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Pre-Implementation Review Under Section 15 of the Shipping Act of 1916

INTRODUCTION


Section 15 provides in pertinent part:

Every common carrier by water, or other person subject to this chapter, shall file immediately with the Commission a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this chapter, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term “agreement” in this section includes understandings, conferences, and other arrangements.

The Commission shall by order, after notice and hearing, disapprove, cancel or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be contrary to the public interest, or to be in violation of this chapter, and shall approve all other agreements, modifications, or cancellations. No such agreement shall be approved, nor shall continued approval be permitted for any agreement (1) between carriers not members of the same conference or conferences of carriers serving different trades that would otherwise be naturally competitive, unless in the case of agreements between carriers, each carrier, or in the case of agreements between conferences, each conference, retains the right of independent action, or (2) in respect to any conference agreement, which fails to provide reasonable and equal terms and conditions for admission and readmission to conference membership of other qualified carriers in the trade, or fails to provide that any member may withdraw from membership upon reasonable notice without penalty for such withdrawal.

The Commission shall disapprove any such agreement, after notice and hearing, on a finding of inadequate policing of the obligations under it, or of failure or refusal to adopt and maintain reasonable procedures for promptly and fairly hearing and considering shippers’ requests and complaints.

Any agreement and any modification or cancellation of any agreement not approved, or disapproved, by the Commission shall be unlawful, and agreements, modifications, and cancellations shall be lawful only when and as long as approved by the Commission; before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation; except that tariff rates, fares, and charges, and classifications, rules, and regulations explanatory thereof (including changes in special rates and regulations explanatory thereof (including changes in special rates and regulations explanatory thereof (including changes in special rates and
1916³ as granting to the Federal Maritime Commission (FMC or Commission) jurisdiction to require filing and approval of all restrictive maritime agreements⁴ that affect labor-management relations in the shipping industry. Since the Volkswagenwerk decision, the FMC and the courts have inconsistently interpreted⁵ the scope of the FMC's power under section 15 to require pre-implementation filing and approval of collective bargaining and other labor related agreements in the shipping industry. The Supreme Court has granted certiorari in the case of Pacific Maritime Association v. FMC⁶ to consider the most recent construction of the Commission's section 15 jurisdiction to control anticompetitive agreements in maritime law.

In Pacific Maritime Association, the District of Columbia Circuit rejected the FMC's exercise of jurisdiction over a collective bargain-

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³ See, e.g., Pacific Maritime Ass'n v. FMC, 543 F.2d 395 (D.C. Cir. 1976), cert. granted, 430 U.S. 905 (1977); New York Shipping Ass'n, Inc. v. FMC, 495 F.2d 1215 (2d Cir.), cert. denied, 419 U.S. 964 (1974); United Stevedoring Corp. v. Boston Shipping Ass'n, 15 F.M.C. 33 (1971) (Boston I), on remand, 16 F.M.C. 7 (1972) (Boston II).
⁴ See 430 U.S. 905 (1977); see text accompanying notes 90-96 infra.
ing agreement between the Pacific Maritime Association (PMA)\(^7\) and the International Longshoremen’s and Warehousemen’s Union (ILWU). The agreement imposed participation hiring hall procedures on non-PMA employers of dockworkers. The court held that collective bargaining agreements are not subject to either the pre-implementation filing requirements or the approval of the Federal Maritime Commission.\(^8\)

\textit{Pacific Maritime Association} highlights the jurisdictional conflict between the FMC and the National Labor Relations Board (NLRB)\(^9\) concerning maritime agreements that affect both national labor policy\(^10\) and the shipping industry. In practice, the FMC and the courts have adopted an ad hoc approach, balancing labor and shipping interests,\(^11\) to determine the scope of the Commission’s section 15 jurisdiction. One of the principal reasons for adopting this case by case determination has been the difficulty in reconciling the conflict between the national labor policy promoting freedom of collective bargaining and the national policy favoring a competitive shipping industry.\(^12\)

**BACKGROUND**

The collective bargaining agreement in issue in \textit{Pacific Maritime Association} arose out of the 1972 and 1973 labor negotiations between the Pacific Maritime Association and the ILWU.\(^13\) The controversy concerned the employment of dockworkers registered with PMA-ILWU hiring halls by non-association employers.\(^14\) The collective bargaining agreement required non-association employers, as a condition to the use of the hiring halls, to participate in fringe

\(^7\) Maritime and shipping associations are multi-employer collective bargaining units representing various employers of dockworkers.

