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June 12, 1995

The Honorable Anne K. Bingaman
Assistant Attorney General
U.S. Department of Justice
Antitrust Division
10th and Pennsylvania Avenue, N.W.
Washington, D.C. 20530

Re: Intermodal Committee on Efficiency - Business Review Request

Dear Ms. Bingaman:

Pursuant to the Antitrust Division's Business Review procedure, 28 C.F.R. § 50.6, this letter is written on behalf of the Intermodal Committee on Efficiency ("ICE") to request a statement of the Division's present enforcement intention regarding the proposed activities and objectives of ICE. ICE will be formed as a non-profit Georgia corporation consisting of four members, who are each engaged in arranging for the transportation of intermodal shipments. Based upon an analysis of the competitive structure of the intermodal market and prior Business Review Letters issued by the Antitrust Division, we believe that you will find the proposed activities of ICE to be clearly not anticompetitive.

The four members of ICE, GST Corporation ("GST"), Manufacturer's Consolidation Service, Inc. ("MCS"), Rail Van, Inc. ("Rail Van"), and Riss Intermodal ("Riss"), are "Intermodal Marketing Companies" ("IMCs"). IMCs are just one type of the various business entities known collectively as either "intermediaries" or "consolidators." These entities arrange for the transportation of freight belonging to others. Such entities include IMCs (formerly known as "shippers' agents" but more recently referred to as "IMCs"), freight forwarders, shipper's associations, freight brokers, and logistics consultants. There are thousands of such "intermediaries" or "consolidators," and hundreds of IMCs. These entities arrange for the transportation of a shipper's property by either rail, motor carrier, water carrier, air carrier, or a combination thereof. The term "intermodal" or "multimodal" refers to the movement of trailers or containers by rail where the container or trailer has a prior or subsequent movement by motor carriage. IMCs not only compete with each other, but also directly compete against trucking companies and railroads who can, and do, provide intermodal service through separately established subsidiary companies.

A typical movement involving an IMC consists of the following: In order to obtain the best rate, a shipper will contact various IMCs to arrange a shipment from a particular origin to a particular destination. Once the shipper selects an IMC, the IMC contacts a local trucking company located near the origin to arrange for the actual physical pick-up of the goods from the origin point. Such local trucking companies are normally known as "drayage" companies.[1] The drayage company picks up a chassis and empty container from a railroad intermodal facility and transports the container and chassis to the pick-up point, such as a consolidation center, warehouse, or manufacturing facility. The goods are then loaded into the container. After loading, the drayage company then picks up the loaded container and chassis and takes them to the rail carrier's loading facility where the container, not the chassis, is placed on a train. The rail carrier loads the container onto a flatcar or special container car. The container is then transported in a line-haul rail movement to the rail carrier's intermodal facility closest to the destination. The flatcar and container are interchanged with another railroad if the originating railroad does not reach the destination point. At destination, another local drayage company, arranged by the IMC, picks up the container, which the railroad has loaded onto a chassis, and moves the container and chassis to its ultimate destination where the container is unloaded. The container may also be taken to a "break bulk" facility where it is broken down and loaded into other trucks for ultimate delivery. The chassis and empty container are then returned to their original location by the drayage company. Trailers may also be used instead of containers, in which case chassis are not used because trailers can move directly over the road onto a rail flatcar.

The IMC is the one that arranges the overall transportation move and quotes the overall transportation price to the shipper. To arrive at that price, the IMC negotiates rates with drayage companies and railroads. Some rates quoted to the IMC by the railroads at some locations include the cost of drayage, but for most IMC moves, the drayage rate is separate from the railroad rate. The shipper does not know the rate being charged by each separate entity because the IMC offers the shipper a single invoice for the entire multimodal move. Because

