr. Lambos. This has been extremely helpful.

Would you think that, if you are allowed for this order to be retroactive for, say, 90 days, would that still cause havoc?

Mr. LAMBOS. Mr. Chairman, I think that it would, because what we're doing is collecting in the future, and even something effective on the day of the order is going to cause us a little difficulty, because what we have to do now is change our instructions to the various cargo interests, the various shipping interests, and so on so that any retroactivity is an extremely difficult and labor-unsettling situation.

Now merely because we say that the Commission must act in 180 days does not mean that the Commission could not act in a lesser period of time, so that that would be an outer limit. And that type of outer limit in a long 3-year collective bargaining agreement, I don't think would cause the various interests who are protesting any great difficulty.

It certainly is, I think, a tremendous improvement over what they might expect now, because these assessment cases go on, as I pointed out, in 69-57 for 10 years. Various other assessment litigations before the Commission will take years.

Senator INOUE. Under the compromise, this assessment agreement will not be subject to FMC scrutiny?

Mr. LAMBOS. Pardon me? We are suggesting that the assessment agreement on other than an hourly basis be subject to the scrutiny of the Commission if someone files a protest, providing however that that type of agreement is deemed approved under section 15 of the act in the first instance.

I think Mr. Gleason has some points he would like to make.

Mr. DICKMAN. Before Teddy goes, I would just like to finish off just for the record, Mr. Chairman, the statement of the New York Shipping Association, Inc., in support of H.R. 6613 pointed out that the national negotiations with the International Longshoremen's Association, the ILA, were about to begin and that the presidents of the ILA and the NYSA had both pledged their efforts to avoid a strike during a period of hideous inflation and imbalanced external payments.

I am happy to report, sir, that since that statement was last prepared and submitted to the subcommittee on May 7, 1980, that the industry, management, and labor have entered into an unprec-

edented agreement resolving all master contract issues. This agreement is dated May 27, 1980.

Local issues in each of the 34 ports from Maine to Texas are next to be negotiated. The master contract, therefore, leaves unresolved the various local port issues. The president of the ILA and NTSA pledged to resolve these issues not later than July 8, 1980, well in advance of the September 30, 1980, contract expiration date. The local port issues contain certain subjects which in the past normally required filing and an approval by the Federal Maritime Commission. These are the issues that relate to the matters of assessment for fringe benefits, allocations of costs among various cargo interests, and other matters.

And that, I think, is why we are so anxious to have this resolved. [The statement follows:]

STATEMENT OF JAMES J. DICKMAN, PRESIDENT, NEW YORK SHIPPING ASSOCIATION, INC.

Mr. Chairman and Members of the Subcommittee, I am James J. Dickman, President and chief negotiator for the New York Shipping Association, Inc. NYSA is a multi-employer bargaining association comprised of approximately 130 steamship carriers, terminal operators, stevedores and other direct employers, employing tens of thousands of longshoremen and other deepsea longshore workers represented by the International Longshoremen's Association. AFL-CIO (ILA). Our membership is composed of every major steamship and liner carrier, both American flag and foreign flag, serving the commerce of the United States. NYSA's members also include the largest terminal operators and stevedores in the country.

LONGSHORE COLLECTIVE BARGAINING NEGOTIATIONS—1980

For more than fifty years, NYSA has been the traditional pattern setter in longshore labor negotiations on the North Atlantic, South Atlantic and Gulf Coasts of the United States. The labor accord reached in New York on the master contract issues has normally been adopted in each of the other ports. In the period from 1971 until the middle of the negotiations in 1977, NYSA was a member of the Council of North Atlantic Shipping Associations (CONASA) which bargained with the ILA on the master contract issues.

I am here today with Mr. Thomas W. Gleason, President of the International Longshoremen's Association, AFL-CIO, and our respective counsel, to express our strong support for H.R. 6613. This bill, which would amend the Shipping Act of 1916 to prohibit regulation of collective bargaining agreements by the Federal Maritime Commission ("FMC" or "Commission"), was approved by the House of Representatives by a virtually unanimous 358 to 2 vote. On the date of its passage by the House, it was noted that "this bill has the support of the FMC, the Department of Labor, and other groups representing maritime labor and management." 126 CONG. REC. H 2500 (daily ed. Apr. 15, 1980) (remarks of Rep. Murphy).

We are about to embark on national negotiations with the ILA that will determine whether our country's commerce on the East and Gulf Coasts will continue to flow on and after September 30, 1980, or whether it will be paralyzed. Mr. Gleason and I have both pledged ourselves to make every effort to avoid this cataclysmic event which would sorely hurt our nation during the period of hideous inflation and imbalanced external payments.

To this end we have already met in Bal Harbour, Florida, on February 14 and 15, 1980, for the purpose of establishing a rigorous schedule for negotiations which we hope will result in labor peace no later than the end of June of this year. These meetings were historic in that for the first time there were present on the scene employer representatives of the Gulf and South Atlantic ports of the United States, important and crucial representatives in our industry, whose cooperation is important to the reaching of a successful contract this year. I am sure that the management representatives in the range of ports from Maine to Texas will do all in their power to create a cohesive employer negotiating group, which will be fully responsive to the requirements of good faith and productive bargaining.

On April 24, 1980, the ILA formally presented its collective bargaining demands. In Atlanta, Georgia, on May 13, 1980, these demands will be reviewed and discussed by the employer negotiating group. Thereafter, joint bargaining negotiations with

the ILA are scheduled to commence on May 20, 1980 in Miami, Florida. We hope that these important negotiations will continue until their successful culmination.

TWO MAJOR PROBLEMS ENCUMBERING NEGOTIATIONS

1. *Litigation involving rules on containers*

Two major items stand in the way of my being able to tell this Committee that we think that we will succeed. One has to do with an important issue of federal labor law now before the Supreme Court of the United States in *NLRB v. International Longshoremen's Ass'n*, No. 79-1082, involving our contractual work preservation provisions, known as the Rules on Containers.

These Rules codified the parties' collective bargaining compromise which permitted more than 80 percent of the containerized cargo on the East and Gulf Coasts to be transported without any pierside handling by ILA longshore labor. However, the union insisted upon some reasonable protection for the traditional work opportunities of its dockworker members, which had been drastically diminished by automation. After a devastating 57 day coastwide strike in 1968, Rules were adopted requiring local less-than-containerload cargo, originating at or destined to any point within 50 miles of a port, to be loaded or unloaded into the carriers' containers at the piers by their longshore employees, rather than at inland consolidation facilities.

On January 21, 1980, the Supreme Court granted certiorari to review the decision of the United States Court of Appeals for the District of Columbia Circuit which overturned the NLRB's invalidation of the Rules on Containers under federal labor law. *International Longshoremen's Ass'n v. NLRB*, 613 F.2d 890 (D.C. Cir. 1979). The Supreme Court will adjudicate the exceptional questions of national scope and importance relating to the validity of the Rules on Containers under the doctrine of work preservation. Its decision will guide us in the forthcoming negotiations in our attempts to resolve the problems of technological job displacement, that have been the crucial focus of contention in our industry, since the advent of containerization more than twenty years ago.

The Solicitor General of the United States filed his brief on behalf of the NLRB with the Supreme Court on Thursday, March 6, 1980. The briefs of NYSA, CONASA, and ILA were filed on April 6, 1980. The Supreme Court heard oral argument on April 22, 1980. We reasonably anticipate that a decision may be rendered by the Court before its summer recess.

We are thankful to the Solicitor General and the National Labor Relations Board for their representation to the Supreme Court that the ensuing negotiations with the ILA in 1980 is a matter of significant national interest requiring expeditious consideration by the Court. We agree that this country cannot now afford a longshore strike which would be a matter of comfort to our enemies and of grave injury to our nation.

2. *FMC interference*

The second urgent issue requiring remedy before negotiations can succeed is the subject covered by H.R. 6613. Never in the 50 year history of collective bargaining, until this year's negotiations, have NYSA and ILA been faced with the prospect that their agreement would be subject to regulation, not only by the National Labor Relations Board, the United States Department of Justice, the federal courts, the state judiciaries, the Waterfront Commission of New York Harbor, the Department of Labor, the various federal and state taxing and revenue raising authorities, but also, for the first time, by the Federal Maritime Commission.

PMA CASE

The remarks accompanying the introduction of this Bill, 126 CONG. REC. E 826 (daily ed. Feb. 26, 1980) (remarks of Rep. Murphy), indicate that in 1978, the Supreme Court in *FMC v. Pacific Maritime Ass'n*, 435 U.S. 40 (1978) (hereinafter "*PMA*"), in a five to three split opinion, authorized the FMC to regulate multi-employer collective bargaining agreements in the maritime industry. Mr. Justice Powell, dissenting in *PMA*, vividly described the disruptive effective upon collective bargaining that will be engendered by Commission regulation:

"The prospects for peaceful resolution of labor disputes in an industry marked by a history of industrial strife, see, *C. Larowe, Shape-Up and Hiring Hall*, 1-48, 83-138 (1955); *Volkswagenwerk v. FMC*, 390 U.S., at 296-299, 19 L Ed 2d 1090, 88 S Ct 929 (Douglas, J., dissenting in part), are not enhanced by the Court's imposition of a system of administrative prior restraints. Collective bargaining works best when the parties are free to arrive at negotiated solutions to problems without first having to secure the approval of Government regulators. The legal consequences of a bargain

may be assessed after the fact, but the parties should be free to negotiate an agreement within the framework of procedures prescribed by the National Labor Relations Board (Board). Often negotiations are conducted under substantial constraints of time, and agreement is reached at the eleventh hour. If there is no agreement by the expiration date of the previous contract, or if an accord may not be executed because of a requirement of prior governmental approval, labor's 'no contract, no work' tradition suggests the likelihood of a disruptive work stoppage. Moreover, the bargaining process itself may suffer where the parties know that any agreement is simply a tentative accord, subject to pre-implementation review by an administrative agency." (435 U.S. at 69 (Powell J., dissenting).)

OPPOSITION OF OTHER FEDERAL AGENCIES AND COURTS TO FMC REGULATION OF
COLLECTIVE BARGAINING

PMA is the latest case involving the propriety of FMC jurisdiction over collective bargaining. See, *New York Shipping Ass'n v. FMC*, 495 F.2d 1215 (2d Cir.), cert. denied, 419 U.S. 964 (1974) (hereinafter "*NYSA*"); *Boston Shipping Ass'n v. United States*, 8 S.R.R. 20,828 (1st Cir. 1972) (hereinafter "*BSA*"). In the *PMA* case before the District of Columbia Circuit, the Court of Appeals panel unanimously rejected the Commission's exercise of jurisdiction over a maritime labor contract. *Pacific Maritime Ass'n v. FMC*, 543 F.2d 395 (D.C. Cir. 1976), rev'd, 435 U.S. 40 (1978). This disagreement with the Supreme Court's majority opinion in *PMA* was also adopted by the First Circuit in *BSA*, by the Department of Justice in *BSA* and by the NLRB and Department of Labor in both *NYSA* and *BSA*.

When the FMC sought to assert jurisdiction over the labor agreement between Boston Shipping Association and the ILA, the Court of Appeals for the First Circuit stated: "In all frankness we are compelled to remark that our initial reaction to the Commission's ruling is one of astonishment." (*BSA*, supra, 8 S.R.R. at 20,830.)

In *BSA*, the NLRB, the United States Department of Labor and the United States Department of Justice agreed with the industry position that the FMC should withhold its jurisdiction. In their briefs they stated:

"NLRB:

"To require Commission approval of work allocation agreements such as those involved here would not only represent a significant intrusion into the process of free collective bargaining which the NLRB is designed to foster, but it is likely to disrupt the process of collective bargaining and deter the speedy resolution of labor disputes in the maritime industry. To be sure, the Commission states (citation omitted) that it is not requiring 'preapproval clearance of the negotiating positions of management during collective bargaining.' But, under its decision, the parties must still obtain approval of a provision which they have agreed to before they can lawfully put it into effect. In these circumstances, collective bargaining negotiations are bound to be hampered. The process of collective bargaining involves a give-and-take, with one party making a concession on one subject in return for obtaining a concession on another subject. It is difficult, if not impossible, for the parties to make a meaningful judgment as to the kind of bargain they are negotiating if one or more of the key provisions on which agreement turns is subject to invalidation by the Commission. Moreover, the fact that Commission approval would have to be obtained before the agreement could be put into effect would necessarily delay—for the period of the Commission hearing and decision and possible court review—the implementation of the agreement; and this delay may, in turn, cause industrial strife.

"Department of Labor:

"Therefore, if FMC determines that multi-employer collective bargaining agreements, as a general rule, fall within its Section 15 review authority, no such collective bargaining agreement can go into effect until there is an affirmative FMC determination.

"The Department of Labor believes that the delay and uncertainty inherent in this procedure would do great damage to the cause of collective bargaining in the maritime industry—an industry already beset with labor-management strife and discord—and would place serious roadblocks in the way of multi-employer bargaining in that industry. The Department of Labor believes, further, that the assertion of such jurisdiction by the Commission is beyond its authority under the Shipping Act.

"Department of Justice:

"However, where the agreements involved are made a part of the collective bargaining process—whether the actual contract or management agreements antecedent to it—a new element is introduced: the concern with preservation of the national labor policy of collective bargaining. It is not that the introduction of labor policy magically transmutes the agreements otherwise subject to Section 15; rather,

it is that it brings into play other, additional values that are of at least equal weight to Shipping Act policy. Labor policy looks to settlement of issues by the parties themselves under certain ground rules and with as little government interference as possible. The difficulty with Maritime Commission involvement is not just that it is government involvement, but that it is government involvement by an agency that possesses neither experience nor expertise in labor matters. Thus it would be desirable for the Commission generally to avoid involving itself in matters arising in collective bargaining."

In the *NYSA* case, both federal agencies primarily concerned with labor relations repeated their opposition to the FMC's regulation of collective bargaining agreements. Both expressed concern that the Commission's exercise of jurisdiction over labor contracts posed significant danger to maritime labor relations and could have serious consequences to industrial peace in the maritime industry. The Department of Labor stated:

"The Commission's intrusion into the process of collective bargaining is very likely to disrupt the process and deter the speedy resolution of labor disputes in the maritime industry." (Department of Labor's Position Statement appended to Brief of the United States, *New York Shipping Ass'n v. FMC*, 495 F.2d 1215 (2d Cir. 1974).)

The NLRB also found the Commission's assertion of jurisdiction inimicable to the national labor policy of promoting collective bargaining:

"The process of collective bargaining is an ongoing series of negotiations, with one party making a concession on one subject in return for obtaining a concession on another. It is extremely difficult for the parties to make a meaningful judgment as to the kind of bargain they are negotiating if one or more of the key provisions on which agreement turns is subject to invalidation by the Commission. This kind of administrative supervision will impede the process of collective bargaining and could inhibit negotiators' attempts to arrive at novel solutions to troublesome labor problems. The superimposition of the approval of the FMC over a matter that was so crucial to the agreement is likely to disrupt the process of collective bargaining and deter the speedy resolution of industrial disputes in the maritime industry." (Brief for NLRB as *Amicus Curiae* at 13-14, *New York Shipping Ass'n v. FMC*, 495 F.2d 1215 (2d Cir. 1974).)

The unequivocal opposition to the FMC's assertion of jurisdiction over collective bargaining by the federal agencies specifically entrusted by Congress with regulatory supervision over labor relations did not prevail in the *PMA* case. Instead, the Commission was given virtually unlimited discretion to extend its regulatory regime to embrace all aspects of maritime multi-employer collective bargaining.

PMA'S UNWARRANTED EXPANSION OF FMC JURISDICTION

The majority in *PMA* radically expanded the scope of the Commission's regulatory jurisdiction beyond the narrowly defined boundaries previously established by the Supreme Court in *Volkswagenwerk A. G. v. FMC*, 390 U.S. 261 (1968). *Volkswagen* allowed the FMC to apply the filing and approval requirements of Section 15 of the Shipping Act, 46 U.S.C. Section 814(1976), to a labor related, unilateral employer assessment agreement, not embodied in the collective bargaining agreement, which allocated the costs of fringe benefits prescribed in the labor contract. The *Volkswagen* Court expressly qualified its decision by stating that it did not apply to collective bargaining agreements.

The Commission now unalterably favors a return to the regulatory scheme in effect prior to *Volkswagen*.

"The Commission would not object to deletion of collective bargaining agreements, agreements establishing multi-employer groups and agreements implementing collective bargaining funding obligations from the scope of section 15 of the Shipping Act. This was the status of such agreements prior to the Volkswagen decision and candidly, the present Commission would rather that status had never changed." (*Proposed Amendments to the Shipping Act: Open Hearings on H.R. 6613, Before the Subcomm. On Merchant Marine of the House Comm. On Merchant Marine and Fisheries*, 96th Cong., 2d Sess. (Mar. 11, 1980) (written prepared statement of Hon. Thomas F. Moakley, Vice Chairman, FMC at 6), reprinted in part in *House Comm. On Merchant Marine and Fisheries, Collective Bargaining Agreements*, H.R. Rep. No. 96-876, 96th Cong., 2d Sess. 4 (Apr. 15, 1980).)

Under the *PMA* ruling, however, the Commission is directed to regulate not only collectively bargained assessment agreements, but even the most fundamental provisions of a labor contract. A basic contractual wage scale clause that says that "employees shall receive a wage increase of 50¢ per hour" is now subject to second guessing and disapproval by the Commission operating with different motives and under different rules totally unrelated to the economic and social processes involved in collective bargaining.

The *PMA* decision has essentially deprived the vital maritime industry of the benefits of the Congressional policy favoring unfettered collective bargaining without governmental intervention. See, Section 101 of the Labor Management Relations Act, 1947, as amended, 29 U.S.C. Section 151 (1976); see generally, *Lodge 76, Int'l Ass'n of Machinists and Aerospace Wkrs. v. Wisconsin Employment Relations Com'n*, 427 U.S. 132, 153 (1976); *NLRB v. Burns Int'l Security Services, Inc.*, 406 U.S. 272, 288 (1972); *NLRB v. Insurance Agents Int'l U.*, 361 U.S. 477, 489-90 (1960); see also, *House Comm. on Merchant Marine and Fisheries, Collective Bargaining Agreements*, H.R. Rep. No. 96-876, 96th Cong., 2d Sess. 5-6 (Apr. 15, 1980).

FMC'S LACK OF EXPERTISE IN THE AREA OF LABOR RELATIONS

The *PMA* case, which was decided after we had negotiated our last contract with the ILA, required us to file with the FMC all of our many collective bargaining agreements. To this day, none of these documents, with the exception of the Job Security Program and New York Assessment Agreement, has been reviewed or approved by the Commission. The reason for this is obvious: the Commission has been inundated with lengthy and complex maritime labor agreements from every port in the nation.

The Commission has neither the time, resources, expertise nor inclination to review the plethora of collective bargaining agreements deposited with it. I think we can even venture a guess that the Commission does not have the basic experience needed for a knowledgeable appraisal of these collective bargaining agreements. It does not have a firm grasp of the elementary factors that are germane to any meaningful analysis of a labor contract. These factors would include the collective bargaining history of the agreement, the nature, purpose and underlying cause of particular provisions, the unique problems of hundreds of individual bargaining units, etc. In essence, then, the Commission is simply unequipped to manage effectively this extraordinary and complex regulatory task.

The important consideration is that, notwithstanding its inability to regulate, the Commission has been told by the Supreme Court in *PMA* that it must undertake this unprecedented regulatory mission, despite the absence of any prior Congressional authorization.

NO PRIOR CONGRESSIONAL INTENT TO SUBJECT COLLECTIVE BARGAINING TO SHIPPING ACT REGULATION

Nowhere in the statutory language or legislative history of federal shipping laws has there been the slightest hint that Congress intended to subject maritime labor contracts to the regulatory jurisdiction of the FMC. Indeed, if this were the Congressional objective, Congress "would have done so specifically or, at least, it would have provided for jurisdiction over the indispensable party to such an agreement—the labor union." *PMA, supra*, 435 U.S. at 74-75 (Powell, J. dissenting) (footnote omitted); see also, *House Comm. on Merchant Marine and Fisheries, Collective Bargaining Agreements*, H.R. Rep. No. 96-876, 96th Cong., 2d Sess. 5 (Apr. 15, 1980).

Neither statutory language nor legislative history offers specific support for this result. For well over a half a century, the agency responsible for enforcing the Act did not consider Section 15 previews of maritime labor contracts to be within its mission, even though collective bargaining is hardly a recent development in the major ports of the Nation. No intervening legislation explains the Court's willingness to recognize this belated assertion of jurisdiction.

"This decision would be debatable but unexceptional were it not for the presence of a competing statute. The task confronting the Court is one of reconciling the broad language of Section 15 with the distinct policy of federal labor law embodied in the Labor Management Relations Act, 1947, 29 U.S.C. Section 141 *et seq.* It seems to me that today's ruling undercuts federal labor policy, imposing undue burdens on collective bargaining, without advancing significantly any Shipping Act objective. I therefore dissent." (*Id.* at 64-65 (dissenting opinion of Mr. Justice Powell) (footnotes omitted).)

FMC'S RECENT RULE OF EXEMPTION IS INADEQUATE

On April 10, 1980, the Commission promulgated a final rule to exempt collective bargaining agreements from the pre-implementation filing and approval requirements of Section 15 of the Shipping Act. The Commission's rule, inspired by a desire to remove any encumbrances upon our soon to commence negotiations with the ILA, falls far short of the desired objective of shielding maritime collective bargaining from unsettling Commission regulation.

The Commission's rule only protects against the disruptive consequences of prior filing and approval under Section 15. However, the occasion for mischief still remains, since anyone has the liberty to file a complaint with the Commission for

any alleged violation of Sections 16, 17 or any other provision of the Shipping Act. The Commission's rule in no way speaks of the firmly established doctrine of labor exemption from the full panoply of federal antitrust and similar statutory schemes, including the Shipping Act. *See, House Comm. on Merchant Marine and Fisheries, Collective Bargaining Agreements*, H.R. Rep. No. 96-876, 96th Cong., 2d Sess. 6-7 (April 15, 1980).

It is indeed noteworthy that the Honorable Thomas F. Moakley, Vice Chairman of the Federal Maritime Commission, unequivocally disavowed the Commission's rule in favor of a legislative exemption as follows:

"Having chaired the committee that produced that rule and having been a party to the numerous and lengthy discussions within that committee concerning the legal and practical problems inherent in virtually all of the myriad options for exemption that we considered, I can state with conviction that legislation is preferable to a Commission rule exempting these labor agreements from Section 15." *Proposed Amendment to the Shipping Act: Open Hearings on H.R. 6613, Before the Subcomm. On Merchant Marine of the House Comm. On Merchant Marine and Fisheries*, 96th Cong., 2d Sess. (Mar. 11, 1980) (written prepared statement of Hon. Thomas F. Moakley, Vice Chairman, FMC, at 7); emphasis supplied.)

H.R. 6613 IS THE ONLY EFFECTIVE SOLUTION

The only genuinely efficacious solution then is the complete prohibition of Shipping Act regulation in H.R. 6613. Unless the ruling of the *PMA* case is set aside by this Congress, NYSA will be put in a position where it cannot assure its counterpart's president, Teddy Gleason, that a collective bargaining agreement, once hammered out and entered into, is not subject to being altered, modified or set aside by the action of the FMC. This revocation or reformulation of our labor contract may ensue, even if the collective bargaining agreement complies with all of the requirements of labor law, antitrust law and all other federal and state laws. If the contract should be determined in some fashion to be unacceptable to the Commission under the peculiar strictures of the Shipping Act of 1916, it would be rescinded.

These concerns are not hypothetical. The same Rules on Containers now before the Supreme Court for adjudication under federal labor law have been previously declared unlawful by the FMC under federal shipping laws. *Sea-Land Service, Inc. and Gulf Puerto Rico Lines—Proposed Rules on Containers*, FMC Docket Nos. 73-17 and 74-40 (June 14, 1978), *appeal docketed sub nom. Council of North Atlantic Shipping Associations v. FMC*, No. 78-1776 (D.C. Cir. Aug. 9, 1978).

As a result of the FMC's adjudication, even if the Supreme Court should sanction the Rules under federal labor law and subsequently under federal antitrust law, *Consolidated Express, Inc. v. New York Shipping Ass'n*, 452 F. Supp. 1024 (D.N.J. 1977), *aff'd in part and rev'd in part*, 602 F.2d 494 (3d Cir. 1979), *petitions for cert. filed*, 48 U.S.L.W. 3001 (U.S. June 22, 1979) (Nos. 78-1902 and 78-1905), they must still pass muster under the shipping acts. Meaningful and productive collective bargaining cannot exist under this unduly burdensome regime of multiple federal regulation. Labor strife is the inevitable result.

It is to avoid just such a dilemma that H.R. 6613 has been introduced. It is absolutely essential, if our quest for a strike-free agreement is to succeed, that H.R. 6613 be quickly enacted into law.

A brief synopsis of the Bill might state that:

(a) Multi-employer bargaining groups, such as NYSA, are not deemed subject to FMC jurisdiction in connection with their collective bargaining activities.

(b) Neither labor agreements nor proposals or agreements preparatory to collective bargaining in the maritime industry are to be deemed subject to FMC jurisdiction under any provision of the Shipping Act, including but not limited to Sections 15, 16 and 17.

(c) No charge, tax, or assessment of any fringe benefit obligations in maritime collective bargaining agreements are to be deemed a charge within the meaning of Sections 16 and 17 of the Shipping Act.

Quite bluntly, the Bill would remove FMC jurisdiction over labor agreements and collective bargaining.

MARITIME COLLECTIVE BARGAINING IS ALREADY SUFFICIENTLY REGULATED

It should be made plain that the industry is not asking that it remain unregulated. It is subject, and has subjected itself, to the civil laws of the United States and of the various states in which it operates. It asks, however, that it not be so overly regulated that it cannot hope to reach a successful collective bargaining agreement with the union representing its employees.

What is the difference between FMC regulation and other regulation?

Are we only complaining about too much regulation?

Not at all!

Labor, antitrust and other regulatory schemes are prospective in their operation. Moreover, they focus on the particular provisions of the labor contract being challenged and apply only the specific, well-defined statutory prescriptions in issue. FMC regulation, however, has the far reaching power to strike down an entire agreement, even before its implementation. It is this type of blanket Shipping Act regulation that the industry—both labor and management—finds most devastating.

While the NLRB and the courts may not rewrite our contract but can only strike down the challenged portion of the agreement, after it has been entered into, the FMC has the power to insist that our agreements be presented in their entirety for its approval in advance, with the full power to modify, change, amend or obliterate any and all provisions entered into after many months of good-faith bargaining.

In recommending enactment of H.R. 6613, the House Committee on Merchant Marine and Fisheries cogently articulated the harmful consequences of Commission regulation:

"Thus, under the current system, any agreements found by the FMC to be "contrary to the public interest," can be modified by the Commission. This modification of one or two provisions could undo an entire labor agreement; thus, upsetting the delicate set of compromises reached during arms length negotiations which constitute most maritime collective bargaining agreements. Further, the present system would allow parties to a collective bargaining agreement to challenge an agreement which they helped prepare. Such a situation will not promote industrial peace, economic stability, or the U.S. Merchant Marine. The imposition on the maritime industry of these more stringent requirements with respect to settling labor disputed will place the U.S. Merchant Marine at a disadvantage when competing against foreign carriers and other modes of transportation." (*House Comm. On Merchant Marine and Fisheries, Collective Bargaining Agreements*, H.R. Rep. No. 96-876, 96th cong., 2d Sess. 6 (Apr. 15, 1980).)

It is this type of awesome regulation, which is not applicable in any other industry, that we seek to have done away with, and which the proposed Bill would remedy.

OVERWHELMING SUPPORT FOR H.R. 6613

The governmental agencies, which are most intimately concerned with this proposed legislation, have expressly endorsed H.R. 6613. Indeed, the FMC has made it clear that it:

"* * * has no desire to interfere with the collective bargaining process and supports your efforts to legislate an exemption of collective bargaining agreements from section 15 of the Act. We agree with those who argue that the prior approval requirements of this section unduly stifle the bargaining process.

"Likewise, the Commission does not wish to engage in duplicative regulation of activities in implementation of collective bargaining agreements under sections 16, 17 and other provisions of the Act. Therefore, we would also support exemptions of such activities from Shipping Act jurisdiction in those areas where other laws provide adequate protection." (*Proposed Amendments to the Shipping Act: Open Hearings on H.R. 6613 Before the Subcomm. On Merchant Marine of the House Comm. On Merchant Marine and Fisheries*, 96th Cong., 2d Sess. (Mar. 11, 1980) (prepared written statement of Thomas F. Moakley vice Chairman, FMC at 10-11), reprinted in *House Comm. On Merchant Marine and Fisheries Collective Bargaining Agreements*, H.R. Rep. No. 96-876, 96th Cong., 2d Sess. 4 (Apr. 15, 1980).)

The United States Department of Labor also earnestly advocates the enactment of H.R. 6613. Secretary of Labor Ray Marshall explicated the position of the Department of Labor as follows:

"We strongly support the objective of H.R. 6613. It is important to ensure that the agreements entered into between labor and management in the maritime industry are subject to the same provisions of Federal labor laws which govern collective bargaining agreements in other industries. Further, such collective bargaining agreements and concerted activities to implement them should be subject to review by those agencies which have expertise in labor-management relations matters.

"The Office of Management and Budget advises that there is no objection to the submission of this report from the standpoint of the Administration's program." (*Proposed Amendments to the Shipping Act: Open Hearings on H.R. 6613 Before the Subcomm. On Merchant Marine of the House comm. On Merchant Marine and Fisheries*, 96th Cong., 2d Sess. (Mar. 11, 1980) (Mar. 10, 1980 letter to REp. Murphy, Chairman of the House Comm. on Merchant Marine and Fisheries from Secretary of Labor Ray Marshall), reprinted in *House Comm. On Merchant Marine and Fisheries, Collective Bargaining Agreements*, H.R. Rep. No. 96-876, 96th Cong., 2d Sess. 5, 9-10 (Apr. 15, 1980).)

The shipping industry welcomes the progressive action taken by the FMC and the Department of Labor in favor of H.R. 6613. This proposed legislation will accomplish the equitable and desirable result of entrusting maritime labor relations and collective bargaining to the same regulatory regime applicable to all other industries in the United States. On behalf of the entire shipping industry, we join these administrative agencies and other supporters of H.R. 6613 in asking that this bill be approved by the Subcommittee and presented to the Senate for its early adoption.

[The following information was subsequently received for the record:]

QUESTIONS OF THE COMMITTEE AND THE ANSWERS THERETO

New York Shipping Association, Inc. ("NYSA") respectfully submits the following responses to the questions posed by the Subcommittee and presented in writing to NYSA:

Question 1. Under the present situation, if an aggrieved party seeks relief in the Courts from a practice growing out of an agreement implementing a collective bargaining agreement, he can go into Court and seek a temporary restraining order and then a preliminary injunction, etc. These are fairly expeditious procedures involving days, or a few weeks at most.

If, on the other hand, a party seeks relief from such practice before the FMC, can he obtain it as expeditiously?

Answer 1. The FMC lacks authority to issue any preliminary injunctive relief. It may only act after notice and lengthy hearings, which often consume considerable time, in some cases spanning several years. For example, litigation before the FMC involving the 1968-1971 assessment formula in the Port of New York has not as yet been finally concluded, although it was first commenced in 1969, more than 10 years ago. The final phase of that litigation is now pending before the District of Columbia Circuit. *New York Shipping Association v. FMC*, No. 78-1479 (argued May 7, 1980).

Question 2. Very simply, much of the opposition to H.R. 6613, is based on the contention that funds raised by assessment against specific cargoes introduce issues of fairness as between various shippers; and the nature of these abuses is such that they lend themselves to consideration under the anti-discrimination sections of the Shipping Act, and are entirely outside the scope of the labor laws.

Would you please comment?

Answer 2. Federal antitrust statutes and the entire body of common law principles relating to maritime transportation provide a comprehensive regime for the regulation of assessment agreements equal in scope and effect to the shipping laws. Labor law principles play and significant role in this regulatory scheme to assure a proper accommodation of national labor, antitrust and transportation policies.

Question 3. In its testimony, the FMC has proposed three alternative draft bills. Which do you prefer?

Answer 3. NYSA would prefer alternative No. 3—the complete elimination of all FMC jurisdiction over collective bargaining and labor relations. However, in the interest of achieving a reasonable accommodation, NYSA would favor the adoption of the proposed compromise legislation permitting limited FMC review of certain assessment agreements.

Question 4. Is it your understanding that if collective bargaining agreements are removed from section 15, the parties to such agreements would be exposed to possible antitrust prosecution?

Answer 4. Absent the express antitrust immunity prescribed in section 15 of the Shipping Act, 1916, 46 U.S.C. Section 814, a maritime labor contract would be subject to the full panoply of potential antitrust sanctions if the agreement were found to be outside of the scope of the labor exemption doctrine.

Question 5. The compromise provides that all provisions of collective bargaining agreements except for the assessment of fringe benefit costs on other than an hourly basis, would be exempt from sections 15, 16, and 17 jurisdiction.

(a) What is the reason for the distinction?

(b) On what basis are fringe benefit costs assessed in most of the 34 ports from Maine to Texas, other than the Port of New York?

(c) On the Pacific Coast?

Answer 5. (a) The traditional, longstanding method for funding labor costs has been a man-hour formula. Manhour assessments have usually been expressly prescribed in the labor contract. NYSA knows of no case in which the FMC has asserted jurisdiction over a pure manhour assessment. It is this traditional practice that provides the fundamental reason for the distinction in the compromise proposal.

(b) It is NYSA's understanding that fringe benefit costs in most ports are assessed principally on a manhour basis.

(c) NYSA has no firm knowledge of the method of assessment utilized on the Pacific Coast.

Question 6. Under the proposed compromise is it clear just what activities arising out of collective bargaining agreements would still be subject to the FMC's jurisdiction?

Answer 6. The proposed compromise clearly limits the FMC's authority to the review of (1) assessment agreements formulated on other than a uniform manhour basis and (2) matters required to be included in tariffs subject to the FMC's jurisdiction.

Question 7. At the request of the Subcommittee, the FMC has prepared an alternative to H.R. 6613, which would exempt maritime labor agreements from section 15 of the Act. The effect of this proposal would be to permit collective bargaining agreements and assessment agreements to become effective immediately. There would be no need for filing with and approval by the FMC.

(a) In your view is the FMC's alternative preferable to the compromise which has been proposed?

(b) Suppose an additional provision were added to the FMC's alternative which would provide that if the FMC subsequently finds a maritime agreement or activity based upon it to be unjust or unfair, the agency could grant only *prospective* relief, and that such prospective relief must be granted within 180 days after a notice and hearing upon the agreement or practice complained of?

Answer 7. (a) The major shortcoming in the FMC's exemption proposal is the complete elimination of the antitrust immunity that Section 15 would provide. If a labor contract is to be subject to FMC review then, as the proposed compromise provides, it should be entitled to the same Section 15 exemption from the antitrust laws enjoyed by all other agreements subject to Section 15.

(b) Although prospective relief is certainly beneficial, it does not remedy the fundamentally unsound removal of antitrust immunity which would prevail under the firm's proposal.

Question 8. 1. In your judgment, would the compromise proposal ensure equal treatment of shippers, cargo, and localities?