\(^8\) 543 F.2d at 411-12. The court believed that “[a]greements between labor and management, while subject to antitrust and shipping legislation, cannot be fitted into the pre-implementation approval procedures of section 15 without ignoring the national policy fostering industrial peace through collective bargaining.” Id. at 411.

\(^9\) See cases cited at note 5 supra; see also text accompanying notes 63-96 infra.


\(^11\) United Stevedoring Corp. v. Boston Shipping Ass’n, 16 F.M.C. 7, 12 (1972) (Boston II); New York Shipping Ass’n, Inc., 16 F.M.C. 381, 390 (1973).

\(^12\) See Volkswagenwerk Aktiengesellschaft v. FMC, 390 U.S. 261, 282 (1968) (Harlan, J. concurring).

\(^13\) These agreements include the master collective bargaining agreement, agreements evidencing understandings among Association members, and Supplemental Memorandum No. 4. Of primary interest is the supplemental memorandum which imposes conditions on non-members.

\(^14\) 543 F.2d at 397. Prior to the PMA-ILWU agreements in issue, non-member employers negotiated separately with the ILWU and executed a separate agreement with the PMA regarding the use of the PMA-ILWU hiring halls.
benefit programs, pay full association dues and assessments, employ union members regularly, and be treated as association employers during work stoppages. In hearings before the FMC concerning the validity of the agreements under the Shipping Act, the section 15 jurisdictional issue was severed from the other issues to expedite the proceedings. The FMC's hearing counsel argued that the collective bargaining agreements in issue raised antitrust and labor law considerations. Although the maritime agreements appeared to be outside labor's antitrust exemption, counsel contended that the matter should be left to the NLRB and the courts, since the NLRB and not the FMC is equipped with the expertise and experience to handle the complexities of labor relations.

The Commission rejected the hearing counsel's argument and applied the guidelines enunciated in United Stevedoring Corp. v. Boston Shipping Association. The FMC concluded that the agreements were outside the protection of labor's antitrust exemption and therefore subject to the filing and approval requirements of section 15. On appeal, the District of Columbia Circuit overruled the FMC, holding the agreements to be outside the parameters of section 15 filing and approval procedures. The court stated:

At issue in the controversy is the applicability of the pre-implementation filing and approval procedure of section 15 of the

15. Id. at 397-98.
16. Id. at 398.
17. Id.
18. 16 F.M.C. 7 (1972). The guidelines as set forth in Boston II are:
   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 “arms-length” or “eye-ball to eye-ball.”
   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.

Id. at 13. The Commission further stated:

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.

19. 543 F.2d at 411-12.
Shipping Act of 1916 to a collective bargaining agreement between the union and a multi-employer bargaining unit.\textsuperscript{20}

\textbf{THE LEGISLATIVE HISTORY OF SECTION 15}

The Shipping Act of 1916 was the legislative response to recommendations contained in the report on steamship agreements and affiliations filed by the Alexander Committee.\textsuperscript{21} Congress, in adopting the Alexander Report recognized that certain anticompetitive practices were advantageous to the shipping industry;\textsuperscript{22} at the same time, however, some government supervision was deemed necessary to prevent monopolistic abuses.\textsuperscript{23} The statute was enacted to eliminate disadvantages and abuses in foreign and domestic shipping created by secret anticompetitive agreements and conferences between shipping concerns.\textsuperscript{24} To effectuate this purpose, section 15 of the Shipping Act of 1916 requires a wide variety of maritime agreements\textsuperscript{25} affecting competition in the shipping industry be filed with the FMC for approval before implementation.

Section 15 of the Act is designed to grant the shipping industry a limited antitrust exemption.\textsuperscript{26} Nevertheless, the Supreme Court in \textit{Carnation Co. v. Pacific Westbound Conference}\textsuperscript{27} held that the

