DECISIONS OF THE
FEDERAL MARITIME BOARD, AND MARITIME ADMINISTRATION DEPARTMENT OF COMMERCE

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DECISIONS OF THE

FEDERAL MARITIME BOARD, AND MARITIME ADMINISTRATION DEPARTMENT OF COMMERCE

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FEDERAL MARITIME BOARD

No. 696

FELDMAN FAMILY CLOTHING EXPORT & SHIPPING CORPORATION

v.

PETER BOGATY ET AL.[1]

Submitted January 30, 1952. Decided April 2, 1952

Judgment and other documents in a litigated New York case between the parties not involving the Shipping Act, 1916, as amended, irrelevant and inadmissible on complaint charging violation of sections 17 and 20 of the Act.

No other evidence in support of the complaint being offered, the complaint is dismissed for lack of proof.

Jack Wasserman and *Benjamin Barondess* for complainant.
Louis Levin for respondent.

REPORT OF THE BOARD

BY THE BOARD:

The original complaint in this proceeding, filed on March 13, 1950, and the amended complaint, filed on November 20, 1950, named Peter Bogaty and Hudson Shipping Co., Inc., respondents. Both complaints against Hudson Shipping Co., Inc., were dismissed by separate orders of the Board, dated November 2, 1950, and January 25, 1951. The proceeding continued against Peter Bogaty.

The complaint, as amended, alleged that complainant was a freight forwarder doing business in New York City; that respondent Bogaty was also a freight forwarder subject to the Shipping Act, 1916, as amended (hereinafter referred to as "the Act"); and that complainant in 1949 shipped to respondent in Poland over 2,000 gift packages which complainant had received through travel agents and other persons in the United States for delivery to various consignees throughout Poland. The complaint charged (1) that respondent refused and neglected to

[1] Hudson Shipping Co., Inc.

deliver many of the packages in accordance with its written contract with complainant to do so; (2) that respondent declined to deliver to complainant the Polish consignees' receipts for such of the packages as were delivered; (3) that respondent returned to the United States and was soliciting complainant's customers and agents by unfair methods; and (4) that respondent, by misrepresentations to complainant's customers and agents and by unfair solicitation of complainant's customers, was conspiring to drive complainant out of business. The complaint alleged that respondent's conduct as described resulted in the disclosure of confidential information and was an unfair practice in violation of sections 17 and 20 of the Act. The complaint demanded reparation in the sum of $100,000 for damage to complainant's business and reputation, and an order requiring respondent to cease and desist from the violations of the Act as described and to put into force and apply such rates and practices as the Board might determine to be lawful.

Respondent's answer, while not denying that the packages had been shipped to respondent in Poland, denied that respondent was subject to the Act and denied all the allegations charging violations. As separate defenses, it alleged (1) that respondent was not licensed by the Maritime Commission and was, therefore, not subject to the jurisdiction of the Commission (now the Board); (2) that prior to the filing of the complaint in this case complainant had instituted a suit against respondent in the Supreme Court of the State of New York setting forth a similar and identical cause of action, and that such suit was pending; and (3) that the contract between the parties had been fulfilled by respondent and has expired.

At the hearing before the examiner held in New York on October 4, 1951, it was shown that the proceedings in the Supreme Court of New York between the parties were of an equitable nature and had resulted in a decision and judgment for the plaintiff. At the examiner's hearing, complainant's counsel produced no witnesses nor did he account for their absence. Instead, he offered certain documents as the only evidence in support of the complaint. These were (1) a certified copy of the decision of the Supreme Court of New York, dated December 4, 1950; (2) a certified copy of the judgment of the Supreme Court of New York, entered December 26, 1950, both in the case of *Feldman Family Clothing Export & Shipping Corp.* (the complainant here) v. *Peter Bogaty* (the defendant here) and *Hudson*

shipping Co., Inc.; (3) 10 original exhibits, each bearing a court stamp showing their introduction in evidence in the same case; and (4) a volume of 209 type-written pages purporting to be a transcript of the testimony in the New York case before Judge Samuel H. Hofstadter, given on September 19, 1950, bearing no verification or certification whatever. Complainant's counsel urged that the basic facts necessary to prove complainant's case before the examiner were before the New York court, and that on the principle of *res judicata* the final determination of the court favorable to complainant was proof of the facts alleged in the complaint before the examiner. Respondent objected to the introduction of all the documents, pointing out that the judgment of the New York court was entered some time after the serving of the complaint in these proceedings and, therefore, was not and could not have been the basis of the complaint before the Board. The examiner excluded the documents, pointing out that to sustain a plea of *res judicata* it was essential, among other things, either that the cause of action be the same or that the identical point had been decided, and that this was not shown to be the fact in this case. No further evidence was offered, and, accordingly, the examiner recommended that the complaint be dismissed.

Exceptions to the examiner's recommended decision were filed by complainant and the case was submitted on complainant's brief without oral argument on January 30, 1952.

The Board on February 27, 1952, entered an order pointing out that complainant had failed to deliver to the examiner the documentary evidence which it relied on for inclusion in the record before the Board and directing that complainant should have thirty days within which to file with the Secretary of the Board. The four items of documentary evidence, above referred to, were filed and are now in the record.

We agree with the examiner that the complaint must be dismissed.

The complaint charges violation of sections 17 and 20 of the Act. The parts of these sections so far as they apply to a freight forwarder are as follows:

Sec. 17. * * * Every such carrier and every other person subject to this act 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 board 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.

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Sec. 20. That it shall be unlawful for any * * * other person subject to this Act * * * knowingly to disclose to or permit to be acquired by any person other than the shipper or consignee, without the consent of such shipper or consignee, any information concerning the nature, kind, quantity, destination, consignee, or routing of any property tendered or delivered to such * * * other person subject to this act for transportation * * * which information may be used to the detriment or prejudice of such shipper or consignee, or which may improperly disclose his business transactions to a competitor, or which may be used to the detriment or prejudice of any carrier * * *

The mere statement of a violation in a complaint is not proof of such violation. A regulatory order of the Board may be issued only if supported by proof. The production of proof before the examiners of this Board is regulated by the Board's rules. Section 201.121 of these rules provides that rules of evidence in civil proceedings in courts of the United States shall be generally applied and may be relaxed where the ends of justice will be better served by so doing. The right to offer oral and documentary evidence is preserved and all parties are entitled to such cross-examination as may be required for the full disclosure of facts.

Considering first the transcript of the testimony of Mr. Herman Feldman and Mr. Peter Bogaty, taken before Judge Hofstadter in the Supreme Court of New York, this was, as above indicated, neither verified nor certified. Objection to the transcript was not made on that ground and under our rules need not have been excluded for that reason alone. Ordinarily the written transcript of testimony of witnesses at a prior trial is not admissible in a later proceeding primarily because cross-examination of the witnesses on the issues of the second trial cannot then be had. It is only when there is preliminary proof that the parties and issues of the earlier trial are substantially the same as in the later proceeding, and that the witnesses who earlier testified are at the time of the second trial unavailable on account of death, insanity, mental incompetence, being beyond the seas, or kept away by the contrivance of the opposing party that the transcript of their former testimony is admissible. See *Wigmore on Evidence*, sections 1398, 1402, 1414, and 1415; *Greenleaf on Evidence*, section 163. There was no proof or even any statement of counsel in this case that either witness Feldman or witness Bogaty was unavailable to testify, and, accordingly, the transcript was not a legally acceptable substitute for the witnesses themselves. What is said with regard to the inadmissibility of

the transcript of prior testimony of Messrs. Feldman and Bogaty is also applicable to the ten exhibits which were offered in evidence in the New York case in connection with the testimony of those witnesses, these exhibits being, for the most part, letters of Peter Bogaty to various Polish shippers in New York City. Their relevance and identity were dependent upon the excluded transcript of the earlier trial.

We next carefully consider the decision and the judgment of the New York court, offered in evidence, to ascertain whether these documents supply proof of the alleged violations of the Shipping Act.

The decision of the New York court as submitted to us refers to receipts from Polish consignees for packages delivered to them and directs respondent Bogaty to deliver these receipts to the plaintiff Feldman Family Clothing Export & Shipping Corporation for distribution to its American shipping customers. The decision also refers to mutual claims of the plaintiff and respondent, and orders a court accounting between them, but directs that the accounting shall not include any such item as loss of business by plaintiff or damage to its business by reason of respondent's withholding of consignees' receipts.

The judgment or decree of the New York court contains seven paragraphs which may be summarized as follows:

1. Directs respondent Bogaty to deliver to plaintiff the consignees' receipts;
2. Directs plaintiff to deliver these receipts to its consignor customers;
3. Permits respondent Bogaty to make photostatic copies of the receipts;
4. Directs an accounting between the parties as provided in the decision;
5. Permanently restrains Bogaty

(*a*) From attempting to ascertain from plaintiff's customers the identity of the collecting agents used or employed by plaintiff; and

(*b*) From soliciting the business of plaintiff's customers whose names were not obtained from defendant Bogaty's written lists, and from making any derogatory statements to any of plaintiff's customers about plaintiff or its business methods;

6. Dimisses the complaint against defendant Hudson Shipping Co., Inc.; and
7. Awards costs to plaintiff against defendant Bogaty.

A careful reading of the New York decision and judgment shows that certain relief was granted to complainant, but fails to disclose the adjudication of facts as between complainant and respondent—certainly not the adjudication that respondent was guilty of violating the Shipping Act, 1916, as amended. The New York case raised different issues from those before us. Complainant's counsel when appearing before us in November

1950 stated frankly that the issues before this Board *were not* the same as the issues before the New York court, saying (Record p. 21):

> I wish to point out, as I pointed out before, that the issues are not identical with the New York suit * * *

In fact, if the issues in the New York case had been the same issues that are now before us—that is, whether there has been a violation of the Act, the New York court would not have been in a position to proceed to a final judgment until our primary jurisdiction had first been exercised. *U. S. Navigation Co.* v. *Cunard Steamship Co.*, 284 U. S. 474.

Plaintiff's attorney, in offering these court documents to prove its case, stated (Record, pp. 33 and 34):

> I am relying upon the doctrine of res adjudicata; definitely, I am.
>
> And the principle, I take it, of res adjudicata, that is of a determination by a court of competent jurisdiction, at this stage, doesn't require a citation of cases. It is a rule of universal application throughout all courts.

The issues before us being different from the issues in the New York case, it is clear that the decision and judgment in that case cannot have the effect of a pre-judgment of the case before us. The principal of *res adjudicata* is not applicable. The examiner was correct in deciding that the judgment and other documents in the New York case were not relevant evidence on the issues to be decided by us and properly excluded them. Since complainant offered no other evidence, its case must be dismissed for lack of proof. An appropriate order will be entered.

ORDER

At a Session of the FEDERAL MARITIME BOARD, held at its office in Washington, D. C., on the 2nd day of April A.D. 1952

No. 696

FELDMAN FAMILY CLOTHING EXPORT & SHIPPING CORPORATION

v.

PETER BOGATY ET AL.

This case being at issue upon complaint and answer on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Board, on the date hereof, having made and entered of record a report stating its conclusions, decision, and findings thereon, which report is hereby referred to and made a part hereof;

It is ordered, That the complaint be, and it is hereby, dismissed.

By the Board.