2. In your view, is the compromise proposal preferable to H.R. 6613, in its present form?

Answer 8. (1) The compromise proposal permits a complaint to be filed asserting a Section 15 challenge. The substantive provisions of Section 15 would then apply assuring equal treatment of shippers, cargo and localities.

(2) NYSA prefers H.R. 6613 in its present form. However, it is willing to accept the proposed compromise to achieve a legislative solution that would accommodate all interests on a fair and equitable basis.

Question 9. Do you agree that whatever legislation would be passed should not affect the outcome of any pending case before the courts or the FMC?

Answer 9. The only pending case in which NYSA is participating relates to the collectively bargained Rules on Containers. This case, however, should be controlled by the Supreme Court's adjudication in *NLRB v. International Longshoremen's Ass'n*, No. 79-1082 (decided June 20, 1980).

NYSA trusts that it has fully responded to the questions posed and will provide any additional information that the Subcommittee may require. Dated: June 24, 1980.

Senator INOUE. If the bill is not enacted, would it pose a threat to the negotiations on the local issues?

Mr. DICKMAN. Not only to the local issues but the whole contract, sir.

I will let Mr. Gleason talk for himself on that.

Mr. GLEASON. My name is Thomas Gleason, Mr. Chairman, and I am president of the ILA. I come here today to support what has been said about the compromise agreement, if it can be worked out, but I surely as a negotiator cannot agree to a contract somewhere down the line, 180 days from now, that may be changed. I would rather sit down now and deal with Mr. Moakley and work out the contract. If he thinks I'm a law-abiding citizen, we will get in there and go through this thing and maybe we won't need any legislation.

I may do better than \$1.20 an hour with Mr. Moakley, but if I get two shots at these fellows, I'm going to take advantage of it.

Now I've been around for a long, long time—65 years in this business—and one thing we have tried to do since I have been president of the ILA, since 1962, is bring stability to the industry. We thought we had it in 1974, but again we had a long strike over the JSP.

We are an industry where we used to do 20 tons per hour. When we agreed to automation and mechanization in 1959, we increased our productivity from 20 tons per hour to anywhere from 300 to 600 tons per man-hour.

The cost of doing business with the industry today has come down dramatically. We feel here—as a union—that we can act and work out an agreement. Somewhere down the line this agreement will be vetoed by somebody who doesn't know the first thing about this business, who would not put the time in to understand it.

About 6 months we've worked to get this contract out of the way in order to keep these ships moving. The very fact is that some of the people that are opposed to H.R. 6613 were out doing this while we were negotiating. They went out and chartered ships that diverted freight away from the United States, from the ports of the United States, to bring it from Mexico or Canada on foreign-flag ships, to divert that cargo away from American ships. It has been the position of the ILA for a long, long time that we want to protect our allies and especially the American merchant marine, and this has been since we have been there.

Are we going to have to put up with everybody? Some bureaucrat taking a stand saying: "Here, this contract, I believe is a violation of some act in 1916"—where people didn't know anything about mechanization in 1916. These things, now, are new in this industry. It has come, and it is gradually coming more and more all the time. We have got ourselves set, but we cannot agree—we will not agree to any contract until we know we are free and clear to have those men receive those benefits on October 1. We will hold up, and I think it is wrong to do this.

I think it is absolutely wrong to do this to an industry. We have enough people supervising us now. We have the National Labor Relations Board in the Department of Labor, the same as any other industry. So why should we be singled out so that we're not able to carry on a business as other industries carry theirs on.

As to the rules on containers which you brought up: Mr. Chairman—my God—as anybody who worked on the docks taking that freight and putting them on pallets or single loads 60 years ago knows, there shouldn't be any contest about whether we have helped work on that. We have been doing that work for a great number of years. All you've got to do is look around at the break-bulk ships that now are in circulation and see how the freight is handled now. There are plenty of those ships working.

We in the ILA, you see, we normally handled that freight all of our lives. The fellow who comes in and says we're trying to infringe on somebody else's jurisdiction, to move out up to 50 miles, is wrong! All we are saying is: "Let's just receive freight coming from places 50 miles of the port. It's brought down to the piers by a trucking company; then we in the ILA take it off the trucking

company's truck at the pier, and we stuff it in containers. This is the work we're looking to preserve.

We are 100 percent behind the industry in supporting legislation on 6613.

And one thing I would like to get over to you, Mr. Chairman is this: That this union does not talk about tariffs. I think that is the companies' business; it's none of our business at all. We do not talk about tariffs. We do not negotiate tariffs at all.

[The statement follows:]

STATEMENT OF THOMAS W. GLEASON, PRESIDENT, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO

Mr. Chairman and Members of the Committee, my name is Thomas W. Gleason. I am the International President of the International Longshoremen's Association, AFL-CIO, also known as the "ILA".

The ILA represents in excess of 110,000 members working in ports from Maine to Texas on the North Atlantic, South Atlantic, and Gulf Coasts of the United States as well as on the Great Lakes and in Canadian ports. More than 80,000 of our members are employed on waterfront docks, piers and terminals by stevedores and vessel carriers in a multitude of related crafts and occupations. As their collective bargaining representative, the ILA negotiates labor contracts with various multi-employer bargaining associations including the New York Shipping Association, Inc.

The ILA has already begun preliminary meetings for the negotiating of a new contract to take effect after September 30, 1980. The success of these negotiations will depend in large part upon two major issues, one of which is currently pending before the Supreme Court of the United States and the other which is the subject of this hearing today.

More specifically, the first of these problems concerns the Rules on Containers which are essentially collectively bargained provisions aimed at preserving the traditional work opportunities of ILA members. The compromise which the Rules codify was, unfortunately, not achieved without resorting to a coastwide strike.

The advent of containerization some twenty years ago has progressively diminished job opportunities for longshore workers. It has therefore been a difficult problem in prior negotiations and will be so in the forthcoming sessions.

Of particular importance to the outcome of the negotiations is the action by the Supreme Court in granting certiorari to review the decision of the United States Court of Appeals for the District of Columbia Circuit which overturned the NLRB's invalidation of the Rules on Containers under federal labor law. In essence, the Supreme Court is to consider whether the Rules are valid work preservation. The Court heard oral argument on April 22, 1980 and I understand from our attorneys that a decision may be forthcoming from the court before its summer recess. Needless to say, such a decision would, in great part, guide the course of the negotiations.

The second issue to be resolved concerns the problem which is the subject of H.R. 6613, the amendment of the Shipping Act of 1916 to prohibit regulation of collective bargaining agreement by the Federal Maritime Commission, also known as "FMC" or "Commission". This year's negotiations will have the unprecedented prospect that the agreement eventually reached will be subjected to regulation by the Commission.

The genesis of this regulation is found in a Supreme Court decision, *FMC v. Pacific Maritime Association*, 435 US 40 (1978) which granted discretionary authority to the FMC to assert jurisdiction over multi-employer collective bargaining agreements thereby inflicting a serious setback on collective bargaining in the maritime industry. More specifically, the Supreme Court declared that the FMC has the authority to review and to require pre-implementation approval of multi-employer labor contracts in the maritime industry to the extent that they address so-called "mandatory subjects of bargaining", that is, wages, hours and working conditions. In effect, the Supreme Court's expansion of the FMC's jurisdiction has stifled the long-recognized congressional policy of promoting collective bargaining unfettered by governmental intervention.

Clearly, parties can never bargain decisively because they will never know what the FMC will or will not approve. This will create chaos and uncertainty in labor negotiations in a key national industry. It is inevitable that such delay and uncertainty will ensue if multi-employer bargaining associations in the maritime industry are unable to finalize collective bargaining agreements until they have undergone

lengthy hearings before the Commission followed by protracted litigation in the courts. The collective bargaining process draws its lifeblood from the ability of each side at the bargaining table to deliver its part of the bargain expeditiously and the process is ill served by delay and uncertainty.

Although maritime unions like the ILA are not subject to the Commission's jurisdiction and any Commission determination will bind only employer signatories to the agreements, the unions themselves will still be placed in a position of uncertainty as to what the Commission's ultimate determination might be with respect to a particular agreement and indeed the FMC's action might force them into litigating rather than submitting voluntarily to a determination that would invalidate or modify their negotiated settlement. Indeed, at the outset, there is an understandable reluctance on the part of labor negotiators, who are unfamiliar with the complexities of the shipping statutes, to reach an agreement that might be undone by those unfamiliar complex statutes. In addition, the obligation imposed by federal labor law to bargain in good faith is a duty which is much more difficult to fulfill when the fruit of any bargaining is subject to the scrutiny of the FMC's attorneys and administrators whose motives and rules are geared to much different objectives and goals. In the end, any peaceful resolution of labor disputes through collective bargaining, as envisioned by the national labor policy, is jeopardized in the maritime industry by subjecting the collective bargaining process to adjudicatory scrutiny by the FMC.

Admittedly, the development of federal labor law can be characterized as a striving to achieve labor stability. More precisely, the development of federal labor law can be described as an attempt to promote this stability through the process of collective bargaining. It is evident that, at times, the vagaries of federal labor law can even stymie those administrative agencies, namely the National Labor Relations Board and the U.S. Department of Labor, exclusively charged with its administration. It is inconceivable that labor stability will be enhanced by giving control over the collective bargaining process to a regulatory agency inexperienced and ill equipped to deal with it.

Both the National Labor Relations Board and the U.S. Department of Labor have consistently supported this position in various statements and briefs before various courts. For example, the National Labor Relations Board in its brief in *Boston Shipping Association v. United States*, 8 S.R.R. 20, 828 (1st Cir. 1972) has stated:

"To require Commission approval of work allocation agreements such as those involved here would not only represent a significant intrusion into the process of free collective bargaining which the NLRB is designed to foster, but it is likely to disrupt the process of collective bargaining and deter the speedy resolution of labor disputes in the maritime industry. To be sure, the Commission states [citation omitted] that it is not requiring 'preapproval clearance of the negotiating positions of management during collective bargaining.' But, under its decision, the parties must still obtain approval of a provision which they have agreed to before they can lawfully put it into effect. In these circumstances, collective bargaining negotiations are bound to be hampered. The process of collective bargaining involves a give-and-take, with one party making a concession on one subject in return for obtaining a concession on another subject. It is difficult, if not impossible, for the parties to make a meaningful judgment as to the kind of bargain they are negotiating if one or more of the key provisions on which agreement turns is subject to invalidation by the Commission. Moreover, the fact that Commission approval would have to be obtained before the agreement could be put into effect would necessarily delay—for the period of the Commission hearing and decision and possible court review—the implementation of the agreement; and this delay may, in turn, cause industrial strife."

The NLRB has also stated in its *amicus curiae* brief in *New York Shipping Association v. FMC*, 495 F.2d 1215 (2d Cir. 1974):

"The process of collective bargaining is an ongoing series of negotiations, with one party making a concession on one subject in return for obtaining a concession on another. It is extremely difficult for the parties to make a meaningful judgment as to the kind of bargain they are negotiating if one or more of the key provisions on which agreement turns is subject to invalidation by the Commission. This kind of administrative supervision will impede the process of collective bargaining and could inhibit negotiators' attempts to arrive at novel solutions to troublesome labor problems. The superimposition of the approval of the FMC over a matter that was so crucial to the agreement is likely to disrupt the process of collective bargaining and deter the speedy resolution of industrial disputes in the maritime industry."

In a similar vein, the Department of Labor in its brief in the *Boston Shipping Association* case mentioned above has emphasized the delay and uncertainty inherent in the assertion of FMC jurisdiction as follows:

"Therefore, if FMC determined that multi-employer collective bargaining agreements, as a general rule, fall within its § 15 review authority, no such collective bargaining agreement can go into effect until there is an affirmative FMC determination.

"The Department of Labor believes that the delay and uncertainty inherent in this procedure would do great damage to the cause of collective bargaining in the maritime industry—an industry already beset with labor-management strife and discord—and would place serious roadblocks in the way of multi-employer bargaining in that industry. The Department of Labor believes, further, that the assertion of such jurisdiction by the Commission is beyond its authority under the Shipping Act."

As an indication of the inability of the FMC to cope with the Supreme Court's mandate in the *Pacific Maritime Association* case, one need only note that the FMC has now the responsibility to review the many lengthy and complex maritime labor agreements from every U.S. port. Compounded with this sheer volume of agreements is the FMC's lack of experience and knowledge in dealing with an intelligent appraisal of labor contracts. Behind every complex collective bargaining agreement is an even more complex grouping of actors which had their influence in shaping the ultimate agreement. An intelligent appraisal of any labor agreement cannot therefore be accomplished unless these factors are appreciated and at most, the Commission is ill-equipped for this herculean assignment.

Moreover, the FMC itself is apparently not very anxious to take on this added responsibility, as evidenced by its support of H.R. 6613. Vice Chairman Thomas Moakley, speaking on behalf of the FMC before the House Committee indicated that the FMC has no desire to impose itself on the collective bargaining process:

"The Commission would not object to deletion of collective bargaining agreements, agreements establishing multi-employer groups and agreements implementing collective bargaining funding obligations from the scope of section 15 of the Shipping Act.

"* * * the Federal Maritime Commission has no desire to interfere with the collective bargaining process and supports your efforts to legislate an exemption of collective bargaining agreements from section 15 of the Act. We agree with those who argue that the prior approval requirements of this section unduly stifle the bargaining process."

In voicing its support of H.R. 6613, the Department of Labor implicitly agreed with the FMC insofar as both the FMC and the Department of Labor apparently believe that the FMC should not be involved in the collective bargaining process:

"It is important to ensure that the agreements entered into between labor and management in the maritime industry are subject to the same provisions of Federal labor laws which govern collective bargaining agreements in other industries. Further, such collective bargaining agreements and concerted activities to implement them should be subject to review by those agencies which have expertise in labor-management relations matters."

The Report of the House Committee itself presents a cogent explanation of the reasons why H.R. 6613 should be enacted:

"The filing and prior approval requirements of Section 15 were never intended to apply to bona fide collective bargaining agreements. The Federal Maritime Commission for over half a century did not consider collective bargaining agreements to be included with the scope of Section 15. Congress in enacting Section 15 specifically listed various types of agreements and classes of persons subject to the filing and approval requirement, yet neither collective bargaining agreements nor labor unions are mentioned in Section 15.

"The United States has developed an elaborate system of labor laws designed to foster free collective bargaining without a requirement of prior government approval. The government has adopted a position of neutrality regarding the terms of collective bargaining agreements."

* * * * *
 "The present FMC procedure allows 'official compulsion over the terms of the contract.' It would be imprudent to allow the development of a rival system whereby collective bargaining agreements, before they can be implemented, must be subjected to review and approval by an agency lacking expertise in labor-management matters.

"Testimony received during the Committee hearing on H.R. 6613 indicated that the FMC is the only agency with jurisdiction over a regulated industry which reviews collective bargaining agreements entered into by segments of the industry.

"The introduction of preimplementation approval requirement which permits the government to supervise the terms of collective bargaining agreements will have an adverse impact on parties trying to reach agreements on labor problems. The

concept of labor and management reaching an agreement which represents merely a tentative settlement, which could be nullified by a government agency, is foreign to American labor law."

* * * * *

"Thus, under the current system, any agreements found by the FMC to be 'contrary to the public interest' can be modified by the Commission. This modification of one or two provisions could undo an entire labor agreement; thus, upsetting the delicate set of compromises reached during arms length negotiations which constitute most maritime collective bargaining agreements. Further, the present system would allow parties to a collective bargaining agreement to challenge an agreement which they helped prepare. Such a situation will not promote industrial peace, economic stability, or the U.S. Merchant Marine. The imposition on the maritime industry of these more stringent requirements with respect to settling labor disputes will place the U.S. Merchant Marine at a disadvantage when competing against foreign carriers and other modes of transportation."

It must be noted that if Congress should eliminate FMC jurisdiction over labor agreements by enacting H.R. 6613, the parties and their labor agreements will not be left unregulated. On the contrary, maritime labor relations will remain with those agencies which have developed the requisite expertise and experience, namely, the NLRB and the Department of Labor under federal labor law and the Department of Justice and the courts under federal anti-trust law.

Moreover, a review of the federal shipping laws as well as the legislative history behind their enactment lends no support to the position that Congress intended that maritime labor contracts be subject to the FMC's regulatory jurisdiction. As a further bolster to this position, one need only consider the fact that Congress had intended that the FMC regulate labor contracts, it would have provided that maritime labor unions such as the ILA could also be subjected to its jurisdiction. In contrast, the federal labor statutes and their legislative histories are replete with references to Congressional intent that collective bargaining be subject to limited supervision by the NLRB and the Labor Department. Clearly, the proposed legislation herein is consonant with Congress' previously expressed intent.

Yet another factor to be considered are the Rules on Containers which have been previously mentioned in the context of federal labor law. The necessity for the enactment of H.R. 6613 is starkly highlighted when it is considered that the very Rules which are to be the subject of the Supreme Court's ruling will also have to undergo scrutiny under the federal shipping laws. Indeed, the FMC has previously declared these Rules unlawful under the federal shipping laws. The FMC ruled that a specific tariff provision setting forth the Rules violated various sections of the Shipping Act and of the Intercoastal Shipping Act which paralleled those in the Anti-Trust Acts. The FMC's decision in striking down the Rules on Containers, as implemented in the tariffs, stands as further proof of the FMC's fundamental inexperience in this matter and its inability to flexibly and realistically apply concepts in a maritime anti-trust field which it was created to administer. The inevitable result is that meaningful and productive collective bargaining agreements cannot exist under this unduly burdensome regime of multiple federal regulation.

In summary, therefore, it cannot be stressed too strongly that there is an immediate and pressing need for the elimination of the disruptive and unnecessary intervention of the Federal Maritime Commission into the field of labor relations and collective bargaining in the maritime industry. If H.R. 6613 is not enacted, the ILA will face the very possible result that the many long days usually spent in negotiating a new labor agreement will be nullified by the FMC's action in altering, modifying or setting aside that very agreement even before its implementation. Regardless of how unassailable a labor agreement is under all the other regulatory statutes and administrative regulations, the FMC could still rule the agreement violative under the Shipping Act. H.R. 6613 is clearly designed to avoid this exercise in futility and equalize the position of the maritime industry among other industries in the United States. Therefore, I respectfully ask that H.R. 6613 be approved and presented to Congress for its early adoption.

Senator INOUE. Just for the record, you do support the compromise?

Mr. GLEASON. I do support the compromise.

Senator INOUE. I have a lot of questions that I would like to submit to both Mr. Dickman and Mr. Gleason, but just a few at this time.

Would shippers such as Crown Zellerbach and Weyerhaeuser be eligible to join the association?

Mr. DICKMAN. Sure, if they wanted to. Not shippers. Steamship companies.

Senator INOUE. Yes.

Mr. DICKMAN. No.

Senator INOUE. They would not be? Why?

Mr. DICKMAN. You must be a carrier, an ocean carrier.

Senator INOUE. If collective bargaining were exempt from the scope of section 15, they will be subject to the antitrust laws unless the labor exemption applies.

What is your view there?

Mr. LAMBOS. I think that, Mr. Chairman, both Mr. Gleason and Mr. Dickman in their statements concede that the antitrust laws would be applicable and say that they are willing to subject themselves to the same remedies as are available against other labor/management groups that may violate the antitrust laws.

The very point is, Mr. Chairman, that since there are antitrust remedies, since there are labor board remedies, since there are common law remedies against a carrier or labor union that violates the rights of others, that to impose on top of that the FMC jurisdiction in cases outside the compromise area, I think would be gilding the lily.

As Vice Chairman Moakley earlier indicated, merely because a carrier does wrong does not mean that the carrier escapes that wrong. He can be brought up under the antitrust laws or the labor laws or the common law and be expected to pay damages. And it should be pointed out that relief in those instances sometimes is extremely swift, especially when you go to the southern district court and you find out that the district judge hears the case and issues a temporary order rather quickly.

Senator INOUE. In a capsule, Mr. Gleason, do you feel that collective bargaining agreements should be negotiated in a free and unfettered atmosphere, and you want to be treated like any other labor organization?

Mr. GLEASON. That's all we're looking for, Mr. Chairman, and I think we can handle it pretty well, because I think the people with all the years in this industry know what we're looking for. We're not out to violate any laws at all or make any tariffs or anything else.

But if we are given the same privileges that other unions are allowed in this country, that's all we want and nothing else.

Senator INOUE. Do you think there is any difference between your union and, say, the Teamsters?

Mr. GLEASON. No. We may have our differences once in a while about jurisdiction or something like that, but there is no difference in the negotiating. They're not subject to the Federal Maritime Commission, or the ICC for that matter.

Senator INOUE. Mr. Lambos, do you feel that even with the passage of this measure, other sections and other laws would be sufficient to treat any problem that you may have?

Mr. LAMBOS. Yes. I think these are not academic remedies. They are remedies that have been applied time and again, as Mr. Gleason and Mr. Dickman know. We now have antitrust cases arising

out of the rules on containers. And the various courts have moved swiftly, and we are now awaiting the decision on the rules on containers and entering an antitrust case before the Supreme Court on a writ of certiorari.

So that the relief is there and it has been used by those in the public who felt offended by any conduct that we entered into during the collective course. And they have been very effective remedies in many unfair labor practice cases against the union and management.

And I am happy to say we have succeeded in almost all of them, with the exception of the case now before the Supreme Court of the United States involving the rules on containers, in which we await the judgment of the highest court in the land.

Senator INOUE. Gentlemen, if I may, I would like to submit to both of you and to your counsel questions that we have prepared for your study and response. They are a bit technical in nature, and I thought it might be better to give you a copy of them.

Thank you, gentlemen, very much.

We will next receive testimony from a panel made up of the following: Mr. Dan Skerritt, counsel, Master Contracting Stevedore Association of the Pacific Coast; Mr. John Kauffman, vice president for transportation, Weyerhaeuser Co., Tacoma, Wash.; Mr. John J. Archer, director of logistics, Crown Zellerbach Corp.; Mr. Daniel W. Lenehan, counsel, the Boston Shipping Association of Boston, Mass.; and Mr. Ed Vierengel, Ingersoll-Rand Co., appearing as director, international logistics, New York Chamber of Commerce.

Gentlemen, welcome.

STATEMENT OF DAN SKERRITT, COUNSEL, MASTER CONTRACTING STEVEDORE ASSOCIATION OF THE PACIFIC COAST, INC.

Mr. SKERRITT. I am appearing today in opposition to H.R. 6613, as it was enacted by the House. I am appearing as counsel for the Master Contracting Stevedores. The written testimony which we submitted was by Mr. Mel Stewart, who is out of the country and was unable to attend today's hearing, so I would like to have his written testimony entered into the record.

Senator INOUE. Without objection, all of your statements will be made a part of the record.

Mr. SKERRITT. Thank you. We appreciate the opportunity for these hearings, particularly because we believe that the bill went through the House of Representatives with some haste, with many interests on the west coast not having focused on the legislation at the time that it was before the House. In the interest of time, I am not going to go through very much of the testimony, since there are a number of other witnesses.

I would say that the stevedores whom I represent do not have any argument that the bargaining agreements be exempt from the filing requirements. We believe that the fringe benefits provided for labor agreements should go into effect after the employees have ratified the labor agreements, and they should not be held up in the regulatory process.

It is important to note, however, that H.R. 6613, as you mentioned, goes further than that and provides exemptions from sections 16 and 17 also. The MCSA does object to the elimination of

the antidiscrimination provisions under sections 16 and 17 of the act. We would, therefore, respond to your questions about the compromise by supporting some portions of that, at least in concept. I have not had an opportunity to look at the compromise language very carefully. I just received it a couple of hours ago, so I am unable to give you a very good analysis of it.

Regarding that proposal, there is one comment that I would like to make, however. I notice that Mr. Lambos made reference to the fact that he was only referring to assessments that were based on tons of cargo and not upon man-hours of employment.

I would point out that assessments that are based on man-hours could also provide a basis for a claim of violation of the Shipping Act, and I would refer to the fact that there are cases before the Maritime Commission now which were started when some of the labor-intensive shippers filed complaints, claiming that the man-hour assessments under the PMA-ILWU plan did violate the Shipping Act. And in fact, PMA hired its own independent consultant to review the assessments. And their own consultant, which was Temple, Barker & Sloane, came up with the conclusion that approximately 72 percent of the pension costs related to preexisting unfunded benefits.

So I am not sure that I understand the reason for making that distinction, and I don't think that that would answer the needs of some of the industry.

So I would say that if you are going to retain FMC jurisdiction over the assessment agreements, I would think that all of the assessment agreements, whether they are based on cargo or tonnage, ought to be included because the way the man-hours are assessed can be changed between cargo sectors just as easily as tonnage assessments could. So I fail to see any basis for the distinction.

The stevedores whom I represent, I think, would also wholeheartedly agree with Mr. Lambos's statement regarding the problems caused by retroactive reparations. I think that that does indicate that there is some need for some legislation in this area to eliminate the section 15 filing requirements.

And I would be happy to answer any questions.

Senator INOUE. Do you find the compromise preferable to the bill?

Mr. SKERRITT. I believe that I do, but I am not sure that I am ready to support it without some further study of it, because, as I indicate, I have only seen it a couple of hours ago and I have not had a chance to review it. And I think there are—I think, with some refinements and with some additional discussions, we might be able to support it. But I am not prepared to do so at this stage.

Senator INOUE. In your judgment, would the compromise insure equal treatment of shippers' cargoes and localities?

Mr. SKERRITT. Again, I would raise the issue which I already stated about making man-hour assessments equally subject to the FMC jurisdiction. I think the compromise, if it does provide a mechanism for the assessment agreements and only the assessment agreements to be reviewed by the FMC, that that would provide a mechanism that would be—well, that would do the job and give us

a safety valve that the stevedores and their customers want against any possible abuses in the assessments.

Senator INOUE. Is your association a member of PMA?

Mr. SKERRITT. The association itself is not. The members who are stevedores are also members of PMA. PMA is a large umbrella organization which has more diverse interests within the maritime industry on the west coast included within its membership.

Senator INOUE. I ask this because we have been advised that PMA supports this measure here.

Mr. SKERRITT. Yes, that is correct. There are some differences of opinion on some matters of policy within PMA, since it does include within its membership diverse interests within the maritime industry.

Senator INOUE. If I may, I would like to submit to you as I have with the other witnesses some questions, most of them on antitrust application, and ask for your response to them.

[The statement follows:]

STATEMENT OF M. M. STEWART, FOR MASTER CONTRACTING STEVEDORE
ASSOCIATION OF THE PACIFIC COAST, INC.

Mr. Chairman, members of the committee, I am appearing today in opposition to HR 6613. I am speaking as the Chairman of the Pension Committee of the Master Contracting Stevedore Association of the Pacific Coast, Inc.

The MCSA is an association of the principal contracting stevedores and terminal operators on the West Coast who load and unload vessels and who perform other stevedoring and terminal services at all of the ports in California, Oregon and Washington.

We particularly appreciate the opportunity for these hearings, because we believe that opposition has grown since this matter was considered by the House of Representatives. This bill passed the House in some haste, before several interests from the West Coast had an opportunity to focus attention on the impact of this legislation.

EAST COAST HISTORY OF USING FMC JURISDICTION

The West Coast stevedores and our customers view with concern the claims of East Coast maritime interests that the FMC has no role in cargo assessments, disputes. We do so because the East Coast shipping interests, in fact, have a long history of using the FMC to correct assessment abuses, including those which arise from the funding of fringe benefits under labor agreements.

Shipping interests on the East Coast have used the Federal Maritime Commission as a forum to generate industry changes in the method of funding and collecting assessments for fringe benefits under collective bargaining agreements. For example, I am sure that all of you are familiar with the long history of disputes involving the funding of fringe benefit programs under the jurisdiction of the New York Shipping Association.

It seems obvious to us that anyone making decisions affecting charges made against cargo will do so with a greater view to fairness when those decisions are subject to the antidiscrimination provisions of the Shipping Act. We believe, for example, that the concern for compliance with the Shipping Act has played a significant role in shaping the methods of funding fringe benefits on the East Coast. As examples, we point to the development of a tonnage assessment formula by the New York Shipping Association to replace the prior contribution method which was based primarily on manhours under a system which many industry forces believed placed an unfair proportion of the cost on labor intensive cargoes.

An additional example which we believe was developed, in part, because of the anti-discrimination provisions of the Shipping Act, is the Job Security Plan in effect on the East Gulf Coasts. Under the JSP, shipping companies have guaranteed payment of any shortfalls in the funding for ILA fringe benefit programs. The JSP program is funded through a tonnage assessment on cargoes which are handled under the jurisdiction of the fringe benefit plans.

PENDING FMC LITIGATION INVOLVING PMA-ILWU FRINGE BENEFIT PLANS

The West Coast maritime interests are finally learning from their East Coast counterparts. The stevedores on the West Coast—and many of the shippers which we serve—are in the midst of a controversy before the FMC which is designed to eliminate discriminatory practices in the assessments used to fund the PMA-ILWU fringe benefit programs.

The FMC proceedings began through the filing of a complaint by banana and citrus fruit shippers who believe that they were paying a disproportionate amount of the fringe benefit costs under assessment formulae that were based almost exclusively on a manhour basis.

As a result of the complaints filed under the Shipping Act, PMA hired an independent consultant to determine the accuracy of the complaints that the fringe benefit assessment formulae were unfairly assessing certain cargo sectors.

PMA's own consultant (Temple, Barker & Sloane) confirmed that the method of assessing cargo was, in fact, unfair to certain cargo sectors, particularly the more labor intensive or break bulk cargoes. Regarding the pension plan alone, the consultants' report indicated that approximately 72 percent of the assessments were made to pay for pre-existing unfunded obligations of the Pension Plan which bore no actual relationship to the hours of longshore labor which were being assessed to pay for the plan.

As a result of the complaint cases and the consultant's study confirming the existence of past discrimination, PMA made some changes in its funding methods. However, the West Coast stevedores believe that the changes have not resolved this dispute in a satisfactory manner. Indeed, since that shift in funding has taken place, several other parties have intervened in the proceedings and there are now four cases continuing before the FMC to determine whether PMA has properly redressed the grievances of the shippers and whether the new assessment rates in fact continue to discriminate against any cargo sector.

REVIEW OF ARGUMENTS BY PROPONENTS

We also wish to comment on the statements made by proponents of the legislation.

We are particularly concerned by repeated references in the House record which characterize these assessments as the product of collective bargaining.

On the West Coast, we do not believe that the proponents can honestly claim that the assessment methods are the product of collective bargaining.

While it is true that the level of benefits under the fringe benefit programs are bargained with the Union, PMA has refused to bargain with the Union regarding the method of funding those benefits. The result is that PMA has made unilateral decisions regarding the assessment methods for funding the fringe benefit programs. As a result, these charges are impossible to distinguish from any other charges or assessments made against cargoes which would clearly be subject to jurisdiction of the FMC under the Shipping Act.

We also wish to point out that the House committee report includes another serious misstatement regarding the purpose and result of HR 6613. Page 8 of the report, regarding the elimination of Section 17 jurisdiction states as follows:

"This amendment does not preclude any common carrier utilizing rates, fares, or charges which unjustly discriminate between shippers or ports, or are unjustly prejudicial to U.S. exporters, from being subject to complaints before the Commission. However, it would prevent findings of unjust or discriminatory rates from being used as basis for seeking reparation from employees or an employee organization who received benefits as a result of collective bargaining."

This last sentence implies that employees must pay the price if the FMC determines that discrimination requires payment of reparations. However, neither the FMC, nor the courts, have ever suggested that reparations to correct cargo discrimination should come from the employees or the employee organizations who receive benefits. The FMC has ordered reparations *only* from the employer associations levying the assessments.

This misconception—and in fact the statements made in support of labor organizations—illustrate that the labor's real concern is to prevent the Section 15 filing requirements from preventing the prompt implementation of benefits collectively bargained.

AMENDMENTS PROPOSED BY MCSA

The MCSA has no quarrel with the request of the proponents that collective bargaining agreements be exempt from the Section 15 filing requirements. we agree

that the fringe benefits provided for in labor agreements should go into effect after the employees have ratified the labor agreement.

It is important to note, however, that HR 6613 goes much further than simply eliminating the filing requirements of Section 15. The bill is also designed to eliminate FMC jurisdiction under Section 16 and 17 of the Shipping Act.

The MCSA does strenuously object to elimination of the anti-discrimination provisions under Section 16 and 17. We believe that the pending cases before the FMC and the history of the industry demonstrate that a clear need exists to protect the various sectors of the industry from actual and potential abuses in the form of discrimination in cargo assessments to fund expensive labor agreements.

The MCSA is proposing amendments to HR 6613 which would continue the bill's objective of eliminating the Section 15 filing requirements, while also retaining jurisdiction for review under Section 16 and 17 of the Shipping Act. Copies of our amendments are attached to my written comments.

An additional reason why our association, the MCSA, wants to retain jurisdiction for review under Section 16 and 17 is that no meaningful alternative exists to prevent the types of abuses which are cognizable under the Shipping Act.

The MCSA rejects the National Labor Relations Act as a substitute mechanism to prevent abuses of the type which are now being litigated before the FMC. While the labor laws have some protections against secondary boycotts and refusals to handle "hot cargo", we do not believe that the Labor Relations Board has any precedent or authority which equips it to deal with the economic effects of the type of discrimination between the various cargo sectors under the jurisdiction of a coast-wide collective bargaining agreement such as the PMA-ILWU plan.

The proponents have also suggested that the antitrust laws provide protection against abuse. However, the antitrust laws also are a poor substitute as a mechanism for preventing abuse. Many parties, particularly members of our Association, may well find themselves as targets of expensive antitrust actions, even though they directly have very little, if any, control in the manner in which PMA sets its assessments. Antitrust laws are notorious for their complexity, expense and length of time in prosecuting or defending. In addition, we have no doubt that the proponents of this legislation will claim that any assessments for the payment of fringe benefits would be subject to the labor exemption which the courts have construed as applicable to antitrust actions.

CONCLUSION

We believe that without the amendments which we have proposed, not only is HR 6613 ill-advised, but it is certainly premature given the controversies now under way before the FMC. I hope that the Committee realizes that this bill relates directly to one of the greatest controversies presently confronting the already troubled maritime interests of the West Coast. We ask that you not eliminate the only forum available which requires this controversy to be resolved under meaningful standards of fairness.

[The following information was subsequently received for the record:]

LINDSAY, HART, NEIL & WEIGLER,
Portland, Oreg., June 17, 1980.

Mr. JOHN HARDY,
Staff Counsel, Subcommittee on Merchant Marine and Tourism,
Washington, D.C.

DEAR MR. HARDY: During the June 4, 1980 hearings on HR 6613, you presented the following written questions and requested that we respond to your office on behalf of the Masters Contracting Stevedore Association of the Pacific Coast, Inc.

Question 1. In your judgment, would the compromise proposal insure equal treatment of shippers, cargo, and localities?

Answer. No. The proposal would exempt any fringe benefit assessments which are based upon manhours, rather than assessments against tons of cargo. Assessments on the basis of manhours may be unequal to some shippers or cargoes and hence the proposal is defective.

Question 2. In your view, is the compromise proposal preferable to HR 6613, in its present form?

Answer. Yes. HR 6613 provides no mechanism at all for reviewing any fringe benefit assessment agreements.

Question 3. Do you agree that whatever legislation would be passed should not affect the outcome of any pending cases before the courts or FMC?

