IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, Plaintiff, v. LYKES BROS. STEAMSHIP CO., INC., Defendant.	Civil Action No.: 1:95CV01839 Filed: September 26, 1995

COMPETITIVE IMPACT STATEMENT

Pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)-(h), the United States submits this Competitive Impact Statement relating to the proposed Final Judgment submitted for entry against and with the consent of defendant Lykes Bros. Steamship Co., Inc. ("Lykes") in this civil proceeding.

I.

NATURE AND PURPOSE OF THE PROCEEDING

On , 1995, the United States filed a civil antitrust Complaint alleging that Lykes Bros. Steamship Co., Inc. ("Lykes") entered into an agreement with a shippers' association that unreasonably restrains competition by restraining discounting of rates for ocean transportation services in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1.

On the same date, the United States and Lykes filed a Stipulation by which they consented to the entry of a proposed Final Judgment designed to undo the challenged agreement and prevent any recurrence of such agreements in the future.

Entry of the proposed Final Judgment will terminate this action, except that the Court will retain jurisdiction over the matter for any further proceedings that may be required to interpret, enforce or modify the Judgment or to punish violations of any of its provisions.

II.

PRACTICES GIVING RISE TO THE ALLEGED VIOLATION

Defendant Lykes is a Louisiana corporation with its principal place of business in Tampa, Florida. Lykes is an ocean common carrier that provides ocean transportation services for cargo worldwide, including services in the North Atlantic trade between the United States and Northern Europe. In 1994, Lykes' vessel operating revenues totaled approximately $625 million.

Prices in the ocean shipping industry are not set in a vigorously competitive market. The ocean shipping industry is comprised of both conference and independent ocean common carriers. A conference is a legal cartel of ocean common carriers; its members receive immunity from the antitrust laws (46 U.S.C. App. § 1701, *et seq.*, "1984 Shipping Act") to agree on prices and engage in other otherwise illegal concerted activity. There are over 15 carriers that serve the North Atlantic trade between the United States and Europe, but the majority of these are members of the Trans-Atlantic Conference Agreement ("TACA"). TACA is a conference that

has received antitrust immunity to jointly fix prices and limit capacity in the North Atlantic trade. Their prices are set forth in tariffs filed with the Federal Maritime Commission ("FMC") and are available to all customers (who are called "shippers"). Defendant Lykes is not a member of TACA. It operates as an independent carrier in the North Atlantic, offering transportation services to all shippers at tariff prices that it sets independently. In trades with a significant conference, such as the North Atlantic trade, independents as well as the conference possess some degree of market power over freight rates because there are relatively few separate sellers.

Under the 1984 Shipping Act, independent carriers or conferences may enter into service contracts with shippers or shippers' associations. A shippers' association is a group of shippers that consolidates or distributes freight for its members on a nonprofit basis in order to secure volume discounts. In a service contract, a shipper or shippers' association commits to provide a certain minimum quantity of cargo over a fixed period, and the ocean carrier or conference commits to a certain price schedule based on that volume. Service contract prices are typically lower than the tariff prices.[1]

Universal Shippers Association ("Universal") is a shippers' association composed of member shippers' associations and large independent distillers that

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[1]Independent carriers and conferences may also enter into service contracts with non-vessel operating common carriers ("NVOCCs"). An NVOCC offers transportation services to shippers but does not operate the vessels. NVOCCs typically consolidate the freight of small shippers and then arrange for carriage of the consolidated freight.

ship their own products. Universal accounts for about half of the wine and spirits carried across the North Atlantic. Universal entered into a service contract with Lykes on or about October 26, 1993 (effective through December 31, 1995), for the ocean transportation of wine and spirits from Northern Europe to the United States. The Lykes/Universal contract contained the following "automatic rate differential clause":

> Carrier guarantees that rates and charges in this Contract shall at all times be at least 5% lower than any other tariff, Time Volume or other service contract rates for similar commodities at a lesser volume and essentially similar transportation service. As necessary, Carrier shall reduce rates/charges in this Contract as necessary to honor this guarantee, promptly informing the Association and the FMC.

This clause requires Lykes to charge competing shippers or shippers' associations that purchase lesser volumes than Universal a rate that is at least 5% higher than Universal's.

Other shippers and shippers' associations compete with Universal and its members for importing wines and spirits into the United States. Universal's competitors seek to minimize their costs by, inter alia, obtaining the lowest possible rates for the ocean transportation of wine and spirits. But the automatic rate differential clause limits Lykes' incentive to offer to Universal's competitors transportation rates as favorable as Lykes could otherwise offer. To comply with the clause, Lykes must either offer these shippers prices that are at least 5% higher than the prices in Universal's service contract, or it must lower Universal's price for all of Universal's service contract shipments in order to maintain the 5%

differential. The latter is not an attractive alternative for Lykes, given Universal's volume. And in either case, Universal's competitors pay prices 5% higher than Universal — regardless of Lykes' cost of providing them with transportation — which adversely affects their ability to compete with Universal.