(Sgd.) A. J. WILLIAMS,
Secretary.

FEDERAL MARITIME BOARD

No. S–18

IN THE MATTER OF THE APPLICATION OF PACIFIC TRANSPORT LINES, INC., FOR OPERATING-DIFFERENTIAL SUBSIDY (TRADE ROUTE 29, SERVICE 2) UNDER TITLE VI, MERCHANT MARINE ACT, 1936

No. S–19

IN THE MATTER OF THE APPLICATION OF PACIFIC FAR EAST LINE, INC., FOR OPERATING-DIFFERENTIAL SUBSIDY (TRADE ROUTE 29, SERVICE 2) UNDER TITLE VI, MERCHANT MARINE ACT, 1936

Submitted December 18, 1951. Decided April 8, 1952

Applicants Pacific Transport Lines, Inc., and Pacific Far East Line, Inc., are operating existing services on Service 2 of Trade Route No. 29 within the meaning of section 605(c) of the Merchant Marine Act, 1936.

The effect of the granting of operating-differential subsidy contracts to both of the applicants to the extent of their operations on Service 2 of Trade Route No. 29 at the time of the filing of their applications would not be to give undue advantage or be unduly prejudicial as between citizens of the United States in the operation of vessels on the route.

The provisions of section 605(c) of the Act do not interpose a bar to the granting of operating-differential subsidy contracts to both of the applicants for the operation of cargo vessels on Service 2 of Trade Route 29 to the extent of their operations thereon at the time of the filing of their applications.

All further questions which may arise under this or other sections of the Act are expressly reserved for future determination.

James L. Adams and *John F. Porter* for Pacific Transport Lines, Inc.

William Radner and *Odell Kominers* for Pacific Far East Line, Inc.

Chalmers G. Graham, *Clarence G. Morse*, *Robert B. Mackenzie*, *Leonard G. James*, *Reginald S. Laughlin*, and *Willis R. Deming* for American President Lines, Ltd., *Wm. I. Denning*, *Earl C. Walck*, *Edward P. Cotter*, and *Paul H. Matson* for States Steamship Com-

pany, *John Tilney Carpenter* for States Marine Corporation, and *Thomas F. Lynch*, *A. E. King*, *A. E. Blake*, and *John J. Jacobs* for Isthmian Steamship Company, interveners.

John Ambler, *Albert E. Stephan*, and *L. W. Hartman* for American Mail Line, Ltd., *amicus curiae*.

Paul D. Page, Jr., *John Mason*, *George F. Galland*, and *Joseph A. Klausner* for the Board.

Report of the Board

This proceeding concerns the application of Pacific Transport Lines, Inc., filed on June 27, 1949, and the application of Pacific Far East Line, Inc., filed on October 12, 1949, for operating-differential subsidies under Title VI of the Merchant Marine Act, 1936, as amended, both applicants seeking subsidies for operations to be performed on Service 2 of Trade Route No. 29. Pursuant to the provisions of sections 605(c) and 805(a) of the Merchant Marine Act, 1936, as amended (hereinafter referred to as "the Act"), hearings were held before the chief examiner on a consolidated record at various times between December 6, 1949, and August 8, 1950, at Washington, D. C., and San Francisco, Calif.

Pacific Transport Lines, Inc. (hereinafter referred to as PTL), and Pacific Far East Line, Inc. (hereinafter referred to as PFEL), each intervened in the proceeding involving the other's application. American President Lines, Ltd. (hereinafter referred to as APL), States Steamship Company (hereinafter referred to as States), American Mail Line, Ltd. (hereinafter referred to as AML), States Marine Corporation, and Isthmian Steamship Company intervened generally in opposition to both applications. Of the interveners, however, only APL and States produced testimony in opposition to the applications.

Service 2 of Trade Route No. 29 (hereinafter sometimes referred to as the route) is described in the report of the Maritime Commission on Essential Foreign Trade Routes of the American Merchant Marine as follows:

> Freight Service:
> Itinerary: Between the California ports of Los Angeles and San Francisco and Yokohama, Osaka, Kobe, other Japanese ports (as traffic offers) Shanghai, other North China ports and ports in Manchuria and Korea (as traffic offers), Hong Kong, Manila, Philippine Islands outports, French Indo-China and Siam (as traffic offers): with privilege of calls at ports of U. S. S. R. in Asia.
> Sailing Frequency: 24–26 sailings per year.
> Number and Type of Ships: 5 C3 type freighters.

PTL seeks a subsidy for from 26 to 32 sailings yearly for its 5

owned vessels (4 C–3 and 1 Victory type), with calls at Guam and Honolulu. PFEL seeks a subsidy for from 47 to 57 sailings yearly for its 5 owned C–2 type vessels and for 5 or 6 vessels, as determined by the Board, to be acquired if subsidized, with calls at Guam, Midway, Wake, and Trust Territories. The examiner found at the outset, and we agree, that the issues raised under section 805(a) of the Act for request to serve the above-mentioned off-route areas, with the exception of Hawaii and the Trust Territories, were settled by the Maritime Administrator in Docket No. S–20, 3 M. A. 450, where he ruled that steamship service between the continental United States and Guam, Midway, and Wake was not "domestic intercoastal or coastwise service" within the meaning of section 805(a).[1]

The present proceeding is thus limited to the determinations which the Board is required to make upon relevant issues arising under section 605(c) of the Act, which section provides as follows:

(1) No contract shall be made under this title with respect to a vessel to be operated on a service, route, or line served by citizens of the United States which would be in addition to the existing service, or services, unless the Commission shall determine after proper hearing of all parties that the service already provided by vessels of United States registry in such service, route, or line is inadequate, and that in the accomplishment of the purposes and policy of this Act additional vessels should be operated thereon; and

(2) no contract shall be made with respect to a vessel operated or to be operated in a service, route, or line served by two or more citizens of the United States with vessels of United States registry, if the Commission shall determine the effect of such a contract would be to give undue advantage or be unduly prejudicial, as between citizens of the United States, in the operation of vessels in competitive services, routes, or lines, unless following public hearing, due notice of which shall be given to each line serving the route, the Commission shall find that it is necessary to enter into such contract in order to provide adequate service by vessels of United States registry. The Commission, in determining for the purposes of this section whether services are competitive, shall take into consideration the type, size, and speed of the vessels employed, whether passenger or cargo, or combination passenger and cargo, vessels, the ports or ranges between which they run, the character of cargo carried, and such other facts as it may deem proper. [Numbering and paragraphing supplied.]

Both of the present applicants have maintained regular berth services on the route since 1946. In 1949, PTL made 26 outbound

[1] The original application of PTL was amended to include permission to call at Hawaii, but no action was taken to expand the section 805(a) issues to include Hawaii or to give notice thereof in the Federal Register. The ruling of the Administrator in Docket No. S–20 does not apply to Hawaii, Puerto Rico, or Alaska. Before permission can be granted to any subsidized operator to serve Hawaii, it will be required that such intention be published in the Federal Register, giving any interested party the opportunity for a public hearing under section 805(a) of the Act. The ruling of the Administrator also does not expressly include the Trust Territories; the question thus raised with respect to this off-route area will be reserved for the Administrator's final determination.

sailings with its 5 owned vessels, and 5 such sailings with a chartered vessel, which has been redelivered. PTL has had a yearly average of 26 outbound sailings during the years 1947 through 1949. In 1949, PFEL made 58 outbound sailings with its 5 owned vessels and 6 privately chartered vessels. PFEL has maintained a yearly average of 58 outbound sailings during the years 1947 through 1949.[2]

The examiner has found in his recommended decision which was served on August 30, 1951, that: (1) PFEL is not operating an existing service on the route as to its chartered vessels and as to such vessels is required to establish the inadequacy of other United States-flag services; (2) both PTL and PFEL are existing operators as to their own vessels and to this extent are not required to establish inadequacy of service provided by other United States-flag operators; (3) existing service, other than that of PFEL, is inadequate to the extent of capacity for 200,000 long tons, and additional vessels should be operated on the route to provide such capacity;[3] and (4) the granting of the applications under consideration, insofar as consistent with the findings as to adequacy, would not give undue advantage or would not be unduly prejudicial as between citizens of the United States operating on the route. Various exceptions, which will be considered below, were filed to the examiner's recommended decision by PFEL, APL, States, and AML. PTL filed a memorandum substantially in support of, but partially in exception to, the examiner's recommended decision. Oral argument on exceptions was had before the Board on December 17 and 18, 1951,[4] at which counsel for the above parties and counsel for the Board were heard.

It is contended, especially by PTL, and it has been found by the examiner, that PFEL does not have the status of an existing operator

[2] During 1950 and 1951 the records of the Maritime Administration show that the outbound sailings of both PTL and PFEL equalled or exceeded their 1949 outbound sailings on the route.

[3] This conclusion in the recommended decision of the examiner is premised on the following findings which he made: (1) that during the period of any proposed subsidy contract, outbound commercial liner traffic on the route will approximate 1,350,000 long tons per year; (2) that a proper goal for United States-flag participation in the outbound movement of commercial liner traffic on the route is 67½ percent; and (3) that the lifting capacity of United States-flag vessels available for Trade Route No. 29 cargo, other than those of PFEL, will approximate 711,000 long tons. The figure of 200,000 is the difference between 911,000 tons (67½ percent of 1,350,000) and 711,000 tons (the lifting capacity of lines other than PFEL). The latter figure is the sum of the lifting capacity assigned by the examiner to the respective fleets of PTL and APL (249,000 for PTL and 299,000 for APL) at 85 percent capacity, plus actual carryings of other United States-flag lines of outbound commercial and military cargo in 1949 (244,000). The examiner estimated that 200,000 tons could be accommodated by approximately 35 outbound sailings with seven vessels.

[4] Oral argument before the Board was originally scheduled and begun in San Francisco on October 22, 1951, but was unfortunately interrupted by the untimely death of counsel for one of the applicants. Argument before the Board in the proceeding at San Francisco was adjourned at the request of applicants, and argument *de novo* was had before the Board in Washington.

under section 605(c) as to more than its five owned vessels which were operated on the route at the time its application was filed, and that, consequently, in order to obtain a subsidy for more than its owned vessels, PFEL has the burden of showing that the service already provided by existing United States-flag vessels is inadequate. The examiner states that, although PFEL is a substantial operator and has demonstrated ability to get business, the failure of PFEL in three years of operations to purchase sufficient additional tonnage to handle its business suggests that the capital risk involved outweighed the prospect of successfully conducting and maintaining the business on the existing scale. He reasons that, although this may have been prudent management on the part of PFEL,

> in a contest with those who have taken the risk, the latter at least should have the opportunity to rebut any claim that their services are inadequate.

We believe that the word "service" as used in section 605(c) is used broadly to cover the entire scope of an operation and could include chartered as well as owned vessels. This interpretation is consistent with the use of the word "service" as it appears in sections 211, 215, 501, 606, and 608 of the Act. There appears to be no substantial reason why we should, under section 605(c), construe the phrase "existing service" as meaning only a "service maintained with owned vessels." The term "service" embraces much more than vessels; it includes the scope, regularity, and probable permanency of the operation, the route covered, the traffic handled, the support given by the shipping public, and other factors which concern the bona fide character of the operation. This conclusion is buttressed by the fact that under section 708 of the Act we have express discretion to grant operating-differential subsidy, if necessary, to a charterer of Government-owned vessels under Title VII of the Act,

> upon the *same terms and conditions* and subject to the same limitations and restrictions, where applicable, *as are elsewhere provided in this Act with respect to payments of such subsidies to operators of privately owned vessels.* [Emphasis added.]