Answer. Yes.

Question 4. In support of your arguments that antitrust laws do not provide an adequate remedy, you state on P. 5 that undoubtedly proponents of HR 6613, if it is enacted, will also claim that any assessments for the payment of fringe benefits would be subject to the "labor exemption" from the antitrust laws.

It is by no means clear, however, that an "assessment agreement" is included within the meaning of "other terms and conditions of employment".

If it is not, an assessment agreement would not be entitled to a labor exemption from the antitrust laws, would it?

Answer. Your assumption appears to be correct, as the courts which have construed the labor exemption to the antitrust laws have used the phrase "other terms and conditions of employment" as the key phrase in describing the scope of the exemption.

Question 5. At the request of the Subcommittee, the FMC has prepared an alternative to HR 6613, which would exempt maritime labor agreements from Section 15 of the Act. The effect of this proposal would be to permit collective bargaining agreements and assessment agreements to become effective immediately. There would be no need for filing with and approval by the FMC.

(a) In your view is the FMC alternative preferable to the compromise which has been proposed?

Answer. Yes. However, if the compromise proposal is modified to make it applicable to manhour assessment agreements and if the burden of proof is redefined to be more consistent with normal administrative law practice, the MCSA would prefer the compromise proposal to the FMC proposal.

(b) Suppose an additional provision were added to the FMC alternative which would provide that if the FMC subsequently finds a maritime agreement or activity based upon it to be unjust or unfair, the agency could grant only prospective relief, and that such prospective relief would be granted within 180 days after notice and hearing upon the agreement or practice complained of?

Answer. The MCSA strongly supports the proposal which limits any reparations or damages under an FMC proceeding to prospective relief. The MCSA agrees with the testimony of NYSA and PMA that retroactive assessments are exceedingly impractical to administer.

Question 6. Is your organization a member of PMA?

Answer. No, the MCSA is not a member of the PMA. However, the independent contracting stevedores and terminal operators who are members of the MCSA are also members of PMA.

Question 7. Under the present situation, if an aggrieved party seeks relief in the courts from a practice growing out of an agreement implementing a bargaining agreement, he can go into court and seek a temporary restraining order and then a preliminary injunction, etc. These are fairly expeditious procedures involving days, or a few weeks at most.

If, on the other hand, a party seeks relief from such a practice before the FMC, can he obtain it as expeditiously?

Answer. In those instances in which provisional process is available, we agree that such restraining orders would be more expeditious than relief available under proceedings before the FMC. However, as we have noted to you in previous correspondence, we do not believe that temporary restraining orders or preliminary injunctions would be available in most instances.

If you require further expansion of these answers, please notify us.

Sincerely,

DANIEL H. SKERRITT.

LINDSAY, HART, NEIL & WEIGLER,
Portland, Oreg., June 17, 1980.

HON. DANIEL K. INOUE,
U.S. Senate,
Washington, D.C.

DEAR SENATOR INOUE: This letter responds to your request that the Master Contracting Stevedore Association of the Pacific Coast, Inc. comment on the compromise proposed by the New York Shipping Association which may be used by your staff for preparation to amendments of HR 6613.

(1) NYSA proposal for prospective effective orders is supported

The members of the MCSA agree with the concern expressed by the New York Shipping Association that retroactive reparations are impractical. Accordingly, the MCSA supports the proposal by the NYSA that orders of the Commission regarding assessment agreements should operate prospectively only.

(2) Manhour assessments should be reviewed by the FMC

The MCSA does not agree with NYSA's proposal that the only fringe benefit assessment agreements suitable for FMC review are those based upon tonnage assessments, rather than manhours.

Man-hour assessments used to fund fringe benefits may be just as arbitrary as tonnage assessments. On the West Coast, the PMA-ILWU fringe benefits were funded primarily on a manhour basis until January 1, 1980. These manhour assessments were found to be unfair to labor intensive cargoes by an independent consultant hired by PMA. The consultant (Temple, Barker & Sloane) identified many portions of the fringe benefit plans that are based on past service costs (such as the unfunded liability of the pension plan). The consultant concluded to PMA:

"Current manhours have no identifiable relationship to these past service costs; these costs are a function of the industry configuration and labor profile that existed prior to the transition [caused by mechanization]. The existing funding method based on current manhours shifts a disproportionate share of these past service costs to those sectors of the industry which made the lesser productivity gains during the transition. Consequently, modifications to the current formulae are desirable in order to eliminate this inequity."

We also believe that the East Coast has recognized that manhour assessments may be unfair to labor intensive cargoes, as demonstrated by NYSA's use of tonnage assessments and the tonnage formula used in the JSP agreements used to cover short-falls in fringe benefit contributions.

The MCSA is proposing amendments to the NYSA proposal which are enclosed to ensure that manhour assessments as well as tonnage assessments which are used to fund fringe benefits programs will remain subject to protests before the Federal Maritime Commission. We believe this change is necessary, because manhour assessments, as well as tonnage assessments, may be weighted or charged differently between cargo sectors.

(3) Standard of proof

The NYSA proposal appears to overreach in its allocation of the burden of proof for any person filing a protest with the FMC against an assessment agreement.

The MCSA has no quarrel with simply allocation the burden of proof to an individual filing a protest with an Administrative agency. However, the "clear and convincing evidence" test more appropriately is used for judicial review of agency decisions, rather than at trial before the Administrative Law Judges.

The MCSA proposes deletion of the provisions of the NYSA proposal that impose the "clear and convincing evidence" test and provide the additional statement of presumptive validity for the assessment agreements.

(4) Time limitation for FMC review

During the hearings, the testimony indicated that some parties discussed with NYSA the imposition of a time limitation for FMC review. I note that the copy of the NYSA proposal provided to us does not include such a time limit.

The MCSA supports a 270 day time limit for MCSA review. We believe that a time limit is justified to prevent abuses which might otherwise occur under the provisions of the NYSA proposal that FMC orders operate prospectively only. However, we believe that the suggestion of 180 days for FMC action may be inadequate given the complexity of some of the issues which may arise.

If the MCSA amendments to the NYSA proposal are adopted, the MCSA would support a compromise bill.

Sincerely,

DANIEL H. SKERRITT.

MASTER CONTRACTING STEVEDORE ASSOCIATION AMENDMENTS TO NYSA PROPOSALS
TO AMEND H.R. 6613

1. *First amendment.*—To include fringe benefit assessments based upon manhours among those subject to FMC filing requirements:

Change lines 21 through 27 to read as follows after the word "1933" on line 21:
" * * * except that (1) agreements or arrangements establishing the means and method of raising money for wages, based upon tons of cargo and not upon manhours of employment, and (2) agreements and arrangements establishing the means and methods or raising money for fringe and other employee benefits (whether upon tons of cargo or manhours of employment), shall be subject to the filing provisions of this section * * * "

2. *Second amendment.*—*Deletion of language on excessive burden of proof:*

On page 4, change the comma in line 8 after the word "proof" to a period and delete lines 9 through 14.

3. *Third amendment.*—Imposing time limit on FMC action:
 Add a provision after line 14 on page 4 stating substantially as follows:
 "Any order issued by the Commission concerning such agreement or arrangement should be made within 270 days of the filing of the complaint."

Senator INOUE. Our next witness, Mr. Archer, please proceed.

**STATEMENT OF JOHN J. ARCHER, DIRECTOR OF LOGISTICS,
 CROWN ZELLERBACH CORP.; ACCOMPANIED BY PAUL DONOVAN,
 COUNSEL**

Mr. ARCHER. Thank you, Mr. Chairman.

Mr. Chairman, I am accompanied here today by Mr. Paul Donovan, local Washington counsel, who is representing Crown Zellerbach in a PMA-FMC proceeding at the present time.

To get right at the heart of the matter, since you have already accepted our testimony, Mr. Chairman, I would like to say this. Late in December of last year I received notice that the PMA, which is a collection of companies—private companies; not labor organizations—on the west coast had just imposed new charges in their assessment formulas. And I asked for a history of that from one of the companies on the west coast, the Marine Terminals Corp., from Mr. Chris Redland, their president. And I have that in front of me here, and I would be happy to make that a part of the record.

But the point I would like to make here is simply this: What this shows is that, without any hearing where we could be heard as shippers, what they did in effect was reduce the cost for importing automobiles into the United States and increase the cost for bringing in newsprint into the United States. Newsprint must come from British Columbia. The United States does not make enough newsprint on the west coast to meet our newspaper needs. Sixty-five percent of it must come from Canada either via rail or by water. Therefore, it is in the interest of longshoremen to treat newspapers favorably on the west coast and encourage the water movement rather than the rail movement. This did just the opposite.

In addition, we have a problem, as you all know and have been reading about lately, with import automobiles. And here, this did exactly the opposite of what might be in the national interest, by reducing their cost and increasing our cost.

So, even looking at these things broadly without all of the evidence in front of us, it just didn't seem to make any sense at that time. I asked our counsel to file and intervene in these proceedings with the FMC, and that is where we are today.

Now, some of the questions that have been raised, new to me, is this question about whether the present FMC proceedings will continue to termination if H.R. 6613 is enacted. Here, I am again subject to what my counsel tells me; I am not an expert in the law business. The counsel tells me that the FMC or the PMA, if they wanted to, could cancel the present application they have if, in fact, they wanted to put in a new one. And a new one, then, would be subject to whatever comes out of this law that is being proposed here today.

So, if, in fact, we, let's say, assumed the extreme case, that the FMC would lose all jurisdiction over these assessment formulas, Mr. Chairman, what could happen is somebody could cancel a

present one, put in a new one, and there would be no jurisdiction at all.

So it isn't an absolute requirement that the present case continue to termination unless there is an opportunity under your proposals here or some modification of H.R. 6613 to continue our rights in any future case as well as in the present case.

The second thing that I would like to mention to you is this: I have been in transportation 25 years in various industrial companies, railroads, and steamship companies. And I followed from a distance the various labor negotiations. I am no expert in any of those labor negotiations. It seems to me, in listening over the years to what the Teamsters do and what the railroad and the United Transportation Union does, is reach agreement on a labor contract with the employers, the railroads and the truckers, but in no part of that is it said that so many of those charges are going to be assessed against the grain people, so much against the coal people, so much against the lumber people and the paper people. It's just, "Here is what the fringe benefits are," and somebody will put the money in the funds.

And then, of course, tariffs are filed, and railroads raise their rates or truckers raise their rates, and then out of those increased rates and tariffs, which are subject to ICC jurisdiction, money is put in the pot for the fringe benefits.

Now, I say that is not happening here. What is happening basically here is a group of management people on the west coast, PMA, are getting together without any opportunity for shippers to be heard, and they are deciding how the fringe benefits will be paid for by various classes of traffic, and then arbitrarily—I say arbitrarily in the sense that I have no say in the matter—they go ahead and assess these charges.

And then, overnight, here I am hit with them, and somebody tells me, "Well, you have antitrust here. You could go the route of antitrust." Again, speaking for our counsel, they tell me if you go antitrust, well, you had better figure on 10 years or 15 years to resolve your particular case.

Well, that is not satisfactory. We just don't want to wait that long to resolve something.

We are also unhappy with any lengthy litigation before the FMC. And we, of course, would not object to anything that would substantially limit the time a case might have to be litigated before the FMC.

Now, Mr. Chairman, we first saw the proposal that was made to you, to this committee, last night. It was late last night. We have not really had a chance to analyze it in any great depth.

As of this morning, we had one serious obstacle with it, and that had to do with the retroactivity of the refunds and whether we would be able to get that money if, in fact, the FMC found something to be unjust and unreasonable. And that was one particular concern we could not reach agreement on.

I have got a note here to read to you. I would like to read it to you, with respect to the proposal that was made last night to us, that has been written up by counsel.

The points are as follows:

The assessment agreements are not mandatory elements of collective bargaining. For example, the PMA assessment agreement now before the FMC in litigation. The ILWU is not a party to that agreement. It is an agreement among competitors that directly affects the charges assessed against Crown Zellerbach and other shippers in the northwest. And I might add at this point we have been asked to submit to you that Georgia Pacific Co. and Boise Cascade clearly agree with our sentiments. So there is widespread support for what we are seeking here.

The second point is that the alleged compromise was first given to us at 6 p.m. last evening. The effect of the proposal is to leave the shipper without any remedy or recourse either under the anti-trust laws or the Shipping Act and during the FMC review. Let me stress that under the proposed compromise, the agreements on assessments would be deemed approved—and those are legal words, I understand—and antitrust remedies would be unavailable during the review period by the FMC.

Other industries may not fix prices among competitors simply by putting the price fixing into a collective-bargaining agreement. I don't think the railroads do that. I don't know whether truckers do it. At least if they have, it has never affected us, and we are a national shipper, so it would have to be something that is very well hidden for us not to see it.

We still feel very strongly that we need something other than antitrust to protect us against the way the assessments are made against various cargoes and in various classes of traffic. If there was one charge uniformly against everybody, we would have no disagreement, no problem. Once you start splitting it up and affecting different people differently, we need protection. We need simple protection, not complex protection, of the antitrust laws.

And, Mr. Chairman, we will not go further into our statement. We will be very happy, either myself or our counsel who is here, to answer any questions that you may have.

Senator INOUE. You don't believe that the compromise will provide you equal protection?

Mr. ARCHER. First of all, it does not provide retroactivity; that is number one. And a week ago, 9 months, 6 months, whatever moneys were spent, we have no recourse to them. That's one thing. There might be some technical aspects, legal aspects of it, that I would rather, if we are capable of speaking to it, have our counsel speak to it.

Mr. DONOVAN. Mr. Chairman, as Mr. Archer mentioned, we first saw this proposal at about 6 o'clock last evening. Quite frankly, we haven't had an opportunity to examine it in great depth to determine whether it would provide equal or not. Mr. Skerritt, for the Master Contracting Stevedore Association, pointed out that the exclusion in the language to formulas other than man-hour formulas might cause some considerable problem.

Second, the lack of retroactivity in effect leaves shippers with no remedy, no recourse, no right of recoupment for unjustly assessed charges during any period of FMC review, be that 180 days, 270 days, or whatever period.

In the current PMA situation, for example, Crown Zellerbach, as one shipper, could find itself paying a quarter of a million or half a

million dollars unjustly and unreasonably during that 180-day period. And under the proposed compromise, that money would be forever gone and there would be no right of recourse.

Senator INOUE. What are your thoughts on the statement made by Mr. Gleason and Mr. Dickman on retroactivity?

Mr. DONOVAN. I don't have them very clearly in my mind, except I think Mr. Gleason and Mr. Dickman's position is essentially that an assessment agreement is a matter of labor-management relations and that is a part of a collective-bargaining agreement. And I would suggest, with all due respect, Mr. Chairman, that an assessment agreement among competitors, steamship lines, steamship carriers, terminal operators, is not a necessary mandatory element of collective bargaining. It is nothing more than an agreement among competitors. Given an agreement with a union, for example, to raise x number of dollars, it then becomes a matter of agreement among those competitors on how and who is going to pay that bill.

That is not a mandatory element of collective bargaining, and I think the Supreme Court agrees with that position. It is, in fact, nothing more than a price-fixing mechanism. The price fixing then gets passed through to the shipper. And without belaboring the point, that leaves us with a very tenuous antitrust remedy under the *Illinois Brick* decision of the Supreme Court last year, we may not have an antitrust remedy to go after the price fixers in this situation.

But, in any event, the assessment agreement is not a mandatory element of collective bargaining. It is not an agreement that is absolutely necessary to labor-management in order for them to settle their differences.

Senator INOUE. On the east coast, that is an element of collective bargaining; isn't it?

Mr. DONOVAN. It has been put in as an element of collective bargaining. Whether it's a mandatory element of collective bargaining is a different question.

Senator INOUE. And I gather from what you've said that or the west coast it is not part of the collective bargaining?

Mr. DONOVAN. Under the agreement presently pending before the Federal Maritime Commission, there is no ILWU participation in that agreement. It is simply a PMA decision.

Senator INOUE. What do you have to say as to Mr. Gleason's contention that retroactivity would be theoretically possible, but practically impossible?

Mr. DONOVAN. I couldn't really say that it is theoretically possible and practically impossible, no. I would have to disagree with that, Mr. Chairman, especially if we talk of a limitation on the FMC for the period of review. If, for example, the FMC were charged by statute with arriving at its decision within 180 days or 270 days, certainly the eggs that Mr. Lambrose made reference to would not be that difficult to unscramble.

The alternative, of course, is that the shipper who is unjustly charged during that period of time would simply be out of pocket money and some other shipper will be unjustly enriched to the same degree.

Senator INOUE. Thank you very much.

[The statement follows:]

STATEMENT OF JOHN J. ARCHER, DIRECTOR OF LOGISTICS, CROWN ZELLERBACH CORPORATION

(A) SUMMARY INTRODUCTION

My intention today is to impress upon this Committee the substantial harm which would result to shippers if HR 6613 is adopted by the Senate in the form that it passed the House of Representatives. The Shipping Act of 1916, which would be amended by HR 6613, is an important statute which protects shippers against being charged ocean freight rates which are unreasonably discriminatory or unfair. Under the Shipping Act, agreements approved under Section 15, provide antitrust immunity to carriers and other parties, where the agreements fix or regulate transportation rates or fares, etc. In approving agreements under Section 15, the FMC applies the fairness and discrimination standards under Sections 16 and 17. It is the essentially monopolistic nature of associations, such as Pacific Maritime Association on the West Coast which make the oversight review of the Federal Maritime Commission under the Shipping Act of such great importance to shippers.

To remove this oversight review from jurisdiction of the Federal Maritime Commission would have a materially adverse effect upon shippers, upon the business of export and import, and would leave to the shipper substantially no remedy to correct abuses which might necessarily flow from activities of these associations. Furthermore, removing authority of the FMC to grant antitrust immunity for assessment agreements raises important antitrust considerations which may not have been thoroughly considered. We have no argument with the Bill's purpose to exclude from FMC jurisdiction review of collective bargaining agreements that merely set forth wages, fringe benefits and terms and conditions of employment.

(B) DESCRIPTION OF CARRIER ASSOCIATION ACTIVITIES

To fully understand our position, it is important for you to realize that any shipper moving cargo through West Coast ports will unavoidably find itself dealing with members of the Pacific Maritime Association (PMA). On the West Coast of the United States, substantially the whole of all longshore activity is governed by collective bargaining agreements entered into between the International Longshoreman and Warehouseman Union (Longshore Union) and the Pacific Maritime Association (PMA). PMA membership consists of various carriers, terminal operators and stevedore companies. Shippers, such as Crown Zellerbach which is a substantial exporter and importer of forest products, are not members of and cannot participate in PMA. PMA functions in a two-fold capacity: (1) It is the employer agent of the carriers and stevedore companies in the collective bargaining process. (2) By vote of the members, it determines how fringe benefits payable under the collective bargaining agreements will be allocated among members and cargoes. It should be noted that in this latter function, which is totally independent of the collective bargaining process, there is no necessary involvement of the longshore union. While there are a number of members within PMA, it should be noted that PMA is substantially controlled by the container shipping companies. Shippers to whom the assessments are eventually passed on, have no say whatever in establishing the level of such assessments. This control which exists within PMA carries the danger that the control group will seek to shift assessments away from the control group to others who lack effective representation.

Shippers moving cargoes through West Coast ports have no choice but to pay such assessments (either directly or indirectly as a portion of the transportation rate) without any involvement whatever in establishing the level of such assessments.

(C) PRESENT VALUE OF EXISTING PROCEDURE

There are substantial values which benefit the public by reason of the present FMC oversight which will be removed by HR 6613. I should at this point note that the objections which Crown has to HR 6613 are: (i) Those portions of the Bill which would exclude from the definition of Section 15 agreement "any provisions for the implementation of the collective bargaining agreement, including the means and methods of raising the monies for wages, fringes and other employee benefits provided in the collective bargaining agreement," (ii) and those provisions which would exclude from jurisdiction of the FMC the determination whether charges imposed to fund fringe benefits are consistent with Sections 16 and 17 of the Shipping Act.

Under present law, assessment agreements are subject to the Section 15 approval procedure and charges imposed to fund fringe benefits are subject to Sections 16 and 17. These procedures provide an oversight mechanism whereby the Federal Maritime Commission involvement protects the shipping public against the potentially damaging effects of collectively established assessment agreements arrived at in situations where the shipper has no control over the assessment procedure itself (and therefore needs oversight assistance), and where the shipper has no option available to avoid assessment unless it diverts the origin of its shipments to points off the West Coast or outside of the U.S., for example, Canada or Mexico.

It should be noted that the procedures presently followed before the FMC in determining the legality of fringe benefit assessment agreements and in determining the legality of charges which fund fringe benefits, work hand in glove with the basic provisions of the Shipping Act, which protect the shipper from being assessed transportation rates which are discriminatory or unreasonable. It thus can be seen that there are substantial benefits which accrue to the shipping public by reason of the existing Section 15 approval procedure being applied to assessment agreements and by reason of charges assessed to fund fringe benefits being subject to Sections 16 and 17.

(D) HOW THE SHIPPING INDUSTRY WILL SUFFER IF H.R. 6613 IS PASSED AND FMC OVERSIGHT IS REMOVED?

If the Senate adopts H.R. 6613 as it is presently drafted, including within the Bill that provision which excludes from jurisdiction the provisions implementing collective bargaining agreements "including means and methods of raising monies for wages, fringe and other employee benefits," shippers such as Crown Zellerbach will be left with no remedy to challenge assessments other than action under the antitrust laws. I have been advised by counsel that since assessment agreements are agreements among competitors directly affecting prices, they are prima facie violations of the Sherman Act if the FMC is deprived of jurisdiction to grant immunity from the Sherman Act provisions. Restricting shippers to an antitrust remedy would undoubtedly result in a multiplicity of lawsuits to solve a problem which in our view is more effectively and adequately dealt with administratively by the Federal Maritime Commission.

One example of a pending matter in which Crown Zellerbach is obtaining oversight review of the Federal Maritime Commission can be seen in FMC Docket 79-103. In this proceeding set by the FMC to determine propriety of a new PMA assessment agreement which became effective January 1, 1980, Crown Zellerbach has intervened to challenge the level of fringe benefit assessments against it and other companies within the forest products industry. Forest products are being assessed cost increases in the range of 100 percent plus while products carried in containers are having their assessment cost increased at a much lower rate if at all.

In FMC Docket 79-103, Crown has the opportunity to challenge the assessment formula and to present evidence why it thinks the assessment is not in compliance with the fairness standards under the Shipping Act. This form of investigative oversight by the FMC will be lost if H.R. 6613 is adopted in its present form. While there is a statement included in the House Report suggesting that the Bill will not apply retroactively (and thus will not affect the pending investigation), it should be noted that Crown Zellerbach's interest is not limited to preservation of its interest in the pending proceeding. In any event, if the PMA saw fit to do so, it could withdraw the present agreement which is subject to the investigative review and submit a new one as a means of attempting to avoid the retroactive prohibition under the Bill.

(E) WHY THE PRESENT OVERSIGHT PROCEDURE UNDER SECTION 15 IS TO BE PREFERRED?

The Federal Maritime Commission has intimate and long-established experience with the shipping industry. The procedure presently employed under section 15 of the Act has been effective in providing an administrative mechanism to review and if necessary require changes in such assessment agreements. Said another way, the present system works. If the procedure which presently exists works, as it does, and it satisfies important public interests, which it does, we ask this Committee why then should the procedure be changed? While proponents of the Bill will argue that shippers would retain the right to bring private treble damage court actions under the antitrust laws, it must be readily apparent to this Committee that such remedies would be unsatisfactory and unduly burdensome.

(F) CONCLUSION AND RECOMMENDATION

In light of the foregoing, Crown Zellerbach asks this Committee to seriously consider what are perhaps unintended and unexpected implications were this Bill to be adopted in its present form. Crown Zellerbach certainly has no objection to excluding from the jurisdiction of the FMC the legitimate aspects of carrier association activity involved in the actual collective bargaining process. It does, however, take strong objection to excluding from FMC jurisdiction the investigative review of assessment agreements which do not fall within the collective bargaining process and the power of the FMC to determine whether charges to fund fringe benefits are lawful. These agreements are not legitimate subjects of the collective bargaining process and for the several reasons noted should not be treated similarly to collective bargaining agreements.

It is the recommendation of Crown Zellerbach that the attached amendments to H.R. 6613 be made.

Senator INOUE. Mr. Kauffman.

**STATEMENT OF JOHN KAUFFMAN, VICE PRESIDENT,
TRANSPORTATION, WEYERHAEUSER CO.**

Mr. KAUFFMAN. Thank you, Mr. Chairman.

I would like to make some comments in support of the statement just made by Mr. Archer. As another major west coast forest products exporter, we are supportive of those provisions within H.R. 6613 which remove the FMC jurisdiction from what we consider as labor matters.

However, we are deeply concerned about agreements between members of multiemployer groups. We submit that the reasonableness of assessment agreements that are arrived at between competitors and shipping companies should continue to be subject to FMC review.

As Mr. Archer mentioned, on the west coast, the multiemployer group is the Pacific Maritime Association. The Pacific Maritime Association has 115 members. Six large carriers, however, have 50 percent of the votes within the Pacific Maritime Association, and the stevedoring company who provides us with a large part of our longshoremen services has one vote, Seattle Stevedore Co. So you can see the influence of a small number of members of the PMA.

We feel retaining FMC jurisdiction over agreements under section 15 would not delay the implementation of collective bargaining agreements. It has been the FMC policy to conditionally approve assessment agreements.

And last, we feel that the issues raised in the assessment agreements obviously call for specialized knowledge that is in the hands of the Federal Maritime Commission, that antitrust litigation is not socially desirable as a way to arrive at fair and equitable assessment. Antitrust litigation is costly, it is time consuming, and it focuses on the damages for past conduct rather than an equitable formula.

Last, my attorney tells me that retroactive adjustments in correcting assessment agreements have been made in the past. And under the proposed compromise they should be less difficult to arrive at, since there will be a time constraint or time limit under that compromise arrangement. So we don't feel that they should be avoided. We feel there should be a retroactive adjustment, and it should not be negated simply because it is difficult.

Senator INOUE. Before the Supreme Court acted in the *PMA* case, how did you proceed if you felt aggrieved by the terms of a collective bargaining agreement to which you were not a party?

Mr. KAUFFMAN. I will have to turn to my attorney for their experience prior to the Supreme Court decision.

Mr. MADDIE. Weyerhaeuser had no problems over assessments. Other people on the west coast did, but Weyerhaeuser did not have those problems.

Senator INOUE. Did Crown Zellerbach have any problems prior to the *PMA* case?

Mr. ARCHER. No, we did not, Mr. Chairman. We find here in the history of these assessments that they then proliferated, since about 1966 is when they really began to proliferate into more and more categories. And the first time we really had a problem was on January 1 of this year.

Senator INOUE. Before the Supreme Court decision in the *Volkswagen* case, how did you proceed if you felt aggrieved by a practice arriving out of a multiemployer agreement implementing a collective bargaining agreement?

Mr. KAUFFMAN. To my knowledge, we did not have difficulties, and I wasn't directly involved back during that period. I suppose their only recourse would have been through antitrust litigation.

Mr. DONOVAN. Mr. Chairman, to my knowledge, the problem with funding fringe benefit programs is a relatively recent problem. Prior to 1968, on the west coast at least, there was no overwhelming problem with respect to fringe benefit agreements. I might also say that between *Volkswagen* and *PMA* case, the west coast funding agreement was essentially a straight man-hour assessment, so much per man-hour. There was some tonnage element, but it was a small portion of the total, a matter of cents per ton, small cents per ton.

On the other hand, the current agreement is substantially different in that it is not primarily a man-hour assessment but adds a substantial tonnage assessment as well. So there has been a substantial change in circumstances since January 1 of this year.

Senator INOUE. Thank you very much, sir.

[The statement follows:]

STATEMENT OF JOHN G. KAUFFMAN, VICE PRESIDENT, TRANSPORTATION,
WEYERHAEUSER CO.

H.R. 6613, if passed by the Senate, would amend the Shipping Act of 1916 (49 USC 801 et seq.) so as to totally deprive the Federal Maritime Commission of jurisdiction over both (a) agreements between labor organizations and multi-employer bargaining groups on collective bargaining matters and (b) agreements between members of a multi-employer group on how the costs of a labor settlement are to be borne by the various segments of the shipping public. Weyerhaeuser Company shares the concern of the sponsors of this bill with protecting the collective bargaining process from unnecessary governmental interference. We support the bill insofar as it would remove the FMC's jurisdiction over collective bargaining agreements. However, we oppose that portion of the bill that would remove the FMC's jurisdiction over agreements covering the manner in which rates are assessed against various shippers. We submit that the reasonableness of any assessment agreement should continue to be subject to FMC review in order to protect shippers, such as Weyerhaeuser, who are not members of a multi-employer bargaining group and who, therefore, have no say in the assessment process. Under the present law, the FMC can look into the fairness of assessments pursuant to sections 16 and 17 of the Shipping Act which are designed to prevent discriminatory practices in the industry.

Labor negotiations on the West Coast of the United States are negotiated between the International Longshoreman's and Warehouseman's Union and the Pacific Maritime Association, a multi-employer group dominated by a handful of ocean carriers. Six carriers have 50 percent of the votes within the PMA. In contrast, Weyerhaeuser's principal stevedore, Seattle Stevedore, has one vote. Most of the time the labor agreements negotiated by the PMA have been implemented without controversy. However, there have been exceptions. At the present time, there is a controversy over the implementation of the 1978 labor agreement. The labor negotiations in 1978 involved a sum of money required to fund unfunded pension liability so as to bring the union pension into compliance with the Employer Retirement Income Security Act passed by Congress in 1974. The results of these negotiations was an agreement between the ILWU and the PMA which in part would fund this liability. Members of PMA then reached agreement amongst themselves on an assessment formula. This assessment was not a uniform assessment based on the number of man hours used by each shipper. Instead, the formula spread the cost of funding the pension liability unevenly among various shippers based on the PMA's judgment as to which cargoes contributed the most to creating the liability.

We submit that assessment agreements, such as the PMA formula I have just described, can be subject to the FMC's jurisdiction without an adverse impact on the collective bargaining process. Retaining FMC jurisdiction over assessment agreements under Section 15 would not delay implementation of collective bargaining agreements. It is the FMC's policy to conditionally approve assessment agreement. The assessment agreement presently before the FMC has been implemented by the PMA subject to whatever retroactive adjustment may be required. Any such adjustment would not impact the ILWU; its only impact would be on the costs to be borne by various shippers. Moreover, while the large carrier members of the PMA may be unconcerned about the loss of anti-trust immunity that comes with removal of the FMC's jurisdiction under Section 15, we believe many of the smaller members, such as stevedores, may have very legitimate concerns about implementing a PMA assessment agreement that provides for uneven treatment of its customers without the anti-trust immunity afforded by Section 15.

It is important to recognize that assessment agreements are not within the traditional labor law exemption from anti-trust laws as defined by the courts. Review of these agreements under Section 16 or 17 by the Commission would be less disruptive to the collective bargaining process than the filing of an anti-trust action by shippers. The reason why this is true is because the principle objective of an anti-trust suit is triple damages whereas the focus of Section 16 and 17 is on arriving at an equitable assessment formula.

The importance of having the FMC in a position to review the fairness of the way assessments are borne by shippers is manifest by the case currently before the FMC in which Weyerhaeuser is a party, *Agreements LM-28 et al., FMC DKT 79-102*. In this proceeding the FMC is looking into the fairness of the PMA assessment for unfunded pension liability I mentioned earlier. My attorneys tell me that the testimony in that proceeding has developed the fact that those in the PMA responsible for making the decision to adopt the funding method being utilized delegated their responsibility to the consulting firm of Temple, Barker and Sloane, Inc. Those making the decision in the PMA only examined the consultant's recommendations from the point of view of its impact on their specific companies. No examination was made concerning the fairness of the formula as it applied to the various companies in the forest product industry. Also, the testimony shows that the data used as a basis for the assessments borne by the forest products industry was not truly representative of the major exporters of forest products. This testimony came as no surprise to me. It is well known that the PMA is dominated by container carriers and the rates are presently structured by the PMA to protect their interests. Under these circumstances, it is readily apparent why shippers, such as Weyerhaeuser, feel the fairness of an industry assessment formula arrived at primarily by carriers should be subjected to an impartial review by the FMC.

The issues in the present PMA assessment case go to the heart of the Shipping Act, since the results of these assessments leads to substantial differences in rates for different shippers. Weyerhaeuser, along with other shippers, believes the rates imposed by the PMA are unfair; the PMA argues they are reasonable given the nature of the shipping industry. Regardless of which side is correct, the issues raised obviously call for the specialized knowledge of the FMC. My attorneys tell me that if FMC jurisdiction under Sections 16 and 17 is removed from assessment agreements, remedies available under other laws will be inadequate to protect shippers. The most likely remedy would be an anti-trust suit. In my judgment, anti-trust litigation is not a socially desirable way in which to arrive at a fair and just

assessment; they are costly, time consuming and focus on damages for past conduct rather than on an equitable formula.

To remedy the problem we see with the present bill, we suggest the legislation be amended so as to preserve the FMC's jurisdiction over the kind of assessment agreements I have described. In other words, the FMC should continue to have jurisdiction over any tax or assessment imposed upon cargo or any shipper or ocean carrier to fund the fringe benefit obligations under collective bargaining agreements. I have attached our suggested amendments for accomplishing this objective to my written testimony that I have made available to the Committee staff.

We submit that a bill that retains the FMC's jurisdiction over assessment agreements while removing its jurisdiction over labor agreements accomplishes two desirable purposes. On the one hand, it insures that the FMC will continue to play a constructive role in preventing unfair treatment to shippers; on the other hand, it accomplishes the primary purpose of the legislation by removing unnecessary governmental intervention in the collective bargaining process itself.

[The following information was subsequently received for the record:]

QUESTIONS OF THE COMMITTEE AND THE ANSWERS THERETO

Question 1. (a) Before the Supreme Court's decision in PMA, how did you proceed if you felt aggrieved by the terms of a collective bargaining agreement to which you were not a party?

(b) Before the Supreme Court's decision in *Volkswagen* who did you proceed if you felt aggrieved by practices arising out of a multi-employer agreement implementing a collective bargaining agreement?

Answer. Prior to 1979, Weyerhaeuser was satisfied with assessments made by the PMA to fund collective bargaining agreements and, accordingly, the issue of how the Company would proceed did not arise.

Question 2. In your statement you say it is necessary for the FMC to retain jurisdiction over assessment agreements in order to protect shippers like Weyerhaeuser who are not members of the multi-employer bargaining association and therefore have no say in the assessment process.

(a) If you are aggrieved under the assessment agreement can't you seek relief under the antitrust laws, the labor laws, or under common law principles of common carriage?

(b) By proceeding in the courts you can seek an expeditious remedy, i.e., injunctive relief.

Proceeding before the FMC doesn't offer that kind of expeditious relief does it?

(c) Is there anything to prevent you from joining the multi-employer bargaining association and having your say in the assessment process?