\begin{enumerate}
\item[20.]\textit{Id.} at 396.
\item[22.]\textit{Alexander Report, supra} note 21, at 416. The Alexander Committee reported: 
\begin{quote}
[There are] advantages . . . resulting from agreements and conferences if honestly and fairly conducted, such as greater regularity and frequency of service, stability and uniformity of rates, economy in the cost of service, better distribution of sailings, maintenance of American and European rates to foreign markets on a parity, and equal treatment of shippers through the elimination of secret arrangements and underhanded methods of discrimination. . . .
\end{quote}
\item[23.]\textit{Id.} at 416-18; S. REP. No. 689, 64th Cong., 1st Sess. 8-9 (1916); H.R. REP. No. 659, 64th Cong., 1st Sess. 27-32 (1916).
\item[24.]\ The complaints filed with the Alexander Committee included objections to the secrecy surrounding maritime agreements and conferences, "excessive rates, discrimination between shippers in rates and cargo space . . . arbitrariness in the settlement of just claims, failure to give due notice to shippers when rates were to be increased, refusal to properly adjust rates as between various classes of commodities, and the unfairness of certain methods—such as fighting ships, deferred rebates, the threats to refuse shipping accommodations used by some conference lines to meet the competition of nonconference lines." \textit{Alexander Report, supra} note 21, at 417.
\item[25.]\ See note 4 \textit{supra}.
\item[26.]\ \textit{Alexander Report, supra} note 21, at 418-21.
\item[27.]\ 383 U.S. 213 (1966). The \textit{Carnation case} involved ratemaking agreements between maritime interests which had not been filed with the FMC for approval before implementation. The Court stated that "[t]he creation of an antitrust exemption for rate-making activi-
Shipping Act of 1916 did not completely preclude the application of the antitrust laws to the shipping industry. Congress intended the antitrust exemption be available only to anticompetitive agreements filed and approved by the FMC pursuant to section 15. Hence, agreements implemented without filing and approval remain subject to federal antitrust laws. In *Carnation*, the Court found that maritime accords implemented without FMC approval, although subject to the antitrust statutes, might also be tested under the shipping laws. The validity of these agreements would be measured against sections 15, 16 and 17 of the Shipping Act.

Section 15 empowers the FMC to disapprove, cancel, or modify agreements it finds unjustly discriminatory or unfair, detrimental to interstate or foreign commerce, or in violation of the shipping laws. The Commission may exercise its supervisory authority whether or not the agreements have been previously approved under section 15.

Section 16 of the Shipping Act of 1916 makes it unlawful for any

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28. The United States Supreme Court in *Carnation* believed that the provisions of the Shipping Act could not be construed as an implied repeal of all antitrust regulation. *Id.* at 217-18.

In addition, the Court has held that the FMC should consider antitrust policy in its decisions under § 15 of the Act. FMC v. Svenska Amerika Linien (Swedish America Line), 390 U.S. 238 (1968); Volkswagenwerk Aktiengesellschaft v. FMC, 390 U.S. 261 (1968).


30. *Id.* at 221-24. The Supreme Court in *Carnation* reversed the court of appeals' dismissal of the antitrust action involving the unapproved but implemented agreements stating:

Petitioner's failure to seek Shipping Act reparations does not affect its rights under the antitrust laws. The rights which petitioner claims under the antitrust laws are entirely collateral to those which petitioner might have sought under the Shipping Act. This does not suggest that petitioner might have sought recovery under both, but petitioner did have his choice.

*Id.* at 224.


32. *Id.* See note 2 supra.

33. 46 U.S.C. § 815 (Supp. IV 1974). Section 16 provides in relevant part:

- It shall be unlawful for any shipper, consignor, consignee, forwarder, broker, or other person, or any officer, agent, or employee thereof, knowingly and willfully, directly or indirectly, by means of false billing, false classification, false weighing, false report of weight, or by any other unjust or unfair device or means to obtain or attempt to obtain transportation by water for property at less than the rates or charges which would otherwise be applicable.

- It shall be unlawful for any common carrier by water, or person subject to this chapter, either alone or in conjunction with any other person, directly or indirectly—

  First. To make or give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever, or to subject any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever. . . .
shipping interest to practice discriminatory acts. The section proscribes activities which grant unjustifiable preference or advantage or impose undue or unreasonable prejudice or disadvantage on any person. In addition, unfair price discounts from regular rates and charges for transportation of property, are expressly prohibited.\textsuperscript{34}

Section 17\textsuperscript{35} of the Act makes it unlawful for shipping interests in foreign commerce to charge or collect unjustly discriminatory or prejudicial rates, fares, or charges. This section gives the FMC jurisdiction over the transporting and storage practices of all maritime interests subject to the Act.\textsuperscript{36}

Although the Supreme Court in \textit{Carnation} expressly recognized the applicability of the provisions of the Act, sections 15, 16 and 17 were not necessary to the Court’s disposition of the case. Since the plaintiff brought the action under the antitrust laws, the Court considered only whether an antitrust remedy was appropriate.\textsuperscript{37}

If a remedy is pursued under the maritime laws, however, and a collective bargaining agreement between a union and a shipping

\begin{quote}
Second. To allow any person to obtain transportation for property at less than the regular rates or charges then established and enforced on the line of such carrier by means of false billing, false classification, false weighing, false report of weight, or by any other unjust or unfair device or means.