Under this latter section, it seems clear that the Board is authorized to determine that the charterer of Government-owned vessels under Title VII of the Act is operating an "existing service" within the meaning of section 605(c); it does not appear that different considerations, for the purposes of section 605(c), should be applicable to the charterer of privately owned vessels.

PFEL has stated that, should its present application be approved, it will purchase vessels to replace chartered vessels presently being operated by it on the route. Vessel ownership is a matter which we

must eventually consider under section 601(a) and other apposite sections of the Act, but it is not germane to our present inquiry as to whether PFEL is operating an existing service on the route. We conclude, therefore, that both PTL and PFEL are operating existing servcies on the route within the meaning of section 605(c) to the extent of their operations thereon at the time of filing of their applications, and consequently, our further consideration herein will be limited to the second part of that section.

We accordingly proceed to determine as an initial question under the second part of section 605(c) whether the effect of the granting of a subsidy to either or both of the present applicants would be to give undue advantage or would be unduly prejudicial as between citizens of the United States in the operation of vessels in competitive services, routes, or lines.

As already stated, each applicant intervened in the proceeding involving the other's application, and contends generally that the granting of a subsidy to the other and a denial of a subsidy to it would be unduly prejudicial to it. PFEL also contends that it would be unduly prejudiced if both applicants were granted a subsidy but only as to their owned vessels. PTL, on the other hand, contends that it would be unduly prejudiced if a subsidy should be granted PFEL in excess of the latter's owned vessels. Interveners APL, States Marine, and Isthmian contend that the granting of a subsidy to either or both applicants would be unduly prejudicial as to their operations on the route. AML, while not opposing either of the present applications, contends that section 605(c) requires the Board, in any event, to find that the service presently offered by United States-flag vessels on the route is inadequate before any additional subsidy can be awarded.

In addition to the present applicants, eight other United States-flag lines furnish service to various ports on the route, but only PTL, PFEL, and APL comprehensively and regularly serve the whole route as set forth in the trade-route descriptions. The combined carryings of the latter three lines on the route in 1949 were 59 percent of the total commercial liner cargo; the combined carryings of other United States-flag operators amounted to 12 percent.

APL is the only presently subsidized operator on the route, and it operates thereon with five owned freighters providing from 24 to 26 subsidized sailings yearly. Since APL is subsidized it has the obligation to serve the full route as above described, and it is definitely competitive with the applicants within the meaning of section 605(c).

No United States-flag operator on the route, other than applicants

and APL, offers a service which is in general conformity with the description of the route. AML operates a subsidized service on Trade Route No. 30, and in connection therewith provides inbound service to California from some Trade Route No. 29 ports. The operations of AML, however, are devoted primarily to serving United States ports outside the latter route. The primary operations of States have been from the Pacific Northwest on Trade Route No. 30. States first advertised its commercial outbound Trade Route No. 29 berth service in 1948, mainly to acquire an allocation of military cargo moving over a portion of the route. The direct outbound sailings of States are divided between ports in California and ports in the Pacfic Northwest; the inbound sailings of States return directly to the Pacific Northwest and then proceed to California for delivery of cargo, if any, destined for that area. Isthmian operates only on the southern portion of the route. This company, during its 1949 operation on the route, served only the Philippines, Hong Kong, French Indo China, and Siam. In 1949 Isthmian had 24 outbound sailings from California ports, but such sailings originated at Atlantic ports. In the same year, Isthmian made 10 inbound sailings to California which sailings terminated at Atlantic destinations. States Marine's operations originate at Atlantic or Gulf ports, calling as cargo offers at ports in California and in the Pacific Northwest; its operations are primarily to Japan and secondarily to the Philippines. States Marine carried no inbound cargo to California in 1949. The remaining United States-flag operators, American-Hawaiian Steamship Company, Isbrandtsen, and Sudden & Christenson, Inc., did not intervene in this proceeding.

The table below shows the 1949 commercial and military carryings of United States-flag operators on the route, exclusive of PTL, PFEL, APL, and Isbrandtsen; the carryings of Isbrandtsen have not been shown, since they are not disclosed clearly in the record and are not great enough to be material. Because the evidence presented does not disclose the separate carryings of American-Hawaiian and Sudden & Christenson, the carryings of these operators have been combined.

TABLE I.—*Liner cargo carrying (in thousands of long tons) and sailings, in 1949, on Trade Route No. 29, of United States-flag lines other than PTL, PFEL, APL, and Isbrandtsen*

	Outbound						Inbound		
	Commercial and military	Percent of Trade Route 29 cargo [1]	Military	Commercial	Percent of Trade Route 29 cargo [1]	Sailings	Commercial	Percent of Trade Route 29 cargo [1]	Sailings
Isthmian	30	22	0	30	22	24	5	6	10
States Marine	68	21	37	31	24	40	0	.....	6
States	89	53	52	37	52	25	0.6	.....	15
A-H S-C	57	.....	38	19	.....	21	3	.....	13
American Mail	0	.....	0	0	.....	0	26.4	.....	9
Total	244	.....	127	117	.....	110	35	.....	53
Percent of total Trade Route 29 cargo	20%	.....	28.5%	14.8%	.....	.....	7.4%	.....	.....

[1] Percentage of Trade Route 29 cargo, of the type indicated in the column immediately preceding, to the total cargo of this type carried by the vessels of each line operating on the route.

This tabulation reveals either (1) a concentration on outbound cargo to the virtual exclusion of inbound cargo, or vice versa, (2) a predominance of military cargo, or (3) the relatively small percentage of Trade Route No. 29 cargo carried by those lines serving ports in the Atlantic and Gulf.

In determining whether services are competitive, within the meaning of section 605(c), it is provided that the Board shall take into consideration

> the type, size, and speed of the vessels employed, whether passenger or cargo, or combination passenger and cargo vessels, *the ports or ranges between which they run*, the character of cargo carried, and such other facts as it may deem proper. [Emphasis supplied.]

In administering the operating-differential subsidy program, provided in Title VI of the Act, an underlying consideration must be the execution of the Act's primary purpose, as expressed in the preamble, which is

> To further the development and maintenance of an adequate and well-balanced American merchant marine, to promote the commerce of the United States, to aid in the national defense, . . .

We must also consider the major Congressional declaration of policy as expressed in section 101 of the Act, which is,

> that the United States shall have a merchant marine . . . sufficient to carry its domestic water-borne commerce and a substantial portion of the water-borne export and import foreign commerce of the United States and to provide shipping service *on all routes essential for maintaining the flow of such domestic and foreign water-borne commerce at all times . . .*" [Emphasis supplied.]

We believe, therefore, that the standing of an intervening operator in any claim of undue prejudice or advantage under section 605(c) is diminished to the extent that it does not offer a direct and regular service in general conformity to the route as a whole.

Our responsibilities relating to this route, which are a subsidiary but necessary part of our larger responsibility to effectuate the purposes of the Act, cannot be effectively discharged by disqualifying an applicant which regularly and comprehensively serves the entire route, solely to protect those operators which serve only such portions thereof as suit their preference, or which observe such itineraries and schedules as shifting requirements in the trade may dictate. The Senate Committee on Commerce, 75th Congress, 3d Session, has stated in Report No. 1618 that the whole subsidy system is designed "to preserve and expand an industry demanded in the interest of our national welfare" and not to provide aid "for the benefit of the shipowner." An applicant for an operating-differential subsidy agrees that it will assume the obligation to restrict its operations to the route for which the subsidy is granted and to serve the requirements of the whole route. The participation of United States-flag vessels on the route involved is thus insured a reasonable expectancy of long-range permanency. As we have recently stated in *U. S. Lines Co.—Subsidy, Route 8*, 3 F. M. B. 713,

> A subsidy under such circumstances is thus no more than a fair allowance for the necessary restriction, and will not give to the applicant undue advantage as compared with the interveners who are now and will hereafter be free to seek higher voyage revenues because of freedom from such restriction.

The question of undue prejudice or advantage, in so far as United States-flag operators on the route other than APL and the two applicants are concerned, must be judged in the light of the above considerations. Although it may be admitted that the granting of subsidies to the present applicants for their operations on the route may give them an economic advantage over these other United States-flag operators to the extent that they are competing on certain segments thereof, we believe that the resulting prejudice, if any, suffered by these operators which cover only part of the route would not be undue within the meaning of section 605(c) of the Act.

Considering now the position of APL on the route, the following table discloses, *inter alia*, the total liner cargo carryings, both commercial and military, and the number of sailings on the route for the years 1938, 1947, 1948, and 1949, respectively:

TABLE II.—*Liner cargo carryings (commercial and military) and sailings on Trade Route 29 (thousands of long tons)*

	Commercial and military	Military	Commercial	Percent of commercial	Sailings commercial	Total sailings
1938						
Total United States and foreign	----------	----------	958	100	602	100
United States lines	----------	----------	234	24	63	10
Foreign lines	----------	----------	724	76	539	90
APL	----------	----------	161	17	----------	----------
Other United States lines	----------	----------	73	7	----------	----------
1947						
Total United States and foreign	1,511	460	1,051	100	677	100
United States lines	1,186	460	726	69	481	71
Foreign lines	325	0	325	31	196	29
1948						
Total United States and foreign	1,362	317	1,045	100	674	100
United States lines	1,042	317	725	69	452	67
Foreign lines	320	0	320	31	222	33
1949						
Total United States and foreign	1,707	445	1,262	100	920	100
United States lines	1,345	445	900	71	610	66
Foreign lines	362	0	362	29	310	34
APL and applicants	1,067	319	748	59	447	48
Other United States lines	279	127	152	12	163	18
APL:						
All services	349	66	283	22	156	17
Trade Route 29 freight	216	59	157	12	58	6
PTL	244	112	132	11	62	6
PFEL:						
Total	474	141	333	26	229	25
Reefer	164	109	55	4	114	12
Freighter	310	32	278	22	115	13

It will be observed from the above table that United States-flag participation in liner commercial traffic has increased from about 24 percent in 1938 to approximately 71 percent in 1949. There has also been a substantial improvement in the position of APL over its prewar participation. In 1938, APL carried approximately 17 percent of the total cargo moving over the route, whereas it carried 22.4 percent in 1949. The total commercial carryings of APL have increased from 161,000 tons in 1938 to 283,000 tons in 1949. The record also shows that APL operated on the route at more than 90 percent capacity outbound in 1949 while, for the same period, PTL operated at 73 percent and PFEL at 87 percent capacity. The record further discloses that there are seasonal fluctuations in cargo offerings, and the examiner has found that there is an over-all 15 percent unused space factor that must be taken into account in evaluating outbound utilization statistics for the route. PFEL contends

that the foregoing utilization figures demonstrate that the trade was not over-tonnaged in 1949.

APL is receiving subsidy and derives therefrom certain long-range benefits. It would appear, therefore, that APL has a greater burden is proving undue prejudice under section 605(c) than would a non-subsidized operator were there one in this case which regularly and comprehensively served the route as a whole.