Answer. (a) We believe anti-trust, labor and common law remedies are inadequate to protect shippers from unfair assessment agreements. The focus of anti-trust litigation is on triple damages and the focus of the labor laws is on unfair labor practices. Neither deals directly with the development of an assessment formula that is fair and reasonable to ocean shippers. As far as a common law remedy is concerned, there has been no relevant common law for ocean carriage in this country since the present statutory scheme was enacted in 1916. Moreover, as Commissioner Moakley of the FMC testified "resurrection of such common law rights would simply shift the forum from the agency charged with expertise in shipping matters to a variety of judicial forums." Statement of the Honorable Thomas F. Moakley, Vice Chairman, Federal Maritime Commission before the Subcommittee of the Merchant Marine and Tourism Senate Committee on Commerce, June 4, 1980, p. 11.

(b) While it is true the courts have the power to grant injunctive relief, it is necessary to prove that monetary damage would be inadequate before such equitable relief would be available. In an anti-trust case, which is the most likely remedy for a shipper outside the administrative process, monetary damages are provided for and, therefore, the likelihood of being able to obtain injunctive relief is extremely remote.

(c) Yes. PMA membership is open to employers of longshoremen such as carriers and stevedores. Weyerhaeuser is a shipper and does not directly employ longshoremen.

Question 3. (a) Is Weyerhaeuser involved before the ICC?

(b) Do you have the same remedies available before the ICC, that you now have before the FMC?

Answer. (a) Yes. Weyerhaeuser, or one of its common carrier railroad subsidiaries, has been involved in cases before the ICC. However, Weyerhaeuser has never had

any cases before the ICC involving agreements similar to the PMA assessment case presently before the FMC.

(b) There are many differences between the regulatory framework under the Interstate Commerce Act and the Shipping Act of 1916. For example, entry into the ocean shipping business is unregulated whereas entry into the railroad business is regulated. Also, rates are more tightly controlled under the Interstate Commerce Act than under the Shipping Act. These differences have led to different remedies being available to shippers under the two statutes. Notwithstanding these differences, both statutes provide remedies in the event a carrier unjustly discriminates against a shipper.

Question 4. You have said that assessment issues go to the heart of the Shipping Act, since the results of these assessments lead to substantial differences in rates for different shippers.

If, as you urge, the FMC's jurisdiction over assessment issues under sections 17 and 18 of the Shipping Act be retained, the FMC will not only be able to pass on the fairness or reasonableness of assessments, the agency will have the authority to revise assessments, and in effect therefore determine rates to some extent.

Under the Shipping Act, the FMC does not have rate setting authority over international shipping, does it?

Answer. Section 17 of the Shipping Act specifically provides the FMC with the authority to alter any rate, fare or charge of a common carrier that the Commission determines is unjustly discriminatory between shippers or ports or unjustly prejudicial to exporters of the United States. Furthermore, Section 17 provides that the Commission may determine, prescribe and order any such alteration to the extent necessary to correct such unjust discrimination or prejudice. In effect, Section 17 gives the Commission the power to specifically set rates, fare or charges in order to render them just, non-discriminatory and non-prejudicial. Thus, the Commission has the authority to take the necessary rate action to correct an unfair assessment.

Question 5. If the FMC has to approve multi-employer bargaining agreements before they go into effect, doesn't this requirement have the effect of impeding the implementation of a collective bargaining agreement because the parties really don't know if they have a basic collective bargaining agreement until the FMC has approved one of the agreements intended by the parties to implement it?

Answer. No. Under the FMC present rules, assessment agreements are permitted to go into effect pending a decision as to the reasonableness of the assessment formula.

Question 6. Do you agree that whatever legislation would be passed should not affect the outcome of any pending cases before the courts of the FMC?

Answer. Yes.

Question 7. In your judgment, would the compromise proposal ensure equal treatment of shippers, cargo and localities?

Answer. No, because the proposal, as we understand it, does not permit recovery of reparations for past unequal treatment; unfairly puts the burden of proof on shippers to show the assessment formula is unfair; and limits the type of assessment formula subject to review to one on other than a man hour basis without providing it be on a "uniform" man hour basis.

Question 8. In your view, is the compromise proposal preferable to H.R. 6613, in its present form?

Answer. Yes, but see answer to question 7.

Question 9. At the request of the Subcommittee, the FMC has prepared an alternative to H.R. 6613, which would exempt maritime labor agreements from section 15 of the Act. The effect of this proposal would be to permit collective bargaining agreements and assessment agreements to become effective immediately. There would be no need for filing with and approval by the FMC.

(a) In your view is the FMC's alternative preferable to the compromise which has been proposed?

(b) Suppose an additional provision were added to the FMC's alternative which would provide that if the FMC subsequently finds a maritime agreement or activity based upon it to be unjust or unfair, the agency could grant only prospective relief, and that such prospective relief must be granted within 180 days after a notice and hearing upon the agreement or practice complained of?

Answer. (a) We have not seen the precise details of the "FMC alternative" and therefore, find it difficult to comment. However, we do have the following comments on the three alternative discussed in Commissioner Moakley's testimony, Statement, supra at 8-12.

The FMC's first alternative would eliminate FMC jurisdiction over labor agreements under Section 15. While we do not feel this legislation is necessary in view of

the FMC's current practices (see answer to question 5), we would not object to this proposal, so long as it is limited to Section 15.

The second alternative contains the exemption provisions of the first proposal and in addition would exempt labor agreements and assessment agreements from Section 16 and 17. We are opposed to this proposal because it would leave shippers without an adequate remedy to deal with unfair assessments.

The third alternative would eliminate all FMC jurisdiction related in any way to labor agreements. We oppose this alternative. Commissioner Moakley does not appear to favor this alternative either, as he states, "(t)he Commission has some misgivings about the wisdom of exemptions which extend beyond Section 15, particularly those contained in alternative (3)." Statement, supra at 10.

(b) We object to any provisions that limits a shippers right to prospective relief only as being unfair to those shippers who have been required to pay unjust assessments. However, we would support a 180 day time limit within which the Commission must act.

Question 10. Do shippers have recourse to the labor laws if they feel they have been aggrieved by a collective bargaining agreement, a multi-employer agreement, or any practice implementing such an agreement?

Answer. No. The National Labor Relations Act generally applies to employer refusals to bargain with employees or other unfair labor practices. The PMA assessment practice with which Weyerhaeuser is concerned is not part of a collective bargaining agreement. The issue involves the method by which employers apportion labor costs among shippers and the NLRA simply does not apply.

Senator INOUE. Mr. Lenehan.

**STATEMENT OF DANIEL W. LENEHAN, COUNSEL, BOSTON
SHIPPING ASSOCIATION, INC.**

Mr. LENEHAN. Thank you, Mr. Chairman.

I am grateful and very honored, in fact, to have the opportunity to present the views of our association to you today.

I was only advised of the NYSA proposal last night, when I received a copy of the proposal from your staff. Therefore, any comments I make on the proposal must necessarily be somewhat tentative.

The Boston Shipping Association is a multiemployer bargaining group which represents 27 commercial firms and the Massachusetts Port Authority.

Consequently, the impact of H.R. 6613 on the members of the Boston Shipping Association is immediate and direct to the extent that the proposal and H.R. 6613 would free both the labor and the management party from the Government interference with negotiated labor contracts.

The act has our wholehearted support. However, we oppose the proposal to the extent that it eliminates the Federal Maritime Commission as a congressionally established expert forum for the resolution of legitimate grievances arising under the Shipping Act.

We do not feel that any practice that would be otherwise violative of the national maritime policy, as enunciated in section 16 or 17 of the Shipping Act, should be immunized against redress before the FMC solely by the fact that such a practice is accomplished within the framework of a labor management contract, a contract which the shipper takes no part in negotiating.

Specifically addressing the New York proposal, I would like to echo Mr. Skerritt's comments that a man-hour assessment can be just as discriminatory and just as prejudicial as a tonnage assessment, and we see no reason for the distinction in the proposal.

Mr. Chairman, these comments have been brief, and I would be happy to attempt to answer any questions that you may have.

Senator INOUE. Obviously, I'm not involved in the shipping industry, but can you explain why this difference of views between Boston and New York? It seems you are dealing with the same ocean and, I believe, the same union.

Mr. LENEHAN. Both, Senator. The situation is somewhat analogous to that mentioned here previously on the west coast. The New York Shipping Association negotiates contracts for New York. New York's interests and New York's needs are different from those of Boston. Boston is a much smaller port. But what Boston sees as being in its interest is not necessarily as what New York sees as being in its interest. It is basically a difference between two ports and two economies.

Senator INOUE. Now, the master contract that was reached on May 17, will that affect you?

Mr. LENEHAN. Yes, Senator. The contract provides certain funding requirements. I believe the JSP program on tonnage assessments are included in the national contract, and then the local contracts will be negotiated sometime between now and hopefully October 1, which will fill in these specific elements applicable to the Port of Boston.

Senator INOUE. It was suggested by Mr. Dickman that if this bill or the compromise failed to be enacted, it would jeopardize the master contract and the negotiations on the local issues. Do you agree with that?

Mr. LENEHAN. I would have to say that the negotiations on the local issues would be a matter of give and take. Previous contracts have been negotiated, both nationally and locally, without this bill being enacted. And I believe that it would still be possible to negotiate the local issues without enactment of this bill.

Senator INOUE. A couple of fellows in the back are shaking their heads.

If a choice had to be made—and if you don't wish to respond to this, I can understand, because you haven't really had an opportunity to study this measure or the compromise—but a choice between the bill or the compromise, would there be any preference?

Mr. LENEHAN. Could I answer that question, Senator, tentatively, by saying the compromise apparently is somewhat less objectionable.

Senator INOUE. But it is still objectionable?

Mr. LENEHAN. Yes, sir.

Senator INOUE. Would you be able to provide this committee with views that are a bit more detailed—say, within a week?

Mr. LENEHAN. Yes, sir, I could.

Senator INOUE. That would be extremely helpful to us, because time is flying. And as you know, July and August are special months, and the Members of Congress will be out of town, off to Detroit and New York City. And after that, they will be all over the Nation.

So if we are to get any action out of this, it will have to be done sometime during the month of June. So therefore we are hoping that your views will be submitted to us within the time the Committee requested.

Mr. LENEHAN. They will be, Senator.

Senator INOUE. And, as with the others, I would like to submit to you, questions that are a bit more detailed and ask for your views on them.

Thank you very much.

[The statement follows:]

STATEMENT OF DANIEL W. LENEHAN, COUNSEL, BOSTON SHIPPING ASSOCIATION, INC.

Mr. Chairman and members of the committee, I am both grateful and honored to have the opportunity to present the views of The Boston Shipping Association, Inc. on H.R. 6613 to this Committee.

The Boston Shipping Association represents 27 commercial firms and the Massachusetts Port Authority, all of which use the Port of Boston regularly in both foreign and intercoastal commerce. In this capacity, The Boston Shipping Association acts as the negotiating agent and administrator of most longshore labor-management agreements in the Port of Boston.

It is clear that the purpose of H.R. 6613 is the elimination of governmental interference in the collective bargaining process as this process relates to longshore labor-management contracts. To the extent that this legislation would free the parties to such agreements to negotiate and agree independently of government interference, we heartily support H.R. 6613. Indeed, we can conceive of few things which we support more strongly. The essential concept of the collective bargaining process requires that the parties know with certainty that the contract to which they have agreed will in fact govern their relationship for the term of that contract, and that such a contract will not be subjected to third-party interference by an agency of the government.

For this reason, while we support the Federal Maritime Commission's recent decision to exempt longshore labor-management contracts from the scope of its Section 15 Review Procedures, we welcome a Congressional affirmation of this administrative exemption through an appropriate statutory enactment.

We do not feel, however, that H.R. 6613, in its current form, is such an enactment.

If we are to judge from the questions we have received in Boston, the initial reaction among the shipper community was to object to the provisions in H.R. 6613 which seemed to eliminate the F.M.C. as a forum for the resolution of disputes arising under Sections 16 and 17 of the Shipping Act. It was felt that by eliminating the availability of the F.M.C.'s expertise in these areas, the Act would deprive shippers of a knowledgeable forum for the resolution of disputes arising out of a longshore labor-management contract, when such a contract contained provisions violative of these Sections. It appeared that with an already overworked Federal Court System, the shipper would be subjected to an unnecessary delay and an uncalled for lack of expertise.

This idea was based on the fact that since the labor parties to such agreements are not subject to the F.M.C.'s Shipping Act jurisdiction, and since the redefinition of "common carrier by water" and of "other person subject to the Act" in H.R. 6613 removed the management parties from the jurisdiction of the Shipping Act, it followed that both the parties and therefore any action they might take in concert would no longer be subject to F.M.C. jurisdiction.

While this analysis is obviously correct, insofar as it goes, H.R. 6613 takes the issue beyond this limited jurisdictional matter and moves directly into the area of substantive rights of the parties. In so doing, the Act establishes a very real potential for seriously undermining the fundamental concept of common carriage as we understand that term today.

The Act does not merely eliminate an expert forum for seeking a remedy, the Act serves to legalize activities otherwise specifically proscribed by Sections 16 and 17 to the extent such activities are encompassed in a signed labor-management contract of the type with which we are here concerned. In short, it eliminates not only remedies, but also rights.

The provisions of H.R. 6613 amending Sections 16 and 17 specify that charges arising out of labor-management agreements "shall not be deemed a charge within the meaning of this section." Sections 16 and 17 themselves refer among other things to "charges" which are considered to be illegal. By defining such charges out of the meaning of Sections 16 and 17, H.R. 6613 effectively provides that otherwise illegal charges can be made legal by writing them into a labor-management contract; a contract, it should be emphasized, which is not negotiated by the shipper.

To fully comprehend the impact of this problem, it is essential to maintain a perspective on H.R. 6613's various provisions not only as they relate to current law, but also as they interrelate with each other.

The provisions amending Section 15 provide that a longshore labor-management contract "shall not be deemed either an agreement or a cooperative working arrangement subject to the filing provision herein." This clause when read in conjunction with H.R. 6613's proposed amendments to Sections 16 and 17, not only legalizes otherwise proscribed activities, but further serves to shield such activities from the light of public scrutiny.

Thus, the Act denies a remedy by eliminating a presently existing right and further denies the shipper or consignee the opportunity even to be aware of when such a right has been eliminated. I would suggest that this is a potentially classic example of elevating form above substance.

Carrying this concept a step further, what is the result under H.R. 6613 of inclusion of a provision in the contract which is, on its face, violative of a Section 18 tariff provision of the Shipping Act? It seems clear that such a provision would still be illegal, since nothing in H.R. 6613 serves to make it legal. However, jurisdictionally, what forum is available to resolve such matters? The Shipping Act vests jurisdiction over Section 18 matters with the F.M.C. H.R. 6613 removes labor-management contracts from F.M.C.'s jurisdiction. Will an aggrieved shipper be forced to try one forum, hoping that it is the correct one, and to try another if it is not?

Even if the jurisdictional issue is resolved, there still remains the question of resolving the conflict of available remedies. Should the shipper seek treble damages under some antitrust theory, since H.R. 6613 eliminates traditional Section 15 antitrust immunity? Should the shipper seek reparations under some common law theory, despite the fact that H.R. 6613 seems to enunciate a clear statutory denial of any such common law right which may exist?

Viewed in this light, it appears that rather than eliminating uncertainty from the collective bargaining process, H.R. 6613 as it is presently written actually creates new and more onerous uncertainties. We would therefore suggest that H.R. 6613 be amended to eliminate such uncertainty and thereby insure that the purposes which the Act seeks are in fact attained.

We suggest that consideration be given to language which would parallel the present situation pertaining to similar questions before the Interstate Commerce Commission.

While the I.C.C. neither approves nor disapproves collective bargaining agreements, it nevertheless retains jurisdiction over all violations of the Interstate Commerce Act, whether or not such violations stem from any provision of a labor-management contract. We suggest that the F.M.C. should exercise similar authority as pertains to matters involving our ocean-borne commerce.

As the Congressionally established, expert arbiter of maritime regulatory matters, the F.M.C. should retain responsibility for the adjudication and authority for the resolution of Section 16 and 17 questions. The thrust of the Commission's efforts, however, should be directed not toward the contract, but rather toward the practice.

In order to both avoid undue interference with the collective bargaining process, and at the same time further the goals of H.R. 6613, we would propose language to provide:

1. That copies of such labor-management agreements be available for inspection in the public files of the Commission;
2. That regarding labor-management contracts, the F.M.C. act under Section 22 only upon a sworn complaint, and not on its own motion; and
3. That in such cases, the F.M.C.'s rulings may only be prospective in nature.

The effect of these changes would be to prevent self-initiated investigations by the F.M.C. into matters arising under labor-management contracts, while at the same time eliminating the uncertainty that arises were the Commission to remain free to award reparations before such time as specific acts are adjudicated to be violations.

This concludes my prepared testimony. I will be happy to try to answer any questions you may have.

QUESTIONS OF THE COMMITTEE AND THE ANSWERS THERETO

Question 1. In your judgment, would the compromise proposal ensure equal treatment of shippers, cargo and localities?

Answer. We do not feel that the NYSA proposal ensures equal treatment of shippers, cargos and ports. On the contrary, the proposal establishes a clear dichotomy between cargos, (and therefore between shippers), which are assessed on a man-hour basis and those assessed on a tonnage basis.

Assessments based upon tonnage and agreements relating to such assessments would be subject to F.M.C. review and revision in futuro. However, where the assessment is based upon man-hours, neither the assessment formula nor related practices would be subject to F.M.C. review. Furthermore, man-hour assessment practices are removed from the ambit of the antitrust laws by the language in the proposal which provides that agreements shall be granted immediate approval upon filing with the F.M.C. Our research leads us to believe that any Common Law right of action arising out of the concepts of Common Carriage have been effectively preempted by statute in the maritime area. Thus we feel that aggrieved parties whose cargos are subject to assessments based on man-hours worked would be denied any right to seek relief under the proposal.

In view of this dichotomy and since the shipper has no say in negotiating the contract or establishing the assessment formula we would suggest that the proposal, if enacted, may raise a very real Equal Protection problem.

Question 2. In your view, is the compromise proposal preferable to H.R. 6613, in its present form?

Answer. We feel that the compromise proposal is slightly less objectionable than H.R. 6613 for the reasons specified in our comments on the proposal submitted herewith.

Question 3. Do you agree that whatever legislation would be passed should not affect the outcome of any pending cases before the courts or the F.M.C.?

Answer. We agree that this legislation, in whatever form it takes, should not affect the outcome of any pending cases before the courts or the F.M.C.

Question 4. Under the present situation, if an aggrieved party seeks relief in the Courts from a practice growing out of an agreement implementing a collective bargaining agreement, he can go into Court and seek a temporary restraining order and then a preliminary injunction, etc. These are fairly expeditious procedures involving days, or a few weeks at most.

If, on the one hand, a party seeks relief from such a practice before the F.M.C., can he obtain it as expeditiously?

Answer. Under the present framework, we believe that a party seeking relief from a practice growing out of an agreement implementing a collective bargaining agreement can obtain such relief just as expeditiously if he elects to seek such relief before the F.M.C.

While a temporary restraining order and a preliminary injunction are fairly expeditious procedures, they are only temporary in nature, designed to maintain the status quo in order to prevent irreparable harm pendente lite.

Permanent relief must come from a full adjudication on the merits before the F.M.C. Here, the agency expertise insures a more complete understanding of the issues leading to a more fair resolution of the dispute.

These remedies are not exclusive. An aggrieved party may seek injunctive relief in Court pending final action by the F.M.C.

Question 5. At the request of the Subcommittee, the F.M.C. has prepared an alternative to H.R. 6613, which would exempt maritime labor agreements from section 15 of the Act. The effect of this proposal would be to permit collective bargaining agreements and assessment agreements to become effective immediately. There would be no need for filing with and approval by the F.M.C.

(a) In your view is the F.M.C.'s alternative preferable to the compromise which has been proposed?

(b) Suppose an additional provision were added to the F.M.C.'s alternative which would provide that if the F.M.C. subsequently finds a maritime agreement or activity based upon it to be unjust or unfair, the agency could grant only prospective relief, and that such prospective relief must be granted within 180 days after a notice and hearing upon the agreement or practice complained of?

Answer. (a) It is our understanding that the F.M.C.'s alternative leaves intact the complaint procedures and reparation mechanisms in the present statute, and that its only effect is to statutorily affirm the F.M.C.'s recent decision to exempt longshore labor-management contracts from the scope of its Section 15 review procedures. To this extent, the F.M.C.'s alternative is clearly preferable to the NYSA proposal.

First: By not tampering with the current complaint procedures, the large body of existing precedent dealing with jurisdiction, standing to bring an action, privity, standards of proof, burden of proof, and the like will be preserved.

Second: Unlike the NYSA proposal, complaints arising out of man-hour assessment may still be pursued. It should be noted that the NYSA proposal eliminates recourse to the Courts under the antitrust laws in this regard, since by its terms, such agreements "upon . . . filing, shall be granted immediate approval hereunder . . ." (NYSA Proposal, pp 3-4)

Third: The NYSA proposal invites almost certain appeal, and consequent delay, by changing the standard of proof from proof by substantial evidence to proof by clear and convincing evidence.

(b) In our testimony in opposition to H.R. 6613, we suggested that consideration be given to language limiting FMC relief to that which could be granted prospectively. We emphasize that we prefer retroactive application to *right a wrong*, since the implementation of an unfair assessment or the application thereof could bring about irreparable harm to the actuarial soundness of an employee benefit plan in a relatively short time. Nevertheless, we felt that by suggesting the limitation on FMC Orders, we would open up an area which might lead to compromise, and we note that both the NYSA proposal and the FMC alternative have incorporated our suggestion.

To the extent that the FMC alternative provides essentially that such prospective relief must be granted within 180 days, it is clearly preferable to the NYSA proposal. The effect would be to statutorily limit the time during which a malpractice could continue. This, we feel, would significantly blunt the adverse effects of prospective application of FMC Orders.

We suggest that careful consideration be given to determining the minimum time period for FMC action, consistent with full and reasoned deliberation of the issues.

CHARLES J. HUMPHREYS,
ATTORNEYS AND COUNSELORS AT LAW,
Cohasset, Mass., June 10, 1980.

HON. DANIEL K. INOUE,
*Chairman, Senate Subcommittee on Merchant Marine and Tourism, 5202 Dirksen
Senate Office Building, Washington, D.C.*

DEAR MR. CHAIRMAN: The following comments on the New York Shipping Association (NYSA) proposal are submitted by the Boston Shipping Association (BSA).

To a large extent, our comments are already before the subcommittee in the form of our responses to questions submitted at the June 4, 1980 hearing. We have therefore not attempted to repeat that information here, but ask that those responses dealing with equality of cargo, shippers and ports, and the relationship of the FMC alternative proposal to the NYSA proposal be treated as incorporated herein by reference.

Further, we have not attempted to address technical matters dealing with the proposed statutory language. Rather we have confined our comments to the substantive issues raised by the NYSA proposal.

We concur in the proposal in the following areas:

1. That assessment agreements should be filed with the FMC;
2. That upon filing, agreements would be granted immediate approval and would continue approved until cancelled, modified or disapproved by the Commission;
3. That FMC action would follow notice and hearing;
4. That FMC action would be prospective in nature. (We note, however, that while our concurrence is an attempt to accommodate the various interests concerned with this Act, our preference would be for retroactive remedial action by the FMC);
5. That the burden of proof would be on the protestant; and
6. That the assessment agreement would be deemed contractually valid until otherwise proven.

We are opposed to the NYSA proposal in the following areas:

1. The specific assessment agreements to be filed with the FMC, and subject to its jurisdiction;
2. The scope of such FMC jurisdiction; and
3. The standard of proof which must be met by a protestant. Each of these is discussed in detail below.

A. The specific assessment agreements to be filed with the FMC and subject to its jurisdiction

An explanation of our opposition to the NYSA proposal in this area first requires a clarification of the differences between Boston and New York in terms of their respective ports.

Boston is in a unique position among East Coast ports, in that it is geographically isolated from the South by the busiest port on the East Coast and from the North by the Coast's least expensive ports, Montreal, Halifax and St. Johns.

A 1979 study prepared for MARAD's Office of Commercial Development entitled "Evaluation of a Domestic Container Feeder Service on the Atlantic and Gulf Coast" (U.S. Department of Commerce, National Technical Information Service; PB-293 244) points out further differences between New York and Boston. "The U.S.

Maritime Administration and Sea-Land Service, Inc., jointly undertook this study of a coastwise shipping service in the U.S. Gulf and East Coasts. The service investigated was one that would have the potential to handle domestic cargo in coastwise movement, and international relay cargo from secondary ports to load center ports." page I-1-A)

In essence this study performed for MARAD and the New York based Sea-Land by Booz-Allen and Hamilton, Inc. concluded that the operative economic factors indicate the advisability of Boston becoming a feeder port for New York.

As pertains to longshore labor, the report notes that "Cargo moved via the feeder system will have to be loaded on to the feeder vessel, and unloaded from it, incurring a stevedoring charge in each movement" (Appendix A(12).

"Overall, the largest single cost element involved in the feeder system is the stevedoring charge . . . (which) . . . accounts for 20 to 30 percent of the total cost of the operation. . . . The benefits that could accrue to these two groups (i.e. the stevedores and the ILA) from the development of a waterborne feeder service should be sufficient to induce that to promote the concept. The most direct means via which they could encourage feeder systems is by developing special rates and work rules for feeder vessels and cargo." (page VII-4)

Yet it is precisely the lack of special rules, or more precisely the presence of special rules exactly opposite those envisioned by the study that result in a distinct divergence between the interests of Boston and those of New York.

Rule 10—Container Royalty Payments, of the BSA-ILA Longshore General Cargo Agreement provides that: "the two Container Royalty payments required by the CONASA-ILA collective bargaining agreements shall be payable only once in the Continental United States. *They shall be paid in that ILA Port where the container is first handled by ILA longshore labor at longshore rates.*" (Emphasis supplied.)

The result of this provision during the October 1, 1978 through September 30, 1979 contract year was the diversion of over half a million dollars in revenue from Boston to New York.

It should therefore be clear that the economic situations in the two ports are very different. It should also be clear that these differences are reflective of significant dollar amounts.

Returning to geographic considerations, the effective marketing range of the Port of Boston for export cargoes is severely limited by the Port's geographic isolation. Boston is the only Northern Tier East Coast Port which does not serve the Mid-West. Furthermore, due to geographic factors previously discussed, cargo originating in or destined for Southern New England is frequently shipped through New York.

To the north, Maine, New Hampshire and Vermont cargoes often move through Canadian Ports such as Montreal, Halifax and St. Johns. This cargo is actively solicited away from U.S. ports by the Canadians who not only are free of FMC regulation but are also supported by a modern, efficient government supported national railroad system. The enclosed advertisement by CAST North American (Agencies) Ltd., which appeared in the May 16, 1980 Boston Marine Guide is illustrative.

For all of these reasons we feel that the unique position of the Port of Boston must dictate that any proposal by the Shipping Association in New York will frequently conflict with the needs of the Port of Boston.

As regards this specific proposal, and as pointed out in our abbreviated testimony on June 4th, the Boston Shipping Association strongly and unequivocally opposes limiting F.M.C. authority to assessment agreements based on tons of cargo handled. It is clear that an assessment agreement based on man-hours worked can be equally as oppressive as one based on tonnage.

We again emphasize that the NYSA proposal totally eliminates the antitrust laws as a basis for any action to challenge an assessment formula based on man-hours. There would therefore be no forum nor theory of action to pursue a grievance arising from a man-hour assessment under the NYSA proposal.

Consequently, we urge that the implicit Equal Protection issue be considered in any legislation prepared by the committee.

B. The scope of such F.M.C. jurisdiction

If, as discussed above, assessment agreements are a significant factor in the rates paid by carriers, it follows that these charges must be passed on to shippers/ consignees and ultimately to consumers. Likewise, the consumer ultimately bears the burden of such assessments as they affect the charges particular to a port and a port area. We therefore feel that it makes little sense to deny shippers and ports protections of Sections 16 and 17.

C. The standard of proof which must be met by any protestant

We see no reason to deviate from the Substantial Evidence standard currently followed by the Commission pursuant to the Administrative Procedure Act. We do not feel that the almost certain appellate litigation which would result is justified by any benefit to be derived. Where the party challenging an assessment agreement, which is presumptively approvable, has the burden of proof, proof by substantial evidence, before an expert administrative agency should be sufficient to safeguard the rights of all concerned.

We remain ready to discuss these comments with the Committee staff and with any of the other parties concerned with this legislation.

In closing we wish to express our appreciation for the consideration you have afforded our comments to date, and we look forward to cooperating in whatever way possible in the development of compromise legislation.

Very truly yours,

DANIEL W. LENEHAN.

Senator INOUE. Our last witness represents the International Logistics, New York Chamber of Commerce, Mr. Ed Vierengel.

STATEMENT OF ED VIERENGEL, DIRECTOR, INTERNATIONAL LOGISTICS, NEW YORK CHAMBER OF COMMERCE

Mr. VIERENGEL. Thank you very much, Senator.

I would like to clarify that I am vice chairman of the International Traffic Committee of the New York Chamber of Commerce and Industry, which is a voluntary group of 30 international transportation executives employed by member corporations of the chamber, who regularly meet to discuss issues related to international traffic and transportation, providing input to the chamber to form policies and positions in this important area.

As a result therefore, I am representing the chamber in this statement. Our position was developed prior to the development of the compromise position, which unfortunately I have not seen, although I have listened to the discussion of it. I would not be able to address it because, as you can see, representing a group as large as the New York chamber I am restricted to the positions which were developed and agreed by the chamber.

I would like to review the areas with which we agree in the original bill, H.R. 6613, and the areas with which we disagree.

We agree that legislative action may be required to correct the potentially excessive interference of the Federal Maritime Commission in the collective bargaining process as a result of the decision of the Supreme Court in the *PMA* case. We do not agree that jurisdiction should be removed from the Commission to adjudicate legitimate grievances or damages resulting from activities arising out of such agreements which may be adverse to the interest of shippers.

I think that Mr. Archer made this very point, put our position very clearly. Inasmuch as we are not parties to the process of bargaining, if an assessment or assessments are made to fund agreements against cargo and those assessments are not incorporated as costs of the bargainer-employer and then generally distributed among all of the customers of that employer, we feel that there is a possibility of discriminatory activity taking place. I think Mr. Archer made that very clear.

In this particular bill, the language of the bill would make any assessments or fees arising out of collective bargaining agreements which are assessed against the cargo to be deemed not rates under

the Shipping Act of 1916 and therefore not under the jurisdiction of the Federal Maritime Commission.

Now, a very large shipper with very substantial damage may be able to take the case to court in order to try to recover costs which are substantial and which he feels are discriminatory.

A small shipper, on the other hand, would not find it economically feasible to pursue that type of action. As you can imagine, if you had \$100,000-a-year business and you suffer a \$2,000 or \$3,000 or \$5,000 cost, you're not going to spend \$10,000 to pursue the recovery of a \$5,000 cost.

In the case of Crown Zellerbach, we are talking about costs which may be \$350,000 in a period of 180 days. This is well worth going to court to recover.

We agree that the collective bargaining process should be free and unfettered, as asserted by Congressman Murphy in introducing the legislation. But it must also be responsible.

By continuing to provide recourse to the Federal Maritime Commission, the only agency uniquely competent to judge the reasonableness of maritime collective bargaining agreements, the Congress will safeguard the interests of the country and its citizens, who while not parties to such agreements may be substantially affected by them.

It seems to us that the question is not whether or not parties sustaining injury as a result of maritime collective bargaining agreements will have recourse, but rather to whom. If the FMC is stripped of its jurisdiction in this area, only the Federal courts will remain.

It seems to us that should litigation in this area be brought in the courts, rather than in complaint proceedings before the FMC, the process will be more protracted than it would otherwise be due to the lack of expertise in the courts in this area.

And I believe Mr. Lambos gave a good illustration of this possibility in his response to the chairman's questions.

So, in conclusion, we do agree that the first two elements of the bill, the removal of jurisdiction of the Federal Maritime Commission from the collective bargaining process, in terms of reviewing agreements prior to implementation, that we would support that.

We would also support the denial of the FMC the right to impose indemnities or collect indemnities from the parties in the event of complaint that they would use it in order to fund the reparations which they might find. This was an issue in the recent FMC docket—I think it was 78-13.

However, we do feel that in this area of assessments that assessments should be considered rates, because they are assessed against cargo, and that therefore they should continue to be under the jurisdiction and review of the Federal Maritime Commission and subject to hearings and complaints of parties who claim injury in those areas.

Thank you very much.

Senator INOUE. You have heard Mr. Gleason maintain that as a matter of national policy collective bargaining should be free and unfettered. And I gather you agree with that.

Do you feel that Mr. Gleason's union should be treated differently than, say, railroad workers?

Mr. VIERENGEL. No, I don't. And I, frankly, don't feel that this particular issue treats him—let's say that the issues in this case would separate him from, say, the railroad unions.

I think perhaps, again, Mr. Archer made the point very well, that in general in collective-bargaining agreements when the costs of an agreement are established, they are established as costs to the employers—of the employers of the labor.

The employers then turn around and continue to provide services or goods to their customers. They spread the cost of their labor across the entire range of services of goods, and that is the general practice in industry in any union.

And any employer, if the cost of settlement of an agreement, of a negotiated contract, were to provide for assessments against cargoes in a fashion which does not uniformly spread the cost of that agreement across all cargoes as a reasonably equal method, then there should be a recourse for those parties who may have—who may be discriminated against.

I think, again, Mr. Archer made this point very clearly.

And we believe that the Federal Maritime Commission is an appropriate agency to receive such complaints and review such complaints, because they are expert in this area.

Senator INOUE. Are you aware of how shippers are assessed in other areas, such as rail, air, or trucking?

Mr. VIERENGEL. Yes, I am aware that when a shipper wishes to make a shipment by rail, air, or truck, that he has tariffs to consult, that he is charged tariff rates, and sometimes there are surcharges which are permitted by the agency and are filed with the regulatory agency and are allowed to be assigned.

Those surcharges, in the case of fuel, for instance, are uniformly distributed, as uniformly as possible. And if they are not uniformly distributed, the Commission or the regulatory agency hears about it.

So, yes, shippers ship under tariffs, and the tariffs spell out what the costs to the shipper are.

Now, the suggestion in this bill is that the shipper would not only be subject possibly to the tariff charges, but other charges which are not deemed to tariff charges, which would nevertheless add to his cost of transportation.

Senator INOUE. We are talking about assessment agreements, aren't we?

Mr. VIERENGEL. That's my understanding of the last—I think it's the last two paragraphs of the bill—that assessments which arise out of collective bargaining agreements would not be deemed to be rates and therefore would not be subject to the jurisdiction of the Federal Maritime Commission. Nonetheless, they would be additional costs to the shipper—they would represent additional costs to the shipper, against whom the assessment was made; am I correct in that?

Senator INOUE. I'm just trying to find out.

Mr. VIERENGEL. That is my understanding at least, or that is our understanding.

Senator INOUE. I realize that this measure, H.R. 6613, went through the House rather expeditiously. It was introduced on February 26 of this year and passed the House on April 15.

When were you invited to participate? Or were you invited to participate in a hearing?

Mr. VIERENGEL. On H.R. 6613?

Senator INOUE. Yes.

Mr. VIERENGEL. We were not—we were not aware of the passage of the bill, or the introduction of that bill, until after the fact.

As I said, we are a committee, we meet monthly, we try to keep up with all of the activities that are going on in the maritime area; but it is a voluntary committee, and it's difficult sometimes. So we did not become aware of this legislative proposal.