Third. To induce, persuade, or otherwise influence any maritime insurance company or underwriter, or agent thereof, not to give a competing carrier by water as favorable a rate of insurance on vessel or cargo, having due regard to the class of vessel or cargo, as is granted to such carrier or other person subject to this chapter.

Whoever violates any provision of this section other than paragraphs First and Third hereof shall be subject to a civil penalty of not more than $5,000 for each violation.

Whoever violates paragraphs First and Third hereof shall be guilty of a misdemeanor punishable by a fine of not more than $5,000 for each offense.
\end{quote}

\textit{Id.}

\textsuperscript{34} \textit{Id.}

\textsuperscript{35} 46 U.S.C. § 818 (Supp. IV 1974). Section 17 provides:

No common carrier by water in foreign commerce shall demand, charge, or collect any rate, fare or charge which is unjustly discriminatory between shippers or ports, or unjustly prejudicial to exporters of the United States as compared with their foreign competitors. Whenever the Federal Maritime Commission finds that any such rate, fare, or charge is demanded, charged or collected it may alter the same to the extent necessary to correct such unjust discrimination or prejudice and make an order that the carrier shall discontinue demanding, charging, or collecting any such unjustly discriminatory or prejudicial rate, fare or charge.

Every such carrier and every other person subject to this chapter shall establish, observe, and enforce just and reasonable regulations and practices relating to or connected with the receiving, handling, storing, or delivering of property. Whenever the Commission finds that any such regulation or practice is unjust or unreasonable it may determine, prescribe, and order enforced a just and reasonable regulation or practice.

\textit{Id.}

\textsuperscript{36} \textit{Id.}

\textsuperscript{37} \textit{See note 30 supra.}
employer is found violative of sections 16 and 17, the shipping interests involved are subject to the sanctions provided by the terms of the Act. Thus, if an implemented but unapproved collective bargaining agreement is determined to be in violation of sections 16 and 17 of the Act, the Commission may cancel or modify the agreement.

**THE COMMISSION'S POWER UNDER SECTION 35**

In 1966 Congress amended the Shipping Act of 1916 to include section 35. The new provision empowers the FMC to exempt any class of shipping agreements from the requirements of the Shipping Act of 1916 or the Intercoastal Shipping Act of 1933. Of course, the FMC's exemptive powers are not unlimited. The Commission may order a section 35 exemption only after notice and opportunity for a full hearing have been afforded interested parties. No exemption will be granted, however, where it impairs substantially the free flow of commerce.

Section 35 specifically provides that agreements may be exempt from FMC regulation only where the Commission finds that "such exemption will not substantially impair effective regulation by the Federal Maritime Commission, be unjustly discriminatory, or be detrimental to commerce." Further, the Commission is authorized to attach conditions to effectuate the national policy favoring a free and unrestricted economy. The FMC may also, after affording all

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38. Section 16 of the Shipping Act provides civil and criminal penalties for violations of its provisions. Section 17 empowers the FMC to correct any violation of its provisions. See notes 33 and 35 supra.

39. 46 U.S.C. § 814. See also note 2 supra.

40. Id. § 833a (Supp. IV 1974). Section 35 provides:

   The Federal Maritime Commission, upon application or on its own motion, may by order or rule exempt for the future any class of agreements between persons subject to this chapter or any specified activity of such persons from any requirement of this chapter, or Intercoastal Shipping Act, 1933, where it finds that such exemption will not substantially impair effective regulation by the Federal Maritime Commission, be unjustly discriminatory, or be detrimental to commerce.

   The Commission may attach conditions to any such exemptions and may, by order revoke any such exemption.

   No order or rule of exemption or revocation of exemption shall be issued unless opportunity for hearing has been afforded interested persons.


