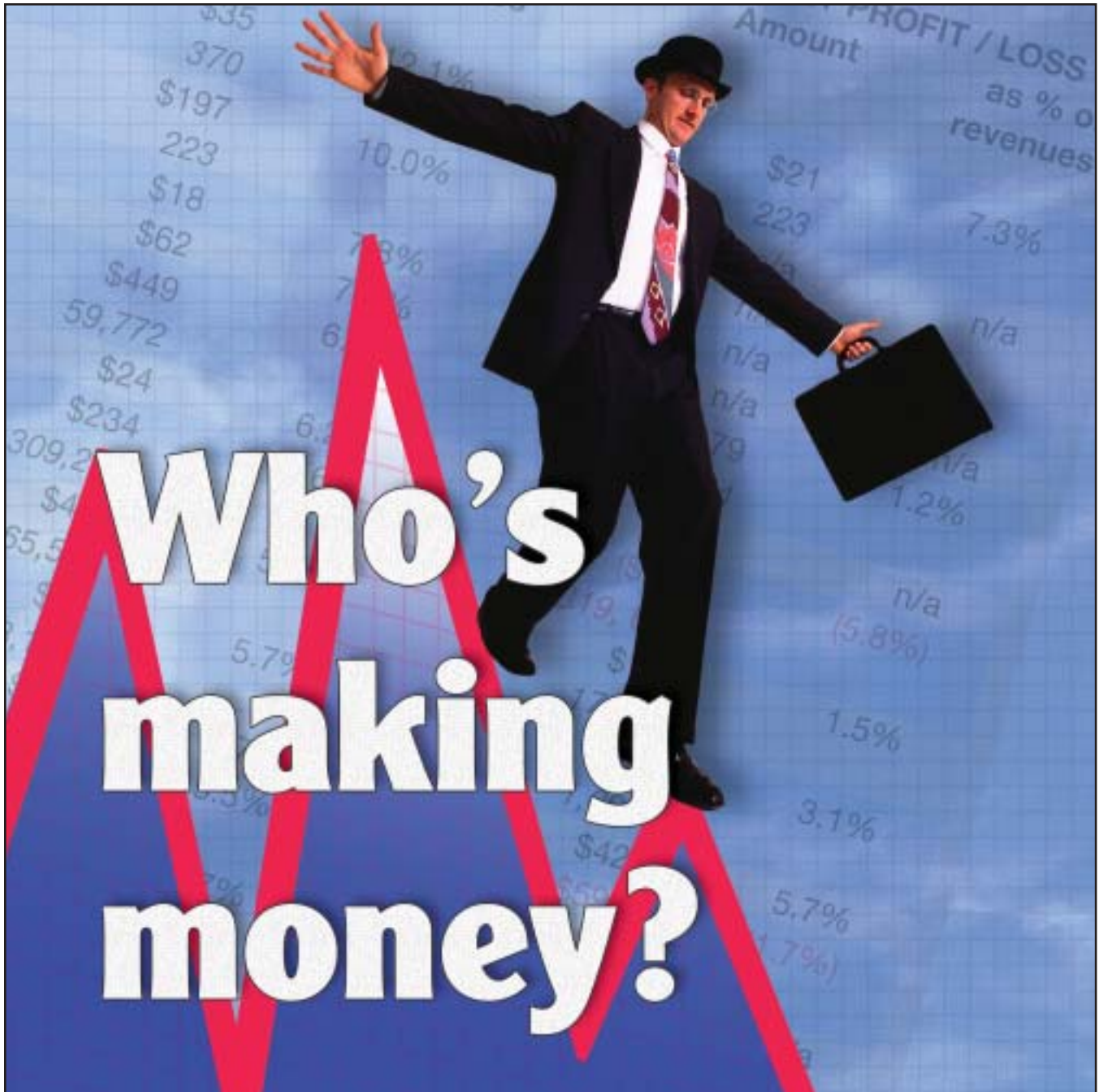


# American Shipper

The Monthly Journal of

INTERNATIONAL LOGISTICS



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American Shipper's annual survey of container shipping lines' results and industry trends found that carriers suffered heavy losses in 2002, with some reporting their worst-ever results. Freight rates and carriers' average operating margins fell to their lowest levels in years, but cargo volumes remained strong. But carriers are expected to recoup some of their losses in 2003.