Although a more exhaustive examination will be necessary under other sections of the Act, we take an optimistic view of the prospective traffic movement on the route in view of the industrial growth of California and the other areas which its ports serve, and of the present trend of economic recovery in Japan, the Philippine Islands, and other countries on the route. For example, the military cargo shown in the above table includes all types of cargo that is transported under military jurisdiction. A considerable amount of such cargo, which includes civilian foodstuffs and commercial products, will continue to move in normal times after the abandonment of military interest or control.

The evidence discloses that APL has operated profitably on the route and has been holding its own with substantial success since the entry of applicants into the trade, notwithstanding that applicants have secured more than one-third of the total traffic moving over the route. The record is clear that, on the basis of its 1949 operation, APL alone could not have handled with its then existing service the outbound traffic of either or both applicants in addition to its own traffic.[5] The evidence is not convincing that the granting of either or both of the present applications would adversely affect APL's relative position on the route.

APL contends that if additional vessels should be required on the route it will furnish them.[6] Whether there is undue prejudice and advantage under section 605(c) must depend on the *existing* service of the interveners as well as that of applicants. We do not regard an offer to supply additional vessels, if needed in the future, as bearing on the question of undue prejudice or advantage "as between citizens of the United States, *in the operation of vessels in*

[5] PTL and PFEL combined carried 34 percent of the outbound liner dry cargo moving over the route with 89 sailings. APL's transpacific freighter service carried 13 percent of such cargo with 27 sailings. In order to handle the cargo moved by applicants in 1949, excluding cargo on PFEL's reefer ships, APL would have had to supply space for 421,000 tons of additional outbound commercial and military cargo (229,000 tons for PFEL plus 192,000 tons for PTL), or for 278,000 tons of additional outbound commercial cargo (197,000 tons for PFEL plus 81,000 tons for PTL). The latter figure alone exceeds APL's transpacific freighter carryings of outbound commercial cargo by 174,000 tons.

[6] States also contended that it would furnish additional vessels if traffic on the route should warrant.

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competitive services, routes, or lines . . ." (Emphasis added.) Neither a subsidized nor a nonsubsidized operator is entitled under section 605(c) to assert a claim of undue prejudice to a prospective but nonexisting operation.

Applicants content that APL's offer to expand its service must be considered in light of the fact that APL itself has recently requested the Board for permission to increase its service in order to provide from 47 to 57 subsidized voyages on the route. The implication perhaps arises that APL considers it has the primary responsibility for maintaining and developing the vast commerce on the route, and that APL indirectly attacks the Board's power to grant multiple subsidies on a single route so long as the exisiting subsidized operator is willing to expand its service. The Maritime Commission in its first report on a subsidy application in 1938, Docket No. S–1, *Am. Sou. African Line, Inc.—Subsidy, S. and E. Africa*, 3 U. S. M. C. 277 (1938), rejected both of these contentions. The Commission stated that "plenary power to grant dual and multiple subsidies is expressly conferred upon the Commission by . . . section 605(c), subject only to the limitations therein stated. The language of the section is too clear in this regard to require further elaboration." The Commission also stated that "The Act neither by definition nor implication invests a subsidy contract with the legal effect of an exclusive franchise . . ." We concur in that view.

In light of all the foregoing, we conclude that the granting of either or both of the present applications will not result in undue prejudice as against APL.

The above considerations set forth with respect to APL are not necessarily determinative of the question of undue prejudice and advantage as between the applicants. Both applicants and APL have operated profitably on the route with comparatively little free space during the test year 1949, and it appears that neither applicant has the ability to carry all, or a substantial portion, of the cargo being carried by the other. It may be, however, that the granting of a subsidy to one of the applicants and the denial of a subsidy to the other might result in undue prejudice to the latter operator so long as it continues its comprehensive and regular service on the route as a whole. We conclude, on the basis of the present record, that the granting of subsidies to both PTL and PFEL to the extent of their operations on the route at the time the applications were filed would not unduly prejudice either operator. We leave open the question of the undue prejudice which might result as between applicants if one of them should fail to qualify for a subsidy under other sections of the Act,

and the possible question of the necessity of entering into a subsidy contract with the qualifying applicant in order to provide adequate service.

Both AML and APL urge that the Board, in any event, must decide under section 605(c) whether a subsidy is necessary to provide adequate United States-flag service; AML has submitted briefs in which the legislative history of the section has been extensively collated and expounded. We believe the wording of the Act is clear that except where section 605(c) makes adequacy of United States-flag service an issue, viz, where the applicant seeks to establish a service not in existence or where the Board finds that the prospective subsidy contract would be unduly advantageous or prejudicial, no finding need be made on this question under this section. The question of adequacy of United States-flag service under the second part of section 605 (c) thus is not reached unless the Board finds that the granting of the application would result in undue prejudice or advantage. We have carefully considered the interpretation of section 605(c) that has been urged by AML and APL, and believe that the legislative history of the section does not lend cogent support to a contrary construction to that taken above.

AML and APL argue that prior to the Commission's report in *P. A. B. Line, Inc.—Subsidy, Route 24*, 3 U. S. M. C. 357 (1948), section 605(c) had been interpreted to require that the applicant prove that a subsidy was necessary to maintain adequate United States-flag service on the route involved. In support of this contention, AML and APL cite the report of the Maritime Commission in *Bloomfield S. S. Co.—Subsidy, Route 15B*, 3 U. S. M. C. 299 (1946), where both Bloomfield and Lykes were applying for subsidies on the same route. It is true that the Commission in denying subsidies to both applicants in that case said:

> Under the circumstances, we conclude that financial aid under Title VI of the Act is not necessary at the present time to promote the foreign commerce of the United States on Trade Route No. 15B, and that both applications therefor should be denied.

Lykes' service on the route was found to be "existing" and was admitted by both applicants to be adequate. The Commission held that because of section 605(c) it could not grant a subsidy to Bloomfield since its service was in prospect only, and therefore would be in addition to the *existing* service of Lykes, which was admittedly adequate.

On the other hand, the denial of subsidy to Lykes was not stated to be because of any bar interposed by section 605(c). The Commission referred rather to the authority granted to it under section 601(a),

and stated as a matter of policy that aid would be granted whenever "necessary to maintain adequate United States service on essential foreign trade routes." Section 605(c) would clearly not have been a bar to granting a subsidy to Lykes, for Lykes was then the only existing United States-flag operator on the route therein involved. It seems obvious, therefore, that in considering adequacy in connection with Lykes' application, the Commission was not determining this issue under section 605(c), but rather giving effect to the policy of section 601(a). We do not abandon adequacy of service as a consideration in our ultimate disposition of operating-differential subsidy applications, nor do we reject the other considerations presented by interveners and those contributed in the recommended decision of the examiner, which, however, do not bear on the present issued under section 605(c).

Although we take an optimistic view of the prospective traffic on the route, we do not herein attempt to evaluate the various tonnage forecasts that have been presented or to decide whether the figures projected for United States-flag participation therein should be revised up or down. The question of the number, type, and size of vessels which may or should be subsidized, and, indeed, the question of whether either or both applicants should be granted a subsidy must await our determinations under other sections of the Act. In this respect, the voluminous and comprehensive record and the chief examiner's expert distillation thereof in his recommended decision are informative, and, together with other material which may be required, can readily form the basis for the disposition of the other issues not yet decided. The exceptions of the various interveners and those of applicants have been carefully considered, and except to the extent that they are consistent with this report they are overruled at this time.

CONCLUSIONS

The Board therefore concludes:

1. Applicants Pacific Transport Lines, Inc., and Pacific Far East Line, Inc., are operating existing services on Service 2 of Trade Route No. 29 within the meaning of section 605(c) of the Act:

2. The effect of the granting of operating-differential subsidy contracts to both of the applicants to the extent of their operations on Service 2 of Trade Route No. 29 at the time of the filing of their applications would not be to give undue advantage or be unduly prejudicial as between citizens of the United States in the operation of vessels on the route; and

3. The provisions of section 605(c) of the Act do not interpose a bar to the granting of operating-differential subsidy contracts to both of the applicants for the operation of cargo vessels on Service 2 of Trade Route 29 to the extent of their operations thereon at the time of the filing of their applications.

All further questions which may arise under this or other sections of the Act are expressly reserved for future determination.

By the Board.

A. J. WILLIAMS,
Secretary.

FEDERAL MARITIME BOARD

No. S–31

FARRELL LINES INCORPORATED—OPERATING-DIFFERENTIAL SUBSIDY, COMBINATION VESSELS

REPORT ON MOTION TO DISMISS PROCEEDINGS

BY THE BOARD:

This case was instituted pursuant to an order of the Board, and, as announced in the notice dated December 17, 1951, and published in the Federal Register on December 20, 1951, was to receive evidence to determine (1) whether vessels during the period July 1949 to date were operated under the registry of a foreign country which were or are substantial competitors of the combination passenger and cargo vessels operated by Farrell Lines Incorporated on Trade Route No. 15A, and (2) whether and to what extent operating-subsidy aid is necessary to place the operation of such combination vessels on a parity with vessels of foreign competitors, and is reasonably calculated to carry out effectively the purposes and policy of said Act (Merchant Marine Act, 1936).

At the prehearing conference held before the examiner on January 10, 1952, Farrell presented a petition to intervene solely for the purpose of moving to dismiss the case for lack of jurisdiction. Counsel for the Board filed an answer in opposition to the motion, and the matter was argued before the Board on February 14, 1952.

Farrell alleges that the Maritime Commission entered into a formal operating-differential subsidy contract with it, dated January 1, 1947, but actually executed on January 5, 1950, wherein it was recited that the Commission had made all necessary determinations and findings and had entered such formal orders as were required by the Act, and wherein the Government agreed to pay operating-differential subsidy for cargo and combination vessels on Trade Route No. 15A and for cargo vessels on Trade Route No. 14, Service No. 1. Farrell argues that there is no authority under Title VI of the Merchant Marine Act, 1936, for the review of this operating-differential subsidy contract,

and that the United States is obligated under the contract to pay Farrel a subsidy for the operation of the combination and cargo vessels. Carrying these points further, Farrell argues that since there is no authority to review the existing contract, the Board has no jurisdiction to hold a hearing to inquire into the matters referred to in the notice.

It is to be pointed out that on January 1, 1947, Farrell's combination vessels S. S. *African Endeavor* and S. S. *African Enterprise* were not in service. The contract established the maximum and minimum number of sailings, and named the vessels to be subsidized on the routes, including the combination vessels *African Endeavor* and *African Enterprise* on Trade Route No. 15A. The contract fixed subsidy rates for wages and subsistence for the cargo ships on each line, which rates, however, were to be subject to verification and revision by the Commission in the event that the Commission should determine that there was any error in the computation thereof. Article 1–4(c) of the contract provided:

> Items and percentages of differentials for the combination passenger and cargo vessels *African Endeavor* and *African Enterprise* applicable on and after the respective dates of their introduction into the subsidized service hereunder shall also be added by an addendum.

Two addenda to the contract have been made, one dated March 15, 1950, and one dated February 8, 1952. The second addendum recited that the Board, as successor to the Maritime Commission, had reviewed the subsidy rates for wages of cargo vessels on the two routes and fixed revised rates in lieu of the original rates effective from the commencement of the subsidy contract. Neither the first nor the second addendum, however, in any way modified Article 1–4(c), quoted above, nor fixed either the items or percentage rates for subsidy for the two combination vessels.