Senator INOUE. Is that the situation with the rest of you?

Mr. ARCHER. Yes, it is.

Mr. KAUFMAN. Yes, it is.

Mr. SKERRITT. Our organization did know of the bill when it was in the House, Senator, and we did submit written comments, but we did not have anyone present to testify.

Senator INOUE. Were you invited to testify?

Mr. SKERRITT. I think we just barely—I think, if I recall right, we were aware of the bill and submitted written comments after the hearing, so that we contacted the committee staff the day of the hearings and asked to be allowed to submit written comments.

Mr. VIERENGEL. I might add, Senator, also, that the International Traffic Committee of the Chamber is not unknown to the House Merchant Marine and Fisheries Committee since we have participated very closely in testifying on the regulatory reform aspects of the omnibus bill ever since it was H.R. 11422, but we were not aware of this.

Senator INOUE. Well, I want to make certain that before this subcommittee passes judgment upon this measure it will have provided every element in the industry an opportunity to make an input on this measure. I am just hoping that the time that we have provided will be enough.

Would a week be enough for you to express your views on the compromise?

Mr. VIERENGEL. I believe so. We are in the process now of a 3-day meeting here in Washington; so I think that if we have a copy of the compromise proposal, I am sure we can address and develop our views on it.

Senator INOUE. Well, I have instructed the staff to draft legislation based upon this proposed compromise, which should be ready for your study on or before the 25th of June.

So up until then I would hope that—if you feel you can have your counsel communicate with our staff—that possibly we can incorporate some of your thoughts in the committee staff bill.

After that, I will be providing you time to look over the committee staff bill. Otherwise, this exercise we're going through today would be for naught.

But I thank all of you for coming forward to express your thoughts. And I can assure you that your concerns will be very seriously considered, and we hope you will participate as we draft these measures.

Thank you.

[The statement follows:]

STATEMENT OF EDGAR A. VIERENGEL, VICE-CHAIRMAN, INTERNATIONAL TRAFFIC COMMITTEE, NEW YORK CHAMBER OF COMMERCE AND INDUSTRY, INC.

My name is Edgar A. Vierengel. I am Vice-Chairman of the International Traffic Committee of the New York Chamber of Commerce and Industry, Inc., a voluntary group of thirty international transportation executives of member corporations of the Chamber, who meet regularly to discuss and debate issues related to international traffic and transportation, providing input to the Chamber to form policy and positions in this important area.

I am employed by Ingersoll-Rand Company, a major producer of industrial machinery, as Director of International Logistics.

We appreciate this opportunity to appear and comment on the provisions of HR-6613 which would eliminate the regulatory jurisdiction of the Federal Maritime Commission over Maritime Labor-Management Agreements.

As you may be aware, Mr. Chairman, the Chamber, through its International Traffic Committee has been an active participant in the legislative process leading up to this year's Congressional consideration of an overall maritime regulatory reform bill.

While we have been more active on the House side, testifying on HR-11422 and on Title II of HR-4769, the predecessor to HR-6899, we have followed closely the development of this Committee's thinking on the subject as put forward in S-1460, 1462 and 1463, and have submitted written comments on the Staff Draft of the regulatory reform proposals which grew out of these bills and has now been reported out of this Committee as the Senate Ocean Shipping Act of 1980.

The primary thrust of our testimony with respect to regulatory reform has been to urge the Congress to authorize the formation of a United States Shippers Council through which, we believe, the commercial parties served by liner carriers in the foreign commerce of the United States will exert a positive influence on the industry, making it more responsive to the commercial needs of American shippers in terms of reliability, efficiency and competitiveness. We feel that, in the long run, such an organizations will contribute to the overall stability of maritime services and enhance U.S. flag participation in the liner trades.

We have also consistently urged that the Federal Maritime Commission continue in its role as the expert arbiter of disputes arising out of the implementation of maritime agreements.

It is in this context that we wish to address the provisions of HR-6613.

We agree that legislative action may be required to correct the potentially excessive interference of the Commission in the collective bargaining process as a result of the decision of the Supreme Court in the PMA Case. We do not agree that jurisdiction should be removed from the Commission to adjudicate legitimate grievances or damages resulting from activities arising out of such agreements, which may be adverse to the interests of shippers.

We agree that the collective bargaining process should be "free and unfettered" as asserted by Congressman Murphy in introducing the legislation. It must also be responsible. By continuing to provide recourse to the FMC, the only agency uniquely competent to judge the reasonableness of maritime collective bargaining agreements, the Congress will safeguard the interests of the Country and its citizens who, while not parties to such agreements, may be substantially affected by them.

It seems to us that the question is not whether or not parties sustaining injury as a result of maritime collective bargaining agreement will have recourse, but rather to whom. If the FMC is stripped of its jurisdiction in this area, only the Federal courts will remain. It also seems to us that should litigation in this area be brought in the courts rather than in complaint proceedings before the FMC, the process will be more protracted than it would otherwise be, due to the lack of expertise in the courts in this area.

In view of the recently published rulemaking by the FMC in Docket 78-11, in which they specifically exempted multi-employer maritime collective bargaining agreements from their review prior to implementation, and also decided against requiring indemnification by the parties to assure settlement of damages in subsequent claim proceedings while reasserting their jurisdiction to hear and settle complaints arising out of such agreements under Articles 16, 17 and 22 of the Shipping Act, we wonder whether this proposed legislation is, in fact, necessary at all.

Finally, the Federal Maritime Commission is an independent regulatory agency created by the Congress. If the Congress is unhappy with the actions of its own regulatory creation, it might have been more appropriate to amend its authority in this area in the maritime regulatory reform bill now pending rather than in this separate narrow Bill.

We therefore urge this Committee to reject this Bill in its entirety or to amend it so that shippers will continue to have recourse to the FMC to adjudicate complaints arising out of maritime collective bargaining agreements which may be brought by shippers who are not parties to those agreements.

[The following information was subsequently received for the record:]

New York, N.Y., June 10, 1980.

U.S. SENATE,
Senate Committee on Commerce, Science and Transportation, Subcommittee on Merchant Marine and Tourism, Washington, D.C.

DEAR SENATOR: After delivering our statement on the subject, we were requested to respond to the following questions which were presented to us in writing.

Question 1. Under the present situation, if an aggrieved party seeks relief in the Courts from a practice growing out of an agreement implementing a collective bargaining agreement, he can go into Court and seek a temporary restraining order and then a preliminary injunction, etc. These are fairly expeditious procedures involving days, or a few weeks at most.

If, on the other hand, a party seeks relief from such a practice before the FMC, can he obtain it as expeditiously?

Answer. It seems to us that before an aggrieved party can seek relief he must have a legitimate complaint. If the complaint alleges a violation of the Shipping Act, the complainant might seek injunctive relief in the courts but would seek permanent relief through complaint proceedings before the FMC. We are a bit mystified by the question.

Question 2. At the request of the Subcommittee, the FMC has prepared an alternative to H.R. 6613, which would exempt maritime labor agreements from section 15 of the Act. The effect of this proposal would be to permit collective bargaining agreements and assessment agreements to become effective immediately. There would be no need for filing with and approval by the FMC.

(a) In your view is the FMC's alternative preferable to the compromise which has been proposed?

Answer. Yes. This is the same position as we took in our prepared statement.

Question. (b) Suppose an additional provision were added to the FMC's alternative which would provide that if the FMC subsequently finds a maritime agreement or activity based upon it to be unjust or unfair, the agency could grant only prospective relief, and that such prospective relief must be granted within 180 days after a notice and hearing upon the agreement or practice complained of?

Answer. No. If an assessment was found to be unlawful under section 16 or 17 of the Shipping Act, we see no reason why only prospective relief should be granted. All U.S. citizens are responsible for their actions under the law. If an assessment were found to be unlawful after notice and hearing before the FMC, it would have been unlawful from the time it was imposed. Complainants should have the right to recover all assessments found to have been unlawful.

Question 3. In your judgment, would the compromise proposal ensure equal treatment of shippers, cargo, and localities?

Answer. No. In our view, if the compromise proposal were enacted and assessments grew out of a longshore labor agreement along the east coast and gulf whether or not they were exempt from the provisions of the Shipping Act, shippers in certain areas such as the mid-west might find it profitable to ship via Canada depriving both U.S. ports and U.S. flag carriers of business they might otherwise receive.

Question 4. In your view, is the compromise proposal preferable to H.R. 6613, in its present form?

Answer. No. Neither the compromise nor H.R. 6613 is acceptable.

Question 5. Do you agree that whatever legislation would be passed should not affect the outcome of any pending cases before the courts of the FMC?

Answer. Since we are not familiar with any cases pending before the courts or the FMC we do not feel competent to answer this question.

* * * * *

We hope that the above fully answers the questions posed. If any clarification or amplification is required in any of them, please let us know.

We sincerely hope that any legislation which is enacted retains FMC jurisdiction over the legality of assessments and charges arising out of multi-employer maritime labor-management agreements, especially under section 17.

Very truly yours,

E. A. VIERENGEL,
Vice Chairman,
International Traffic Committee.

Senator INOUE. We now have a panel consisting of the president of the Pacific Maritime Association, Mr. Edmund Flynn, who will be accompanied by Mr. Hal Mesirov, counsel; and the president of the International Longshoremen's and Warehousemen's Union, Mr. James Herman.

[The complete statement follows:]

STATEMENT OF EDMUND FLYNN, PRESIDENT, PACIFIC MARITIME ASSOCIATION; ACCOMPANIED BY HAL MESIROW, COUNSEL

Mr. FLYNN. Mr. Chairman, I will make a few opening remarks.

I believe, as a result of listening to the testimony and the dialog that has preceded my appearance here, that most of the interest of yourself and others who have a hand in drafting the final legislation that we hope will take care of a very serious problem in the industry, that you're interested in an amendment that has been proposed to H.R. 6613. And I am prepared, to the extent that I am knowledgeable about the amendment, to answer whatever questions you may direct in connection with it.

But preliminarily I would like to say that it is the position of the Pacific Maritime Association that H.R. 6613 as it went through the House and as it has been at least reviewed initially by your committee is an acceptable bill for the purposes of dealing with the problems of labor-management agreements and assessment agreements.

In our opinion, the bill does not need any amendments. We believe that the industry itself has the capability and the capacity not only for negotiating collective bargaining agreements, but also for determining what is the proper rate of assessment among various cargoes necessary to implement the collective bargaining agreements that we do negotiate, both with the onshore unions and offshore unions.

It is our opinion that we in the industry have greater expertise than the Federal Maritime Commission with respect to those factors which are necessary to determine the proper methods of assessment. Assessments are determined largely by labor-intensive cargo and by productivity. And I have heard many statements made here today about the expertise of the Federal Maritime Commission. I have not too great a relationship or closeness with respect to the FMC deliberations, but I daresay that whatever expertise the Federal Maritime Commission may have, it does not match the expertise of the people in the industry itself.

As I say, we prefer H.R. 6613 in its present form. But we are realists, and if a compromise is necessary, particularly in the assessment area, we would be willing to work with the staff and others who have an interest in getting basic legislation through, to at least immunize the collective bargaining agreements from review by the FMC.

Senator INOUE. Have you had an opportunity to study the proposed compromise?

Mr. FLYNN. I had a limited opportunity, Senator. I did not see the language until last evening. And while generally I understand what they are attempting to do, there are some changes that I personally would like to incorporate in the amendment as it has been proposed. I have two particular problems with the amendatory language as I understand it:

One is, I think that it is susceptible to an interpretation that the Federal Maritime Commission would even have the opportunity to review assessments which are necessary to run and to administer a maritime trade association, such as PMA.

And I am also of the belief that the amendatory language as I read it could, for example, undercut an agreement that the Pacific Maritime Association might reach with the ILWU with respect to particular assessment rates, and I think that would be as bad as having the FMC look over the entire collective bargaining agreement.

So at least in two areas, I think when we approach this and we will do what we can to assist we would like to add a couple of caveats or additional amendments of our own.

Senator INOUE. What are your views on the retroactivity concern expressed by the former panel?

Mr. FLYNN. I have no sympathy at all with their views on retroactivity, and for this reason: We have operated on the west coast for, as you know, many, many years with various assessment formulas, and we believe that those assessment formulas are fair. And everything we have done over the years, naturally, it is done as a result of input of the industry.

We believe that what we do, at the time we do it, we do fairly. And I would say, until the Federal Maritime Commission approves or disapproves that, there should not be any concern on the part of anybody with respect to retroactivity. I think what we do we do with the best of intentions and good faith, and we believe it is fair for all sectors of the industry, and therefore there is no violation of anything up until, we believe, the time the Federal Maritime Commission approves or disapproves. And from that date, if there are any adjustments to be made, the adjustments should be prospective.

It's not very simple to go back and recalculate assessment rates. We have—for example, you have tramp steamers that come in and their cargo is assessed at a particular rate. They leave port. Now, if there are added assessments to be made, I don't know how you're going to collect any changes in assessment rates from the tramp steamer that has left. I don't know how we collect from foreign-flag carriers.

It is an extremely difficult problem. I believe therefore that if there is going to be a review by the Federal Maritime Commission of rates of assessment, unquestionably, if they have any differences of opinion with respect to any formula to be worked out internally in the industry, any changes should be prospective.

Senator INOUE. So you agree completely with Mr. Dickman on this aspect?

Mr. FLYNN. If that is what he said, I do. I was in the back of the room and I did not follow everything he said. I did not mean that facetiously.

[The statement follows:]

STATEMENT OF EDMUND J. FLYNN, PRESIDENT, PACIFIC MARITIME ASSOCIATION

Mr. Chairman, Members of the Sub-Committee and Staff, I am grateful for the opportunity to appear before you today to present the views of the Pacific Maritime Association on H.R. 6613. This legislation is of very great importance to the future of collective bargaining in the maritime industry. The Bill has now passed the House of Representatives, and I strongly urge that it be reported favorably by this Committee.

Successful multi-employer collective bargaining in the maritime industry generally, and on the West Coast specifically, requires, in my judgment, passage of H.R. 6613 in the Senate and enactment into law.

Pacific Maritime Association, or PMA, is the maritime employers' collective bargaining unit for the Pacific Coast. Its 113 members include shipping companies, terminal operators, and stevedoring companies in California, Washington, and Oregon. It bargains with the International Longshoremen and Warehousemen's Union (ILWU), representing West Coast longshoremen and clerks, and with a number of offshore, sea-going unions, including Masters, Mates and Pilots, Marine Engineers Beneficial Association, American Radio Association, and Seafarers International Union-Pacific District, all of which represent sea-going personnel. Our industry has an earlier history of abrasive, even violent labor relations beset by frequent strikes, slowdowns and resistance to mechanization. I am pleased to report to you that West Coast maritime labor relations in recent years represents one of the great successes in free collective bargaining by the parties themselves, achieved without governmentally-imposed solutions.

By cooperative labor-management relations:

We have achieved a long period of labor peace in which our ports have been largely free of strikes or slowdowns;

We have achieved mechanization and have instituted labor saving cargo handling methods;

We have achieved a high standard of living for sea-going and shoreside maritime personnel, together with generous fringe benefit programs financed by the industry as a whole.

As President of PMA my perspective on H.R. 6613 is a West Coast maritime labor relations perspective. My experience and background in labor management relations, however, go well beyond that of the maritime industry. Prior to becoming President of PMA, I was Director of Industrial Relations for the Metal Mining Division of Kennecott Copper Corporation. Prior to that I served as a Director of Industrial Relations for the unionized companies of the Printing Industry of America, Washington, D.C. and before that was a supervisory attorney for the National Labor Relations Board, Washington, D.C.

H.R. 6613 and the problems it seeks to solve in maritime labor relations are best understood in a broader, national context. The remarks of the author of the Bill, Chairman Murphy, of the House Merchant Marine and Fisheries Committee, went to the heart of the matter when he pointed out that the maritime industry:

"* * * has now been singled out as the only industry in the United States which is to be deprived of the benefits of the express congressional policy of free and unfettered collective bargaining without governmental intervention."

No other industry, regulated or not, has its labor bargains subjected to advance approval requirements by a governmental agency charged with economic regulations of an industry's prices for its products and its competitive practices. Recent FMC rulemaking proceedings to exempt collective bargaining agreements from Section 15 of the Shipping Act have not fully solved the problem.

No other industry, regulated or not, has its collective bargaining subjected to governmental second-guessing by an industry regulatory agency (and thereafter by lengthy court appeals) long after the labor bargain has been reached.

No other industry has its labor bargains published in the Federal Register with invitation to employers, customers of employers or anyone who is dissatisfied with the terms to file protests with a government agency, to attack the bargain, to hold it up, or to seek damages against employer parties.

No other industry has the substance of its labor bargains regulated by a non-labor agency lacking labor expertise.

No other industry has its labor bargains judged by legal standards not designed for or related to labor problems but instead enacted to regulate industry pricing and rates.

No other industry has the unique and unfair experience of having an agency regulate management's side of the bargaining table while the union is not even subject to the agency's jurisdiction.

I emphasize that H.R. 6613 would not create any special treatment or favoritism for the maritime industry as compared to any other industry. It would not take away any legal remedies, such as that provided under the antitrust laws or the labor laws, that apply to labor bargains reached in other industries. Rather, it would return maritime collective bargaining to a position of equality with other industries by applying the same legal standards to maintain labor agreements as are applied in all other industries. The Bill would thus restore the situation that prevailed prior to Supreme Court decisions which construed the Shipping Act to give the Federal Maritime Commission unprecedented powers over the maritime collective bargaining process.

The labor laws provide the appropriate remedy in the event of abuses of the collective bargaining process. Those laws represent generations of experience and of delicate legislative and administrative compromises between labor and management, between antitrust and labor considerations, between the objectives of labor peace and avoidance of union imposition of terms on employers outside the bargaining unit. It is under these laws that collective bargaining agreements and their implementation in all industries are and should be governed.

No employer is compelled to join a multi-employer bargaining unit such as PMA and thereby to accept wage or fringe benefit costs applicable to PMA members. The labor laws provide a remedy in the event there should be an attempt to deprive an employer of his right to his own collective bargaining representatives. (29 U.S.C. Section 158(b)(1)(B); *Amax Coal Co. v. NLRB*, 614 F. 2d 872 (3rd Cir. 1980).)

In the event that employers and unions should go beyond the bounds of proper collective bargaining and the labor exemption from the antitrust laws and seek to impose anticompetitive terms on employers outside the bargaining unit, remedies are available under the antitrust laws. (*Mine Workers v. Pennington*, 381 U.S. 657 (1965).)

The labor exemption from the antitrust laws is the means courts have developed to reconcile conflicts between the national labor policy and antitrust policy. Unfortunately the Commission has not, to date, recognized any comparable labor exemption from Sections 16 and 17 of the Shipping Act which are unrealistically applied to labor bargains. Thus, a labor bargain that is exempt from antitrust attack in every industry is—for the maritime industry only—subject to attack as a matter of course under the Shipping Act.

The Congress did not enact legislation designed to subject the maritime industry to special treatment. This result was imposed by the courts. Justice Powell, dissenting in the recent PMA case (*FMC v. Pacific Maritime Association*, 435 U.S. 40 (1978)) made clear that there was no evidence that Congress had ever intended FMC regulation of maritime labor relations. Such regulatory jurisdiction was first found by the court fifty years after Congress had enacted the Shipping Act and over 30 years following the establishment of industry bargaining in the maritime industry.

The Federal Maritime Commission has no expertise in labor-management relations or issues. Its expertise, its statutory mission and its legal standards apply to rate-making by conferences, common carriers and public terminal companies. Giving the FMC jurisdiction over collective bargaining relationships necessarily means that the FMC is placed in the position of applying Shipping Act standards designed to deal with conferences and shipping rates to wage costs resulting from labor agreements for which the standards of the Act were not designed to deal.

The Shipping Act was modeled on the Interstate Commerce Act. Yet railroads, motor carriers and other ICC carriers do not have their labor relations regulated by the ICC or under the standards of the Interstate Commerce Act. The Shipping Act is comparable to the Interstate Commerce Act. Yet airline labor relations are not regulated by the CAB or under the Aviation Act's provisions regarding airline rates. Oil company labor relations are not regulated by the Energy Regulatory Commission, and labor relations of telecommunication companies are not regulated by the FCC.

Oddly, the court decisions give the FMC broad substantive powers over the labor bargain and over its implementation which Congress has withheld from truly expert labor agencies like the NLRB and the Department of Labor. The decision to withhold such power from these labor experts is soundly based on knowledge that the complex issues involved in wage settlement are not readily resolved by the regulatory process. Only in times of extreme emergency has Congress relied on regulation

for wage stabilization. Yet the Supreme Court has thrust the FMC into reviewing, approving, disapproving, or amending the distribution of wage costs of a labor settlement in the maritime industry.

In my judgment, the relative success achieved in West Coast maritime industrial relations beginning in the 1950's is a great tribute to the wisdom of free collective bargaining guaranteed under the labor laws to all industries except, now, the maritime industry. Continuation of our achievement, in my judgment, requires continuation of collective bargaining free from governmentally-imposed solutions and second guessing. This success is jeopardized by having a regulatory agency like the FMC sitting in judgment on the labor bargain.

I believe it will be helpful to the Committee to consider some of the very real practical problems that FMC jurisdiction over labor-management relations has brought.

Every time a labor bargain comes before the Commission for review under the Shipping Act, an uncertainty is created in the collective bargaining process. This uncertainty goes to the ability of the parties to deliver on the bargain they have reached. The very process of guessing what the Commission might do with particular provisions can become a disruptive issue at the bargaining table. This can make reaching a bargain more difficult. Speculation as to FMC action or non-action can become a basis for one side or the other resisting a particular collective bargaining demand.

PMA has experienced a dramatic example in the last round of bargaining with the ILWU. ILWU demanded that certain PMA fringe benefit costs be shifted to a financing method based on assessments of employers upon tonnage handled instead of a man-hour assessment basis. PMA successfully resisted this demand. Since the collective bargaining agreements had to be filed with the FMC, however, interests favoring the ILWU's position for their own reasons are now seeking to have the FMC impose the very tonnage formula that the union had been unsuccessful in imposing on the employers at the bargaining table! My point is not whether the union is right, PMA is right or some other group is right. The point is that the FMC's intrusion into this area and into delicate collective bargaining subjects is an extreme and intolerable disruptive element in the collective bargaining process.

A multi-employer bargaining situation by definition means that the labor bargain represents compromises. Rarely do compromises make everyone happy. But compromise is exactly what the collective bargaining process is all about. FMC jurisdiction, however, encourages litigation and reopens the compromise. Even persons bound by the labor bargain as employers may turn around and litigate for years the "fairness" of the bargain reached, under standards designed for conferences and rate agreements. As a result, years after a particular labor contract has been completed and often well after a particular contract has expired, litigation continues over what its terms should have been. This, I might add, occurs at tremendous expense and risk to all parties.

These problems, created by FMC jurisdiction, are not solved—as the FMC admitted to the House Merchant Marine and Fisheries Committee—by the FMC's recent action exempting collective bargaining agreements from Section 15 of the Shipping Act. (FMC Docket No. 78-11, Exemption of Collective Bargaining Agreements, Vol. 45, No. 75, Fed. Reg. 25798 (April 16, 1980).) First, the FMC's exemption may be challenged in the courts or undone by the FMC at any time on its own. Second, the FMC's exemption fails to exempt employer bargaining positions (themselves an agreement between employers) reached during negotiations and prior to execution of the ultimate collective bargaining agreement. Third, the FMC's exemption does not cover the implementation of the collective bargaining agreement, which by definition requires joint employer action. Fourth, the FMC exemption explicitly leaves the labor bargain subject to regulation, litigation and amendment pursuant to Sections 16, 17 and other sections of the Shipping Act that are parts of an integrated legislative program for regulation of steamship and terminal company rates and practices. This integrated statutory program was not in any respect designed to deal with labor problems and indeed makes no reference to labor considerations.

We are convinced that this legislation is necessary and that the Commission's recent and partial administrative exemption of collective bargaining agreements from Section 15 of the Shipping Act, 1916, is inadequate. The Commission's action does not create a complete Section 15 exemption. It can be revoked at any time by the Commission or a court. It fails to resolve the conflict between the national policy favoring free collective bargaining and the regulation of labor bargains under other sections of the Shipping Act.

H.R. 6613 would remove these very real problems and put the industry and those who use its services on the same footing as every other industry in this country.

I very much appreciate the opportunity given to PMA to comment on H.R. 6613. I will be happy to answer any questions the Committee may have.

[The following information was subsequently received for the record:]

PACIFIC MARITIME ASSOCIATION,
San Francisco, Calif., June 16, 1980.

Mr. JOHN HARDY,
Staff—Senate Commerce Committee, U.S. Senate, Committee on Commerce, Science,
and Transportation, Washington, D.C.

DEAR MR. HARDY: Here are the answers to questions submitted to PMA at the hearing before the subcommittee on H.R. 6613.

Question. 1. In your judgment, would the compromise proposal ensure equal treatment of shippers, cargo and localities?

Answer. H.R. 6613 as it passed the House would be the method most likely to achieve fair and equal treatment of shippers, cargo and localities because it leaves the matter to the collective bargaining process. Subjecting labor-management agreements to the FMC's Shipping Act standards which were not designed to deal with such questions, is highly unlikely to achieve greater equity in the treatment of shippers, cargo and localities. To the extent the compromise proposal would still involve the FMC in this process, we doubt that it will achieve the equal treatment objective.

Question. 2. In your view, is the compromise proposal preferable to H.R. 6613, in its present form?

Answer. No.

Question. 3. Do you agree that whatever legislation would be passed should not affect the outcome of any pending cases before the courts of the FMC?

Answer. Logically, whatever legislation is passed should affect the outcome of pending cases. If a matter is pending before the FMC for approval under Section 15, for example, which would not fall within Section 15 under the Bill, there is no reason to continue the proceeding. There seems little point in having cases litigated and decided at great expense under a legal standard that has been changed by the Congress. With respect to the compromise proposal, present PMA cases pending before the Commission do involve a substantial tonnage assessment element. Therefore, under the compromise proposal, litigation would continue in any event insofar as the tonnage element is concerned.

Question. 4. When is your present master contract due to expire?

Answer. July 1, 1981, for Shoreside contracts; June 15, 1981 for Offshore contracts.

Question. 5. In other words, there would be no threat to labor peace on the Pacific Coast if legislation were not enacted this year?

Answer. PMA would certainly hope not.

Question. 6. If collective bargaining agreements are exempt from the scope of Section 15, they will be subject to the antitrust laws unless the "labor exemption" applies. What is your view on this?

Answer. PMA's basic position is that the labor exemption from the antitrust laws is adequate to protect maritime collective bargaining and implementation thereof. In essence, PMA wishes to be treated the same as other industries.

Question. 7. In its testimony, the FMC has proposed three alternative draft bills. Which do you prefer?

Answer. Alternative 3.

Question. 8. Under the present situation, if an aggrieved party seeks relief in the Courts from a practice growing out of an agreement implementing a collective bargaining agreement, he can go into Court and seek a temporary restraining order and then a preliminary injunction, etc. These are fairly expeditious procedures involving days, or a few weeks at most.

If, on the other hand, a party seeks relief from such a practice before the FMC, can he obtain it as expeditiously?

Answer. No.

Question. 9. Are shippers such as Crown-Zellerbach and Weyerhaeuser eligible to join your Association?

Answer. Yes, because they operate their own fleets. Crown Zellerbach through its subsidiary, Norsk-Pacific Line, is a member of the Association.

Question. 10. Is it your understanding that if collective bargaining agreements are removed from Section 15, the parties to such agreements would be exposed to possible antitrust prosecution?

Answer. Yes, but PMA would understand that it would be subject to the same laws and rules as other industries. On balance, such risks as exist under the antitrust laws are far preferable to the immense expense, delays and inapplicable standards provided by the Shipping Act.

Question. 11. At the request of the Subcommittee, the FMC has prepared an alternative to H.R. 6613, which would exempt maritime labor agreements from Section 15 of the Act. The effect of this proposal would be to permit collective bargaining agreements and assessment agreements to become effective immediately. There would be no need for filing with an approval by the FMC.

(a) In your view is the FMC's alternative preferable to the compromise which has been proposed?

Answer. No. (We assume the question relates to Alternative 1.)

(b) Suppose an additional provision were added to the FMC's alternative which would provide that if the FMC subsequently finds a maritime agreement or activity based upon it to be unjust or unfair, the agency could grant only prospective relief, and that such prospective relief must be granted within 180 days after a notice and hearing upon the agreement or practice complained of?

PMA would favor this additional provision.

Question. 12. Very simply, much of the opposition to H.R. 6613, is based on the contention that funds raised by assessment against specific cargoes introduce issues of fairness as between various shippers; and the nature of these abuses is such that they lend themselves to consideration under the antitrust discrimination sections of the Shipping Act, and are entirely outside the scope of the labor laws.

Would you please comment?

Answer. PMA disagrees with the assertion that issues of fairness, incorrectly characterized as "abuses", lend themselves to consideration under the antidiscrimination provision of the Shipping Act and are outside the scope of the labor laws. All multi-employer labor agreements, by definition, affect different employers and their customers differently depending on how the costs may impact them. An absolutely uniform labor cost, such as a wage cost or fringe benefit cost, is going to have a vastly different impact on employers depending on the extent to which they utilize labor. The pursuit of fairness issues in this context is the pursuit of a will of the wisp. These industrial problems simply are not solvable at any reasonable cost by use of the Shipping Act regulatory process and the Federal Maritime Commission.

Yours very truly,

EDMUND J. FLYNN, *President.*

PACIFIC MARITIME ASSOCIATION,
San Francisco, Calif., June 16, 1980.

Mr. WILLIAM MCCLUSKEY,
Staff—Senate Commerce Committee, U.S. Senate, Committee on Commerce, Science and Transportation Washington, D.C.

DEAR MR. MCCLUSKEY: Thank you for your letter of June 9, 1980 which invites me to answer two additional questions.

Question. 1. If a cost allocation is challenged, what occurs to labor's funds while FMC or the Courts are settling this problem?

Answer. In the past, while such litigation continues for years at very considerable expense to all concerned, the FMC has granted interim approvals so that the funds necessary to finance the plans and pay the benefits are obtained. A very serious problem occurs if the FMC or the courts later order retroactive adjustments of assessment formulae according to an FMC-derived assessment method. Attempts to apply formulae retroactively create extraordinarily difficult problems of collection and of fairness. For example, a stevedore contractor generally passes on his labor assessment costs to his ocean carrier customers. If, three years later, he receives credits or reimbursement of funds because some subsequent FMC-imposed formula is more favorable to him be obligated to attempt to reimburse some of his "over paying" ocean carrier customers. By the same token, if he receives a large bill for past, so-called overassessments, he, as a practical matter, has little ability to recover these costs from his customers. Even a system of future "credits" to adjust past costs inevitably operates unfairly. A new entrant under such a system may be penalized or rewarded along with persons who earlier were "over" or "under" assessed.

Question. 2. What should be the effect if the FMC was denied the right to restructure cost allocations among shippers retroactively? Would only the shipping company that was initially over-charged bear the brunt? Or would the labor force be impacted as well?

Answer. First, it is a mistake to assume that FMC-imposed formula means that an industry-designed formula rejected by the FMC in favor of its own formula produced "overcharges". There are differing ways of making assessments, all of which have arguments pro and con. The term "overcharge" means nothing more than a higher charge than would be paid under the formula decreed by the FMC. With respect to charges under an industry formula which the FMC disapproves in favor of its own formula, the shipping companies or the stevedoring contractors rather than the labor force itself would ordinarily bear the brunt.

Yours very truly,

EDMUND J. FLYNN, *President.*

Senator INOUE. Mr. Herman.

STATEMENT OF JAMES R. HERMAN, PRESIDENT, INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION

Mr. HERMAN. Well, I would, Senator, just briefly echo the point of view expressed by Mr. Gleason, Mr. Dickman, Mr. Lambos, and now Mr. Flynn. We are supportive of the passage of H.R. 6613.

I was not aware until I arrived in Washington this morning that there was an effort to achieve a compromise between the opponents and those of us that are proponents of that legislation. I have not had an opportunity to review it, so I will not be able to comment as to whether or not it is fully satisfactory or to make any other observation.

We believe very strongly that it is not in the interests of the national objective for effective and peaceful collective bargaining to have ongoing interference by any agency of the Federal Government. And we feel very strongly that it is only a matter of time before it precipitates a strike, a settlement of collective-bargaining issues notwithstanding.

The ILWU, as a matter of fact, included in our 1978 longshore settlement a provision that in the event there was any interference or any rejection as a consequence of Federal Maritime Commission review, we reserve the right to reopen the contract, cancel it, and exercise a strike option. We were hopeful and we were pleased that that did not occur. But we are alarmed that it could occur.

Bargaining in the maritime industry is at least tumultuous. There are many difficulties, not the least of which is the introduction of technological change that has made the industry a capital intensive one rather than labor intensive.

Our union, in dealing with the PMA, has had one strike since 1949, and that occurred in 1971. We are hopeful that that record will be maintained and we think that it is critical that once the parties come to grips with the difficult questions that they have to deal with and once the contract is ratified by both sides, that then the respective parties to the agreement on both sides of the table, whether it be my own constituency or the membership of the PMA, that they accommodate that agreement entered into and ratified.

So we are at this moment, I could indicate, in support of H.R. 6613. I agree with you that the spirit of compromise more often than not is the practical approach. And while I have not had an opportunity to absorb the proposed amendments, we would certainly take a healthy look at it.

Senator INOUE. What are your thoughts on the contention expressed by the shippers from the west coast, that they need the FMC to air their grievances that may result from collective-bargaining agreements?

Mr. HERMAN. I would reject that. The shippers on the west coast have the advantage of industrywide bargaining from Seattle to the Mexican border. Where we deal with the Pacific Maritime Association, those bargaining arrangements take into consideration as best we can all of the variables in the industry.

We touch basis with respect to each port's operation, the different peculiarities that may exist. There are at the table those people who are stevedore operators, who effectively articulate a particular position that may collide with one from a container operator. In all cases, the parties in my experience advocate positions that are always in the interests of the shippers.

And I don't see that shippers deserve special treatment with respect to the end result of a collective-bargaining agreement in maritime any more than they would have it in the dispatch of air freight. There are variables there. There are variables in the movement of cargo by truck or by rail. And while there are no special arrangements to give shippers a voice beyond the bargaining table, at the bargaining table those variables are taken into consideration.

What the shippers want here is a double whammy.

Mr. Lambos did not only refer to the antitrust litigation that is possible and available, but he also alluded to common law. And while that might be cumbersome, difficult, timely, costly, that is the name of the game when you engage in challenges to what people did. That includes everyone.

They want not only to reserve the right to test what is done through the legal procedures, but they want a government review so as to back up what they might have a weak case for when it comes to the courts.

Senator INOUE. Then it's your contention that even if this bill passed, the shippers on the west coast would have legal recourse to air their grievances?

Mr. HERMAN. Yes, sir.

Senator INOUE. Mr. Flynn, would you care to add anything more?

Mr. FLYNN. I think Mr. Herman's response pretty much paraphrases whatever views I might have on the subject. I think there are remedies available through other channels, and I think that the area that we're talking about—I get back to what I said in my opening remarks: That what we're talking about is expertise and what's in the best interests of the industry.