### Chris Koch: Astute Washington insider 18

A 26-year career spent predominantly in Washington, Koch has been counsel for the Senate Committee on Commerce, a top staffer for prominent senators in both political parties, chairman of the Federal Maritime Commission, as well as senior vice president for Sea-Land Service Inc. As the World Shipping Council's president and chief executive officer, he keeps security issues on realistic, reliable track.



### SSA seizes opportunities 30

The port business isn't only about handling thousands of container moves in a main port like Long Beach or Los Angeles. At Stevedoring Services of America, the company's executives are also on the lookout for port business opportunities, wherever they may be around the world. The result: the Seattle-based privately held company has developed and runs terminals in major port gateways and far-flung overseas ports.



### Open letter 36

Excuse the buzzword, but Carlos Rodriguez, general counsel for the NVOCC-Government Affairs Council, says ocean carriers, non-vessel-operating common carriers and logistics companies are facing another paradigm shift in the shipping industry. Frequently fractured by disparate issues, these three sides have a shared interest in modifying laws and regulations that impede their common business objectives, he said.

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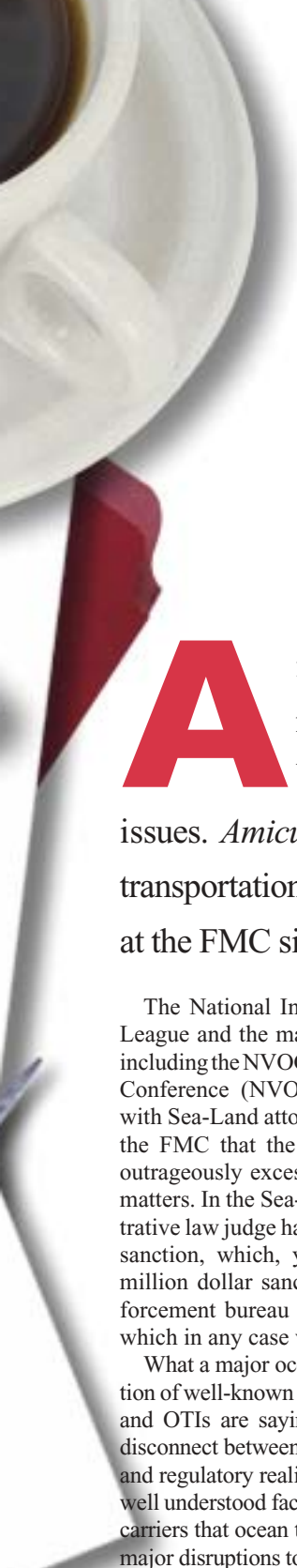
A collage of documents, a coffee cup with a spoon, and a butter knife. The documents are scattered and overlapping, with some text visible. The coffee cup is white with a silver spoon resting on the saucer. The butter knife is silver with a dark handle. The overall scene suggests a professional or legal setting.

# Open Letter

**TO:** *Ocean carriers, NVOCCs and logistics companies*

**RE:** *Another paradigm shift in the shipping industry?*

**BY** CARLOS RODRIGUEZ



**A**n interesting event happened when Sea-Land recently found itself in a regulatory bind at the U.S. Federal Maritime Commission over tariff issues. *Amicus Curiae* briefs filed by organizations of ocean transportation intermediaries and shippers on Sea-Land's behalf at the FMC signaled a definite paradigm shift in the industry.

The National Industrial Transportation League and the major OTI organizations, including the NVOCC-Government Affairs Conference (NVOCC-GAC), teamed up with Sea-Land attorneys in pointing out to the FMC that the agency was assessing outrageously excessive penalties on tariff matters. In the Sea-Land case the administrative law judge had assessed a \$4-million sanction, which, yes, paled to the \$20-million dollar sanction that the FMC enforcement bureau had recommended, but which in any case was clearly hefty.

What a major ocean carrier, an organization of well-known importers and exporters, and OTIs are saying is there is a serious disconnect between their business activities and regulatory reality. It has now become a well understood fact to NVOCCs and ocean carriers that ocean tariff issues can result in major disruptions to their businesses, and in some cases can result in their demise. More importantly, it has become clear there are issues on which shippers, ocean carriers and OTIs can form common policy.