Farrell carefully analyzes the functions of this Board derived from Reorganization Plan No. 21 of 1950, pointing out that under section 105(1) the Board succeeded to the following functions of the Maritime Commission: (1) with respect to making, amending, and terminating subsidy contracts, and (2) with respect to conducting hearings and making determinations antecedent to making, amending, and terminating subsidy contracts, all under the provisions of Title VI and other titles of the Act. It argues that since the contract of January 1, 1947, had been "made," the present inquiry could not relate to the "making" of a contract, and further that any inquiry into the matter of the combination ships as outlined in the notice was not leading to an "amendment" to the contract because the establishment of the

amount of the subsidy was a mere incident to the administration of the contract and hence exclusively within the jurisdiction of the Maritime Administrator.

We do not agree that this is the proper analysis of the situation. It is clear that the Board has authority with respect to the "making" of the subsidy contract, including the determination in the first instance of the subsidy rate, and it also has authority on behalf of the Government to "amend" the subsidy contracts in so far as amendments are proper, and in connection with both of these functions the Board is expressly authorized under section 105(1) "to conduct hearings and make determinations antecedent to making, amending, * * * subsidy contracts." Such amendments to the original contract were made by the Board by the two addenda referred to above. In this case the subsidy contract of January 1, 1947, was not a complete agreement on all the matters which were before the contracting parties. It was a partial agreement fixing rates for the cargo vessels and expressly leaving open for future determination the rates for the combination vessels. The contract provided that this remaining matter should be cared for by an "addendum." Until the Board fixed the rates applicable to the combination vessels, either in the original contract or by addendum, the matter could not become a mere incident of administration for the Maritime Administrator, for, until determined and added to the contract, this element in the agreement was nonexistent and impossible of administration. We do not think it important to decide whether the act of completing the original agreement by adding the differentials applicable to the combination ships, if such additions are legally authorized, is a completing of the original contract (thus a "making") or an adding to the original contract (thus an "amending"). In either event, such act is the function of the Board and the conducting of hearings antecedent thereto is duly authorized under section 105(1) of the Reorganization Plan. Some mention was made of the Board's authority to hold hearings in respect to making readjustments in determinations as to operating-cost differentials under the provisions of section 606 of the Act. Clearly this section is applicable only to readjustments made, from time to time, after the original differential rates have been established, and is not applicable here where original rates have not yet been established for the combination ships.

But Farrell argues that this case was not set up to establish the rates or percentages of the operating-differential subsidy for the combination ships, but rather was to determine whether there was warrant for the payment of any operating subsidy whatsoever on the combi-

nation ships. We think it is true that the tenor of the notice indicates a broad inquiry into whether the subsidy is to be paid on these vessels rather than *how much*. The motion to dismiss, however, is an attack upon the Board's jurisdiction to hold hearings and conduct an inquiry. As above indicated, we certainly have jurisdiction to conduct an inquiry into the matter of *how much*, and we cannot well determine that issue without having before us all material facts upon which the legal position depends. We think the problem is one on which the Board should obtain as much light as possible. Other arguments in support of Farrell's contractual rights are not relevant to the motion to dismiss and will be considered on final hearing.

An order will be entered overruling the motion to dismiss and remanding the case to the examiner for further proceedings.

ORDER

At a Session of the Federal Maritime Board, held at its office in Washington, D. C., on the 11th day of April A. D. 1952.

No. S-31

FARRELL LINES INCORPORATED—OPERATING-DIFFERENTIAL SUBSIDY, COMBINATION VESSELS

Farrell Lines Incorporated having filed a motion to dismiss this proceeding for want of jurisdiction, and the Board, on the date hereof, having entered of record its report on said motion, which report is hereby referred to and made a part hereof,

It is ordered, That the said motion be, and it is hereby, overruled, and that the case be, and it is hereby, remanded to the examiner for further proceedings.

By the Board.

[SEAL] (Sgd.) A. J. WILLIAMS,
Secretary.

FEDERAL MARITIME BOARD

No. M-52

FARRELL LINES INCORPORATED—APPLICATION FOR BAREBOAT CHARTER OF TWO VICTORY-TYPE, GOVERNMENT-OWNED, WAR-BUILT, DRY-CARGO VESSELS FOR EMPLOYMENT IN THE SERVICE BETWEEN UNITED STATES ATLANTIC PORTS AND PORTS IN SOUTH AND EAST AFRICA (TRADE ROUTE NO. 15A)

REPORT OF THE BOARD

This proceeding was instituted pursuant to Public Law 591, 81st Congress, upon the application of Farrell Lines Incorporated for the bareboat charter for an indefinite period of two Victory-type, Government-owned, war-built, dry-cargo vessels for employment in its berth service between United States Atlantic ports and ports in South and East Africa (Trade Route No. 15A).

Hearing on the application was held before an examiner on April 11, 1952, pursuant to notice in the Federal Register of April 8, 1952. Because of the urgency of the matter, the usual 15 days' notice was not given. There was no opposition to the application. The examiner's recommended decision was served on April 15, 1952, in which he recommended that the Board should make the statutory findings necessary for the charter. Because of an apparent inconsistency in the record, we issued an order on April 16, 1952, remanding the proceeding to the examiner to take further evidence on the issue of inadequacy of United States-flag service on the route. Bursuant to this order, a further hearing was held before the examiner on April 17, 1952, and the examiner's supplemental recommended decision was served on the same day, in which he affirmed his initial recommendations. Counsel for the Board has stipulated that he will not file exceptions to either the initial or supplemental recommended decisions of the examiner.

The record is convincing that the service under consideration is in the public interest. Trade Route No. 15A is an essential trade route in the foreign commerce of the United States, and it appears that applicant carries large quantities of cargo essential to the defense

effort of the United States and to the economy and development of the areas served in South and East Africa.

Applicant holds an operating-differential subsidy contract for operations on Trade Route No. 15A. At the present time, it maintains service on the route with 6 C–3 type, 2 C–2 type, and 2 combination passenger vessels, providing sailings from the Atlantic approximately three times a month.

Applicant's witness testified that the areas serviced in South and East Africa are experiencing an extensive period of development, and that during World War II these areas did not receive normal replacements for railroad equipment, so that the inland transportation problem is presently acute and is intensified whenever there is a breakdown in the railroad service. It was testified that the deficiency in railroad equipment has resulted in serious port congestion. The normal average turnaround for applicant's vessels is 90 days, but recently sailings to the ports of Mombasa and Beira have required approximately twice the normal time to complete the round-trip voyage. The witness testified that all lines are attempting to keep the ports in a fluid state by staggering their sailings, and that local officials are handling the situation on an allocation basis. Applicant's witness was of the opinion, however, that this congestion is not likely to be alleviated in the immediate future. It appears that the congestion has seriously disrupted applicant's sailing schedule; at the present time applicant does not have vessels available to cover sailings from United States Atlantic ports to South and East Africa on April 30 and May 10.

Seas Shipping Company, Inc., also holds an operating-differential subsidy contract for operations on Trade Route No. 15A. At the initial hearing before the examiner evidence was introduced to show that Seas had offered for charter to another operator one of its vessels which is now designated in its subsidy contract for operation on Trade Route 15A. Since there was an apparent inconsistency, not explained by the record, in a competitor withdrawing a vessel from the service, while at the same time applicant sought to charter two vessels for the same service, the proceeding was remanded to the examiner for further evidence on the issue of the inadequacy of United States-flag service on the route.

Applicant's witness explained that the withdrawing of a vessel by Seas was apparently the result of that vessel being thrown off schedule by the African port congestion. The witness stated that, although there is a lack of tonnage on the route as a whole, because of port congestion which extends the round-trip sailings of certain ships, there

is, from time to time, a surplus of vessels at United States Atlantic ports. It was the opinion of the witness that if Seas had placed the extra ship into its Trade Route No. 15A service at the present time it would have resulted in too many sailings now and left a gap later in its regular schedule. This opinion of applicant's witness is supported by the fact that Seas was willing to make only a two-month time charter, whereas a round-trip voyage on Trade Route No. 15A would take at least three months.

It was further testified by applicant's witness that United States-flag service on the route would not be adequate if the present charter should not be granted. The witness testified that applicant's vessels have been running full or substantially full on both the outbound and inbound voyages during 1952, and that it has been necessary for applicant to refuse cargo offered both in the United States and in South and East Africa. It was stated by the witness that should the present application for two Government-owned vessels be granted, those vessels will sail substantially full in both directions. The witness stated that, so far as he knows, all other lines operating in the trade are running full. It appears from the evidence that no privately owned United States-flag vessels are available for charter on reasonable conditions and at reasonable rates for use in this service.

FINDINGS, CERTIFICATION, AND RECOMMENDATIONS

On the basis of the facts adduced in the record, the Board finds and hereby certifies to the Secretary of Commerce:

(1) That the service under consideration is in the public interest;

(2) That such service is not adequately served; and

(3) That privately owned United States-flag vessels are not available for charter from private operators on reasonable conditions and at reasonable rates for use in such service.

The Board recommends that any charter which may be granted pursuant to the findings in this case be for an indefinite period, subject to the usual right of cancellation by either party on 15 days' notice, and subject further to annual review of the charter as provided in Public Law 591. The Board also recommends that any such charter include provisions to protect the interests of the Government under its operating-differential subsidy agreement with applicant.

By the Board.

APRIL 17, 1952.

(Sgd.) A. J. WILLIAMS,
Secretary.

FEDERAL MARITIME BOARD

No. 712

CARRIER-IMPOSED TIME LIMITS ON PRESENTATION OF CLAIMS FOR FREIGHT ADJUSTMENTS

Submitted March 6, 1952. Decided April 30, 1952

The Board does not have jurisdiction, without allegations of violation of some provision of the Shipping Act, 1916, to establish rules relating to carrier-imposed time limitations on claims for freight adjustments.

Chalmers G. Graham, *Leonard G. James*, *Gilbert C. Wheat*, *John R. Mahoney*, *Burton H. White*, *Elkan Turk*, *John Tilney Carpenter*, *William H. Atack*, and *Harold B. Finn* for petitioners.

Charles Noble and *G. J. Burt* for Coastwise Line, *Walter A. Rohde* for San Francisco Chamber of Commerce, *L. H. Wolters* for Golden State Company, Ltd., *Howard H. Fisher* for California Packing Corporation, *A. W. Brown* for Pabco Products, Inc., *Clement T. Mayo* for Department of the Navy, Department of Defense, and General Services Administration, and *E. Craig Kennedy* for General Accounting Office, interveners.

Francis T. Greene, *John Mason*, *Joseph A. Klausner*, and *Allen Dawson* for the Board.

REPORT OF THE BOARD ON MOTION TO DISMISS

BY THE BOARD:

Notice was published in the Federal Register of April 26, 1951, of the institution of a proceeding, under section 4 of the Administrative Procedure Act, section 204 of the Merchant Marine Act, 1936, and sections 14, 14(a), 15, 16, 17, 18, and 22 of the Shipping Act, 1916, as amended, to consider the adoption of a rule governing the right of common carriers by water, subject to the Board's jurisdiction, to limit the time for presentation by shippers and consignees of claims for freight adjustments.