43. Id. § 833a; see note 40 supra; S. REP. No. 1459, 89th Cong., 2nd Sess. 2 (1966).

interested parties a full hearing, revoke any exemption previously granted. 45

The purpose of section 3546 is "to provide the Federal Maritime Commission with authority to exempt certain operations of water carriers or other persons or activities from provisions of the Shipping Act, 1916, where circumstances would warrant such action." 47 The Senate Commerce Committee's report on section 35 notes that strict compliance with the Act involves unnecessary expense to the government and to persons subject to the Act where the maritime activity has an inconsequential effect on commerce. 48 The Commission's authority under section 35 to grant exemptions from the provisions or requirements of the Act, relieves the FMC and affected parties from undue regulation and an unnecessarily time-consuming burden. Further, the creation of classes of exempt agreements prevents piecemeal regulation and supervision by the Commission. 49

It is arguable that anticompetitive agreements between shipping associations and dockworkers' unions can have more than an inconsequential effect on commerce. However, this potential is slight in comparison to the demonstrated effects of labor-management conflicts. The effect on commerce of strikes and work stoppages arising out of labor disputes is pervasive. Longshoremen's strikes and work stoppages have frequently shut down the nation's ports and coast lines. The significant impact of these disruptions on national and international commerce cannot be ignored. 50

The FMC, by exempting collective bargaining agreements from the pre-implementation filing and approval procedure of section 15, does not limit or impair its power to regulate the agreements under the Shipping Act. Furthermore, these accords remain subject to the antitrust statutes and the labor laws. 51 As a result, the collective bargaining process is permitted to continue undisturbed by Commission intervention. According to the District of Columbia Circuit in Pacific Maritime Association v. FMC, 52 the FMC's exemptive power under section 35 presents the most sensible resolution of the conflict. 53

45. Id.
46. The purposes of § 35 of the Shipping Act are set forth in the Senate Committee report.
47. Id. at 1 (emphasis added).
48. Id. at 2.
49. Id.
51. See text accompanying notes 21-39 supra.
53. Id. at 409.
THE IMPACT OF LABOR'S ANTITRUST EXEMPTION ON MARITIME INTERESTS

Labor's Antitrust Exemption

The jurisdictional question confronting the United States Supreme Court in Pacific Maritime Association arises as a result of two competing national policies. The antitrust laws promote competition, while labor legislation seeks to protect working class interests by guaranteeing the right to bargain collectively. By enacting the Wagner Act in 1935, Congress adopted collective bargaining as a national policy "for the prevention and settlement of labor disputes." This national labor policy favors unfettered collective bargaining. The resolution of labor-management differences without strikes and work stoppages effectively serves the public interest. Congress further protected labor's right to bargain collectively by enacting a federal antitrust exemption for labor, and by providing for NLRB supervision of the collective bargaining process.

In addition, labor is also protected by a judicially developed exemption from the antitrust laws. This exemption arises from the courts' acknowledgement that federal labor policy requires tolerance of labor's anticompetitive efforts concerning wages and working conditions. However, this tolerance does not allow unions to

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56. Feinsinger, The National Labor Relations Act and Collective Bargaining, 57 Mich. L. Rev. 807, 808-11 (1959). Professor Feinsinger, quoting from NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 45, noted: "The act was based on the theory '. . . that free opportunity for negotiation with accredited representatives of employees is likely to promote industrial peace and may bring about the adjustments and agreements which the Act itself does not attempt to compel.'" Feinsinger, supra at 808.
freely impose direct restraints on competition among employers of union members.61

Labor's antitrust exemption is intended to promote collective bargaining between labor and management.62 This national policy in favor of collective bargaining inevitably collides with the national policy favoring the free flow of commerce. While collective bargaining should be fostered, agreements between shipping interests and dockworkers' unions should not be permitted to impinge on the FMC's regulation and supervision of competition in the maritime industry.

The Volkswagenwerk Precedent

Prior to the Supreme Court's 1968 decision in Volkswagenwerk Aktiengesellschaft v. FMC,63 the Federal Maritime Commission had not attempted to assert section 15 jurisdiction over agreements that involved labor matters and disputes. In Volkswagenwerk, the Supreme Court held that the FMC had jurisdiction over an assessment agreement among members of a multi-employer association created pursuant to a collective bargaining agreement between the association and the dockworkers' union. As a result of the Supreme Court's construction of section 15,64 it has been held that collective bargaining provisions affecting maritime competition must be filed with and approved by the FMC before implementation.65

Recurring labor difficulties in the West Coast shipping industry led to the bargaining agreement in Volkswagenwerk.66 In return for the ILWU's promise to introduce labor saving devices and eliminate certain restrictive work practices, the Pacific Maritime Association agreed to create a Mechanization and Modernization Fund. The purpose of the fund was to mitigate the impact of technological unemployment on longshoremen.67 The association reserved the right to determine the method by which the fund would be raised. Association members subsequently adopted an assessment formula.