Where there are few separate sellers, as is the case here, an automatic rate differential clause in effect places a tax on the buyer's competitors. There is a danger that this tax will protect the buyer from competition from firms whose costs may otherwise be lower than its own, thus erecting barriers to competition. It is the raising of these barriers to competition with Universal, which already has a substantial market presence, that constitutes the unreasonable restraint of trade in this case.

III.

EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The Plaintiff and Lykes have stipulated that the Court may enter the proposed Final Judgment after compliance with the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)-(h). The proposed Final Judgment provides that its entry does not constitute any evidence against or admission of any party concerning any issue of fact or law.

Under the provisions of Section 2(e) of the Antitrust Procedures and Penalties Act 15 U.S.C. § 16(e), the proposed Final Judgment may not be entered unless the Court finds that entry is in the public interest. Section IX(C) of the proposed Final Judgment sets forth such a finding.

The proposed Final Judgment is designed to eliminate the automatic differential clause from defendant's individual contracts for the provision of ocean liner transportation services with shippers or shippers' associations. Under Section IV of the proposed Final Judgment, Lykes is restrained and enjoined from maintaining, adopting, agreeing to, abiding by, or enforcing an automatic rate differential clause in any contract when acting in its capacity as an independent carrier. Section IX of the proposed Final Judgment provides for an initial term of five years, which the United States in its sole discretion may extend up to five additional years. Section V(A) nullifies any automatic rate differential clauses currently in effect in any of Lykes' contracts as an independent ocean carrier.

The proposed Final Judgment does not affect any contracts of any conference in which Lykes is member, and it does not limit Lykes' ability to participate in any conference contracts that contain such a clause. (Section V(B)(1-2))

Section VI of the proposed Final Judgement requires Lykes to send a copy of the Final Judgment to each shipper whose contract with Lykes, as an independent carrier, contains an automatic rate differential clause, and to send a copy of the Final Judgment to any other shipper or shippers' association that requests an automatic rate differential clause. Section VI also obligates Lykes to maintain an antitrust compliance program that meets the obligations specified in Section VI(C). The Final Judgment also contains provisions, in Section VII, obligating Lykes to certify its compliance with specified obligations of Sections V and VI of the Final Judgment. In addition, Section VIII of the Final Judgment sets forth a series of

measures by which the plaintiff may have access to information needed to determine or secure Lykes' compliance with the Final Judgment.

The relief in the proposed Final Judgment removes the contractual clause that requires Lykes to place in essence a 5% "tax" on the shipping costs of Universal's competitors. It restores to Universal's competitors the ability to compete for the lowest shipping prices.

IV.

ALTERNATIVE TO THE PROPOSED FINAL JUDGMENT

The alternative to the proposed Final Judgment would be a full trial on the merits of the case. In the view of the Department of Justice, such a trial would involve substantial costs to both the United States and Lykes and is not warranted because the proposed Final Judgment provides relief that will fully remedy the violations of the Sherman Act alleged in the United States' Complaint.

V.

REMEDIES AVAILABLE TO PRIVATE LITIGANTS

Section 4 of the Clayton Act, 15 U.S.C. § 15, provides that any person who has been injured as a result of conduct prohibited by the antitrust laws may bring suit in federal court to recover three times the damage suffered, as well as costs and reasonable attorney's fees. Entry of the proposed Final Judgment will neither impair nor assist in the bringing of such actions. Under the provisions of Section 5(a) of the Clayton Act, 15 U.S.C. § 16(a), the proposed Final Judgment has no prima facie effect in any subsequent action that may be brought against the

defendant in this matter.

VI.

PROCEDURES AVAILABLE FOR
MODIFICATION OF THE PROPOSED FINAL JUDGMENT

As provided by the Antitrust Procedures and Penalties Act, any person believing that the proposed Judgment should be modified may submit written comments to Roger W. Fones, Chief; Transportation, Energy, and Agriculture Section; Department of Justice; Antitrust Division; Judiciary Center Building, Room 9104; 555 Fourth Street, N.W.; Washington, D.C. 20001, within the 60-day period provided by the Act. Comments received, and the Government's responses to them, will be filed with the Court and published in the Federal Register. All comments will be given due consideration by the Department of Justice, which remains free, pursuant to Paragraph 2 of the Stipulation, to withdraw its consent to the proposed Final Judgment at any time before its entry if the Department should determine that some modification of the Judgment is warranted in the public interest. The proposed Judgment itself provides that the Court will retain jurisdiction over this action, and that the parties may apply to the Court for such orders as may be necessary or appropriate for the modification, interpretation, or enforcement of the Judgment.

VII.

DETERMINATIVE DOCUMENTS

No materials and documents of the type described in Section 2(b) of the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b), were considered in formulating the proposed Judgment, consequently, none are filed herewith.

Dated:

Respectfully submitted,

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