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Eleanor J. Doyle
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February 22, 2000

The Honorable Joel I. Klein
Assistant Attorney General
Antitrust Division
Department of Justice
Washington, DC 20530

Re: Request for Business Review Letter
Collection of "Detention and Demurrage" Shipping Charges
in the Puerto Rico Trade

Dear Sirs:

Request for Business Review Letter; overview of proposed activities

This is a request on behalf of Carrier Credit Services, Inc. ("CCS") for the issuance of a business review letter pursuant to the Department of Justice's Business Review Procedure, 28 C.F.R. §50.6, and its Information Exchange review procedures. CCS respectfully requests a statement of the Department of Justice's antitrust enforcement intentions with respect to a proposal under which CCS would bill and collect the detention and demurrage charges assessed by various container-ship and container-barge carriers in the ocean trade to Puerto Rico, against such carriers' customers. In addition, CCS will publish a list of the customers of the ocean carriers who have not paid their detention or demurrage charges, the total amount of the delinquency, and the number of days the delinquency is "past due". CCS is not an ocean carrier, it is a billing and collection company.

CCS is recently incorporated, but as yet inactive and is not now performing these billing and collection services in the Puerto Rico trade, nor are any of the carriers customers of CCS in the trade.

Request that certain information be exempt from disclosure under the Freedom of Information Act, as amended

This request letter contains confidential financial, commercial and competitive information developed by CCS about each of its prospective customers (*i.e.*, the competing container-ship and container-barge operators in the Puerto Rico trade). This information has not been shared among the prospective customers, and is confidential and proprietary to CCS. The information developed by CCS, is being supplied to the Department of Justice for the limited purpose of analyzing the proposed activity for which the business review letter is requested.

The commercial and financial information should not be released because such release would cause substantial competitive harm to CCS, and its prospective customers. See, National Parks & Conservation Ass'n v. Morton, 498 F.2d 765 (D.C. Cir. 1974). This information is not submitted to the public by either the carriers (*i.e.*, CCS' prospective customers), or CCS. Accordingly, the commercial and financial information provided in this letter also falls within the rule that the voluntary submission of commercial or financial information is categorically protected provided it is not customarily disclosed to the public by the submitter. See Critical Mass Energy Project v. NRC, 975 F.2d 871 (D.C. Cir. 1992) (*en banc*), cert. denied, 507 U.S. 984 (1993).

Container Shipping the Puerto Rico Trade

There are approximately 300,000 ocean containers of cargo shipped from the mainland to Puerto Rico each year. There are approximately 100,000 containers of cargo shipped from Puerto Rico to the mainland each year. (The other 200,000 empty boxes are returned as well.)

The largest consignees (*i.e.*, receivers or purchasers) of cargo in Puerto Rico each receive approximately 2,000-4,000 containers a year. There are approximately 50-100 consignees of this size. These consignees are generally in the pharmaceutical manufacturing, food and grocery and general merchandise businesses.

"Detention and Demurrage" in the Container Shipping Business

CCS' prospective customers are the container-ship and container-barge operators (*i.e.*, carriers) in the Puerto Rico trade. These carriers transport freight in uniformed size shipping containers which are placed on chassis (platform, wheels, brakes) that are pulled by a tractor (*i.e.*, the "cab"). In the usual case, empty containers on chassis are delivered to the shipper's (*i.e.*, the seller of the cargo) premises where the cargo is loaded into the container. The container and chassis are then hauled to the port of shipment. At the port, the containers are lifted off of the chassis and placed in the container-ship or container-

barge. At the port of discharge the process is reversed, and the containers are placed on chassis and driven to the consignee's place of business.

The carriers own (or lease) the containers and chassis. Consignees often use the containers for the temporary storage of the cargo. It is in the carrier's financial and operating interest to have their equipment returned as soon as possible. To accomplish this objective, the carriers charge the consignee if the equipment is not returned within a certain period. These charges are called "detention and demurrage" charges.

Each carrier has its own general policy with respect to when and how it calculates and assesses detention and demurrage charges. These general policies are usually set forth in the carrier's tariffs but a carrier may enter into different detention and demurrage arrangements for different customers, by contract. Under the ICC Termination Act of 1995, the carriers are required to bill *and collect* all tariff charges. Accordingly, where detention and demurrage are *tariff* charges, they must be collected. (49 U.S.C. 13702)

CCS' Prospective Customers: The primary container-ship and container-barge operators*

CCS' prospective customers are the five primary container-ship and container-barge ocean carriers in the Puerto Rico Trade.

The staff of CCS has developed the following estimates of the approximate market share and annual detention and demurrage billings for each of its prospective customers. This information is not public, but CCS' staff believes that they are reasonably accurate estimates.