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[1] Drayage companies are not the same as less-than-truckload (LTL) or truckload (TL) carriers. Standard LTL carriers will pick up a shipment, move it to a warehouse, combine that load into a single truck with various other separate shipments destined for a similar location, move the LTL truck to the destination warehouse, unload the various separate shipments, and deliver them to the ultimate destination. TL shipments involve the movement of an entire truckload of the same good from a specific origin point to a specific destination point. TL shipments do not involve warehouses or consolidations performed by the trucking company. Today, based upon Interstate Commerce Commission figures, there are approximately 50,000 "for-hire" TL and LTL carriers. Based upon Department of Transportation registrations, there are approximately 150,000 companies who perform their own transportation for their own goods in their own trucks. Intermodal, as another means by which goods may be transported, competes, to a significant extent, against these TL, LTL, and private carriers.

of their ability to consolidate shipments in order to achieve volume discounts, IMCs can usually offer an overall lower cost than if the shipper dealt directly with the railroad or drayage company. The IMC is paid by the shipper, and the IMC pays the drayage company and the railroad. Some railroads and trucking companies have established subsidiary companies to perform a similar service directly with the shipper without the involvement of an IMC.

These intermodal movements require a significant degree of cooperation between the IMCs, the drayage companies, and the railroads. The chassis, containers, and trailers used in the move are owned primarily by leasing companies who have leased them to the railroads. The rail carrier thus controls the use of the chassis, containers, and trailers. Drayage companies use the intermodal equipment (the chassis, container, or trailer) pursuant to an Equipment Interchange Agreement ("EIA") negotiated between the rail carrier and the drayage company. IMCs are not part of the actual EIA. The EIA provides incentives to drayage companies to make timely pick-ups and deliveries. These incentives take the form of "free-time," which is the amount of time a drayage company may have possession of the intermodal equipment without incurring any charges for its use, and "per-diem," which is the daily rate at which a drayage company is charged for use of the equipment once free time has expired. Free-time and per-diem are often referred to as detention and storage. The EIA's also allocate between the parties the risk of damage to the equipment, establish levels of insurability, govern access to the rail intermodal facilities, and provide indemnification clauses. Each drayage company negotiates its own EIAs with the railroads. Today, there are approximately 2,000 drayage companies and 12 major railroads.

With literally thousands of intermodal containers and trailers[2] moving every day on behalf of hundreds of IMCs utilizing 2,000 different drayage companies and with rail practices varying from location to location, a significant amount of confusion exists as to the responsibilities of the parties. Each IMC, drayage company, and rail carrier has developed its own particular methods of handling free-time and per-diem problems. Often one party in the chain will unilaterally institute changes in its system. While the change may appear to resolve the problem for the party implementing the change, the change has a ripple effect on the other parties, which may create other problems. Last year, for example, in an effort to relieve congestion at the various rail ramp facilities, the railroads unilaterally implemented changes to the detention and storage rules. These rule changes then required changes and additional charges by the drayage companies. These changes impacted shippers and IMCs. In the end, the unilateral changes by the railroads did little to reduce congestion at the rail ramps. It was not

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[2] The approximate number of railroad owned or controlled chassis is 23,000. There are approximately 50,000 containers in domestic intermodal use and 96,400 trailers being utilized for intermodal shipments. *See* Official Intermodal Equipment Register, Intermodal Publishing Co., Ltd, New York, March, 1995.

until the railroads were provided information by IMCs that they realized some of their changes were ineffective.

There are numerous other continuing problems creating substantial inefficiencies. For example, after a drayage company picks up a loaded container and chassis at the destination intermodal facility and takes it to the place where the container is unloaded, the container and chassis must be returned empty to the original terminal in which it was located. This results in empty backhaul movements. If IMCs were able to share information and equipment, one IMC would be able to offer that chassis and container to another IMC for container pick-up and shipment without having the chassis and container first returned to its point of origin empty. Other issues such as dwell time (the amount of time spent sitting at a facility), intermodal terminal capacity, carrier capacity, the ability to "schedule" appointments for pick-up and delivery, and the ability to interchange electronic data among IMCs also affect the efficiency of an intermodal move.

The continuing existence of these problems has led to the proposed formation of ICE. The IMC members of ICE desire to form together as a non-profit organization in order to discuss the common problems facing their segment of the intermodal industry. Upon reaching a consensus among the members of ICE on any particular problem, the members of ICE then desire to approach a railroad (or railroads) or drayage company in order to present to the carrier(s) their views. Of course a railroad or drayage company can accept or reject any positions proposed or changes recommended by ICE. Furthermore, given that ICE consists of only four companies and there are hundreds of IMCs, ICE will not be in a posture to dictate positions to the railroads.