We believe that the people in the industry, who make up the industry, are the ones who have had the expertise to do it. And just as in every other industry where collective-bargaining is a factor, you have the National Labor Relations Board and you have anti-trust. And as my prepared statement which you have incorporated in the record points out, that maritime is the only industry that has the FMC or a government agency looking over its shoulder with respect to agreements that it reaches in the collective-bargaining field.

Senator INOUE. Is there any justification you can think of to single out this one area for this special treatment?

Mr. FLYNN. I think it's a very simple one. It is the bottom line. People think they can save a dollar by having another arena in

which to air their views. For example, some of the protestants at the table here a little while ago—we have had assessment formulas on the west coast for a long time, and apparently they didn't think that maybe somebody else was paying part of the bill that they should have been paying, or if they didn't bother them.

We had a largely labor intensive assessment up until 1980. We had a man-hour assessment. And the protestants to the man-hour assessment were the people that handled general cargo. And we responded to that as a result of an issue that was raised in our 1978 collective bargaining by the ILWU. The ILWU thought it was unfair that the man-hour assessment would be the principal vehicle for raising moneys necessary to pay for various fringe benefits that were part of our collective bargaining agreement.

And part of our response to the ILWU demand was, well, we will review it. And we did the best job that we could do. We hired an outside consultant to review the history of the assessments on the west coast and came up with something that the outside consultant believed perhaps was equitable in terms of changing conditions. And we reviewed it very intensively, the recommendations of the consultant, and we agreed that perhaps it was time for a change.

And there are concerns about container people having had a more advantageous rate as a result of the labor-based assessments. But the fact is, the container people's assessments went up as a result of the formula and schedule that was introduced by PMA on January 1, 1980.

That is as a bottom line. I guess if I was in their place I would do the same thing. If I could save a dollar, I would be looking for a place to save it.

Senator INOUE. But it is your contention that the shippers have a real opportunity to make an input in the determination of assessments?

Mr. FLYNN. Well, if they are not members of the association, they have the ability through their agents who are members of the association, to make whatever input is required.

PMA has, let's say, they have an executive committee of five people. We have two representatives of American-flag carriers, two representatives of foreign-flag carriers, and a representative from the stevedores. They represent the interests of the industry.

And I sit with them and I work with them, and I believe the industry and not a particular company or a particular cargo is their prime interest in serving as responsible executives within the association.

Senator INOUE. Mr. Herman, do you have anything to add?

Mr. HERMAN. Well, I did hear claims laid here this afternoon that the method of making fringe benefit assessments was not a collective-bargaining issue. Others said it should not be. The fact is, whether it should be or it should not be is not important. It is.

The ILWU in 1978 very aggressively resented what we heard from industry sources was an inequity in what was then the method of assessing these benefits. As a consequence of what we heard and because of points of view that we had, the ILWU advocated, as a condition of coming to terms with an overall agreement, that there should be reforms. The ILWU was in fact the catalyst for ultimately achieving certain reforms; not all that we wanted,

but no different than anything else with a collective-bargaining question. Relief was provided as a consequence of it being an identified and acceptable collective-bargaining question.

We intend to pursue the issue next year when the contract again expires. And we are optimistic that more relief will be provided, and we certainly are not unwilling to hear other arguments. If it is alleged that there are other or new inequities, clearly it is a collective-bargaining matter.

Now, there are companies that have appeared here who certainly have the option of belonging to the PMA. Indeed, at least one of those companies did belong to the PMA, Weyerhaeuser until some time around the midsixties, the exact date I'm not certain of. Those companies could elect to have a voice and an input, a forum, if you will, on these questions within that employer association. Whatever the reason is that they don't choose to exercise that option is for them to explain.

Stevedoring companies have regularly represented a point of view having to do with assessments, and parties, I think, did come to grips with at least some of the things we heard. We share their point of view and we are hopeful that in the not too distant future total resolution of that problem will be achieved through the collective-bargaining process. So that I agree with Mr. Flynn that the bottom line is the buck.

But we deal in an industry that has an incredible number of variables, and I would hope that shippers or stevedoring companies or steamship companies or terminal operators, that they would act with the same discipline that we expect our members to act with when it comes to the collective-bargaining process that ends in an agreement; that whatever difference they might have, they would handle within their own associations.

We are obligated to handle differences that we have within our organization, and that is the best way to avoid unnecessary confrontations that can come about accidentally and from which no one is immunized. If the shippers, because they have a particular point of view on a single issue, represent to an ultimate conclusion where there is a brawl, they are not going to be insulated from that, and that is what they had better take a hard look at.

And Mr. Gleason I think very effectively represented that point of view. And we would hope that they would take a harder look as to the consequences of FMC involvement or interference in a way that would have a very severe effect, far beyond what they complain about here today. And I think that their position in the overall is less than realistic in terms of what continued FMC involvement in the collective-bargaining process could end up with, and that's what we want to avoid. And I think that we have the record of having avoided it, and that is pretty much where we're at, Senator.

Senator INOUE. Well, gentlemen, I thank you very much.

Mr. HERMAN. I would just make one other comment. By the way, one of the longstanding problems we have had in this industry, west coast, east and gulf, is capturing retroactive moneys. There are too many foreign-flag operators, fly-by-night. They are in today and you might not ever see them again. No way you can capture significant amounts of moneys in that area, no possibility.

Senator INOUE. It is impractical?

Mr. HERMAN. Totally impractical.

Senator INOUE. You have been extremely helpful. We will be studying the transcript, and as I have indicated to the others, we would like to submit to you a few technical questions for your consideration and invite you to join our staff in coming out with a committee draft bill.

We would like to act on this before the convention season opens up. Thank you very much.

[The statement follows:]

STATEMENT BY JAMES R. HERMAN, PRESIDENT, INTERNATIONAL LONGSHOREMEN'S & WAREHOUSEMEN'S UNION

Mr. Chairman, members of the subcommittee, and staff, the International Longshoremen's & Warehousemen's Union is a labor organization representing longshore industry workers in the states of California, Oregon, Washington, Alaska and Hawaii. Our primary agreement, and that which sets the pattern for our agreements with employers in Alaska and Hawaii, is the Pacific Coast Longshore Contract Document negotiated with steamship and stevedore companies represented by the Pacific Maritime Association.

The Union and the employers with whom we negotiate take pride in the fact that there has been only one industry-wide strike in our jurisdiction since 1948. We fear, however, that the recent decision of the Supreme Court discussed below, threatens to destroy the relationships and stability in bargaining we have struggled to achieve. The ILWU, therefore, vigorously supports H.R. 6613, which passed the House by a vote of 358-2, and urges its prompt enactment.

H.R. 6613 would have the practical effect of setting aside the decision in *Federal Maritime Commission v. Pacific Maritime Association*, 435 U.S. 40 (the PMA case), in which a divided Supreme Court (5-3) held that collective bargaining agreements as a class were not exempt from the filing and approval requirements of Section 15 of the Shipping Act of 1916. Contrary to the unanimous decision of the Court of Appeals for the District of Columbia, the Court's majority said that the language of the Shipping Act, when read literally, required that result, even though it recognized that such a result could have an adverse impact upon collective bargaining in the maritime industry.

The three dissenting justices did not believe the language of the Shipping Act required such filing. They were seriously concerned about the impact of the majority decision on maritime collective bargaining, and they felt that the majority decision was like "using a sledge hammer to fix a watch".

The ILWU is of the view, as expressed by the unanimous Court of Appeals and the three dissenting justices, that it was never the intention of Congress to confer jurisdiction over collective bargaining agreements on the Federal Maritime Commission. If the Supreme Court did read the Act correctly, a question upon which there is considerable doubt, Congress now should correct that interpretation by explicitly removing such agreements from the jurisdiction of the Commission. The proposed legislation will make it abundantly clear that the Shipping Act does not apply to collective bargaining agreements, and will thus eliminate the uncertainty and delay in bargaining which result from applying the filing and approval requirements of the Act.

Since the PMA decision, the FMC itself has recognized that if all collective bargaining agreements between maritime unions and employers had to be filed for approval, "needless uncertainty and delay in the collective bargaining process could result".

On April 16, 1980, the Federal Maritime Commission took action which in part at least exempts collective bargaining agreements from Section 15 of the Shipping Act (FMC Docket No. 78-11, Exemption of Collective Bargaining Agreements, Vol. 45, No. 75, Federal Register 25798, April 16, 1980). While the Commission is to be applauded for its sensitivity to the problems of the industry addressed by H.R. 6613. I fear that their recent action is inadequate and leaves open to a large extent the possibility of Commission intervention in collective bargaining in the maritime industry.

The FMC's recent exemption may be challenged in the courts or reversed by the Commission at any time, does not cover the implementation of collective bargaining settlements which by their nature require joint employer action, and specifically leaves a bargaining settlement subject to regulation, litigation, and in effect amend-

ment under Section 16, 17, and other sections of the Shipping Act relating to the level and fairness of steamship and terminal company rates and practices.

This most recent exemption by the Commission is clearly a step in the right direction, and is evidence of the present Commission's awareness of certain stumbling blocks which are implicit in the collective bargaining process. The ILWU is concerned, however, that at another time and with different personnel, the Commission might take a different stand, one which would disrupt collective bargaining and do irreparable damage to labor relations.

As the Federal Maritime Commission itself put it in its explanation of its once proposed Rule 525:

"The Commission concurs with the consensus of opinion expressed in the comments on the Advance Notice of Proposed Rulemaking that any procedure which effectively leaves the legitimacy of a collective bargaining agreement (or any provision(s) thereof) in limbo pending Commission review—regardless of the dispatch with which such review could be undertaken—has a potential for disrupting the collective bargaining process to considerable extent. The clear pattern of collective bargaining in the maritime industry is that immediate implementation is called for once a settlement has been reached. The adoption of any pre-implementation filing requirement would cause delay and introduce a destabilizing element into the collective bargaining process which could precipitate or prolong strikes and cause substantial harm to the industry, its employees, its customers and the national interest. Moreover, the uncertainty associated with potential disapproval of such agreements, even if they were permitted to be implemented prior to Section 15 finality, may hamper labor-management negotiations and relations in a manner contrary to the national labor policy of the United States without any corresponding Shipping Act benefit."

The ILWU, therefore, supports H.R. 6613 which unequivocally would make clear what all apparently are agreed to—that the Federal Maritime Commission has no business dealing with collective bargaining agreements.

I appreciate the opportunity afforded us to appear here today to express our point of view, and will be pleased to answer any questions you might have.

Senator INOUE. Our final panel is made up of the executive vice president and general counsel of the International Association of the NVOCC's: Mr. Raymond P. deMember; and the general counsel of the National Customs Brokers Forwarders Association of America, Mr. Gerald Ullman.

Welcome, gentlemen. Who will be the first?

STATEMENTS OF RAYMOND P. DeMEMBER, EXECUTIVE VICE PRESIDENT AND GENERAL COUNSEL, INTERNATIONAL ASSOCIATION OF NVOCCS; AND GERALD ULLMAN, GENERAL COUNSEL, NATIONAL CUSTOMS BROKERS FORWARDERS ASSOCIATION OF AMERICA, INC.

Mr. DeMEMBER. Mr. Chairman, I'm Raymond deMember, executive vice president and general counsel of the International Association of the NVOCC's.

Mr. Chairman, I learned of the compromise at the hearings today. I was not aware of it previous to the time that the hearings began, and I have not seen it or had a chance to study it.

So I am somewhat limited in commenting on it. However, from listening to the discussion, I don't really think that it goes to our objections to H.R. 6613.

I won't repeat all that I've said in my statement, but primarily, what we stated was that if the Congress would like to correct what they believe is an error in the *Federal Maritime Commission v. PMA* case, with respect to section 15 jurisdiction of collective bargaining agreements, we can understand it and support it.

However, H.R. 6613 goes beyond that and provides for exemption from other sections of the act for collective bargaining agreements

and for the implementation of provisions in the collective bargaining agreement.

The chairman asked several witnesses whether they believed that Mr. Gleason and his workers should be treated any differently than the railroad workers and the carriers under the Interstate Commerce Act, and the teamsters and the trucking companies under the Interstate Commerce Act.

I think to the extent that you would remove section 15 jurisdiction in terms of the filing and prior approval requirements, you would be making them equal. But to the extent that you eliminate the application of other sections of the act to the implementation of collective bargaining agreement provisions, I think you exalt the carriers of ocean transportation and the workers in ocean transportation.

There is no law on the books of the United States that tells teamsters and truckers, you may violate section 5 or 15 or whatever, of the Interstate Commerce Act in your agreement or your implementation.

Nor is there any law exempting railroad carriers or railroad workers from sections of the Interstate Commerce Act. And yet, that is what is being asked for here.

And we strongly objected to that and we think that it is not making them equal; it is putting them in a special status and category.

[The statement follows:]

STATEMENT OF RAYMOND P. deMEMBER, EXECUTIVE VICE PRESIDENT AND GENERAL COUNSEL, INTERNATIONAL ASSOCIATION OF NVOCCS

My name is Raymond P. deMember. I am the Executive Vice President and General Counsel of the International Association of NVOCCS. Members of the Association are non-vessel operating common carriers (NVOCCS or NVOs) recognized by Congress, the Courts, the Federal Maritime Commission and other federal agencies.

We appreciate this opportunity to submit the views of NVOCC on H.R. 6613. The NVOCC operates and provides transportation in the waterborne foreign and domestic commerce of the United States, and files tariffs covering its transportation rates with the Federal Maritime Commission the same as any other common carrier by water. The NVOCC, as a common carrier by water, performs an essential and valuable service to the public by assembling and consolidating less-than-container load (LCL) shipments into container loads, then transferring the loaded containers to the pier for shipment overseas. By thus consolidating LCL shipments for the small shipper, or the less-than-container load shipper; by preparing all of the documentation including waybills, bills of lading and manifests; by routing and tracing shipments and performing transfer services; the NVO not only reduces loss, damage, pilferage, congestion, and delay at the piers, but the NVO in effect becomes the export marketing and traffic management arm of the less-than-container load shipper. The NVO thereby truly makes it possible for many shippers, who, except for the NVO, would not be able to participate in the export trade of the United States on a realistic cost and service competitive basis.

The Association can well understand and might well support a Congressional determination to overrule legislatively the 1978 Supreme Court case of *FMC v. PMA* (435 U.S. 40). The Supreme Court held in the *PMA* case that collective bargaining agreements were subject to the approval and disapproval provisions of Section 15 of the Shipping Act.

The House Committee on Merchant Marine and Fisheries in its report (No. 96-876) on H.R. 6613 said:

"The filing and prior approval requirements of Section 15 were never intended to apply to bona fide collective bargaining agreements. The FMC for over half a century did not consider collective bargaining agreements to be included within the scope of Section 15."

Fine! If Congress desires to correct the Supreme Court holding and make clear that it did not and does not intend that collective bargaining agreements be subject to the filing and prior approval requirements of Section 15 then it should do so. However, H.R. 6613 overreacts and overreaches. H.R. 6613 undoes what no one had complained of for over 50 years, and that is, the application of other sections of the Shipping Act, especially 14, 16, 17, 18 and 22 to unlawful, discriminatory, preferential, prejudicial and unfair activities by carriers against the shipping public if such activities are tied to a provision of a collective bargaining agreement. The Congress would not consider suspending all criminal laws or all tax laws for unlawful activities linked to provisions of collective bargaining agreements—there is no rational basis for suspending all shipping laws for unlawful shipping activities linked to provisions of collective bargaining agreements.

It is one thing to say that collective bargaining agreements are exempt from the filing and prior approval requirements of Section 15, so as not to impede the collective bargaining process—it is another thing to tell the parties that they may agree on and implement any activity which unjustly discriminates amongst shippers without fear of complaint under the Shipping Act.

What would prevent the carriers from agreeing in a labor agreement to change the carriers' tariffs so as to grant any shipping company whose officers or stockholders were somehow related to union members a 90-percent discount from the actual published tariffs? That may seem a ridiculous example—however, such a clearly presently unlawful tariff provision unrelated to transportation factors, and others like it, would be permitted under H.R. 6613 without any recourse by shippers to file to complaint under Section 22 of the Shipping Act. By this bill shippers would lose the only practicable forum they have to protect themselves against unjustly discriminatory and unreasonable practices when those practices are linked to collective bargaining agreements.

There is no need to extend the labor agreement exemption beyond the Section 15 filing and prior approval provisions—there is great harm to the shipping public and the shipping industry in extending such exemption to all other sections of the Shipping Act.

We respectfully and earnestly urge the Committee to reject H.R. 6613.

We thank the Chairman and members of this Committee for this opportunity to present our views on H.R. 6613.

[The following information was subsequently received for the record:]

INTERNATIONAL ASSOCIATION OF NVOCCS,
Washington, D.C., June 11, 1980.

HON. DANIEL K. INOUE,
Chairman, Subcommittee on Merchant Marine and Tourism, Senate Committee on Commerce, U.S. Senate, Washington, D.C.

DEAR CHAIRMAN INOUE: This is in response to several questions you requested we answer at the hearing on H.R. 6613 on June 4, 1980.

Question. Do you agree that whatever legislation would be passed should not affect the outcome of any pending cases before the courts or the FMC?

Answer. Yes, we strongly believe no legislation should affect the outcome of any pending cases before the courts or the FMC.

Question. At the request of the Subcommittee, the FMC has prepared an alternative to H.R. 6613, which would exempt maritime labor agreements from section 15 of the Act. The effect of this proposal would be to permit collective bargaining agreements and assessment agreements to become effective immediately. There would be no need for filing with and approval by the FMC.

(a) In your view is the FMC's alternative preferable to the compromise which has been proposed?

(b) Suppose an additional provision were added to the FMC's alternative which would provide that if the FMC subsequently finds a maritime agreement or activity based upon it to be unjust or unfair, the agency could grant only prospective relief, and that such prospective relief must be granted within 180 days after a notice and hearing upon the agreement or practice complained of?

Answer. The FMC has proposed three alternatives, as we understand the FMC proposals.

The first proposal would exempt maritime labor agreements from section 15 of the Shipping Act. Such agreements are defined to include not only collective bargaining agreements but also agreements among carriers preparatory to, and agreements among carriers implementing, collective bargaining agreements.

We have already stated our position accepting that part of the FMC's alternative which exempts collective bargaining agreements from the prior filing and prior

approval requirements of section 15. We firmly believe that this is all that is necessary to remove any real possible encumbrance on the collective bargaining process. Even now, this exemption has been accomplished by regulations of the Commission so that there is no critical need for immediate legislative action. The Congress should carefully consider removing the existing protections the shipping public has against carriers' unjust discrimination and unfair preferential treatment of shippers.

We are opposed to extending the exemption to carrier agreements preparatory to, or implementing, collective bargaining. Although carrier agreements for assessments to fund union benefits may appear to be the most likely type of agreement in this category, there are others which can harm competing carriers and the shipping public.

A recently decided case, FMC Docket 77-23, Agreement 10294 (Dec. 1979-19SRR 1113) involved precisely the kind of carrier implementation agreement, which was found to be "disapprovable on grounds of unjust discrimination alone under shipping law" and which could not be so found under H.R. 6613 as it now reads or under the FMC alternative proposal or under the compromise proposal.

That case involved a carrier agreement, under union pressure, to prohibit carrier granting of discounts or allowances to NVOCCs consolidating for small shippers containers inland (using teamster or other non ILA labor) while continuing to grant such discounts or allowances to those consolidating on the pier (using ILA labor). A clear case of unlawful discrimination under the Shipping Act, so held by the FMC Administrative Law Judge, but which would not be available to shippers under the exemptions of H.R. 6613, or the FMC alternative or the compromise proposal.

The Administrative Law Judge in that case found:

"In April 1977, the ILA called a selective strike against carriers represented by NYSA. The strike ended after carriers had agreed to include a provision calling for the doubling of container royalty payments and *after the carriers agreed to file Agreement No. 10294 for Commission approval*" (Emphasis added). (19SRR 1134.)

The Judge further stated . . . "Agreement No. 10294, purportedly designed, among other things, to increase utilization of LCL facilities at pierside, is really aimed at one group, the off pier consolidator which is not employing ILA labor." (19SRR 1149.)

And ". . . the Agreement [10294] would establish a system of discrimination among shippers, i.e. paying allowances to on-pier NVOs but not to off-pier NVOs [whether 10 miles from the piers, or 1,000 miles from the piers] both groups being shippers in their relationship to the ocean carrier". (19SRR 1153.)

And finally—"the essential point . . . is that carriers subject to regulation under the Shipping Act *cannot discriminate unjustly among shippers notwithstanding underlying benefits to a labor union written into a labor contract*". (Emphasis added.) (19SRR 1156.)

It is this aspect of shipper protection that Congress should be determined to preserve—it is this aspect of shipper protection that proponents of H.R. 6613 want to remove—it is this aspect of shipper protection that is not preserved in H.R. 6613, the FMC alternative in its widest exemption and in the NYSA compromise proposal. The real aim of proponents of H.R. 6613 is to remove such findings of violation, of unjust discrimination against shippers, under the existing law. The Congress should avoid getting itself embroiled in particular ocean carrier vs. NVO disputes or labor jurisdictional disputes through the vehicle of H.R. 6613 purportedly aimed at making certain that ocean transportation management and labor may engage in "free and unfettered collective bargaining." The "fetters" have been removed by FMC regulation while still preserving the protection shippers have against the kind of unjust discrimination cited above in FMC Docket 77-23. It is preferable to exempt collective bargaining by regulation as the FMC has done, to maintain flexibility and to preserve the authority to correct unforeseen abuses that may arise in the future. There is now no impediment to free and unfettered collective bargaining.

To the extent the FMC alternative would limit the exemption of collective bargaining agreements from the prior filing and approval requirement of section 15, this has been done by regulation. To the extent such exemption includes carrier agreements (whether assessment or otherwise) preparatory to or in implementation of collective bargaining agreements we would oppose it as an unwarranted removal of current shipper protection and as unnecessary to legitimate collective bargaining.

We are also opposed to the suggested proposal in part (b) of the above question relating to the FMC alternative, namely, the granting only of prospective relief by the Commission for unjust or unfair activities. Most or all of the injury and damages to shippers and others from unlawful activities of carriers may have already occurred prior to the Commission finding. There is no rational basis for

removing this traditional Anglo-American legal protection and right of shippers and others to recover for past injury inflicted by unlawful activity.

Question. Under the present situation, if an aggrieved party seeks relief in the Courts from a practice growing out of an agreement implementing a collective bargaining agreement, he can go into Court and seek a temporary restraining order and then a preliminary injunction, etc. These are fairly expeditious procedures involving days, or a few weeks at most.

If, on the other hand, a party seeks relief from such a practice before the FMC, can he obtain it as expeditiously?

Answer. The assumption in the question is that relief in the Courts is more expeditious than relief before the FMC which is not true. In a prior case dealing with an earlier consolidation allowance controversy, the NVOs sought in U.S. District Court S.D.N.Y. (76 Civ. 4418) to obtain an injunction against the carriers which injunction was delayed by carrier opposition, discovery requests and questions of FMC primary jurisdiction. We had also filed at the same time a complaint with the FMC (FMC Docket 76-54). We were only able to obtain a consent court injunction in November 1976, agreed to by the carriers, after our own discovery requests and scheduled depositions in the FMC case, whereby both the FMC case and the court case were settled at the same time. Without the FMC remedy justice would have been delayed and possibly unattainable.

Question. 1. In your judgment, would the compromise proposal ensure equal treatment of shippers, cargo, and localities?

2. In your view, is the compromise proposal preferable to H.R. 6613, in its present form?

Answer. We do not believe the compromise proposal would ensure such equal treatment for the reasons cited above. The compromise still exempts agreements (except assessment) from sections of the Shipping Act other than section 15. We do not believe this affords the necessary protection to shippers and others described above. Nor, for the reasons cited in our response to the grant of only prospective relief in the case of the FMC alternative, do we believe that such prospective relief in the compromise proposal is adequate to protect shippers and properly compensate for the injury and damage caused to shippers. And for this reason we do not believe the compromise is that much preferable to H.R. 6613.

During the hearings on June 4 the Chairman of the Subcommittee questioned our interpretation in our testimony, which stated the bill would relieve carriers not only from Section 15 filing and approval requirements for collective bargaining agreement—but that carriers were further absolved from violations of all other sections of Shipping Act, 1916.

However, the clear language of the bill unequivocally states, after exempting agreements from section 15 of the Shipping Act, in section (b) “. . . collective bargaining agreements and agreements preparatory to, and for implementation thereof, shall not be subject to Commission jurisdiction under any other provision” of the Shipping Act. (emphasis added)

The New York Shipping Association and International Longshoremen's Association claim that carriers and unions should not be any worse off than trucking companies and the teamsters nor the railroads and the workers of the railroad unions. However, H.R. 6613 goes beyond removing prior filing and approval requirements of Section 15. By removing applicability of other sections of the Shipping Act you place carriers and unions in ocean transportation in a more exalted and exempt position than any carriers or unions in other modes of transportation.

There is no law that says truckers and teamsters may violate the Interstate Commerce Act with impunity so long as the truckers can show that they are merely implementing a collective bargaining agreement.

There is no law that immunizes railroads and railroad workers unions from violations of the Interstate Commerce Act so long as they can show that such practice or implementation stems from provisions of collective bargaining agreements.

Although assessments are not the only possible area for carrier discriminations, if there is an assessment by carriers required to fund a benefit negotiated by the union in a collective bargaining agreement and if the carriers implement that requirement with an assessment that is “unreasonably disadvantageous” (section 16) or is “unjustly discriminatory” (section 17) toward pineapple shippers as opposed to other shippers of produce, the pineapple shippers, who have had for many years, a right to bring an action concerning unjust discrimination as to shippers before the FMC, under H.R. 6613, no longer are to have that right. The same can be said of cotton and sugar shippers, shippers of seafood, apples or indeed of any product.

Shippers should continue to be protected by having the expert agency determine whether unfair and unjust discrimination against various classes of shippers is in

fact taking place by carriers' practices, whether such unjust discrimination is based on some connection with a collective bargaining provision or on some other basis.

Why should not those involved in implementing funding or any other provision of a collective bargaining agreement be told that you are free to bargain collectively without any requirement to submit the collective bargaining agreement to the FMC for filing or prior approval—however when carriers by practice or agreement attempt to implement any provisions of such collective bargaining agreement they must be certain that they are not violating the criminal laws or tax laws or ocean transportation laws (Shipping Act, 1916) or surface transportation laws (Interstate Commerce Act) or any other laws, just as every person in the United States must be certain to observe the laws of the United States in their implementation of any contract whether collective bargaining agreement or otherwise. That is the law now, it is wise and it should be maintained.

The Committee should continue the protection accorded the shipping public under the Shipping Act, 1916 and reject H.R. 6613. The Committee should maintain the status quo whereby collective bargaining agreements have been, by FMC regulation, exempted from Section 15 prior filing and approval requirements and give much greater consideration at a later time as to whether there is any need for any legislative change. There is nothing critical now or in the foreseeable future to require enactment of either H.R. 6613 or the compromise or the FMC alternative.

Respectfully submitted,

RAYMOND P. DEMEMBER,
*Executive Vice President,
General Counsel.*

Senator INOUE. Is that your interpretation of the bill that it authorizes them to violate provisions of the law of the land?

Mr. DEMEMBER. Mr. Chairman, the bill states that the implementation of provisions, or any activities implementing provisions of the collective bargaining agreement—if that is done, whether it is through an assessment agreement or some other kind of agreement, with the carriers implementing the collective bargaining agreement, that sections 16 and 17 will not apply, that they are not subject to it.

That seems to me to be the only possible interpretation of the plain language of the bill.

Senator INOUE. Is that your thought, too, sir?

Mr. ULLMAN. Yes, sir. What this bill gets at is an attempt really on the part of the union with the support of management to win a complete exemption from various shipping practices which have been held unlawful to date.

You have heard about the National Labor Relations Board. Only one phase of the so-called 50-mile rule was involved before the Board, namely whether the rule is an unlawful secondary boycott.

The Federal Maritime Commission has held the same 50-mile rule unlawful under the Shipping Act. And what this bill does, and it hasn't been emphasized too much today, is to give immunity to the shipping practices so that anybody who is hurt by these container rules no longer has any avenue of relief before the Federal Maritime Commission.

It would wipe out the Federal Maritime Commission decision which has held these rules unlawful. So they would be violating the law of the land if this bill passes because this bill would give them immunity with respect to those provisions of the Shipping Act.

Senator INOUE. It would provide them immunity from the Shipping Act, but won't those who feel aggrieved be able to apply the antitrust laws and labor laws of the land?

Mr. ULLMAN. Senator, I don't share the confidence of my friend, Mr. Lambos and the others, that the antitrust laws are available to deal with these highly complicated shipping matters.

I just don't think that the antitrust laws were designed for that purpose. And second, it's very difficult for a little fellow who has been hurt by some of these Shipping Act provisions to bring these antitrust actions.

Crown Zellerbach might be able to, but not a little fellow. And if he does bring the action, Senator, we have this problem of the so-called labor exemption in our antitrust laws, where the Supreme Court of the United States has said that if the provisions of the collective-bargaining agreement are reached in good faith, the fact that it may impinge upon third parties and may hurt them and may even be a restraint of trade is not to be considered a violation of the antitrust laws. That is the labor exemption.

So there is a serious question in my mind as to whether or not the antitrust law remedies are available.

Senator INOUE. What other complaints do you have with the measure or the compromise? Do you have any other objections to the measure?

Mr. ULLMAN. Yes, Senator. I would like to review in about a minute or so what this exemption would do to shipping practices from Maine to Texas, which is where the so-called 50-mile rule applies.

If this bill passes in its present form, it would mean that a steamship line has the right to say to a nonvessel operating common carrier by water, the so-called NVO, "We are no longer going to supply you with any containers off the pier. You've got a good operation. You're helping the LCL shippers. You are providing them service which they don't otherwise have. You are giving it at a lower rate, but we, the carriers, are no longer able to provide you with the containers."

Why do they say that? Because the 50-mile rule requires them to say that. So the NVO's would be effectively put out of business if this bill becomes law.

Let's take an exporter who wants to bring in a small shipment and consolidate it within the 50-mile area of the port at a public warehouse.

We have a particular example of that in the testimony in the case we had before the Federal Maritime Commission. General Electric was consolidating its shipments in the port area. But then the 50-mile rule was enforced on shipments in the Puerto Rican trade, and instead of having a smooth movement from their off-pier public warehouse, General Electric's witness testified that the cargo, their containers came to the pier. All the cargo was removed from the containers as the 50-mile rule requires. It had to be stuffed back in the containers. Some of it was left out, some of it was damaged. Some was never found.

And they had to fly parts down to Puerto Rico to keep their plants going down there.

Now that is the 50-mile rule and really, that is the thrust of this bill, as I see it, as far as the union is concerned.

Public warehouses within 50 miles of the port will lose employees. Now these are union employees, Senator. They belong to team-

ster locals. They are even ILA warehouse labor. And if these container operations away from the pier in these public warehouses are stopped, as the 50-mile rule would effectively do, we are talking about perhaps work preservation for deep sea ILA, but we are talking about work deprivation for the teamster employees and the warehouse employees of the ILA, something I don't think that you have heard about until this moment today.

Senator INOUE. But isn't it true that this 50-mile repacking rule is presently being reviewed by the Supreme Court and it was initiated by the NLRB?

Mr. ULLMAN. That is correct, Senator.

Senator INOUE. The FMC played no role in this.

Mr. ULLMAN. No, that's not quite right. We did have a proceeding before the FMC, a 5-year docket, as to the legality of those rules under the Shipping Act. As our statement indicates, Senator, the Federal Maritime Commission finally said in 1978, after 4 or 5 years of litigation, that these 50-mile rules, and I'm quoting now, were "unduly and unreasonably prejudicial and disadvantageous because their effects are unjustified by transportation factors."

So we had these rules declared unlawful by the National Labor Relations Board under the National Labor Relations Act, and we also had the rules declared unlawful by the Federal Maritime Commission. And that decision is now on appeal to the Court of Appeals and it has been held in abeyance pending the Supreme Court determination in the NLRB case.

Senator INOUE. But in bringing this case before the FMC, you didn't rely on section 15, did you?

Mr. ULLMAN. We relied on all sections of the Shipping Act, 16, 17, 18, section 14, and the Commission, in a very broad decision, held the rules unlawful on all the substantive provisions of the Shipping Act, 14, 16, and 17.

We didn't rely on section 15 because the case came up by way of a review of the tariff filings of Sea-Land. It was not a section 15 case.

But what this bill would do, Senator Inouye, is take away from the NVOs, exporters, warehousemen and importers, the right to review shipping practices where they probably have no remedy elsewhere.

Now let me dwell, if I may, for 30 seconds on the problems of the importers. Let's take the fellow who is importing a container of shoes from Italy into New York. Now under the 50-mile rule which is now in the current contract, by the way, that has just been negotiated. That has been reinstalled.

The importer is given two choices: He can have his container of shoes unloaded at the piers—and we know what happens when that takes place, or he has to put them in a public warehouse, according to the 50-mile rule, and keep them there for 30 days.

That ties up his inventory for 30 days. He is paying interest on it, maybe \$100,000 or \$200,000 worth of shoes at 15 or 20 percent, which our American consumers pay for. And that is the only way that that fellow can bring in his shoes without having them shifted to piers and moved around the piers where they are subject to pilferage and what have you.

Now this rule, nobody has mentioned this to date, but the evidence in our FMC case, Senator, shows that this rule causes a loss of traffic to U.S.-flag carriers.

That is a deep, dark secret up until now. But the testimony in that FMC case by the president of the New York Shipping Association, who was here today, was that exporters, fearful of having their containers stripped at the piers and then restuffed, would move their containers after they are consolidated within the port area of New York up to Halifax, where they are moved out by foreign lines.

What does that mean? That means, of course, that U.S.-flag carriers lose that traffic.

All in all, Senator, it is the protection of all of these various elements of our shipping public that would go down the drain in reality because neither the NLRB, nor the antitrust laws can be a complete remedy.

Now, Senator, you asked before who had an opportunity to testify on the House side? And I would like to say that I was the sole voice in opposition on the House side. I heard about this hearing only the day before. I came down and testified and had no opportunity for a written statement.

But as you can see from the way this bill passed, there wasn't really very much consideration of this bill on the House side. I was the sole voice in opposition.

Senator INOUE. Mr. deMember, do you have anything else?

Mr. deMEMBER. I have nothing really further to add, Mr. Chairman, except I want to emphasize again that I think there is a legitimate goal or aim to correct the result of the FMC PMA case, that to remove the prior filing and approval requirement for collective-bargaining agreements under section 15 has a validity, I think, and I would support that part of the bill.

But I really think the committee ought to take a very strong second look at removing other sections, the application of other sections of the act.

As I stated earlier, the provisions of the Interstate Commerce Act apply to implementation of collective bargaining agreements in the trucking and railroad industry and no carrier can violate any of those sections of the act, or is exempted from any of those sections of the act purely because he can tie the violation to a provision in the collective bargaining agreement.

And that is essentially what is being done here.

Senator INOUE. Do you care to add anything else, sir?

Mr. ULLMAN. No, Senator. I think that I have completed my statement. Thank you.

[The statement follows:]

STATEMENT OF THE NATIONAL CUSTOMS BROKERS AND FORWARDERS OF AMERICA

Mr. Chairman and members of the Subcommittee, my name is William R. Casey. I serve as President of the National Customs Brokers and Forwarders Association of America, Inc. and as Chairman and Chief Executive Officer of my own forwarding firm, The Myers Group, Inc.