The above-mentioned notice stated that public hearings would be held before an examiner, at which interested persons would be given the opportunity to submit evidence and argument as to (1) the necessity or desirability of such a rule, and (2) the provisions which might be incorporated therein. The notice specified four particular questions relative to the proposed rule on which evidence and argument were desired [1] and stated that the hearings would be conducted subject to the Board's rules of procedure, except that (1) the examiner would transmit recommendations and the record of proceedings directly to the Board without the opportunity for exceptions or argument, and (2) interested persons not attending the proposed hearings would be allowed to submit verified statements, which would become a part of the record notwithstanding section 201.125(b) of the Board's rules of procedure, which provides that, in a formal hearing at a rule making procedure, verified statements submitted by persons not present at the hearing for cross-examination will be excluded from the record if objected to.

Hearings were held in San Francisco on August 20, 23, and 24, 1951. At the outset of the hearings, counsel representing certain Pacific coast conferences moved to dismiss the proceeding for lack of jurisdiction, and subsequently a formal motion to dismiss was filed. Argument on the motion to dismiss was heard before the Board in San Francisco on October 16, 1951, and also in Washington on February 6, 1952. Interested parties were given until March 6, 1952, to file briefs; and briefs from a number of the parties whose appearances are noted have been received. The motion to dismiss is based on two broad grounds: (1) that the Board does not have jurisdiction to conduct a rule-making proceeding in the manner prescribed in the notice; and (2) that the Board does not have jurisdiction, in any event, to issue any rule which would determine the proper time limitation for presentation by shippers and consignees for freight adjustments.

[1] The notice states that evidence and argument would be desired on the following questions:

(a) Whether any time limitation allowing less than two years within which to file any claim for freight adjustment conflicts with section 22, Shipping Act, 1916, in that such shorter period deprives the shipper of the statutory time in which to claim reparation.

(b) Whether, if no such conflict exists, it is reasonable and otherwise lawful for carriers to require claims for freight adjustments to be filed within six months of shipment, and, if not, what constitutes a reasonable and lawful time.

(c) Whether, if no such conflict exists, it is reasonable and otherwise lawful for carriers to require the shipper to file claims based upon wrong weight or measurement, or on misdescription, before the shipment is delivered by the carrier; and, if not, what constitutes a reasonable and lawful time.

(d) All other questions relevant to a determination of a proper time limitation within which shippers may be required by carriers to file claims for adjustments of freight charges.

I. The first objection thus raised is procedural rather than jurisdictional. It is pointed out that section 8(a) of the Administrative Procedure Act requires in rule-making proceedings either that the examiner make a recommended decision, or, if the entire record is certified to the Board for its decision, that the Board issue a tentative decision with an opportunity for interested parties to file exceptions thereto, except in such cases where the Board finds upon the record that due and timely execution of its functions imperatively and unavoidably require a different procedure.

Several of the counsel appearing before the Board, both at San Francisco and Washington, argued that section 4 of the Administrative Procedure Act is incorrectly cited in the Board's notice as an enabling statutory provision for the proposed rule making. No statutory jurisdiction is claimed by the Board under section 4; the notice merely recites that the proceeding will be conducted thereunder. The notice thus contains an express statement that the Board is adopting an informal rule-making procedure under section 4 and not a formal rule-making procedure under sections 7 and 8 of the Administrative Procedure Act.

Section 8 of the Administrative Procedure Act by its terms applies to cases "in which a hearing is required to be conducted in conformity with section 7." Section 7 applies to hearings required to be conducted thereunder by the provisions of sections 4 and 5. Section 5 concerns adjudications and is thus not material to the present rule-making procedure. Section 4 provides for and permits an informal rule-making procedure but requires the formal procedure of section 8 only "where rules are required by statute to be made on the record after opportunity for an agency hearing." None of the statutory enabling provisions cited in the Board's notice requires a formal notice or hearing in connection with the rule-making proceeding thereby instituted. For an explanation of the difference between informal and formal rule-making procedure see the Attorney General's *Manual on the Administrative Procedure Act*, page 31.

Since the notice states that section 4 of the Administrative Procedure Act is the framework in which the hearing on the proposed rule making is to proceed, it is well within the requirements of that section for the Board to direct the examiner to transmit his recommendations and the record directly to the Board without an opportunity for exceptions or oral argument. It is also not violative of the Administrative Procedure Act for the notice to provide that interested persons not attending the hearings would be permitted to submit verified statements without regard to rule 201.125(b) of the Board's rules of procedure, which operates ordinarily to exclude written testimony if the

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witness is not present for cross-examination. We also believe that there is no policy consideration compelling the Board to adopt a procedure requiring the examiner who conducted the hearing to submit a recommended decision to the Board.

II. The present motion, however, raises a more important and fundamental question which is directed to the Board's jurisdiction. The basic issue thus presented is whether the Board has, in any event, any statutory authority to make rules with respect to carrier-imposed time limitations on presentation of claims for freight adjustment.

For the reasons explained below, we find that our jurisdiction is lacking and that the proceedings must, therefore, be dismissed.

Our authority to proceed must be based upon some statutory provision. As recently declared by Congress in section 9 of the Administrative Procedure Act, 5 U. S. C. A., chapter 19,

> In the exercise of any power or authority—
> (a) In General.—No sanction shall be imposed or substantive rule or order be issued except within jurisdiction delegated to the agency and as authorized by law.

If the proposed rule were to apply only to "common carriers by water in interstate commerce" subject to our regulation under section 18 of the Shipping Act, 1916, we might find support for jurisdiction. Under that section such carriers are required to establish "just and reasonable regulations and practices relating thereto and to the issuance, form, and substance of tickets, receipts, and bills of lading." Similarly, if the rule were to apply only to carriers who are parties to conference or other agreements subject to our approval under section 15 of the Act, we might find jurisdiction on the theory that the proposed rule was necessary to avoid detriment to the commerce of the United States. But the proposed rule is not so limited. Hence, to support jurisdiction for the present proceeding we must find authority to adopt a rule of general application to all common carriers by water.

The Shipping Act, 1916, contains no general grant of rule-making power, but the Merchant Marine Act, 1936, after transferring to the Maritime Commission in section 204(a) "all the functions, powers, and duties vested in the former United States Shipping Board by the Shipping Act, 1916", provides in section 204(b):

> The Commission is hereby authorized to adopt all necessary rules and regulations to carry out the powers, duties, and functions vested in it by this Act.

Thus, the Maritime Commission had, and the Board now has, authority to adopt rules to carry out the powers, duties, and functions given to the Shipping Board by the 1916 Act. The special sections

of that Act relied on to support these proceedings are designated in the notice, and, apart from sections 15 and 18 already mentioned, are: sections 14, 14(a), 16, 17, and 22.

Section 14 of the Act forbids certain practices by water carriers including (a) deferred rebates, (b) use of fighting ships, (c) retaliation against shippers for patronizing other lines or for filing complaints, etc., and (d) unfairly treating or unjustly discriminating against shippers in connection with cargo space, proper cargo handling, or the adjustment and settlement of claims.

Section 14(a) authorizes the Board to investigate the conduct of persons not citizens of the United States, and if they are found to violate the Act, or, in connection with their foreign business to treat unfairly American carriers, the Board may take steps to have them excluded from American ports.

Section 16 forbids certain falsifications by shippers to obtain transportation at less than regular rates, and, likewise, forbids certain practices by water carriers and other persons subject to the Act, such as permitting falsification by shippers to obtain improper rates, giving unreasonable advantage to any person, locality, or description of traffic, or persuading underwriters to discriminate against competing carriers.

Section 17, in its first paragraph, forbids unjust discrimination by ocean carriers and authorizes the Board to issue orders for the correction and prevention thereof. In the second paragraph it requires just and reasonable practices relating to the "receiving, handling, storing, or delivering of property" and authorizes the Board to see that such practices prevail.

Section 22 provides for Board investigations of alleged violations of the Act, either on sworn complaint or on the Board's own motion, and provides for the issuing of orders to abate violations of the Act and also for the payment of reparation for injury caused by any such violations, if a complaint is filed within two years after the cause of action accrued.

Petitioners draw the analogy between shippers' claims for freight adjustment and shippers' claims for cargo damage. The time for filing cargo damage claims against ocean carriers was not regulated by Federal statute until 1936. Before that date, carriers frequently inserted clauses in their bills of lading requiring (a) the filing of written notice of damage with the carrier within a fixed time limit, and (b) the institution of suit within a fixed time limit. Unless the time limits were unreasonably short, the validity of such clauses was generally upheld prior to 1936, and the shipper was required to com-

ply with both requirements in order to make a recovery. *The Turret Crown*, 284 Fed. 434 at 443 (1922).

In 1936, the Carriage of Goods by Sea Act, 46 U. S. C. 1300, etc., became effective, providing in section 1303(b) that unless notice of damage in writing is given to the carrier before removal of the cargo, such removal is *prima facie* evidence of delivery in good order, unless damage is not apparent, in which case three days are allowed; and further, that one year only is allowed for the institution of suit, the carrier being discharged from all liability thereafter. The freedom of contract existing prior to 1936 was cut down, and clauses inconsistent with the Act are now invalid. *The Argentino*, 28 F. Supp. 440; see also *Knauth-Ocean Bills of Lading*, p. 228 *et seq.* Petitioners argue that their freedom to stipulate with shippers for short time limits for the presentation of claims for freight adjustment should not be limited since Congress has not passed an act in this field as it has done in the cargo damage field. Petitioners also point out that Congress has legislated on the question of time limits for the recovery of freight overcharges by railroads by the 1920 amendment to the Interstate Commerce Act, 49 U. S. C. A. 16(3), and that failure to legislate similarly for ocean carriers is a reason against jurisdiction here. We do not think those statutory provisions are conclusive on our power or jurisdiction in this case. They merely show a different treatment by Congress of different situations. The question in the last analysis depends upon whether or not we have statutory authority to adopt the proposed rule.

That part of section 14 of the 1916 Act which makes it a misdemeanor for a carrier to "unfairly treat or unjustly discriminate against any shipper in the matter of * * * the adjustment and settlements of claims" is the only language in sections 14, 14(a), 16, or 17 which refers to the subject matter of the proposed rule making. Under that language a shipper who suffers because of any such unfair treatment may apply to the Board for a cease and desist order or reparation, or may instigate criminal proceedings. This statutory language, however, does not give the Board a power, duty, or function to predetermine or define what does or does not constitute "unfair treatment" under the section.

Counsel for the Board suggests that since the Board can, under section 22, adjudicate a complaint charging unfair treatment in freight adjustments, it has the power to formulate rules of what should be considered unfair treatment in advance of a complaint, under the rule-making power granted under section 204(b) of the 1936 Act. Counsel for the Board does not urge that this power to make such a rule was a power, duty, or function of the 1916 Act prior to 1936, but urges

that section 204(b) is a source of substantive and novel powers. It is true that section 204(b) gives to the Board authority to adopt rules which the Board did not have before, but the section limits the power to making such rules as are necessary "to carry out the powers, duties, and functions" vested in the Board.

There are many prohibitions in the sections of the 1916 Act referred to. If we could take the subject matter of any one of those prohibitions and by the rule-making process interpret and redefine the Congressional language, there would be few limits to our jurisdiction. We do not think section 204(b) of the 1936 Act gives us this broad power.