It is intended that the issues to be discussed by ICE members will include all of the above as well as common efforts to more efficiently manage the intermodal equipment utilized by these four IMCs but provided by others. As the attached article indicates (*See* Exhibit A, Watson, *Equipment Utilization Proves Tough Nut to Crack*, J. Com., May 5, 1995, at B11), improving the utilization and capital productivity of assets utilized by IMCs has been recognized universally as a critical requirement for continued investment in the intermodal business. The proposal by ICE to engage in active equipment management focuses on improving the utilization of equipment provided by others rather than the actual ownership of such equipment. It would not result in the establishment of a new equipment pool as such, as some of the railroads have done through the establishment of the EMP container pool program as noted in the article. Rather, the ICE proposal involves developing methods, such as information sharing, by which members of ICE could better control and utilize the containers and trailers owned by others. Given that railroads are actively engaged in owning and pooling intermodal equipment and that TL carriers are also engaged in equipment management, allowing ICE members to develop similar programs without actually owning such equipment will only serve to increase the significant competition that already exists in the intermodal market.

Membership in ICE will be limited to the four companies previously mentioned. Additionally, in order to guard against any possibility that ICE will be used for inappropriate collective action, the following safeguards will be employed:[3]

1. At ICE meetings and in presentations to the carriers, there will be no discussions regarding actual freight rates charged to shipper customers or individual rates paid to railroads or drayage companies. ICE members will also not share their customer names, individual market shares, or volume amounts.

2. ICE members are free to leave the group at any time and to pursue their own actions and are free to join other similar groups. Each ICE member will have the right of independent action, and each will continue to negotiate individual contracts with the carriers. There will not be a standard ICE contract which ICE members must use in their negotiations.

3. All meetings of ICE will be attended by experienced antitrust counsel to ensure that no pricing information is exchanged and that those attending the meetings fully comply with the antitrust laws. Minutes or recordings of the meetings will be kept and maintained for a minimum of three years.

An analysis of the nature of the transportation market in question and the proposed actions of ICE in relation to that market, taking into consideration past actions by the Department of Justice, demonstrates that the actions proposed by ICE will not be anticompetitive, especially given the procedural safeguards noted above. Based upon information compiled by Standard & Poor's and the U.S. Census Bureau, the total U.S. intercity (domestic) truck and rail market was $208 billion in 1992. Intermodal movements are economical only for intercity moves over 500 miles. Intermodal cannot compete with LTL and TL carriers for movements under 500 miles. As a result, of the $208 billion intercity market, $45 billion of that represents the potential intermodal market for which IMCs could compete, i.e. movements over 500 miles. Intermodal movements accounted for only $6 billion of this $45 billion market. The other $39 billion was performed by railroads, LTL, or TL carriers through standard movements not involving a prior or subsequent intermodal move, but primarily by TL carriers using trucks the entire time. Thus, IMCs are competing for this $45 billion market not only against other IMCs, but also against the railroads and trucking companies.

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[3] The proposed By-Laws for the formation and operation of ICE are attached hereto as Exhibit B. These By-Laws fully incorporate the procedural guidelines necessary to prevent anticompetitive action.

Because of overall lower costs involved with an intermodal movement, as compared to a TL or rail movement, many LTL, TL, and rail carriers have formed subsidiary companies to market intermodal shipments to shippers. For example, even though TL carriers already control the vast majority of the $45 billion potential intermodal market by using standard TL movements, many LTL and TL carriers are working hard at also capturing that portion of the market handled currently by intermodal movements. Because these carriers act as their own drayman, do not have to borrow a chassis or trailer from the railroads, and have a nationwide presence enabling them to better utilize equipment, they are becoming a strong force in the intermodal market. The market shares held by LTL and TL carriers were almost nonexistent just a few years ago. Today, of the $6 billion of intermodal shipments, IMCs control 40%, international movements account for 37%, United Parcel Service controls 10%, the United States Postal Service accounts for 10%, LTL carriers account for 4%, TL carriers for 3%, and specialty carriers for 2%. *See* market share study by Mercer Management Consulting, attached as Exhibit C. Thus, the several hundred IMCs collectively control approximately $2.4 billion of the existing domestic intermodal shipments and only approximately 5% of the potential intermodal market. The market share controlled by IMCs is declining due to increasing competition from TL, LTL, and railroads.