62. See Meltzer, supra note 54.
64. The Court determined the FMC had construed its own jurisdiction too narrowly in view of the expansive language of the statute. Id. at 273-75.
The Court held that the assessment agreement between Pacific Maritime Association members was subject to the filing and approval requirements of section 15. The Court emphasized that it was the funding agreement between association members and not the collective bargaining agreement that was within the FMC's jurisdiction.68

Justice Douglas dissented, arguing that the fund assessment agreement was inseparable from the collective bargaining agreement. According to Justice Douglas, the practical effect of the Court's holding would be to cause a disruption of collective bargaining negotiations.69 Further, to require filing and Commission approval of labor agreements before implementation would paralyze labor-management negotiations.70

Justice Harlan, in his concurring opinion, recognized and predicted that the overlap between the national policies of collective bargaining and competitive commerce would present problems.71 The principles underlying section 15 are broad72 and have the potential to impinge upon other areas of national policy. This policy conflict demands that a delicate balance be maintained between the competing labor and maritime interests. The FMC's jurisdictional exercise must be tempered by an understanding that the national labor policy may, at times, dominate shipping interests when the two are in conflict.73

68. 390 U.S. at 278:

It is to be emphasized that the only agreement involved in this case is the one among members of the Association allocating the impact of the Mech Fund levy. We are not concerned here with the agreement creating the Association or with the collective bargaining agreement between the Association and the ILWU. No claim has been made in this case that either of those agreements was subject to the filing requirements of § 15. Those agreements, reflecting the national labor policy of free collective bargaining by representatives of the parties' choice, fall in an area of concern to the National Labor Relations Board, and nothing we have said in this opinion is to be understood as questioning their continuing validity. But in negotiating with the ILWU, the Association insisted that its members were to have the exclusive right to determine how the Mech Fund was to be assessed, and a clause to that effect was included in the collective bargaining agreement. That assessment arrangement, affecting only relationships among Association members and their customers, is all that is before us in this case.

69. Id. at 310 (Douglas, J., dissenting). Justice Douglas also believed § 15 was misconstrued by the Court. "[T]o require the funding part of maritime collective bargaining agreements to receive prior approval from the Maritime Commission is to use a sledge hammer to fix a watch. I cannot read § 15 so as to attribute to Congress such a heavy-handed management of sensitive labor problems." Id. at 296.

70. Id. at 315-16.

71. Id. at 282-95 (Harlan, J., concurring).

72. See note 21 supra; see also text accompanying notes 21-39 supra.

73. Justice Harlan noted:

The real difficulty in this case is not to distinguish between agreements that must
The jurisdictional dispute between labor interests and the FMC arose again in 1971. In United Stevedoring Corp. v. Boston Shipping Association (Boston I)\(^7\) the Commission asserted section 15 jurisdiction over hiring and work assignment arrangements contained in a collective bargaining agreement between the Boston Shipping Association (BSA) and the International Longshoremen’s Association (ILA). Following the Supreme Court’s Volkswagenwerk decision, the FMC interpreted section 15 broadly, and stated that if an agreement is arguably subject to that section and is embodied in a collective bargaining agreement, it must be filed with the Commission for approval.\(^7\) The Commission premised its exercise of jurisdiction on Supreme Court dicta in Volkswagenwerk and United Mine Workers v. Pennington.\(^7\) The BSA and the ILA instituted an appeal from this determination. After a reconsideration of the dominance of labor issues involved, the FMC petitioned for a remand of the case.