Our Association, a non-profit corporation, has approximately 400 firms licensed as ocean freight forwarders and/or customs brokers. We have affiliated with us 23 regional forwarder/broker associations doing business in every major U.S. port. Our combined membership handles the great majority of general cargo exported from

the United States via common carriers by water. We speak today in opposition to H.R. 6613.

The bill amends the Shipping Act, 1916 in several crucial areas. Firstly, it excludes from the definition of a common carrier by water any multiemployer bargaining group negotiating a collective bargaining agreement with a labor organization. Secondly, it excludes from the §15 filing and prior approval requirement any such collective bargaining agreement and any agreements preparatory thereto among members of the multiemployer bargaining group. Thirdly, it removes from Commission review under the substantive portions of the Shipping Act, the labor agreement, agreements preparatory thereto and any implementation of such agreements. Fourthly, it excludes from Commission review under the first paragraph of §16 and §17 of the Shipping Act any charge imposed upon cargo to fund the benefits payable under a collective bargaining agreement.

So sweeping an exemption from the protective provisions of the Shipping Act as this bill affords should receive the most careful attention of this Subcommittee. Currently, §15 provides protection to the exporting and importing public against any agreement amongst carriers which is unjustly discriminatory between exporters and importers or would operate to the detriment of the commerce of the United States, or be contrary to the public interest. Under subparagraph (a) of the bill, the authority of the Commission to review agreements in order to determine whether they are harmful under the §15 standards would be eliminated. The result is that the International Longshoremen's Association (ILA) and the shipping associations can agree amongst themselves as to practices at the piers which can wreak havoc upon the small, less than containerload shipper, with no protection whatsoever under the only applicable federal law. Thus, if this bill passes, it will be "open season" on our shipping public.

One way that this will happen will be the inclusion of the so-called 50-Mile Rule in the next collective bargaining agreement to be consummated this Fall. The ILA has coerced management to accept this rule in past labor agreements and we will undoubtedly see it again. That this rule is not a "work preservation" provision, as the ILA contends, is persuasively demonstrated in the attached editorial in the March 17th, 1980 issue of Brandon's Shipper and Forwarder. The legality of the 50-Mile Rule under the National Labor Relations Act is currently under review by the U.S. Supreme Court. It is not so well known that the FMC declared this rule unlawful under Sections 14, Fourth, 16 and 18(a) of the Shipping Act, 1916 and § 4, Intercoastal Act, 1933, in *Sea-Land Service, Inc., et al*, Docket No. 73-17, in a June, 1978 decision. The Commission said that these rules were "unduly and unreasonably prejudicial and disadvantageous because their effects are unjustified by transportation factors".

The Subcommittee should understand what the return of the 50-Mile Rule would mean. Vessel operators would be required to deny containers to the non-vessel operating common carrier (NVOCC). Experts have agreed that the NVOCC performs a valuable service to the smaller shipper, a service that will disappear if the NVOCC is not furnished containers off-pier. Exporters who wish to consolidate their shipments at a public warehouse within a 50 mile radius of the port will have their containers stripped at the piers and re-loaded for a charge. They can anticipate, as the record in the FMC docket shows, that the reloading will frequently result in lost, damaged, pilfered and delayed cargo. An importer of a full container must keep the contents of the container within a public warehouse for 30 days, thereby tying his capital up during that period. Again as the record shows, because of the losses and delays suffered by the stripping and re-loading of containers, exporters will divert their boxes to Halifax and other Canadian ports and U.S. flag carriers operating from Maine to Texas will lose that traffic. The President of the New York Shipping Association testified in the FMC case that such diversions of traffic took place when the 50-Mile Rule was enforced.

In a study by the United Aircraft Research Laboratory for the U.S. Maritime Administration, the 50-Mile Rule was described as a "featherbedding" practice. Instead of work preservation, it will accomplish work deprivation. In the New York area, the members of Local 807 of the Teamsters lost 2,500 jobs in the warehouses when containerization was forced to the piers. Employees of public warehouses were laid off because exporters could not containerize their merchandise in such warehouses without having the containers stripped at the piers. Several NVOCCs were required to discontinue their business when the ILA forced the lines in the Puerto Rican trade to deny containers to the NVOCCs. If this bill passes, the useful and cost-saving NVOCC operation in our foreign, off-shore commerce will likewise be drastically curtailed.

Under this bill, not only is the shipping public deprived of the review authority of the FMC under § 15, but it loses whatever relief there may be available under the

substantive provisions of the Shipping Act, as provided in § 16, § 17 and § 22. If an assessment formula agreed upon by ocean carriers unjustly discriminates against a shipper or group of shippers, this bill will deprive them of an opportunity for a fair and impartial review by the FMC. Our exporters and consignees are thus at the mercy of the carriers; they can obtain relief from no other quarter.

For the reasons we have indicated the Subcommittee should reject this bill. Our shipping public should have relief against improper assessments by the steamship lines. An aggressive and economically powerful union should not be permitted to impose the 50-Mile Rule on our shipping public with the acquiescence of ocean carriers. Our foreign trade should not suffer the additional costs resulting from the stripping requirements of the 50-Mile Rule at a time when it is vital that we improve our balance of payments.

The argument that FMC jurisdiction results in uncertainty and delay in the collective bargaining process is without merit. We are not aware of a single labor agreement in the maritime field where either the negotiations or implementations of such agreements were in fact delayed by reason of the Commission's authority in this field. Moreover, in a recent (April 10, 1980) decision by the FMC in Docket No. 78-11, maritime collective bargaining agreements were exempt from the filing and approval requirements of § 15. Such agreements can be implemented immediately.

H.R. 6613 will result in incalculable damage to our export-import trade while improving no benefits whatsoever. It should, therefore, be rejected.

[The following information was subsequently received for the record:]

NATIONAL CUSTOMS BROKERS & FORWARDERS ASSOCIATION
OF AMERICA, INC.,
New York, N.Y., June 9, 1980.

U.S. Senator DANIEL D. INOUE,
Senate Merchant Marine Subcommittee,
Washington, D.C.

DEAR SENATOR INOUE: This letter is in response to your request at the recent hearing held on the above bill that we furnish replies to written questions submitted to us. We are pleased to do so below. Your questions and our answers follow.

Question. 1. You have testified that if H.R. 6613 passes, there will be no forum in which the "50-mile repacking rule" can be reviewed. Isn't that precisely what the Supreme Court has under review now from the NLRB? The FMC as a forum was never involved in this case. It is an unfair labor practice issue. Therefore, how can you say that if this bill is passed there will be no forum to review the "50-mile repacking rule?"

Answer. As the Supreme Court noted in the Volkswagen case, the practices that may arise under a collective bargaining agreement can involve both our labor laws and shipping laws. What the Supreme Court currently has under review is a labor law question, namely, whether the restrictions on the CONASA-ILA Rules on Containers constitutes an unlawful secondary boycott under our labor laws. However, not all phases of the rules on containers pertain to labor practices—shipping practices may be involved—and NLRB review may not, therefore, be available. Thus, it is important that the FMC have jurisdiction to review the question as to whether these rules violate the Shipping Act, 1916.

Question 2. The Supreme Court is now considering whether the "50-mile repacking" rule is an unfair labor practice.

If the Supreme Court decides it is, that is the end of that matter isn't it?

Answer. I mean even if the FMC has jurisdiction requiring its approval of such a rule, and to award reparations or impose fines for a practice implementing such a rule, the issue would never come up because the parties could not include such a rule in a collective bargaining agreement.

If the Supreme Court decides that the particular rules in issue on the appeal before it be an unfair labor practice, it is the end of the matter—but only with respect to the rule under review and its application to specified facts. Other rules could still be enforced by the ILA since their validity was not at issue and hence not adjudicated in the Supreme Court case. For example, an exporter who consolidates his LCL shipments within 50 miles of the pier must have his container stripped and restuffed at the pier. This issue is not before the Supreme Court, but was one of the shipping practices involved in the FMC decision in *Sea-Land Service, Inc., et al*, Docket No. 73-17, June 1978.

Question. 3. As things now stand after drawn out proceedings before the NLRB and the courts, the Supreme Court will now decide whether the "50-mile repacking rule" is an unfair labor practice under the labor laws.

Answer. If the Supreme Court rules it is not and therefore permissible, the losing parties may still go before the FMC seeking monetary penalties or reparations under the Shipping Act.

Doesn't this create instability and uncertainty with regard to collective bargaining agreements?

As indicated above in response to Question 1, the practices under a collective bargaining agreement can involve both our labor and shipping laws. Thus, even if the Supreme Court rules that the practice under review is lawful under our labor laws, there is no reason why the carriers should not be held to account under the Shipping Act if the rules are unreasonable or unjustly discriminatory. While this may result in "uncertainty", what other protection does our shipping public have against over-reaching carriers? Ordinarily it is doubtful whether reparations would be the primary relief sought. Rather, shippers who are victimized would ask the FMC to issue a cease and desist order.

Question. 4. If H.R. 6613 were enacted would members of the shipping public be able to challenge the "50-mile repacking rule" under the: Labor laws? Antitrust laws? Common law relating to common carriage?

Answer. The shipping public could challenge the rules on containers under the labor laws, but only insofar as these laws are applicable. As indicated above in response to Question 1, the Rules on Containers raise questions as to shipping practices not covered by our labor laws.

The antitrust laws afford little or no relief to the shipping public. They were not designed to deal with the highly complicated questions involved in the international movement of goods. The agency with expertise in this regard is the FMC. Moreover, the small, LCL shipper is simply not in the position to take on the shipping association and the union in a major antitrust action. Finally, in such an action, the Supreme Court has carved out the so-called "labor exemption" which makes it difficult, if not virtually impossible, to obtain a finding of a violation of our antitrust laws unless the provision involved was specifically intended to cause harm to a third party rather than work preservation.

The common law relating to common carriage is of little relevance to the restrictions placed upon our shipping public by the Rules on Containers. For example, if an importer is required by the Rules, as is the case, to keep his container and contents in a public warehouse for 30 days after unloading, thus adding to the price of the goods to American consumers, it is difficult to relate this to a matter of "common carriage".

Question. 5. It has been said that the NLRB has no jurisdiction over shipping matters.

If Congress enacts H.R. 6613 and exempts collective bargaining agreements and practices growing out of agreements implementing collective bargaining agreements from the shipping Act, it would be clear, would it not, that Congress and therefore the law does not intend that these agreements and practice, be considered as shipping matters, would it not?

Answer. It would be clear that Congress did not intend that these agreements and practices be reviewed by the FMC. The practices still involve shipping matters, but no relief would be available before the FMC for aggrieved U.S. exporters and importers.

Question 6. Does the ICC or the CAB have jurisdiction to rule on whether collective bargaining agreements or practices implementing them are contrary to the public interest or detrimental to the United States?

If not why should the FMC have this kind of jurisdiction?

Answer. The real question is not whether the ICC or CAB has jurisdiction to rule on collective bargaining agreements or practices implementing them. The FMC does not have this jurisdiction either, but rather the jurisdiction to review anticompetitive agreements amongst carriers. The ICC and CAB have similar jurisdiction. See 49 U.S.C. § 5 and 49 U.S.C., § 1382. To protect the public the FMC, ICC and CAB may review agreements amongst carriers, even when incorporated into a labor agreement, that are contrary to the public interest or detrimental to our commerce. The fact that an offending practice arises from a labor contract has not deterred the ICC, for example, from insisting that motor carriers do not bargain away statutory obligations to the public. See *Galveston Truck Line Corp. v. Ada Motor Lines, Inc.*, 73 MCC 617 (1957).

Question 7. You state that if the requirement of FMC prior approval of labor maritime agreements under section 15 were removed, the "ILA and the shipping associations can agree amongst themselves as to practices at the piers which can wreak havoc on the 'less than containerload' shipper."

(a) When the FMC granted you relief from the '50-mile repacking rule', it did not rely on section 15, did it? I believe it relied on sections 14, 16, and 18, of the 1916 Act, and section 4 of the 1933 Act.

So why is section 15 prior approval so important?

Answer. In the case referred to, FMC Docket No. 73-17, the issue of §15 approval did not arise. Sea-Land had filed a tariff with the FMC incorporating the Rules on Containers. The question was the validity of these rules under the substantive provisions of the Shipping Act, 1916.

Question 8. Under the present situation, if an aggrieved party seeks relief in the Courts from a practice growing out of an agreement implementing a collective bargaining agreement, he can go into Court and seek a temporary restraining order and then a preliminary injunction, etc. These are fairly expeditious procedures involving days, or a few weeks at most.

If, on the other hand, a party seeks relief from such a practice before the FMC, can he obtain it as expeditiously?

Answer. As indicated above, in answering 4 above, it is far from easy for a small shipper to seek relief in the courts under our antitrust laws. He bears the entire burden of litigating against powerful forces. When such a shipper can lodge a complaint with the FMC, it would be the agency rather than the shipper that proceeds on its own motion, as it did in FMC Docket No. 73-17, to test the legality of the practice. While proceedings before the FMC can be lengthy, antitrust laws are equally lengthy and a preliminary injunction (if obtained) does not, of course, end the matter. The case must go forward—and experience shows that this could take years. Moreover, if the Rules on Containers are unlawful under the Shipping Act, 1916 as the FMC has held, attempts to enforce the rules can be met by swift action of the FMC.

Question 9. At the request of the Subcommittee, the FMC has prepared an alternative to H.R. 6613, which would exempt maritime labor agreements from section 15 of the Act. The effect of this proposal would be to permit collective bargaining agreements and assessment agreements to become effective immediately. There would be no need for filing with and approval by the FMC.

(a) In your view is the FMC's alternative preferable to the compromise which has been proposed?

(b) Suppose an additional provision were added to the FMC's alternative which would provide that if the FMC subsequently finds a maritime agreement or activity based upon it to be unjust or unfair, the agency could grant only prospective relief, and that such prospective relief must be granted within 180 days after a notice and hearing upon the agreement or practice complained of?

Answer. (a) Allowing the collective bargaining agreements to become effective immediately is not per se objectionable, but our Association feels that the FMC should still retain jurisdiction to review the action of the carriers under §15 to determine whether the public interest has been harmed and also to pass upon the practices under the substantive provisions of the Shipping Act.

(b) Prospective relief only appears to be a half-way remedy. If an assessment formula or charge is determined by the FMC to be unfair, it is difficult to see why the carriers and/or the union should be allowed to retain moneys unlawfully collected. If a recoupment problem may be anticipated, an escrow or similar arrangement (e.g., a bond) is available.

Question 10. 1. In your judgment, would the compromise proposal ensure equal treatment of shippers, cargo, and localities?

2. In your view, is the compromise proposal preferable to H.R. 6613, in its present form?

Answer. 1. Whether the compromise proposal ensures equal treatment depends on how it is enforced. We see no reason why it may not be enforced equally.

2. Any proposal—including the compromise—is preferable to H.R. 6613 in its present form. As the bill now reads, no matter how egregiously harmful an assessment formula may be, the exporter or importer is deprived of relief before the one agency that has the expertise to pass on the issues. The compromise at least retains FMC jurisdiction, even if only prospectively.

Question 11. Do you agree that whatever legislation would be passed should not effect the outcome of any pending cases before the courts of (sic) the FMC?

Answer. Yes. The legislation should not only not affect pending cases before the courts or the FMC, but cases previously adjudicated, such as FMC docket No. 73-17. Parties who have been aggrieved by the unlawful practices found in that proceeding should not be deprived of the opportunity to seek redress for damages suffered.

We wish to emphasize that passage of H.R. 6613 will deny to the LCL exporter and importer major advantages intended by the container revolution. An FCL exporter has sufficient volume to load an entire container at his plant. This con-

tainer is loaded into the vessel without the contents being re-handled at the pier by ILA labor. But an LCL exporter or importer, usually smaller in size than the FCL shipper with whom he may be competing, can get the benefit of containerization only if he can have his shipment consolidated off-pier with those of other LCL shippers. If the Rules on Containers go into effect, the off-pier consolidation or NVOCC service will no longer be available. The LCL shipper must then send his shipment directly to the pier, subjecting it to additional cost, pilferage, congestion, loss and delay—none of which problems are faced by the FCL shipper. Thus, the LCL shipper will be forced to have his cargo handled at the pier in the same break-bulk operation of sailing ship days. Such a result can hardly be described as progress.

We appreciate the opportunity to appear before your Subcommittee and are always ready to cooperate with you and your staff.

Sincerely yours,

GERALD H. ULLMAN,
General Counsel.

Senator INOUE. Well, gentlemen, I thank you very much. Believe me, we will be studying your statement and your objections to this measure before we act upon it.

And as I have indicated to the others, I invite you to join my committee staff in drafting a measure that might meet all of the objections that you've stated.

I will be submitting to you, if I may, questions for your study and consideration.

So we thank you very much. And with this, the hearings on H.R. 6613 are recessed, subject to the call of the Chair.

[Whereupon, at 4:15 p.m., the hearing was recessed, to reconvene subject to the call of the Chair.]

ADDITIONAL ARTICLES, LETTERS, AND STATEMENTS

LABOR-MANAGEMENT MARITIME COMMITTEE,
Washington, D.C., April 1, 1980.

HON. DANIEL K. INOUYE,
Chairman, Subcommittee on Merchant Marine and Tourism, Committee on Commerce, Science, and Transportation, U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: The Labor-Management Maritime Committee, composed of major U.S. flag liner and tanker interests in association with American maritime labor, wishes to endorse H.R. 6613, a bill which would amend the Shipping Act, 1916, to preclude the Federal Maritime Commission from having to regulate collective bargaining agreements.

The possibility that such regulation might be required emanates from a 1978 Supreme Court decision, the effect of which is to leave uncertain whether collective bargaining agreements must, in fact, be filed for approval with the Commission, and, if so, whether the possible delay that could be occasioned by such Commission review might not, itself, be the factor that prevents the evolution and implementation of the agreement. Just the threat that another party than the two sides involved in the bargaining could interpose itself over some aspect of the agreement, and thereby upset the agreement, makes the whole question of preserving labor peace in the maritime industry a gamble the U.S. economy can ill afford.

There are enough federal agencies that have statutory authority over the collective bargaining process without adding an agency that has neither expertise in the labor field nor interest in becoming involved. There are also sufficient protections of other interests affected by collective bargaining in existing antitrust and labor statutes.

Some of the maritime unions have taken the position that, because they sign individual agreements with the companies, they are not covered by the 1978 Supreme Court ruling. These unions also endorse this legislation without prejudicing their contention that they are not covered.

We fully support the Shipping Act amendments in H.R. 6613 which make absolutely clear that collective bargaining agreements do not fall under the category of agreements which must be filed for approval with the Federal Maritime Commission.

We respectfully request that this communication be filed as a part of the record in connection with the hearings on H.R. 6613.

Respectfully submitted,

ROBERT S. AGMAN,
TALMAGE E. SIMPKINS,
Codirectors.

- MARYLAND DEPARTMENT OF TRANSPORTATION,
MARYLAND PORT ADMINISTRATION,
Baltimore, Md., April 21, 1980.

HON. DANIEL K. INOUYE,
*Senate Merchant Marine and Tourism Subcommittee,
Washington, D.C.*

DEAR SENATOR INOUYE: I am writing to express the views of the Maryland Port Administration on H.R. 6613, a bill to excise from the Federal Maritime Commission jurisdiction over maritime collective bargaining agreements.

As the attached letter to Chairman John M. Murphy indicates, we support the general goal of the bill, but feel that the means used to achieve that end go somewhat beyond necessary bounds. I am alluding specifically to the amending of Sections 16, 17 and 22 of the Shipping Act 1916, which would effectively remove jurisdiction over actions taken pursuant to these contracts and leave an aggrieved party—be it a port, shipper or other entity—with forum to register complaints. The

letter to Chairman Murphy elaborates on this question, as well as making specific amendment recommendations.

Although H.R. 6613 overwhelmingly passed the House in its present form, I would respectfully urge your Committee to examine the questions we and others have raised on this important issue.

Sincerely,

RICHARD A. LIDINSKY, Jr.,
*Director of Tariffs
and National Port Affairs.*

THE SEAFARERS INTERNATIONAL UNION
OF NORTH AMERICA, AFL-CIO,
Washington, D.C., April 28, 1980.

HON. DANIEL INOUE,
*Subcommittee on Merchant Marine and Tourism, Senate Committee on Commerce,
Science, and Transportation, Washington, D.C.*

DEAR MR. CHAIRMAN: The Seafarers International Union of North America, AFL-CIO, wishes to express its support of H.R. 6613, legislation to amend the Shipping Act, 1916, in order to prohibit regulation of Collective bargaining agreements by the Federal Maritime Commission.

Since the Supreme Court's grant of discretionary authority to the FMC to assert jurisdiction over multi-employer collective bargaining agreements, the maritime industry has been singled out as the only industry in the U.S. to be deprived of the benefits of collective bargaining without governmental intervention. Shortly after that decision, the FMC itself acknowledged that if required to review all such contracts before allowing them to become operative, the result would be "unnecessary uncertainty and delay."

The Section 15 filing and approval requirement is not only an unnecessary administrative burden on the FMC but also on the parties to the collective bargaining agreement. Additionally, it is an unwarranted intrusion upon the collective bargaining process.

As a consequence, we feel that the urgent and immediate need for legislation has been accomplished in H.R. 6613. In the proposed legislation, you have effectively eliminated the disruptive and unnecessary intervention of the FMC into the field of labor relations and collective bargaining in the maritime industry.

We request that this letter be made part of your hearing record on the legislation.

Sincerely,

FRANK DROZAK,
Executive Vice President.

THE NEW ENGLAND COUNCIL, INC.,
Boston, Mass., April 29, 1980.

HON. DANIEL K. INOUE,
*Chairman, Senate Subcommittee on Merchant Marine and Tourism,
Washington, D.C.*

DEAR MR. CHAIRMAN: The New England Council, Inc., is a private business association supported by over 1,200 firms employing over one million people in the six-state area. We have been asked by several of our members from the New England port community and those who are shippers through these same ports to comment on the recent House passage of H.R. 6613, which we understand will come before your committee for hearings on May 7, 1980.

This legislation, if passed as currently written, would have several devastating impacts on the New England port system and, therefore, the New England economy. First, H.R. 6613 would increase costs in an already inflationary economy by equalizing assessments against cargo by raising the assessment to the highest nationally negotiated contract rate. This would result in the diversion of significant cargo from Boston and other smaller New England ports, thereby, seriously weakening the economy of the entire port area.

Second, this legislation would prevent referral disputes arising from implementation of longshore agreements to the Federal Maritime Commission, and shippers cannot bring such disputes before the National Labor Relations Board. As a result, the only remaining option available would be to the federal court system.

The New England Council opposes H.R. 6613 and urges its defeat in the Senate. We ask you to join in this opposition.

Thank you for your consideration.
Sincerely,

ERIC SWIDER, *President.*

MASSPORT,
Boston, Mass., April 29, 1980.

Hon. DANIEL K. INOUE,
*Senate on Merchant Marine and Tourism Subcommittee,
Washington, D.C.*

DEAR SENATOR INOUE: On March 18, 1980, the Massachusetts Port Authority wrote to the Chairman of the U.S. House of Representatives Committee on Merchant Marine and Fisheries and presented its views on H.R. 6613, a bill introduced "To amend the Shipping Act, 1916 in order to prohibit regulation of collective bargaining agreements by the Federal Maritime Commission". (FMC)

Although any bill proposing to do away with the so-called "disruptive and unnecessary intervention of the FMC into the field of labor relations" would seemingly be praise-worthy in purpose—and, although in this period of economic crisis there is an acknowledged need for maritime labor stability, H.R. 6613 as presently written is not in our opinion the fit vehicle to achieve an end which is appropriate, fair and equitable for all concerned. Furthermore, on April 9, 1980 the FMC, acting on its own, voted to exempt labor/management agreements from the pre-implementation approval process, in a manner fully acceptable to our requirements thereby obviating the need for this legislation.

In our letter to Chairman Murphy, a copy of which is enclosed for your reference, we did our best to convey that there are ports in the United States other than New York, and that these ports too, require some legal protection from labor/management interests who have customarily made themselves more responsive to New York bargaining pressures than to the survival of the smaller ports like Boston. Despite having voiced our concern, the bill breezed through the House as originally drafted, and is now on its way to the Senate.

I would ask your committee to examine the recently issued (April 16, 1980) General Order No. 44 by the Federal Maritime Commission which accomplishes all that H.R. 6613 purports to fulfill, and at the same time does not deprive an aggrieved party—whether it be a port, shipper or other entity of a forum for registering complaints.

We believe that the questions we and others have raised on this important issue are worthy of consideration and I would respectfully urge your committee to take notice of them.

Thank you for your cooperation.
Sincerely,

MARTIN C. PILSCH, Jr.,
Director, Port of Boston.

NEW ORLEANS STEAMSHIP ASSOCIATION,
New Orleans, La., April 29, 1980.

Hon. DANIEL K. INOUE,
*Chairman, Subcommittee on Merchant Marine and Tourism,
U.S. Senate, Washington, D.C.*

MY DEAR MR. INOUE: I am the President and Director of Labor Relations for New Orleans Steamship Association. The Association is a multi-employer bargaining association comprised of virtually all steamship carriers, steamship agents and stevedoring companies in the Port of New Orleans. The Port of New Orleans is second only to New York in commerce handled. As the chief negotiator for New Orleans Steamship Association, I negotiate the labor contracts covering the thousands of waterfront workers represented by various Locals of the International Longshoremen's Association in the Port of New Orleans.

This Association strongly supports H.R. 6613 and regards its passage as essential if collective bargaining in this vital industry is not to be hamstrung and plagued with unnecessary strikes and work stoppages.

If collective bargaining agreements between labor unions and multi-employer collective bargaining units are exempted entirely from the requirements of the Shipping Act 1916, as is contemplated by H.R. 6613, it will not leave the parties and their labor agreements ungoverned but will place maritime labor relations where they properly belong, that is, before the Department of Justice and courts under federal anti-trust law. This is the regulatory scheme applicable to all other indus-

tries. There is no reason why the essential maritime industry should be the sole exception.

Meaningful and productive collective bargaining simply cannot exist under the unduly burdensome regime of multi-federal regulation. Labor strikes will be the inevitable result. Collective bargaining in the maritime industry should be given the same opportunity as is given to all other industries in the United States.

As you know, this bill was considered by the House of Representatives on April 15, 1980 at which time it was approved on a vote count of 357 to 2. With our labor contracts expiring within a few months and with the time for negotiation of new contracts upon us—as is true up and down the Atlantic and Gulf Coasts—time is of the essence in securing the passage of this Bill. We urge you promptly to approve this Bill for submission to the Senate Commerce Committee for consideration.

Sincerely yours,

JAMES G. HOWELL, *President.*

COUNCIL OF AMERICAN-FLAG SHIP OPERATORS,
Washington, D.C., May 5, 1980.

HON. DANIEL K. INOUYE,
Chairman, Subcommittee on Merchant Marine and Tourism, Committee on Commerce, Science, and Transportation, U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: The Council of American-Flag Ship Operators (CASO) is a national association representing a majority of the owners and operators of liner vessels in the foreign trade of the United States. The members of CASO fully endorse H.R. 6613, which was recently referred to your Committee following almost unanimous approval by the House of Representatives.

Potential for significant problems in collective bargaining in the maritime industry has been introduced by the decision of the United States Supreme Court in *FMC v. Pacific Maritime Association*, 435, U.S. 40 (1978). That decision granted unprecedented discretionary authority to the Federal Maritime Commission (FMC) to assert jurisdiction over collective bargaining agreements made between multi-employer maritime groups and labor groups. That decision is in conflict with the express Congressional policy of free and unfettered collective bargaining without governmental intervention.

It is absolutely essential that the process of collective bargaining in the maritime industry be free from unnecessary and duplicative jurisdiction by the FMC. The potential for delay and uncertainty raised by a requirement for FMC approval of collective bargaining agreements between multi-employer groups and maritime labor is obvious. As in all other industries, these maritime agreements depend upon the ability of each side to deliver its part of the bargain unfettered by unnecessary and unneeded governmental review. The concomitant potential for severe financial loss to operators of United States-flag liner vessels if their operations are disrupted as a result of the Court's decision noted above is a matter of the gravest concern to the industry. Collective bargaining agreements are already subject to an extensive system of labor laws. The National Labor Relations Board was established as the federal agency to protect the rights of workers and police agreements such as these. With all due respect to the FMC, it is not equipped to deal with the complexities of federal labor law. Indeed, it was never intended to.

The FMC in Docket #78-11 has issued a rule (General Order 44, April 9, 1980) which exempts certain of these collective bargaining agreements from the filing and approval requirements of Sec. 15 of the Shipping Act, 1916. This, however, constitutes only a partial remedy to the completely unsatisfactory situation presently existing.

The FMC presented testimony to the House Merchant Marine and Fisheries Committee on March 11 supporting H.R. 6613, candidly stating that "... legislation is preferable to a Commission rule exempting these agreements from Sec. 15." Their statement clearly supports Congressional efforts to correct, by legislation, the present situation.

The members of CASO endorse completely H.R. 6613 and request that this letter be made a part of your record.

Sincerely yours,

ALBERT E. MAY,
Executive Vice President.

JOINT MARITIME CONGRESS,
Washington, D.C., May 5, 1980.

Hon. DANIEL K. INOUE,
Chairman, Subcommittee on Commerce, Science, and Transportation,
Washington, D.C.

DEAR MR. CHAIRMAN: The Joint Maritime Congress has been asked to comment on the House passed H.R. 6613, a bill to amend the Shipping Act of 1916 in order to prohibit regulation of collective bargaining agreements by the Federal Maritime Commission.

I believe it has always been the understanding of the industry that the FMC has not had regulatory power over labor agreements.

The JMC fully agreed with the position of the FMC when it spoke through Vice Chairman Moakley in House testimony as follows:

"The Commission would not object to deletion of collective bargaining agreements, agreements establishing multiemployer groups and agreements implementing collective bargaining funding obligations from the scope of section 15 of the Shipping Act. " * * * the Federal Maritime Commission has no desire to interfere with the collective bargaining process and supports your efforts to legislate an exemption of collective bargaining agreements from section 15 of the Act. We agree with those who argue that the prior approval requirements of this section unduly stifle the bargaining process."

We believe in the Joint Maritime Congress that labor and management agreements in the maritime industry should be subject to the same provisions of Federal Labor Laws which govern collective bargaining agreements in other industries.

I find it of no real value to use a large number of words when a few will suffice. We appreciate the opportunity of filing these views.

Very sincerely,

ROBERT L. LEGGETT, *President.*

TRANSPORTATION INSTITUTE,
Washington, D.C., May 5, 1980.

Hon. DANIEL INOUE,
Chairman, Subcommittee on Merchant Marine and Tourism, Senate Committee on
Commerce, Science, and Transportation, Washington, D.C.

DEAR MR. CHAIRMAN: The Transportation Institute, a research and education organization composed of 174 U.S.-flag shipping companies engaged in all aspects of U.S. domestic and international trade, wishes to express its support for H.R. 6613, legislation to amend the Shipping Act of 1916 to prohibit the regulation of collective bargaining agreements by the Federal Maritime Commission.

As the members of the Committee are well aware, the Supreme Court ruling in *Federal Maritime Commission v. Pacific Maritime Association* granted discretionary authority to the Federal Maritime Commission to assert its authority over multiemployer collective bargaining agreements.

In our opinion, the subjection of the maritime industry to the filing and approval requirements contained in Section 15 of the Shipping Act of 1916, would not only place an unnecessary and administrative burden on the FMC, but also permit an unwarranted intrusion into the collective bargaining process. Specifically, administrative supervision by the Commission will disrupt any attempt of the parties at the negotiating table to arrive at meaningful solutions.

Furthermore, to subject the parties in the collective bargaining process to an FMC determination which might invalidate or modify a settlement negotiated in good faith, would seriously jeopardize the future resolution of labor disputes as envisioned by national labor policy. Shipping management has some very serious concerns that the imposition of the Federal Maritime Commission into the collective bargaining process could be disruptive and affect the industry's stability, without making any positive contribution.

The Institute feels that such assertion of jurisdiction by the Commission is beyond the scope of its authority in the Shipping Act of 1916. We respectfully urge the passage of H.R. 6613, to once more return the maritime multiemployer collective bargaining process to a position of equality with other U.S. industries.

Sincerely,

HERBERT BRAND, *President.*

[TELEGRAM]

WASHINGTON, D.C., *May 6, 1980.*

DANIEL K. INOUE,
*Russell Senate Office Building,
 Washington, D.C.*

The National Maritime Council, the umbrella trade association representing management and labor in the American maritime industry, urges prompt subcommittee and committee action on H.R. 6613, legislation designed to statutorily overrule the decision of the Supreme Court in *Federal Maritime Commission v. Pacific Maritime Association*. In PMA, the Court, in a five to three split opinion, authorized the FMC, an agency devoid of expertise in labor relations, to regulate multi-employer collective bargaining agreements in the maritime industry, this decision, which introduces uncertainty into maritime labor relations, is contrary to the longstanding national labor policy that the collective bargaining process is the proper mechanism to resolve labor disputes.

C. WILLIAM NEUHAUSER,
*Executive Secretary,
 National Maritime Council.*

NATIONAL MARINE ENGINEERS' BENEFICIAL ASSOCIATION,
Washington, D.C., May 7, 1980.

HON. DANIEL K. INOUE,
Chairman, Subcommittee on Merchant Marine and Tourism, Committee on Commerce, Science, and Transportation, Washington, D.C.

DEAR MR. CHAIRMAN: This statement sets forth the position of the National Marine Engineers' Beneficial Association in support of H.R. 6613, to amend the Shipping Act, 1916, in order to prohibit regulation of collective bargaining agreements by the Federal Maritime Commission. We firmly believe that the bill, in the form that it passed the House, must be the version upon which the Senate acts. This will guarantee that the purposes of the bill will, in fact, be realized and that the unfair and discriminatory treatment that the maritime industry has received in this regard, will be stopped.

No other industry in this country has its collective bargaining agreements reviewed by an agency which is not part of the industry's collective bargaining process and which agency has no expertise in the area. There is in place a whole body of federal labor laws to govern labor relations. The National Labor Relations Board has ultimate authority in this area and has both the jurisdiction and expertise to determine whether labor agreements have been arrived at as a result of good faith, arms length collective bargaining. An entire procedure exists for the N.L.R.B. to determine whether these criteria have been met. Therefore, the House-passed bill removes the FMC from an area in which it has no expertise and which simply serves as a disruptive mechanism to finalizing good faith collective bargaining agreements.

Labor relations in this industry have been harmonious. Both management and labor recognize that the precarious state of affairs that underlies current U.S. maritime policy dictates that both sides must make concessions and neither side will receive all that it seeks. Concrete evidence of this is apparent. As larger and more technologically advanced vessels have been introduced into the fleet, the seagoing maritime unions have recognized that their vessels require lesser manning. Consequently, productivity in the maritime industry is probably higher than in any other industry in the United States. Collective bargaining in the industry is enlightened and arrived at through recognition of common problems and solutions that benefit not only the industry but the nation as well.

For the foregoing reasons the National Marine Engineers' Beneficial Association respectfully urges and supports passage of the House version of the bill and we would be happy to provide any additional assistance or information that you might require in furtherance of this constructive legislation.