The members of ICE compete vigorously with each other and will continue to do so even with the formation of ICE. While we understand that the Department of Justice is concerned any time competitors form together to perform collective actions, ICE is being formed as a means of improving efficiency and increasing competition among IMCs and between IMCs and other intermodal providers. ICE members are four of the ten largest IMCs. However, collectively, they represent less than 30% of domestic IMC shipments and hold only a 1.5% market share of the total potential intermodal market.[4] Allowing ICE members to meet in order to share information (other than freight rates or other pricing information), coordinate positions on efficiency related issues, formulate proposals for standards, develop equipment management programs, and present their views on problems in the industry to the railroads and other carriers will not in any way create either monopoly or monopsony power in any intermodal transportation market (*See* various articles in Exhibit A describing the nature and scope of the domestic intermodal market).

The activities of ICE are fully consistent with prior precedent. The Department has issued various Business Review Letters with direct relevance to this proceeding and the goals of ICE. The problems associated with the intermodal industry have been the subject of two previous Business Review Letters. Most recently, the drayage, TL, and LTL carriers, through

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[4] Based upon June, 1994 data compiled by the Intermodal Association of North America, it was projected that for 1994 GST would be ranked No. 5, Rail Van No. 7, MCS No. 8, and Riss No. 10 in gross revenue. The gross revenue for the members of ICE, collectively, is approximately $690 million.

the American Trucking Associations, requested a review of a proposal to develop national forums to discuss the various problems in the intermodal industry. The Department issued a favorable opinion on February 22, 1995, Letter from Assistant Attorney General Anne K. Bingaman to counsel for the Intermodal Council of the American Trucking Associations, Inc. In approving the forums, the Department specifically noted the problems facing the intermodal industry. While ICE members will participate in these forums, the forums themselves will not be sufficient to address problems specific to the members of ICE. In a previous letter filed in 1985 by counsel for the National Association of Shipper's Agents ("NASA"), the then trade association for IMCs, *Release No. 87-1*, Letter from Acting Assistant Attorney General Charles F. Rule to the counsel for the National Association of Shipper's Agents, January 28, 1987, the Department declared that it had no intention of challenging under the antitrust laws a proposal by NASA to develop standardized procedures for detention and storage charges. NASA is no longer in existence and the code was never widely utilized. However, these problems which ICE wishes to address continue to exist.

The Department has previously issued favorable opinions for activities similar to those contemplated by ICE. In *Release No. 88-12*, Letter from Assistant Attorney General Charles F. Rule to Mr. Geoffrey M. Stoudt, counsel to Kreitz Motor Express, December 16, 1988, the Department announced that it would not challenge a proposal by five motor carriers to form a for-profit cooperative by which the members would, on a daily basis, exchange information on the status, location, and type of tractor-trailers being used by the members. The five motor carriers controlled $20 million of a $1 billion dollar market, a market share similar to that held by IMCs collectively and substantially greater than that held by ICE members. The purpose of the exchange was to eliminate costly and inefficient backhaul movements, one of the goals of a potential information exchange by ICE members. Also, in a letter dated January 14, 1993 from J. Mark Gidley, Acting Assistant Attorney General, to George Velez of the General Motors Legal Staff, the Department announced its intention not to challenge a proposal by the nation's largest automotive shippers to form an Auto Shippers' Efficiency Committee ("ASEC") that would exchange information, develop a shipper consensus on an issue, and then present that consensus to the railroads. ASEC was being formed to provide a shipper viewpoint to the railroads in their management of a pooling arrangement approved by the Interstate Commerce Commission known as the Multilevel Railcar Pool. Similarly, the purpose of ICE is to facilitate the presentation to railroads and drayage companies and possible implementation of proposals aimed at improving the efficiencies of the intermodal market where IMCs are involved.[5]