<u>Carrier</u>	<u>Market Share</u>	<u>Detention and Demurrage billing</u>
Navieras NPR, Inc.	30%	\$14.2 million
Crowley Liner Services	28%	8.0 million
CSX Lines, LLC	25%	11.2 million
Sea Star, LLC	11%	3.0 million
Trailer Bridge, Inc.	<u>6%</u>	<u>1.0 million</u>
Total	100%	\$37.4 million

Please note that CCS' proposal to bill and collect detention and demurrage charges does not require CCS to secure all of the carriers as customers, nor is securing all of the carriers as customers a condition for performing any such services. Indeed, assuming

* It is specifically requested that the confidential financial and commercial information set forth in this section not be disclosed in response to a request under the Freedom of Information Act, for the reasons set forth above.

that a favorable business review letter is received, CCS intends to go forward with its proposal in the event that less than all of the carriers become customers.

Specific activities to be performed

Ocean carriers in the trade to Puerto Rico have a serious problem collecting monies owed them for detention and demurrage charges. The ease with which shippers and consignees (*i.e.*, the ocean carriers' customers) can switch from one ocean carrier to another for subsequent shipments has the effect of increasing the shipping industry's uncollectible rate for demurrage and detention charges.

It is CCS' belief, and the belief of its prospective customers, that many shippers and consignees who default on their detention and demurrage bills seek to obtain services from other ocean carriers, without paying the pre-existing bills.

In an effort to reduce the uncollectible detention and demurrage rate, CCS will perform detention and demurrage billing and collection services (pursuant to the respective ocean carrier's tariff or other terms of service) and will publish the names of customers who have failed to pay their detention and demurrage charges as required, including the amount of the delinquency, and the number of days the delinquency is "past due". This "Delinquent List" will be circulated to all of CCS' ocean carrier customers. This will enable each ocean carrier to develop and implement its own credit and collection policies with respect to the delinquent customers.

While CCS, through its experience with an affiliated company in the demurrage and detention billing and collection business in Central America^{*}, may offer recommendations to each ocean carrier, the carrier will be solely responsible for independently developing and adopting its own credit and collection policies and procedures

The Delinquent List information communicated to and from CCS will be limited to the name of the delinquent customer, and the total amount and duration of the delinquency. There will be no disclosure of how much is owed to any particular carrier – only the total delinquency amount and the duration will be reported.

^{*} The collection of detention and demurrage charges in the U.S to Central America trade are being performed by Demurrage Collection Services, Inc. for various competitor-carriers under the aegis of U.S Federal Maritime Commission Agreement No. 011075 ("Central America Discussion Agreement"). Ocean carriers in the U.S. foreign commerce enjoy limited exemptions from otherwise applicable U.S. Antitrust Laws under The Shipping Act of 1984 (46 U.S.C. app. 1701 *et seq.*) and the Ocean Shipping Reform Act of 1998 (Pub. L. 105-258, 112 Stat. 1902).

Safeguards to be implemented to prevent the wrongful disclosure of information

There will be no direct communication between ocean carriers; all information will be exchanged through CCS in what is often described as a "blind" manner, *i.e.*, neither the old nor the prospective new carrier will know the identity of the other.

No information will be exchanged between or among ocean carriers about open accounts, or the credit terms or practices of carriers, or those used in specific cases. No information relating to how carriers treat applicants with "bad" credit histories will be exchanged. When a carrier learns that a customer has defaulted on its obligation(s) to prior (unidentified) carrier(s), the inquiring carrier will be left to make an independent unilateral decision as to whether to provide service to the customer, and if so, whether to insist on any protective credit measures.

To insure that there are no "accidental" communications between or among the ocean carriers, whether independently or inadvertently through CCS' staff, CCS' employees and CCS' customers (the ocean carriers) will be advised that the exchange of sensitive commercial information, especially credit and collection policies and procedures, may violate U.S. antitrust laws, and will not be permitted. Sanctions will include termination of employment for employees, and termination of the contract with the ocean carrier.

CCS will institute the following specific safeguards to insure that there will be no disclosure of sensitive information to competitors:

- information about each carrier's customers will be accessible only through password-protected computer programs;
- the computer operators/collection specialists will be given training in CCS' policies and procedures, which include training and written confirmation with respect to the protection of information; including the significant consequences of inadvertent or wrongful disclosure (*i.e.*, disciplinary action up to and including termination);
- CCS will explain the regulatory ramifications of wrongful disclosure of information (including the voluntary "sharing" of information) to its customers, and will advise them that it will not be a party to any such disclosure.

The Department of Justice and the Federal Trade Commission have looked favorably on these kinds of protections in other industries. (See, "Statements of Antitrust Enforcement Policy in Health Care", issued by the Federal Trade Commission and U.S. Department of Justice, Statement 5: "Providers' Collective Provision of Fee-related Information, ...", issued by the Agencies in 1993.)

Attachments

As further background, attached please find copies of the following documents that have been developed to implement CCS' proposed business plan.

1. Specimen Proposal to Ocean Carrier. Please note item 8 on the "Overview of Proposal" which specifically advises the ocean carrier that sharing sensitive commercial information with competitors could violate U.S. antitrust laws.
2. Draft Agreement for Detention and Demurrage Collection Services. Please note item 5 of Exhibit 1 – "Services to be provided; Terms of Service" in which it is specifically agreed that sensitive commercial information is not to be shared with competitors.