From my perspective as an attorney for OTIs for nearly 30 years, it is not only the message, but the message coupled with the messengers, which speaks volumes. At the risk of utilizing a term that has become a cliché in record time, this development underscores the "paradigm shift" in which

the shipping industry finds itself. What is this paradigm shift? Why are carriers, OTIs, and shippers speaking in unison? It is because their interests have merged significantly at the marketplace. This merging of what previously have been disparate interests, portends to joint efforts in the future to obtain a regulatory structure that does not unreasonably impede normal and lawful business objectives.

**Ocean Carrier Shift.** Ocean carriers with a view to the future, and as partners with shippers in supply chain management solutions, are making serious long-term investments in logistics structures that include personnel with specialized skills, distribution facilities in the United States and overseas, and sophisticated software with global applications. None of these are cheap. The logistics approach necessitates multimodal as well as multicarrier dimensions. Therefore, ocean carrier-owned logistic companies must provide services, not only by ocean but also by air and surface modes. These ocean carrier-owned companies, in order to meet shipper demands on ocean scheduling and pricing, must also have access to pricing and scheduling alternatives offered by their competitors' ocean services. The regulatory mechanism to offer these services on the ocean side has been

the non-vessel operating common carrier. These ocean carrier logistics companies, at least with regard to offering ocean solutions, have become NVOCCs or have related companies that are NVOCCs. As such, they have squarely come against the legally imposed hindrances, and regulatory risks of ocean regulation that are very well known to NVOCCs. These logistic companies, in their NVOCC function, are facing the following regulatory shortcomings:

- As NVOCCs, they are statutorily prohibited from entering service contracts with their shipper customers who insist on comprehensive contracts that include ocean carriage commitments.

- As NVOCCs, they are required to expend serious sums in electronically publishing tariffs in a timely manner for every ocean transaction that is entered into by them globally in the U.S. trades.

- As NVOCCs, they have to provide public pricing structures in tariffs for individual shippers, while shippers would rather keep their negotiated rates confidential.

- As NVOCCs, even considering the best of intentions in complying with tariff publishing requirements, it is impossible to fully control such timely tariff publishing on a global basis for hundreds or thousands of daily transactions. Therefore, under current regulations, there is always going to be serious penalty exposure of up to \$27,500 per violation (shipment). Additionally, this risk exposure has no corresponding benefit in that it is well known and documented that the tariff has no commercial usage in practice *vis a vis* the NVOCC and its customers.

The Sea-Land risk cloud will always hang on the ocean carrier-owned logistics/NVOCC company on tariff issues until tariff regulations are eliminated or modified. In short, the ocean carriers who evidently are serious about



**Carlos Rodriguez**  
general counsel,  
NVOCC-Government Affairs Council

their logistics companies, should be looking for ways to safeguard these substantial investments by creating normal business environments, and removing artificial regulatory barriers and risks that currently envelop them. The fact that some of these reforms have been sought by NVOCCs in the past, should not dictate what is beneficial to ocean carriers and their subsidiaries now. The old paradigm of NVOs on one side of the line and ocean carriers on the other is no longer tenable on these issues. Ocean carriers cannot ignore this paradigm shift, and demands from their shipper customers.

**OTI Shift.** The most salient shift in the OTI environment is marked by the identity of the players themselves. The old knee jerk characterization that NVOCCs are one-man shops working out of a phone booth with a typewriter is no longer effective as a political argument, and belies commercial truths. As noted above, just about every major ocean carrier has a corresponding NVOCC logistics company. Additionally, large corporate players have come into the NVOCC scene. The changes, generally through acquisitions, have come about even since OSRA days. When speaking of NVOCCs today, one has to also consider companies such as FedEx, UPS, Airborne and DHL, Deutsche Post, Deutsche Bahn, Yellow Freight, Emery, OWL (a Pacer International Inc. company), as well as large consolidators such as Shipco, NACA Logistics, and CaroTrans. These OTIs, like their ocean carrier-owned logistics company competitors, are also acting as partners with shippers in structuring supply chain management solutions. They are also making serious long-term investments in logistics solutions. This is not to intimate that the smaller niche OTIs have disappeared, or that they will disappear. However, it is clear that in this AMS/AES/Logistics era, small, lesser-financed companies are almost barred entry into the OTI environment.