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[5] In many ways, the formation and purpose of ICE are analogous to the formation of a shipper's association under Section 8(c) of the Shipping Act of 1984. Under that section, the Department will decline to prosecute cooperative action taken by shippers if the cooperating group does not possess threatening market power. The Department applies the "35/20" rule, whereby it analyzes whether the proposed shipper's association would possess monopsony power and whether the group would facilitate price fixing. While ICE is not a shipper's association

LTL and TL motor carriers and the railroads all enjoy various forms of antitrust immunity granted pursuant to numerous Interstate Commerce Commission decisions. The railroads are free to enter into various pooling arrangements, including one specifically related to the types of railcars used in intermodal service. *See TTX Company, et al. -- Application for Approval of the Pooling of Car Service with Respect to Flat Cars*, Finance Docket No. 27590 (Sub-No. 2) (ICC served Aug. 1994). LTL and TL carriers also participate in various arrangements granted antitrust immunity, even those that allow for the discussion and establishment of collective rates. All of these arrangements have been found not to be anticompetitive. While these arrangements have created substantial efficiencies for carriers, shippers and IMCs do not have similar immunity, yet shippers and IMCs face the very same problems that led the carriers and railroads to seek collective arrangements. It is these similar problems that has led to the formation of ICE.

Conclusion

Currently, inefficiencies in the intermodal market exist due to empty equipment backhauls, lack of consensus on equipment standardization and utilization, excessive dwell time, and actions taken by one party in an intermodal movement not knowing that those actions will adversely impact the other parties involved. Such inefficiencies led to the desire to form ICE. The members of ICE desire to act in a collective fashion, without exchanging sensitive rate and customer information, to alleviate the problems facing IMCs. Similar actions to those proposed by ICE have been approved previously by the Department of Justice in various other Business Review Letters. The proposed activities of ICE will serve only to enhance the competitiveness of intermodal movements. Thus, we respectfully request that the Department of Justice issue a statement of its present intention not to seek any enforcement action against the formation or operation of ICE.

Expedited Consideration Requested

In its press release of December 3, 1992, the Department committed to providing expedited treatment to Business Review Requests with respect to information exchange programs and proposed joint ventures. While the proposed activities of ICE are neither strictly a joint venture nor an information exchange, the activities have characteristics similar to both. Consistent with the press release, we are requesting expedited treatment of our request.

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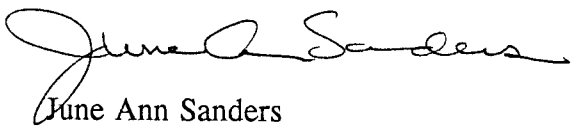
under the Shipping Act of 1984, applying the "35/20" test in light of the small (1.5%) market share possessed by ICE members, clearly establishes that ICE does not possess any market power with respect to intermodal traffic. Even if the market were viewed as limited to existing intermodal shipments, the share represented by ICE members is significantly less than 35%. Furthermore, the proposed safeguards will prevent any form of price fixing or other anticompetitive action.

The press release identified the information and documents which should be provided when requesting expedited consideration. We have set forth (1) the persons or firms expected to participate in ICE; (2) the purposes and objectives of ICE; (3) the nature, type, and timeliness, and of the issues which will be discussed; (4) the general characteristics of the intermodal market; (5) the market shares of the firms involved in ICE; (5) the safeguards that will be utilized to prevent the disclosure of rate specific information; and (6) the estimated business synergies, efficiencies, and other benefits likely to flow from ICE. Some areas of information noted in the press release were not provided due to the fact that ICE is neither a joint venture nor an information exchange of the type requiring more detailed information. Of course, if there is any additional information that you do need, we will promptly provide that information to you.

We look forward to a prompt and favorable response to our request. If implemented, ICE will provide substantial benefits not only to the individual members of ICE, but to the shipping public as well. We are anxious to move forward with this project. Please contact me if you desire any further information.

Sincerely,



June Ann Sanders