Pro-competitive effects of this proposal

It is CCS' view that, to the extent that billing, credit and collection procedures are performed in accordance with the forgoing descriptions, the limited amount of information exchanged between competitor ocean carriers should not produce any anticompetitive effects. The "Delinquent List" program has been designed with sufficient safeguards that the program is not likely to facilitate collusion. The limited amounts of information exchanged are not likely to result in concerted decisions with respect to price or other terms of the ocean carriage to be performed, or with the decision of the individual carriers whether to do business with a customer that has previously defaulted on its obligation to another ocean carrier. The information will be exchanged on a "blind" basis and the receiving ocean carrier will unilaterally determine the terms, if any, on which it will do business with a customer with a bad credit history.

It is CCS' further view that to the extent that the information exchange allows the participating ocean carriers to better evaluate credit risks, or increases their ability to collect monies owed them, it could have a pro-competitive effect, *i.e.*, it would enhance efficiency and lower operating costs thereby making it possible to pass the benefit to the shippers and consignees by way of reduced freight charges. It should be noted that this is a highly competitive trade, and such reduction in rates would be likely to occur.

In addition, the anticipated increased success in the collection of detention and demurrage charges will eliminate the situation where the consignees that are *paying* their detention and demurrage charges are, in effect, *subsidizing* the consignees that do not pay or have resisted paying such charges. Necessarily, where consignees are competitors, there would be a pro-competitive result where the competitors are competing at the same cost levels.

Finally, there would be a presumptive pro-competitive effect insofar as the increased collection rate gives effect to the requirement of the ICC Termination Act's requirement

(continuing the competition policy established by the Shipping Act of 1916) that all tariffed charges are to be billed and collected. The ICC Termination Act provides that where a carrier is providing transportation service in the "non-contiguous" trade (*e.g.*, the trade to Puerto Rico):

"The carrier may not charge or receive a different compensation for the transportation or service than the rate specified in the tariff, whether by returning a part of that rate to a person, giving a person a privilege, allowing the use of a facility that affects the value of that transportation or service, or another device."

49 U.S.C. 13702(a)

Clearly, not collecting charges otherwise due under a tariff would violate this pro-competitive provision of the ICC Termination Act.

Under the CCS proposal, the procedure and safeguards for sharing competitive information satisfies the proposed Department of Justice and Federal Trade Commission Guidelines

Under the CCS proposed plan, competitive information is being shared only in the aggregate - specific information about specific competitors is not being disclosed. This is the procedure for the sharing of competitive information that found favor in the Antitrust Guidelines recently issued (in draft) by the Department of Justice and the Federal Trade Commission. The Guidelines explain:

"Agreements that facilitate collusion sometimes involve the exchange or disclosure of information. ... the sharing of information related to a market in which the collaboration operates or in which the participants are actual or potential competitors may increase the likelihood of collusion on matters such as price, output, or other competitively sensitive variables. ...
...other things being equal, the sharing of information on current operating and future business plans is more likely to raise concerns than the sharing of historical information. Finally, other things being equal, the *sharing of individual company data is more likely to raise concern than the sharing of aggregated data that does not permit recipients to identify individual firm data.*"

"Antitrust Guidelines for Collaborations Among Competitors issued in Draft by the Federal Trade Commission and the U.S. Department of Justice (October 1, 1999); Section 3.31 (b), "Relevant Agreements that May Facilitate Collusion" (pp. 15-16) (emphasis added)

Conclusion

It is CCS' view that its proposal to provide billing and collection of demurrage and detention services in the trade to Puerto Rico addresses the competitive concerns that are raised whenever there is a cooperative venture that affects competitors.

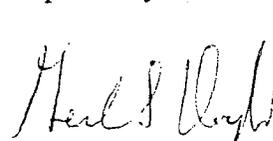
In addition, CCS believes that its proposal is substantially similar to the proposal set out in the business review letter issued by the Antitrust Division in connection with the National Consumer Telecommunications Data Exchange, Inc. (9/3/97), a copy of which is attached.

Request, re-stated

CCS respectfully requests a statement of the Department of Justice's antitrust enforcement intentions with respect to a proposal under which CCS would bill and collect the detention and demurrage charges assessed by various container-ship and container-barge carriers in the ocean trade to Puerto Rico, against such carriers' customers. In addition, CCS will publish a list of the customers of the ocean carriers who have not paid their detention or demurrage charges, the total amount of the delinquency, and the number of days the delinquency is "past due".

If there are any questions about the foregoing, or if additional information is required, please contact the undersigned.

Respectfully submitted,



Gerard S. Doyle, Jr.

GSD:tn

Enc.

cc: Carrier Credit Services, Inc.

cc: U. S. Department of Justice

Attention: Barry Grossman, Esq.