While the financial make-up of the OTI community has changed, so has their political clout. One only needs to quickly add up offices and employees, and political know-how of just a handful of the U.S. companies noted above to know that the political equation from the OSRA days to now are night and day. However, these OTI companies, like their ocean carrier logistics company colleagues, are equally hindered in providing their shipper customer base the ability to enter comprehensive contracts, which include the ocean component. It is clear that the interests of NVOCCs and the ocean carrier logistics/NVOCC subsidiaries have substantially merged in these important areas. Therefore, it has become imperative that they jointly seek administrative and legislative relief in those areas where it means better service for

their customers. In fact, importers and exporters are demanding it.

**Shipper Factor.** One only has to read the industry journals to note that large and medium-sized importers and exporters are relying more and more on logistics/NVOCC companies. As noted above, these logistics companies must provide ocean scheduling and price alternatives on a basis that requires the logistics/NVO firms to have relationships with various ocean carriers. Surface distribution, and warehousing, both in the United States and overseas, have also become important components of the "logistics" agreement with shippers. It is imperative, from a customer perspective, that a logistics/NVO company have the ability to lawfully enter total package contracts that include the ocean components.

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*It has become clear  
there are issues on which  
shippers, ocean carriers  
and OTIs can form  
common policy.*

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Shippers are clamoring more and more for the "right to contract" in the transportation context. This became extremely evident at recent Organization for Economic Co-Operation and Development hearings in Paris, and at other forums where shippers are voicing changes to the Carriage of Goods by Sea Act (COGSA) to allow shippers the right to contract on bill of lading terms.

Under the present regulatory regime, exporters and importers are being denied contractual arrangements with logistics companies who are also NVOs so as to lawfully include the ocean components. Logistics agreements with ocean components have to conform to shipping statutes that deny the right to NVOs to enter service contracts as carriers. Therefore, shippers who fought hard for confidential service contracts in OSRA have their ocean rates relegated to publicly available electronic tariffs. There is no transportation reason for this, and the paradigm shift we are discussing also extinguishes any possible business and political reasons for not allowing freedom of contract to the NVO community and its shippers. It seems almost un-American to prevent any business entity to contract. Not only are NVOs denied the right to enter shipping contracts, but so are their customers, U.S. importers and exporters. These are laws, regulations, and policies that have to change for everyone's benefit in much the same way the petitioners in the Sea-Land case envisioned.

**Suggested Steps.** The time is right to commence the process of having the regulatory infrastructure match the reality of the commercial environment. In this regard, we are suggesting that ocean carriers who have invested seriously in logistics solutions and NVOCCs, who are similarly committed, jointly explore modifications with their shipper customers, to laws and regulations that will result in more efficient and reasonable structures in which to operate, and which will reduce risk to the substantial investments made by the companies.

In view of the above, we suggest that NVOCCs ocean carrier-owned logistics companies, and their shipper customers undertake the following:

1) Jointly develop an immediate strategy to modify the current tariff publishing regulations, and meet with FMC commissioners to persuade them to agree to a rulemaking procedure to establish "minimum/maximum" rates that would still maintain the tariff, including accessorial charges, but would remove (at least significantly lessen) enforcement risk, as in the Sea-Land case, and the expense of having to electronically publish rates for every single NVO transaction. It is undoubtedly in the interest of all parties to attempt this immediately. We suggest a rulemaking approach, as opposed to a legislative one, since this would significantly lessen the time involved to accomplish the objective.

2) Jointly explore the desirability and viability of legislative amendments that would allow NVOs the ability to enter service contracts as carriers. We recognize that this would take a greater effort on the part of all parties, and, therefore, suggest that the parties meet immediately to commence discussing alternative objectives, as well as strategies.

3) Jointly explore the desirability of continuing with antitrust immunity for ocean carriers as current law provides, or in the alternative, to decide what changes should be sought, if any. We recognize that ocean carriers may have positions on this issue that are long-held and highly valued. However, it should not be lost on ocean carriers that NVOs are ambivalent on this issue, and discussions would be helpful to clarify the global interests of all parties.

With a view of moving the above agenda, we have already communicated these thoughts and objectives to certain NVOCCs, logistics companies, and ocean carriers. For those with whom we have not yet exchanged ideas, please communicate your thoughts. In any case, it is my intention to follow-up on these suggestions through various means in an attempt to further the objectives outlined in this letter, which we believe are overdue. ■