On remand from the First Circuit,\(^7\) the FMC held (Boston II) that the BSA-ILA agreements were entitled to labor's antitrust exemption and thus were outside the scope of the FMC's review and approval authority under section 15.\(^7\) The agreement in the Boston Shipping controversy was not an assessment or funding agreement as in Volkswagenwerk. An assessment or funding arrangement, although of concern to labor interests, has a direct and substantial impact on the financial and competitive integrity of the shipping

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74. 15 F.M.C. 33 (1971) (Boston I).
75. See text accompanying notes 63-68 supra.
76. 381 U.S. 657 (1965).
77. Boston Shipping Ass’n v. FMC, No. 72-1004 (1st Cir. May 31, 1972) (unpublished opinion), on remand, 16 F.M.C. 7 (1972) (Boston II).
78. 16 F.M.C. at 14-15.
industry. The work assignment procedure included in the BSA-ILA collective bargaining agreement, however, related solely to the method of hiring longshoremen. The agreement contained no provision imposing either financial or competitive burdens on carriers or shippers. Because of the strong labor considerations involved and minimal and remote effects upon competition in the industry..., the FMC declined to assert section 15 jurisdiction on remand.

The anticompetitive impact of union-employer accords on the maritime industry must be balanced against the adverse effect on collective bargaining posed by the pre-implementation review requirements. The Commission, although holding in Boston II that the agreements were outside its section 15 jurisdiction, stated it could not sanction a "blanket labor exemption from the Shipping Act." Noting Justice Harlan's concurrence in Volkswagenwerk, the FMC pointed out that a single maritime agreement could raise issues that come within the jurisdiction of both the NLRB and the FMC.

In New York Shipping Association, Inc. v. FMC, the Second Circuit upheld the FMC's jurisdiction over an assessment and compensation arrangement contained in a collective bargaining agreement. In New York Shipping Association, as in Volkswagenwerk, the employers' association and the union created a fund to compensate dockworkers displaced from employment by mechanization. In this case, however, the union demanded participation in the fund's collection processes. The formula for ascertaining each employer's contribution to the fund and the methods of collection were incorporated into the collective bargaining agreement. This was the first time a payment formula was made part of the agreement between management and dockworkers.

The New York Shipping Association and the ILA, before implementation, petitioned the Commission for a ruling that the assessment agreement was not subject to the section 15 filing and approval procedures. The Association and the ILA argued that the agreement was not one between water carriers or other persons sub-

79. Id. at 14.
80. Id.
81. Id. at 13.
82. 390 U.S. 261, 282 (Harlan, J., concurring). Justice Harlan saw "no reason for assuming, in advance, that a maritime agreement must always fall neatly into either the Labor Board or Maritime Commission domain; a single contract might well raise issues of concern to both." Id. at 286.
83. 495 F.2d 1215 (2d Cir.), cert. denied, 419 U.S. 964 (1974).
84. Id. at 1216.
ject to the Act, and thus, it was not within the purview of section 15. Further, the parties argued that because the assessment formula was part of a collective bargaining agreement, it was exempt from the Shipping Act. The FMC, embracing the construction given section 15 in Volkswagenwerk, held the assessment formula within its jurisdiction.

On appeal, the Second Circuit affirmed the Commission's determination. The agreement, at least in part, imposed obligations on water carriers and other persons subject to the Act. Volkswagenwerk established that agreements allocating assessments for benefits which result from negotiations with dockworkers' unions are subject to section 15. The fact that the assessment agreement in Volkswagenwerk was one between association members only, while the New York Shipping Association assessment arrangement included the union as a party, was irrelevant in the Second Circuit's view. Although the union had a genuine interest in supervising the fund, the FMC was not relieved of its supervisory responsibility where the arrangement had a direct and substantial impact on competition in the maritime industry.

The Pacific Maritime Association Response

The Federal Maritime Commission faced the most serious challenge to its section 15 jurisdiction in the recent District of Columbia Circuit case, Pacific Maritime Association v. FMC. Maritime employers operating facilities on the Pacific coast, who were not PMA members, petitioned the Commission for a ruling that an agreement between the Association and the union affecting non-members, was subject to the filing and approval procedures under section 15. Similar to the New York Shipping Association case, the PMA and the longshoremen imposed anticompetitive arrangements on employers who did not participate in the collective bargaining agreement.

85. The definitions of persons and entities subject to the Shipping Act of 1916 are set forth in §1 of the Act, 46 U.S.C. § 801 (1970). The Act is applicable to common carriers by water engaged in foreign and interstate commerce. Other persons subject to the Act are “any person not included in the term ‘common carrier by water,’ carrying on the business of forwarding or furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier by water.” Id.

86. Section 15 states that agreements subject to its requirements are those between “[e]very common carrier by water, or other person subject to this chapter...” and any other “such carrier or other person subject to this chapter.” 46 U.S.C. § 814 (Supp. IV 1974). See note 85 supra.