Since Congress has not given to the Board powers, duties, or functions under section 14 or any other section of the 1916 Act with respect to freight adjustment claims other than the investigatory and adjudicatory functions already referred to, we have not the power by rule or otherwise to legislate as to what is, or what is not, unfair treatment in this regard. The rule-making power under the 1936 Act is granted only where necessary to carry out a statutory power, duty, or function. Failing the power, duty, or function, the jurisdiction to adopt rules cannot exist.

We consider that rule making under section 204(b) of the 1936 Act and within the framework of the Administrative Procedure Act as here proposed is something different from investigation of actual or suspected violations of the 1916 Act pursuant to section 22 thereof. The Administrative Procedure Act defines a "rule" and "rule making" in section 2(c) quite differently from an "order" and an "adjudication" in section 2(d). Nothing in this report is to be deemed in any way a limitation on the Board's very broad powers to investigate alleged violations or adopt such orders as are proper if violations are proved. Notice that violations are to be investigated is essential in such a proceeding. Such notice is entirely lacking here.

An order will be entered discontinuing the proceeding.

ORDER

At a Session of the Federal Maritime Board, held at its office in Washington, D. C., on the 30th day of April A. D. 1952.

No. 712

CARRIER-IMPOSED TIME LIMITS ON PRESENTATION OF CLAIMS FOR FREIGHT ADJUSTMENTS

A motion having been filed to dismiss this proceeding for lack of jurisdiction, and the Board, on the date hereof, having entered of record its report on said motion, which report is hereby referred to and made a part hereof:

It is ordered, That this proceeding be, and it is hereby, discontinued.

By the Board.

[SEAL] (Sgd.) A. J. WILLIAMS,
Secretary.

FEDERAL MARITIME BOARD

No. M–54

AMERICAN PRESIDENT LINES, LTD.—APPLICATION FOR BAREBOAT CHARTER OF A VICTORY-TYPE, GOVERNMENT-OWNED, WAR-BUILT, DRY-CARGO VESSEL FOR EMPLOYMENT IN THE ROUND-THE-WORLD SERVICE

This proceeding was instituted pursuant to Public Law 591, 81st Congress, upon the application of American President Lines, Ltd., for the bareboat charter for an indefinite period of a Victory-type, Government-owned, war-built, dry-cargo vessel for employment on Line B of the applicant's round-the-world service.[1]

Hearing on the application was held before an examiner on May 7 and 8, 1952, pursuant to notice in the Federal Register of April 29, 1952. Because of the urgency of the matter, the usual 15 days' notice was not given. Luckenbach Steamship Company, Inc., Pacific Far East Line, Inc., and Waterman Steamship Corporation appeared as interveners. The examiner's recommended decision was served on May 15, 1952, in which he recommended that the Board should make the statutory findings, upon the condition that the vessel herein applied for should be prohibited from lifting cargo at New York destined for ports in Japan or the Philippines. Memoranda partly in support of and partly in exception to the examiner's recommended decision were filed by applicant, Waterman, and counsel for the Board. We heard oral argument on the examiner's recommended decision in its entirety on May 28, 1952, at which counsel for applicant, Waterman, and the Board appeared and were heard.

It is conceded by all parties that the service herein under consideration is in the public interest, and we affirm the finding that we have recently made in this respect in Docket M–51, *Am. Pres. Lines, Ltd.—Charter of War-Built Vessel*, 3 F. M. B. 726.

[1] Described in the applicant's operating-differential subsidy agreement as follows: From New York via Panama Canal, California, Hawaiian Islands, Japan, China, Hong Kong, Philippine Islands, Straits Settlements (Malaya, including Singapore), Ceylon, India and Pakistan, Suez Canal, Egypt, Italy, France in the Mediterranean, to New York, with the privilege of calling at Boston, Havana (Cuba), ports in the Dutch East Indies (Indonesia) and Gibraltar. Applicant has waived the right to carry intercoastal cargo on the vessel herein applied for, and this segment of the service is not presently in issue

Applicant presently operates this service with 11 vessels, 9 of which are owned and 2 of which are chartered from the Government. Applicant's evidence discloses that it presently maintains a regular sailing frequency of 12 days from the North Atlantic; it was testified that the additional vessel would be integrated into this regular schedule so as to provide a sailing every 10 days.

Applicant's witness testified that the average amount of free space on its round-the-world vessels on departure from the last continental United States port in 1952 was 1.6 percent, and that the average amount of free space on such vessels on arrival at the first continental United States port in 1952 was 7.7 percent. Moreover, it was explained that the inbound Mediterranean trades are seasonal and that the subject vessel would be proceeding through that area during the season of heavy cargo offerings.

The witness for applicant testified that during the first three months of 1952 the company had declined 1,450 measurement tons of cargo from New York and Boston, and approximately 35,800 measurement tons from San Francisco and Los Angeles. In addition, the witness stated that approximately 6,000 measurement tons had been declined in the same period from foreign ports on its regular itinerary. Applicant's witness stated that specific cargo declinations during April 1952 have continued in a substantial amount, approximately 11,000 tons having been declined from all ports (including 6,405 weight tons from San Francisco and 952 weight tons from New York).

The examiner has found that cargo declinations from New York have not been substantial, particularly in light of the fact that applicant's witness admitted that such cargo may have been declined for reasons other than lack of space. The examiner therefore concluded that as to this segment of the service inadequacy of United States-flag service could not be found, and that Waterman "should be protected to the extent that if the application is granted the charter should contain a restriction prohibiting applicant from lifting cargo at New York on the subject vessel for points in the Japan-Philippines range."

Counsel for Waterman argues that the record fully supports the determination by the examiner that there is adequate United States-flag service from New York to Japan and the Philippines. Waterman's witness testified that the vessels of his company are sailing and have been sailing recently from North Atlantic ports with the greater amount of their space open. Waterman's vessels operate on a monthly schedule between New York, Philadelphia, and Baltimore and Yokohama, Kobe, and Manila, and call at Gulf ports en route. The witness explained that Waterman books cargo both from the

North Atlantic and the Gulf, and that its vessels are not limited as to the amount of cargo they take from the North Atlantic. It was testified that Waterman is able and willing to accommodate more cargo out of the North Atlantic to Japan and the Philippines. Counsel for Waterman argues that support for the recommendation of the examiner with respect to the restriction can be found in the express language of Public Law 591, permitting the Secretary of Commerce to include in charters made pursuant to the Act such restrictions and conditions as the Board determines to be necessary or appropriate to "protect privately owned vessels against competition."

Counsel for the Board also argues that the evidence is clear that there is at present adequate service on this segment of the route. Counsel for the Board points out, as a further consideration, that the *Cuba Victory*, which was chartered to applicant as a result of our report in Docket M–51, *supra*, has not yet sailed from the Atlantic coast, and therefore the lifting capacity of this additional vessel is not reflected in the cargo situation at the present time. He argues further that it is not unreasonable to expect that with the operation of the *Cuba Victory* from the Atlantic coast, any inadequacy in applicant's service would be cured.

Counsel for applicant, on the other hand, in excepting to the restriction recommended by the examiner, argues that the carriage of cargo from New York to Japan and the Philippines is an integral part of the round-the-world service, and that the record could support a finding of inadequacy of United States-flag service for this segment of the route. He argues that the elimination of this operation is not necessary for the protection of Waterman. Counsel for applicant points out that the witness for Waterman testified that Waterman's vessels are substantially full when they leave the Gulf, and that the vessels of Waterman are not designed to provide service only from New York, since their itineraries include other Atlantic ports as well as Gulf ports. Counsel for applicant asserts that the service of Waterman from the Atlantic to Japan and the Philippines is "irregular and intermitent," but the record discloses that Waterman had sixteen sailings on this service in 1951, and has had a monthly sailing during each of the first 4 months of 1952.

The record is convincing that, with the exception of the service from New York to Japan and the Philippines, there is an inadequacy of United States-flag service on this route. We agree with the examiner that, on the present record, there is no showing of inadequacy of United States-flag service out of New York for cargo offering to Japan and the Philippines. Cargo declinations from New York

during 1952 have not been substantial, and applicant's witness admitted that such cargo may very well have been declined for reasons other than lack of space. The record is clear that Waterman could have accommodated the cargo declined by applicant on the Atlantic coast. We conclude, therefore, that applicant should be restricted from lifting cargo at New York destined for ports in Japan or the Philippines on a vessel chartered pursuant to this proceeding.

Applicant intends to commence the first voyage with the subject vessel on the Pacific coast during the early part of June 1952. The record discloses that no suitable privately owned vessel is now, or was at the time the application was filed, available to applicant for June delivery on the Pacific coast.

FINDINGS, CERTIFICATION, AND RECOMMENDATIONS

On the basis of the facts adduced in the record, the Board finds and hereby certifies to the Secretary of Commerce:

1. That the service under consideration is in the public interest;

2. That such service (exclusive of the intercoastal segment thereof and the service from New York to Japan and the Philippines) is not adequately served; and

3. That privately owned United States-flag vessels are not available for charter from private operators on reasonable conditions and at reasonable rates for use in such service.

The Board recommends that any charter which may be granted pursuant to the findings in this case be for an indefinite period, subject to the usual right of cancellation by either party on 15 days' notice, and subject further to annual review of the charter as provided in Public Law 591. The Board recommends that such charter contain a restriction prohibiting applicant from carrying intercoastal cargo on the chartered vessel, and that the vessel be further restricted so as to prohibit applicant from lifting cargo at New York for ports in Japan or the Philippines. The Board also recommends that any such charter include provisions to protect the interests of the Government under its operating-differential subsidy agreement with applicant for this service.

By the Board.

JUNE 2, 1952.

(Sgd.) A. J. WILLIAMS,
Secretary.

FEDERAL MARITIME BOARD

No. S–29

REVIEW OF THE OPERATING-DIFFERENTIAL SUBSIDY CONTRACT WITH GRACE LINE INC. FOR SERVICE 1 OF TRADE ROUTE NO. 2

Submitted June 3, 1952. Decided July 27, 1952

Grace Line Inc. has encountered substantial direct foreign-flag competition on Service 1 of Trade Route No. 2 for both cargo and passengers from January 1, 1947, to the present.

An operating-differential subsidy to Grace Line Inc. for operation of combination vessels on Service 1 of Trade Route No. 2 is necessary to meet competition from foreign-flag vessels and to promote the commerce of the United States in furtherance of the purposes and policy of the Merchant Marine Act, 1936, as amended.

W. F. Cogswell and *E. Russell Lutz* for Grace Line Inc.
Max E. Halpern and *Joseph A. Klausner* for the Board.

REPORT OF THE BOARD

This proceeding concerns a review by the Board, on its own motion, of the operating-differential subsidy agreement of Grace Line Inc. (hereinafter referred to as Grace) for six C2–S1–AJA combination vessels operated by the company on Service 1 of Trade Route No. 2.