Sincerely yours,

J. M. CALHOON, *President.*

POWELL RIVER-ALBERNI SALES CORP.,
Seattle, Wash., May 12, 1980.

Senator D. K. INOUE,
U.S. Senate,
Washington, D.C.

DEAR SENATOR: I am writing regarding Bill H.R. 6613, to amend the Shipping Act in order to prohibit regulation of collective bargaining agreements by the Federal Maritime Commission.

Powell River-Alberni Sales Corporation is the American newsprint sales arm of a major newsprint manufacturer, supplying newsprint by both rail and water to eleven western states, including Hawaii. We have offices in Seattle, San Francisco and Los Angeles. We operate large private docks and terminals in both San Francisco and Long Beach, and use other private or public docks in Seattle, San Diego and Honolulu. Sales in 1979 were approximately \$180,000,000.

Powell River-Alberni Sales Corporation is concerned over the inclusion in this Bill, on page 3, lines 20-24 as passed by the House, of the "means and method of raising the moneys for wages, fringe and other employee benefits." Through our subsidiary, Star Terminal Company, Inc., Powell River-Alberni Sales Corporation is a member of the Pacific Maritime Association, who administer the funds needed to pay fringe benefits agreed to in collective bargaining between the Pacific Maritime Association and the International Warehousemen's and Longshoremen's Union on the West Coast.

The Pacific Maritime Association, by majority vote of its members, and without reference to the Longshore Union, has absolute power to set assessments on its members to fund the fringe benefit program. Although Powell River-Alberni Sales Corporation is a substantial company, we are nonetheless a relatively small voice in the Pacific Maritime Association. There is always the possibility that the Pacific Maritime Association may set an assessment that unjustly discriminates against newsprint, and unduly favors other types of cargo.

As the Pacific Maritime Association has a de-factor monopoly on collective bargaining with the Longshore Union (individual firms can make their own collective agreements, but because of the sporadic nature of longshoring work and other factors, this is seldom an economic action) individual employers could find themselves very badly treated if there was no legal protection preventing it.

Under current law, Pacific Maritime Association members are protected from unjust assessment by Section 15, 16 and 17 of the Shipping Act. Under H.R. 6613, there would be no recourse.

In Powell River-Alberni Sales Corporation, we support the view that H.R. 6613 be amended to maintain the existing protection of the Shipping Act to members of multi-employee groups against unfair treatment by those groups. That is, H.R. 6613 should be amended to exclude any reference to agreements among multi-employer bargaining groups covering the means and method of funding fringe benefits.

Thank you for your interest in this matter, and for the expeditious handling which brought the matter to light in the Senate.

Sincerely,

DAN E. STRYKER, *President.*

[MAILGRAM]

BOSTON CONSOLIDATION SERVICE,
Charlestown, Mass., May 14, 1980.

Senator DANIEL INOUE,
Chairman, Subcommittee on Merchant Marine and Tourism,
Washington, D.C.

From Robert T. Coyne, President—International Association of NVOCC's President—Boston Consolidation Service Inc.

Subject H.R. 6613: Request careful reconsideration of bill and reject any provisions exempting FMC approval from labor-management pacts

Please accept this mailgram as an expression of my grave concern over this big business/labor sponsored bill which is carefully designed to further promote the anti-competitive posture of big carriers and collusion with their Union in efforts to drive non-vessel operating common carriers out of business.

Since 1974 Boston Consolidation Service Inc. has been engaged in legal battles with various steamship conferences in order to maintain our existence and continue to provide our small exporters and importers service and savings the big carriers are unable to provide. Today my company represents over 1,700 small shippers and

our organization, the International Association of NVOCC's, representing an additional 38,000 small importers and exporters who depend on our industry for competition in service and economy.

Our only ray of hope, our only watchguard in our foreign commerce which has had the flexibility and mobility to act expediently in the best interest of the shipping public has been the Federal Maritime Commission.

Your consideration of a bill which will destroy a proven flexible sounding board and policeman of all parties involved is to my company, the International Association of NVOCC's and our shipping public is an unconscionable act. We beg you to reconsider the source of this bill and the public benefit it is supposed to provide.

Please do not deny the shipping public the flexible protection of our Federal Maritime Commission in an industry which already has a legalized monopoly in shipping through the shipping Act of 1916. Further unrestraint by steamship lines and labor in negotiations obviously sensitive to the unsuspecting shipping public needs and demand this watchguard.

To leave the FMC avenue in favor of court proceedings and anti-trust suits would result in the demise of businesses such as Boston consolidation service due historically to lengthy proceedings and ineffective prosecution.

Your consideration of the outright rejection of this private interest sponsored bill will perform a valid public service and preserve the Federal Maritime Commission's flexible role in protecting the rights of our foreign commerce. Thank you for your consideration.

Respectfully submitted,

ROBERT T. COYNE.

AMERICAN FEDERATION OF LABOR AND CONGRESS
OF INDUSTRIAL ORGANIZATIONS,
Washington, D.C., May 19, 1980.

Hon. DANIEL K. INOUE,
Chairman, Subcommittee on Merchant Marine and Tourism, U.S. Senate, Committee on Commerce, Science, and Transportation, Washington, D.C.

DEAR MR. CHAIRMAN: The AFL-CIO wishes to express its support of H.R. 6613, a bill which will amend the Shipping Act, 1916, by prohibiting the Federal Maritime Commission from regulating multi-employer collective bargaining agreements.

Many of the maritime labor unions affected by this bill are affiliated with the AFL-CIO, including the International Longshoremen's Association, the Seafarers' International Union of North America, the National Marine Engineers' Beneficial Association, and the National Maritime Union.

The Supreme Court, in *Federal Maritime Commission v. Pacific Maritime Association* (1978), ruled that the FMC had authority under Section 15 of the Shipping Act to review and approve all multi-employer collective bargaining agreements in the maritime industry. In effect, the maritime industry was singled out as the only industry in this country to be deprived of the provisions of express congressional policy of free and unfettered collective bargaining without governmental interference.

The AFL-CIO cannot perceive how good faith efforts of business and labor in the maritime industry can ever achieve industrial accord without resulting in unnecessary delay and uncertainty to the collective bargaining process as the direct result of this inequitable statute. Moreover, our national labor policy of fostering an amicable resolution of labor disputes through collective bargaining has now been undermined in the maritime industry by seriously altering collective bargaining into a process of adjudicator rules, regulations, and petitions before the Federal Maritime Commission.

The Congress of the United States, more than 40 years ago, legislated a precise system of laws dealing with the rights of workers. Through these laws the National Labor Relations Board was constituted as the Federal agency to deal with labor-management issues. The expertise of the FMC, to the contrary, lies in the exclusive role of regulating freight rates, conference standards, and other shipping policies as they apply to ocean shipping and terminal operators under the Shipping Act, 1916.

This Act, as we understand it, was patterned after the Interstate Commerce Act, not one of the labor statutes. Yet, the railroads and trucking industries do not take their labor pacts to the Interstate Commerce Commission for final implemental and approval. And certainly the airline industry does not have its many labor contracts first reviewed by the Civil Aeronautics Board. Clearly, the same position should be embodied for the maritime arm of transportation in this country.

This legislation, Mr. Chairman, is vitally necessary. The situation that presently prevails for the maritime industry is not only an unnecessary, inequitable intrusion

into the process of labor bargaining, but it destroys the very essence of what collective bargaining is designed to accomplish. We urge, therefore, favorable consideration of H.R. 6613 in the form that was passed in the House of Representative on April 15, 1980, by 357-2 vote.

Sincerely,

RAY DENISON,
Director,
Department of Legislation.

LINDSAY, HART, NEIL & WEIGLER,
Portland, Oreg., June 2, 1980.

Mr. JOHN HARDY,
Majority Counsel, Senate Subcommittee on Merchant Marine and Tourism,
Washington, D.C.

DEAR MR. HARDY: During my recent visit with you in Washington, we discussed the pros and cons of HR 6613, which would eliminate jurisdiction of the Federal Maritime Commission to remedy discrimination in the charges used to fund fringe benefits required by collective bargaining agreements within the maritime industry.

During our conference, you asked that our clients, the Master Contracting Stevedore Association of the Pacific Coast, Inc., give further consideration to the availability of alternative remedies in the event HR 6613 were enacted and the FMC were no longer available as a forum to our clients. You specifically mentioned (1) common law remedies; (2) the National Labor Relations Act; and (3) antitrust laws. You also emphasized that temporary restraining orders might be available under the Labor or antitrust laws as a further deterrent to the alleged discrimination currently being litigated in four cases before the FMC which challenge the method of funding the fringe benefits for the PMA-ILWU labor agreements.

1. *Common Law Remedies.*—Common law remedies—whether under admiralty jurisdiction or not—are limited to claims for breach of contract or tort.

While various shipping interests maintain that PMA-ILWU assessments for fringe benefits are allocated in a discriminatory manner between cargo sectors, no contention is made that any contracts are violated or that any torts are being committed. Accordingly, none of the issues now being litigated before the FMC could or would be resolved through any common law remedy.

2. *Labor laws.*—The labor laws do, in contrast to common law, provide a possible avenue of relief. The most significant recent cases, of course, are *Consolidated Express, Inc. v. NYSA*, 602 F2d 494 (2d Cir. 1979), Sup. Ct. *Op. pend.*; and *ILA v. NLRB*, 537 F2d 706 (1976), *cert den* 429 US 1041.

ILA v. NLRB and *Consolidated* (assuming it is affirmed) address use of collective bargaining agreements to refuse handling of cargo or to impose a penalty on shippers who refuse to use longshore labor. This conduct fits the classic mold of secondary activity or "hot cargo" boycotts which are outlawed by 8(b)(4)(ii)(b) and 8(e) of the NLRA.

We do not perceive the labor laws as applicable to the facts in the four FMC cases. The issue in those cases is whether a particular cargo sector is charged in a discriminatory fashion when compared to another (e.g. break bulk versus container cargo). No claim is made, or could be made, that the assessments involve secondary activity or violation of labor agreements.

We conclude that labor laws are limited in value only if secondary activity is present, or a collective bargaining agreement is violated.

3. *Antitrust laws.*—Antitrust precedents also suggest remedies for boycott actions. Again, however, no such activity is involved in the PMA-ILWU funding cases.

Another antitrust issue may be a claim of price-fixing in setting rates for funding fringe benefits. Our analysis, however, is that in most cases, the courts would recognize labor law immunity, particularly if the rates are set through the bargaining process.

Antitrust remedies do not help our clients. The stevedores are a minority within the PMA voting structure, yet they are required to collect fringe benefit assessments in charges to their customers. Accordingly, use of antitrust remediew would probably place our clients on the defendant's side of the case—which is obviously unattractive and, under the circumstances, quite unfair.

4. *Provisional remedies.*—You also requested that we comment on the availability of restraining orders as a remedy.

I remain of the opinion that a temporary restraining order would be extremely difficult to obtain if the cases now before the Maritime Commission were to shift to forums available under labor or antitrust laws. You realize, of course, that under the labor statutes, injunctive relief is normally available only at the request of the

Regional Director of the National Labor Relations Board. An individual litigant is not able to obtain an injunction except in the rare case of violence or mass picketing which may prevent a person's access to his property.

The NLRB is understandably reluctant to grant injunctive relief and in those instances where the Board has discretion, injunctive relief is sought only ten percent of the time when it is requested by employers. See Federal Regulation of Employment Services, Volume 8, Chapter 61 (Temporary Injunctions) Section 61.5, p. 6 (1977), and *Siegel*, Section 10 J of the National Labor Relations Act; suggested re forms for an expanded use, 13 BC Industrial and Commercial Law Review, 457 (1972).

5. *Conclusion.*—The independent contracting stevedores whom we represent have a strong preference for the FMC as the forum for litigating the issues concerning the fairness of the cargo assessments whether they arise in the context of fringe benefit agreements, or otherwise.

We believe the employment practices of the Maritime industry are unique. To cite just one example, the West Coast longshoremen work under a coastwide labor agreement, which is controlled on the employer side by indirect employers. Accordingly, we believe it is appropriate for primary jurisdiction of cargo assessment issues to reside in an agency that is most familiar with this industry.

In summary, the stevedores' position is that the Shipping Act and the FMC continue to be the best forums for handling disputes that exist. The reasons for substituting the labor laws or the antitrust laws as the basic forum for regulating this industry are not convincing. We remain convinced that the proponents' primary concern will be satisfied by exempting the labor agreements, but retaining jurisdiction under Sections 16 and 17 of the Shipping Act, as our amendments would do.

Sincerely,

DANIEL H. SKERRITT.

ITT RAYONIER INC.,
Stamford, Conn., June 2, 1980.

Senator DANIEL K. INOUE,
Chairman, Subcommittee on Merchant Marine and Tourism, Committee on Commerce, Science, and Transportation, Washington, D.C.

DEAR SENATOR INOUE: Your Subcommittee on Merchant Marine and Tourism is now considering H.R. 6613 which would amend the Shipping Act of 1916 so as to totally remove the Federal Maritime Commission jurisdiction over a) agreements between labor and multi-employer bargaining groups on collective bargaining matters; and, b) agreements between members of a multi-employer group on how the costs of settlements are to be borne by various segments of the shipping public.

ITT Rayonier, a forest products manufacturer and major ocean shipper, agrees that the collective bargaining process should be protected from unnecessary governmental interference and we support H.R. 6613 insofar as it removes the FMC's jurisdiction over the collective bargaining agreements. However, we oppose that portion of the bill that will remove the FMC's jurisdiction over how rates will be assessed against various shippers.

Shippers not belonging to multi-employer bargaining groups have no voice in the assessment process and therefore need and should have the protection of the FMC which, under existing laws, can review arrangements and prevent discriminatory practices within the industry. Retention of the FMC's power to review assessment procedures will not affect the agreements with labor but will ensure that the cost of those agreements are borne fairly by the shipping public.

If that power is removed, anti-trust litigation may be the shippers only alternative and we do not consider this a reasonable option. Anti-trust litigation is concerned with assessing damages for past wrongs, whereas the cost assessment problem primarily involves establishing future shipping rates. Furthermore, by the very nature of anti-trust litigation, a timely resolution of the issue would be improbable, if not impossible.

To remedy the problem we see in H.R. 6613, we suggest the legislation be amended so as to preserve the FMC's power over multi-employer agreements which seek to assess cargo and shippers to fund the benefit obligations incurred under collective bargaining agreements. In this regard, we endorse the amendments advocated

before the Senate Subcommittee on Merchant Marine and Tourism by the Weyerhaeuser Company and other forest products spokesmen.

Yours very truly,

JEROME D. GREGOIRE,
Vice President.

SEA-LAND INDUSTRIES, INC.,
Edison, N.J., June 3, 1980.

Hon. DANIEL K. INOUE,
Chairman, Subcommittee on Merchant Marine and Tourism, of Senate Committee on
Commerce, Science, and Transportation, Washington, D.C.

DEAR CHAIRMAN INOUE: I am writing to inform you of Sea-Land's strong support for H.R. 6613, a bill which removes collective bargaining agreements from the regulation of the Federal Maritime Commission (FMC). I understand that this bill was passed on April 15 in the House by a vote of 358-2 and that your Subcommittee has scheduled a hearing on the bill on June 4.

The maritime industry is unique in that its multiemployer collective bargaining agreements are subject to review by a government regulatory agency in addition to the jurisdiction of the NLRB. The FMC's assertion of jurisdiction over this area, upheld by the Supreme Court in *FMC vs Pacific Maritime Association*, 435 U.S. 40 (1978), is detrimental to the collective bargaining process. This inserts a substantial measure of uncertainty into an area where decisiveness and timeliness are paramount if costly work disruptions are to be avoided.

The problems which H.R. 6613 seeks to remedy are acutely felt by Sea-Land Service, Inc. This company is the major operating company of Sea-Land Industries Investments, Inc. and is the largest United States flag containership operator. Thus, it is a major user of stevedoring services. Additionally, we employ substantial numbers of longshoremen on the east, gulf and west coasts.

H.R. 6613 has been endorsed by major multiemployer bargaining groups including the New York Shipping Association and the Pacific Maritime Association. It has also been endorsed by the labor unions involved with these matters. Indeed, even the FMC has supported its enactment.

There is an urgent and immediate need for the enactment of H.R. 6613.

I ask that our company's strong interest in and support for this measure be entered in the Committee's record.

Thank you for your efforts to remedy this serious problem.

Sincerely,

C. I. HILTZHEIMER,
Chairman.

AMERICAN PRESIDENT LINES,
Oakland, Calif., June 4, 1980.

Hon. DANIEL K. INOUE,
Chairman, Senate Subcommittee on Merchant Marine and Tourism,
Washington, D.C.

DEAR SENATOR: American President Lines, Ltd., urges prompt subcommittee and committee action on H.R. 6613, legislation designed to overrule the decision of the supreme court in *Federal Maritime Commission vs Pacific Maritime Association*, in this case, the Court, in a split opinion, authorized the FMC, an agency without expertise in labor relations, to regulate multi-employer collective bargaining agreements in the maritime industry. This decision, which introduces uncertainty into maritime labor relations, is contrary to the longstanding national labor policy that the collective bargaining process in particular and labor relations generally come under the aegis of the National Labor Relations Board.

APL, which participates in multi-employer bargaining covering its seagoing personnel as well as employees in the Pacific Coast longshore industry, is apprehensive about the stability of this bargaining process as a result of the regulatory jurisdiction given the FMC by the Supreme Court. The passage of H.R. 6613 is therefore deemed to be of critical importance.

RICHARD L. TAVROW,
Senior Vice President.

U.S. SENATE,
COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION,
Washington, D.C., June 14, 1980.

WITNESSES FROM HEARINGS ON H.R. 6613,
Street Address,
City, State 00000.

DEAR WITNESS: On June 16, 1980, the Subcommittee released a staff draft amendment in the nature of a substitute to H.R. 6613, a bill to amend the Shipping Act, 1916, in order to prohibit regulation of collective bargaining agreements, and activities arising out of or based upon those agreements. A copy is enclosed, and your comments are requested by the close of business on June 23.

While H.R. 6613 passed the House by a substantial margin, at the Subcommittee hearings several witnesses representing significant sectors of the maritime industry indicated they had not been aware that the House was considering H.R. 6613, and consequently had not had an opportunity to express their opposition to the legislation at that time.

We stress that the draft amendment does not necessarily reflect the views of the Subcommittee. It is, however, an attempt by the staff to assure: that the maritime industry is not deprived of the express national policy of free and unfettered bargaining without government intervention; and that FMC jurisdiction is preserved to the extent necessary to ensure equal treatment of shippers, cargo and localities, and to prevent abuses made possible by concerted activity of ocean carriers and others.

Based upon the testimony at the Subcommittee's June 4 hearing, the comments on the staff draft, and our own deliberations the Subcommittee expects to recommend legislation to the full Committee shortly after June 23. No further hearings are contemplated.

Because of the brevity of the legislative session, time is of the essence if Congress is to enact legislation this year. Accordingly, in the interest of all concerned, the Subcommittee will strictly adhere to the June 23 deadline for filing comments. Your cooperation is appreciated.

For further information please contact John D. Hardy, Merchant Marine and Tourism Counsel, at 224-6742.

Sincerely,

DANIEL K. INOUE,
Chairman,
Subcommittee on Merchant Marine and Tourism.
JOHN W. WARNER,
Ranking Minority Member,
Subcommittee on Merchant Marine and Tourism.

CROWN ZELLERBACH,
Washington, D.C., June 19, 1980.

Mr. JOHN HARDY,
Staff Counsel Committee on Commerce, Science and Transportation, Subcommittee
on Merchant Marine and Tourism, Washington, D.C.

DEAR JOHN: We have reviewed and generally support the substitute to H.R. 6613 drafted by the Committee Staff under date of June 16, 1980, but strongly suggest the following changes be incorporated into the bill:

1. Section 2 of the Bill, amending the first paragraph of Section 15 of the Shipping Act deletes (we believe in error) language found in the present Act. The omission, which consists of nine words, occurs after the word "earnings" in line 9 (page 6 of Bill) and should be reinstated in the Bill. Further, the reference to the "fourth paragraph" at lines 17 and 18 (page 6 of the Bill) should read "fifth paragraph." We assume both of these are technical drafting errors.

2. Section 4 of the Bill, amending Section 15 by inserting a new paragraph should be amended to insert the mandatory language "shall" in the place of the permissive work "may" appearing at lines 3 and 21 (page 7 of the Bill).

It is our view that the Commission should not have the discretion to "disapprove, cancel, or modify" any agreement which it finds after notice and hearing to be unjustly discriminatory or unfair. Such a finding should compel disapproval.

In this same section, the word "perspective" at line 18 should read "prospective."
3. Section 5 of the Bill, amending Section 45 erroneously cites the codification as "46 USC 482." The citation should read "46 USC 842." In this same section, for clarification, we recommend that the words "unless such" appearing at line 7 (page

8) be replaced with the words "other than" and that the word "which" be inserted immediately after the word "provisions" in the same line.

4. The staff section by section analysis should be modified to be consistent with the above revisions. We should note that retention of the Shipper example in the third paragraph from the end of the section by section analysis, is particularly critical in clearly expressing legislative intent.

With these changes, Crown Zellerbach supports this Bill.

Sincerely,

SOL MOSHER, *Vice President.*

INTERNATIONAL ASSOCIATION OF NVOCCS,
Washington, D.C., June 19, 1980.

Hon. DANIEL K. INOUE,
*Chairman, Subcommittee on Merchant Marine and Tourism, CA 102 U.S. Senate,
Washington, D.C.*

DEAR CHAIRMAN INOUE: We are submitting these comments on the "staff draft amendment in the nature of a substitute to H.R. 6613" in accordance with the Committee release of June 16, 1980.

We believe the staff draft is very helpful in removing the several concerns we expressed in our submitted statement and testimony on June 4, 1980 and in our response of June 11, 1980 which we ask to be included in the record of the hearings on H.R. 6613.

Section 5 of the staff draft, proposing a new Section 45 of the Shipping Act, 1916, would appear to protect shippers and NVOCCs against unfair and unjust discrimination, by carriers acting as an employer group, in agreements relating to collective bargaining when such agreements involve "rates, charges, regulations, or practices of a common carrier or other person subject to this Act which are required to be set forth in a tariff" (lines 13-16 of Section 5, p. 8 of staff draft amendment). We would point out that there are some matters that should be in tariffs that are as a matter of practice not now so included. One example of such subject matter is—how shippers obtain containers from carriers. Our reading of existing Section 18 (b) of the Shipping Act, 1916 would require that such a basic rule of practice should be in each carrier's or conference's tariff. Yet that is not the general rule—such information is not now contained in carriers' tariffs. We would not want any unjust discrimination as to furnishing containers to shippers and NVOCCs to be interpreted to be exempt under proposed Section 45 on the ground the subject is not tariff matter because of its long standing omission from existing carrier and conference tariffs.

Other than for the above concern we believe that Section 45 is a very constructive change which appears to meet the concerns we have previously expressed to the Committee.

We do feel it is important to repeat that the FMC has by regulation exempted collective bargaining agreements from Section 15 prior filing and approval requirements.

We thank the Chairman and members of the Committee for this opportunity to submit our views.

Respectively,

RAYMOND P. DEMEMBER,
*Executive Vice President,
General Counsel.*

NATIONAL CUSTOMS BROKERS & FORWARDERS ASSOCIATION
OF AMERICA, INC.,
New York, N.Y., June 19, 1980.

U.S. Senator DANIEL INOUE,
*Senate Merchant Marine Subcommittee,
Washington, D.C.*

DEAR SENATOR INOUE: We have reviewed the Staff Working Draft of H.R. 6613, dated June 16th, 1980, the proposed report of the Senate Committee on Commerce, Science & Transportation and accompanying releases issued by the Committee.

In our opinion the changes made in the original bill are salutary and provide the necessary protection to our shipping public against carrier abuses. This being so, our Association has no objection to the bill as amended.

We appreciate the courtesy shown to us by the Subcommittee.
Sincerely yours,

GERALD H. ULLMAN,
General Counsel.

THE BOSTON SHIPPING ASSOCIATION, INC.,
Boston, Mass., June 19, 1980.

Hon. DANIEL K. INOUE,
*Chairman, Senate Subcommittee on Merchant Marine & Tourism
Washington, D.C.*

DEAR MR. CHAIRMAN: The following comments on the Committee Staff Draft Amendment to H.R. 6613 are submitted by the Boston Shipping Association, Inc.

To the extent the draft is an attempt to compromise the many and frequently competing interests concerned with this legislation, we view the draft as successful. While we continue to believe that all assessments including those on a "uniform man hour basis" should be subject to Federal Maritime Commission review, we also recognize that compromise is the essence of legislation. Consequently, while we are not prepared to offer our active support for the draft, we do not feel that it warrants our active opposition.

We wish to express our appreciation for this opportunity to offer our comments on this proposal.

Sincerely,

ROBERT M. CALDER,
Executive Director.

LINDSAY, HART NEIL & WEIGLER,
Portland, Oreg., June 19, 1980.

Hon. DANIEL K. INOUE,
*U.S. Senate,
Washington, D.C. 20514*

DEAR SENATOR INOUE: The MCSA has reviewed the staff working draft of HR 6613. Our Association believes that the draft is deserving of support and should be enacted, subject to one extremely critical exception.

The working draft follows the NYSA compromise proposal in providing for FMC review of fringe benefit assessments based on tons of cargo, but excludes FMC review of any assessments which are based on uniform manhours.

The exclusion of manhour assessments from FMC review is inappropriate for several reasons. First, manhour assessments are the source of serious discrimination against labor intensive cargoes. As we mentioned in previous correspondence to your office, the recent developments in the maritime industry have resulted in a declining manhour base, even though the tons of cargo have increased. However, a tremendous portion of the fringe benefit assessments relate to obligations created *before* the container revolution when manhours were almost twice as high as they are today. These past service costs included the unfunded liability of the pension plan; welfare payments to retirees and survivors; and extra weeks of vacation earned through years of service.

Because of the dramatic changes in the configuration of the industry, fringe benefit assessments based on current manhours have no direct relationship to the past service costs. Manhour assessments in fact, force less productive cargoes to pay the past service portion of fringe benefits for the entire industry. This is unfair, as major portions of the past service costs were created by the other cargo sectors which no longer provide adequate manhours to pay their share of the past service cost.

As you know, two of the major multi-employer groups—the PMA and NYSA—have accepted at least a partial shift from a straight manhour assessment base to a tonnage assessment base for fringe benefits. The genesis of this change and the pressure for additional shifts to tonnage assessments is based upon the refusal of the break bulk carriers to continue paying a disproportionate share of the fringe benefit costs.

If HR 6613 requires that only tonnage (but not manhour) assessments meet the anti-discrimination requirements of the Shipping Act, a natural tendency will develop for multi-employer groups to place assessments only on manhours, rather than tons of cargo. As a result, we believe that the distinction between manhour and tonnage assessments in the staff working draft pre-judges the current dispute within the industry regarding the appropriate method of funding fringe benefits.

The MSCA proposal to place manhour assessments on a par with tonnage assessments may be accomplished through deletions on pages 5, 6, 7 and 8, as indicated in the enclosed copy of the Bill.

If the staff working draft is changed to place manhour assessments on as equal footing with tonnage assessments, the MCSA recommends that it be adopted by the subcommittee.

Sincerely,

DANIEL H. SKERRITT.

[TELEGRAM]

INTERNATIONAL TRAFFIC COMMITTEE,
NEW YORK CHAMBER OF COMMERCE,
New York, N.Y., June 20, 1980

Hon. DANIEL K. INOUE,
Chairman, Subcommittee on Merchant Marine and Tourism,
Washington, D.C.:

We agree with all elements of this draft except reparation provisions, page 7 line 17 thru 21 that if assessment is found and lawful, reparations should be prompt and not drawn out over potentially extended period.

We appreciate your efforts to get broad reaction from affected parties to this Bill and feel you have done excellent job in seeking compromise solutions.

AL PAYNE, *Secretary.*

MARYLAND DEPARTMENT OF TRANSPORTATION,
MARYLAND PORT ADMINISTRATION,
Baltimore, Md., June 20, 1980.

Hon. DANIEL K. INOUE,
Senate Merchant Marine and Tourism Subcommittee,
Washington, D.C.

DEAR SENATOR INOUE: The Maryland Port Administration has reviewed the Staff Draft Amendment in the nature of a substitution to H.R. 6613, a bill to amend the Shipping Act 1916 in order to prohibit regulation of collective bargaining agreements, and activities arising out of or based upon those agreements.

In our letter of April 21, 1980 we expressed reservations concerning H.R. 6613 as it passed the House. We believe the changes made by your staff and all concerned parties in a spirit of compromise will afford adequate protection to ports such as Baltimore.

We commend you and your staff for its fine results and hope for prompt passage of this bill.

Sincerely,

RICHARD A. LIDINSKY, Jr.,
Director of Tariffs
and National Port Affairs.

TRANSPORTATION INSTITUTE,
Washington, D.C., June 23, 1980.

Hon. DANIEL INOUE,
Subcommittee on Merchant Marine and Tourism, Senate Committee on Commerce,
Science, and Transportation, Washington, D.C.

DEAR MR. CHAIRMAN: The Transportation Institute, a research and education organization composed of 174 U.S.-flag deep sea and inland shipping companies, wishes to express its support for the draft amendment in the nature of a substitute to H.R. 6613, legislation to amend the Shipping Act of 1916 to prohibit the regulation of collective bargaining agreements by the Federal Maritime Commission.

We strongly believe that the subjection of the maritime industry to the filing and approval requirements contained in Section 15 of the Shipping Act of 1916 would place an unnecessary and administrative burden on the FMC and allow an unwarranted intrusion into the collective bargaining process. Furthermore, to subject the parties in the collective bargaining process to an FMC determination which might invalidate or modify a settlement negotiated in good faith would seriously jeopardize the further resolution of labor disputes as envisioned by national labor policy.

In this respect, we feel that the draft amendment will accomplish the primary purpose of the legislation by removing unnecessary governmental intervention in the collective bargaining process itself, and also ensure that the FMC continues to play a constructive role in preventing unfair treatment to shippers.

We again urge the passage of this legislation and request that this statement be made part of the record on H.R. 6613.

Sincerely,

HERBERT BRAND, *President.*

THE SEAFARERS INTERNATIONAL UNION
OF NORTH AMERICA,
Washington, D.C., June 23, 1980.

Hon. DANIEL INOUE,
Subcommittee on Merchant Marine and Tourism, Senate Committee on Commerce, Science, and Transportation, Washington, D.C.

DEAR MR. CHAIRMAN: The Seafarers International Union of North America, AFL-CIO, wishes to express its support of the draft amendment offered in the nature of a substitute to H.R. 6613, legislation to amend the Shipping Act of 1916, in order to prohibit the regulation of collective bargaining agreements by the Federal Maritime Commission.

As we pointed out earlier, the Supreme Court's grant of discretionary authority to the Federal Maritime Commission to assert jurisdiction over multi-employer collective bargaining agreements singled out the maritime industry as the only industry to be deprived of the benefits of collective bargaining without governmental intervention.

We therefore feel that the amendment, while preserving FMC jurisdiction necessary to prevent any unjust or discriminating agreements between carriers or shippers, will also prevent the unnecessary intervention of the FMC into the field of labor relations and collective bargaining in the maritime industry.

Once again, we respectfully urge the passage of this legislation, in order that the maritime multi-employer collective bargaining process be returned once more to a position of equality with the other U.S. industries.

Sincerely,

FRANK DROZAK,
Executive Vice President.

STATEMENT OF THE INTERNATIONAL ORGANIZATION OF MASTERS, MATES & PILOTS,
ILA, AFL-CIO

The International Organization of Masters, Mates and Pilots (MM&P) is an autonomous affiliate of the International Longshoremen's Association, ILA, AFL-CIO. It is the largest of all deck officer groups, representing better than 90 percent of all deep sea Licensed Deck Officers in the American Merchant Marine. In addition, we represent virtually all state pilots in the sea ports of the United States and on the Great lakes. We also represent the Panama Canal Pilots. Our officer-members serve aboard nearly all the break-bulk, container, tanker, Ro-Ro, LASH and SEA BEE class vessels under the U.S. flag. We represent government employee deck officers of the Military Sealift Command, the National Oceanic and Atmospheric Administration and other federal agencies, including the Army Corps of Engineers, and the U.S. Dept. of Interior, Geological Survey. We also man auxiliary craft, including passenger ferries and tugs, that work the oceans, bays, harbors, rivers and sounds, and estuaries of our great nation.

The purpose of this organizational description is manifold. Primarily it serves to explain our autonomous and unique identity. Secondly, it serves to describe the multiplicity of missions in which the MM&P is involved. Thirdly, it suggests the numerous labor/management groups in which MM&P participates in cooperation with its approximately 120 contract companies. Above all, it serves to underscore our obligations to our members to comment upon the specifics of H.R. 6613, a bill to amend the Shipping Act, 1916, in order to prohibit regulation of collective bargaining agreements.

The MM&P strongly supports and urges the speedy passage of H.R. 6613. This legislation is most significant in its importance to the maritime industry as a whole and maritime labor in particular, for many reasons.

Foremost among all reasons for passage of H.R. 6613 was that best expressed by Congressman Murphy, Chairman of the Merchant Marine and Fisheries Committee,

House of Representatives, in his statement of support for this bill on the floor of the House:

"Presently the shipping industry is the only regulated industry where collective bargaining agreements are subject to prior approval. The industry is subject not only to our elaborate system of labor laws, but also to regulation by the FMC, an agency totally lacking expertise in the area of collective bargaining.

"The preimplementation approval requirement which permits the Government to supervise the terms of collective bargaining agreements will have an adverse impact on parties trying to reach agreements on labor problems. The concept of labor and management reaching an agreement which represents merely a tentative settlement, which could be nullified by a Government agency, is foreign to American labor law."

Undoubtedly the logic, wisdom and fairness of Chairman Murphy's statement was shared by an overwhelming majority of his peers in the House as the "Yeas" for passage were 358 to but 2 "Nays."

In this era of great technological change, innovation, automation and general redefinition of seagoing commerce, as set apart from the immediate post-WW II period of the 50's and 60's—much must be said for the importance of good labor-management relations and the maturity that has developed in that field in this industry. During the period of traumatic change which we are now experiencing with job attrition and work loss correlative to the numerous technological innovations—one might have expected much unrest. Such, however, is not the case. The MM&P along with its sister seafaring unions have together with management achieved an enviable record of labor peace. This labor peace is enjoyed not only by the direct protagonists, but by the shippers, shareholders, ancillary maritime services and general economy as a whole—and it has been achieved through hard-won but fairly negotiated, arms-length collective bargaining agreements.

No other industry has its labor agreements subject to prior approval by a government regulatory agency. Why should the maritime industry be discriminated against as if we were second-class citizenry? Is this equal protection of the laws or due process of law?

The evidence reveals that labor peace in the maritime industry prevails because of the good faith collective bargaining which exists between labor and management. And as Congressman Murphy has stated, for this process to continue without adverse impact, the unwelcome interference by government in the form of the Federal Maritime Commission must be removed.

We of the MM&P believe that the passage into law of H.R. 6613 would be fair, wise, and productive.

Thank you for your consideration of our statement, which we would like entered in the record as part of the testimony.

○