87. New York Shipping Ass'n, 16 F.M.C. 381 (1973).

88. 495 F.2d at 1220.

89. Id. at 1220-21.

Relying on *Volkswagenwerk* and *New York Shipping Association*, the FMC exercised jurisdiction and demanded pre-implementation filing and approval of the collective bargaining accords.\(^{91}\)

On appeal, the District of Columbia Circuit reversed the FMC. The court recognized, but rejected the Second Circuit's holding in *New York Shipping Association*, and construed narrowly the *Volkswagenwerk* decision.\(^{92}\) According to the *Pacific Maritime Association* court the protection of labor's right to bargain collectively was paramount. Because of the overriding importance of labor policy, collective bargaining agreements should be exempt from the pre-implementation filing procedures. The court held that, although arrangements between labor and management in the maritime industry may be subject to antitrust and shipping regulations, the FMC cannot demand pre-implementation filing where compliance with section 15 unduly impedes the labor union's exercise of its federal guarantees. The District of Columbia Circuit reasoned that to hold otherwise would frustrate the national policy favoring industrial peace through collective bargaining.\(^{93}\)

*Pacific Maritime Association* expressly contradicts the Second Circuit holding in *New York Shipping Association* and interprets narrowly the Supreme Court's *Volkswagenwerk* decision. It also highlights the growing tension between longshoremen and shipping interests concerning the efficacy of the collective bargaining process in maritime law.\(^{94}\) Because of the absence of articulated standards for determining the proper circumstances for FMC jurisdiction, the lower courts and the Commission have attempted to follow the unsteady case law under section 15.\(^{95}\) More importantly, the *Pacific Maritime Association* decision demonstrates that the inconsistent interpretation of the FMC's jurisdiction is a result of differing approaches to the overlap between the national labor policy and the policy of commercial competition in the shipping industry. The Supreme Court has granted certiorari in *Pacific Maritime Association*.

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92. 543 F.2d at 407-09.
95. See cases cited note 5 supra; see also text accompanying notes 63-93 supra.
Association," presumably to resolve the Commission’s jurisdictional tangle and to provide guidance to the NLRB and the FMC for the proper allocation of functions between the agencies under the labor laws and the Shipping Act of 1916.

CONCLUSION

The District of Columbia Circuit in Pacific Maritime Association proposes one solution to this jurisdictional battle: exempt all collective bargaining agreements from the pre-implementation filing and approval requirements of section 15. This balance between the competing policies appears to be the most reasonable solution to the problem.

Under section 35 of the Act, the FMC is empowered to exempt collective bargaining agreements as a class from pre-implementation requirements, leaving them subject to regulation and supervision under the antitrust statutes, federal labor law, and the Shipping Act. Eliminating the pre-implementation review procedures for collective bargaining accords will not unreasonably impede the FMC’s authority to promote competition in the shipping industry. Further, the proscription of discriminatory and anticompetitive practices in the maritime industry under sections 16 and 17 of the Act remains unaffected. If an activity is unlawful under these provisions, the Commission retains jurisdiction under section 15 to disapprove, cancel, or modify the agreement, regardless of labor’s possible exemption from the filing requirements.

If the Supreme Court adopts the District of Columbia Circuit’s resolution to the jurisdictional problem, collective bargaining will proceed unimpaired, a result contemplated in the national labor acts. At the same time, a competitive and responsive shipping industry can be insured by the FMC’s vigorous enforcement of sections 16 and 17 of the Shipping Act. Although pre-implementation filing of potentially anticompetitive agreements is preferable, the satisfactory accommodation of two conflicting national policies demands considerable adjustment in the statutory scheme.


The national policy in favor of competition, reflected in the antitrust laws, is designed to promote economic efficiency, consumer welfare, and a system of diffused power. The national labor policy fosters, or at least tolerates, large-scale labor organization despite its capacity to interfere with those economic and noneconomic
Arguably, the approach of the District of Columbia Circuit strikes the balance in favor of labor policy. But, by allocating and demarcating the respective agency functions—control over the multifaceted collective bargaining process to the NLRB and jurisdiction to proscribe anticompetitive and discriminatory practices affecting the shipping industry to the FMC—two national policies will best be served.

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objectives of the antitrust laws. Accommodation of these conflicting policies, or the subordination of one policy to the other, has, for some time, been a troublesome and unruly issue.