Notice of hearing was published in the Federal Register of September 28, 1951, the stated purpose of which was to receive evidence relative to the following: (1) Whether, and to what extent, the operation of such combination passenger and freight vessels by Grace on the above route was required to meet foreign-flag competition and to promote the foreign commerce of the United States between January 1, 1947, and the present date, or any part of that period; (2) whether such competition, if any, was (*a*) direct foreign-flag competition, or (*b*) other than direct foreign-flag competition; and (3) the extent to which the payment of subsidy in respect to the combination passenger

and freight service afforded by the operation of the above-mentioned combination vessels on Trade Route No. 2 is necessary to place such vessels on a parity with those of foreign-flag competitors, and is reasonably calculated to carry out effectively the purposes and policy of the Merchant Marine Act, 1936, as amended.

This proceeding was instituted in conjunction with other similar proceedings in order to resolve doubts raised by the Comptroller General of the United States concerning the propriety of the former Maritime Commission's action in granting operating-differential subsidies in certain instances where the foreign-flag competition for passengers was not considered by him to be substantial. (See Comptroller General's Audit Report of the Maritime Commission to Congress for fiscal year 1950, House Document No. 93, 82d Cong., 1st sess.) Grace has not been asked to waive any legal rights it may have for the payment of operating-differential subsidy on this route, and its voluntary appearance in this proceeding is not so construed.

Hearing was held before an examiner on October 25 and 26, 1951. The recommended decision of the examiner was served on April 15, 1952, in which he recommended that the Board should find: (1) That the operation of the six combination vessels by Grace on Trade Route No. 2 is, and has been since January 1, 1947, required to meet foreign-flag competition and to promote the foreign commerce of the United States; (2) that Grace meets direct passenger and freight competition by foreign-flag carriers operating on Trade Route No. 2 and indirect competition for passengers from foreign-flag carriers operating over other routes; and (3) that an operating-differential subsidy, computed in accordance with section 603 (b) of the Merchant Marine Act, 1936, as amended, is necessary to place such vessels on a parity with those of foreign-flag competitors and is reasonably calculated to carry out effectively the purposes and policy of the Merchant Marine Act, 1936, as amended.

Exceptions to the recommended decision of the examiner were filed by Board counsel, and oral argument was had before the Board on June 3, 1952.

Except for the examiner's findings on indirect competition, which we find unnecessary to pass on, we agree generally with the results of his recommended decision.

Grace operates on Trade Route No. 2 (hereinafter referred to as the route) with three C–2 freighters and six C2–S1–AJA combination vessels, all subsidized. The combination vessels are the only ones presently under consideration, and they operate on Service 1 of the route, which is described in the report of the Maritime Commission

on *Essential Foreign Trade Routes of the American Merchant Marine* (1949), as follows:

> Passenger and freight service (subsidized):
> Itinerary: Between a port or ports in the United States Atlantic, Maine to Key West, inclusive, and a port or ports on the west coast of South America, as far south as San Antonio or Talchahuano, Chile, with the privilege of calling at ports in the Panama Canal Zone.
> Sailing frequency: 50 to 52 weekly sailings per year.
> Number and type of ships: 6 C2 type passenger and freight vessels.

A temporary operating-differential subsidy contract covering this route was entered into between Grace and the Maritime Commission on June 19, 1937. The temporary agreement was replaced by a permanent contract on December 31, 1937, which contract was revised on November 12, 1940. All subsidized operations were suspended when privately owned vessels were requisitioned by the Government for wartime service in 1942. On December 18, 1947, the Maritime Commission made the necessary findings precedent to the awarding of an operating-differential subsidy to Grace for resumption of service after World War II. These findings included the determinations that: (1) An operating-differential subsidy to Grace for this route "is required to meet foreign-flag competition and to promote the foreign commerce of the United States," and (2) the "granting of financial aid is necessary to place the proposed operations of the vessels on a parity with those of foreign competitors and is reasonably calculated to carry out effectively the purposes and policy of the Act."

The Maritime Commission entered into an extended operating-differential subsidy agreement with Grace, executed December 29, 1949, effective January 1, 1947, and terminating December 31, 1957. This contract designates by name three C–2 freighters and six C2–S1–AJA combination vessels for the route. The operating-differential subsidy rates applicable to those vessels were included in the contract as to wages, subsistence, and maintenance.

The combination ships of Grace have since January 1, 1947, operated in a weekly service from New York to Cristobal, Buenaventura, Guayaquil, Talara, Mollenda, Arica, Antofagasta, Chanaral, and Valparaiso, returning via Antofagasta, Mollenda, Callao, Talara, Puna, Buenaventura, and Cristobal to Charleston and New York. Occasional calls have been made at other foreign and domestic ports, but in general the service has been maintained on a fixed itinerary.

Grace is the only United States-flag operator offering a regular berth service on the route. Foreign-flag competition on the route is offered entirely by freighters with accommodation for not over twelve

passengers each. The principal foreign-flag competitors offering berth service on the route are Cia. Sud Americana De Vapores (hereinafter referred to as the Chilean Line), Cia. Colombiana De Navegacion Maritima S. A. (hereinafter referred to as Coldemar Line), Flota Mercante Grancolombiana S. A. (hereinafter referred to as Grancolombiana), and West Coast Line. The Chilean Line, the most substantial foreign-flag competitor for both passengers and cargo, operates an approximately fortnightly service with 4 C–2 type vessels of Chilean registry, supplemented by occasional foreign-flag chartered vessels. Coldemar Line offers an approximately monthly service to parts of the route with its three owned vessels and foreign-flag chartered vessels; approximately half of the passenger and cargo carryings for this line during the years 1948, 1949, and 1950 were on the route. Grancolombiana is owned by the Governments of Venezuela, Colombia, and Ecuador and now operates ten owned vessels of the three flags, as well as various chartered vessels; this line originally maintained a monthly service on a portion of the route, and in 1950 instituted a weekly service. The West Coast Line offers a twice-monthly service conducted with chartered Danish-flag freighters of various types and sizes.

The C2–S1–AJA combination vessels of Grace are standard C–2 type vessels in the midship house of which an additional deck has been added providing 6 double cabins with 2 fixed beds and pullman berth and 8 single cabins with 1 fixed bed and pullman berth; the former have passenger accommodations for 3 persons and the latter for 2. The original accommodations include 6 double cabins, each able to accommodate a maximum of 3 passengers. The total passenger capacity of each vessel therefore is 32 fixed beds and 20 pullman berths, or 52 in all. Various privileges are extended in several foreign ports on the route to vessels carrying more than 12 passengers, including priority in docking permitting shorter turnarounds and more economical utilization of vessels. Among the advantages which Grace has procured from the additional passenger facilities, without sacrificing cargo space, is its ability to offset the special docking privileges accorded by local governments to their national carriers. The time-saving advantages referred to contribute to the maintenance of fixed schedules for the combination vessels.

We have no difficulty in affirming that the route is of essential importance to the promotion of the foreign commerce of the United States. This is a long-established route which provides the most economical means for carrying on trade between the eastern United States and the Pacific coast ports of South America. Both the cargo

and passenger movements on the route are substantial. The commodities carried are of considerable strategic and commercial importance and include large amounts of nitrate, copper, tin, zinc, manganese, lead, iron ore, coffee, and fruit. The principal southbound commodities are trucks, autos, iron and steel products, machinery, and a full line of general cargo.

The basic traffic statistics in this proceeding, which are set forth more fully in appendix A, indicate, inter alia, that: (1) The total movement of cargo on the route since January 1, 1947, has exceeded 1 million tons per annum, consisting of commodities of considerable strategic and commercial importance and of a value exceeding 1 billion dollars in 1950; (2) from January 1, 1947, to June 30, 1951, United States-flag vessels have carried approximately 60 percent of this total cargo movement; (3) from January 1, 1947, to June 30, 1951, combination vessels of Grace carried 18,262 of the passengers moving on the route, and the foreign-flag lines carried 2,039, or about 10 percent of the total movement; (4) from January 1, 1947, to June 30, 1951, 6,500 passengers moved over the route to and from Valparaiso, the principal port in Chile and the longest haul on the route, of which Grace carried 5,005, and foreign-flag lines carried 1,495, or 77 percent and 23 percent, respectively; and (5) Grace has derived approximately 90 percent of its gross revenue from the operation of its combination ships from cargo carryings, and approximately 10 percent from passenger carryings.

At this point we think it important to relate the three questions under consideration to the appropriate sections of the 1936 Act. We designated question 1 to relate to the requirements of section 601 (a) (1), question 2 to section 602, and question 3 to section 601 (a) (4). The most important question for decision arises under section 601 (a) (1). Is the operation of the combination vessels of Grace on Trade Route No. 2 required to meet foreign-flag competition? In the first place we think it goes without saying that the framers of the Act intended the granting of subsidies where the competition to be met was a real and effective force in the particular trade. Although the word "substantial" is not used to modify "competition" in sections 601 and 602, we must assume that operating subsidy was intended to offset the effects of real and substantial foreign-flag competition.

Have the subject combination vessels of Grace encountered substantial foreign-flag competition on the route since January 1, 1947, in accordance with the requirements of Title VI of the Act? Congress has not provided a definition of the term "substantial competition" as

it applies to foreign-flag operators. Whether competition is "substantial" will, we believe, depend on the facts in each individual case. The term "foreign-flag competition" has similarly not been given a restricted or definite meaning, nor did Congress direct that the administrators of the Act should crystallize its meaning in the manner in which they were directed to do with respect to the words "net earnings" and "capital necessarily employed," in section 607 (d) of the Act.

Thus, we have the responsibility to determine, among other things, what constitutes foreign-flag competition on a particular trade route, and whether such competition is substantial. Those determinations must necessarily be made on the facts in each particular case. For those words, like the words, "interstate commerce" and "navigable waters," used in the Constitution of the United States, should retain that degree of flexibility that will permit the administrators of the Act to carry out the general policies of Congress with consideration for the exigencies of the day.

Board counsel, while admitting that the combination vessels of Grace have encountered substantial foreign-flag competition for cargo on the route, nevertheless argues that the combination service of Grace has been refined in point of schedules, itinerary, and specialized cargo facilities so as to minimize materially the competitive impact encountered from foreign-flag vessels. He contends, for example, that such traffic as reefer cargo is not subject to substantial foreign-flag competition because the foreign lines have small reefer facilities as compared with Grace. We believe that the Act neither requires nor contemplates that we should isolate or categorize special items of traffic and weigh each item against the foreign-flag competition therefor. We conclude that Grace has, from January 1, 1947, to the present time, encountered substantial direct foreign-flag competition for cargo on this route.

In proposing six C2–S1–AJA combination vessels for the route, the Trade Route Committee of the Maritime Commission observed that the passenger service thus offered would appear to be the absolute minimum that should be considered. It was further observed that, even with this service, "there is a danger that it may encourage foreign-flag operators to introduce faster tonnage into the trade to compete for both freight and passengers."

The evidence discloses that the revenue derived from the passenger service on the combination vessels amounts to about 10 percent of the gross revenue derived from the operation of those vessels. Board counsel suggests that the passenger services of Grace was instituted

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primarily to attract cargo and not in anticipation of major financial return. He infers that the passenger service on the combination vessels of Grace, because of the special privileges that inure to the whole vessel, may be considered as an essential and integral part of the cargo service, and that the Board may, thereby, avoid the evaluation of foreign-flag passenger competition. Although we recognize the cogency of this argument, we consider it unnecessary for purposes of this report to adopt it since we conclude in any event that foreign-flag passenger competition on this route is of such a type and of such a magnitude that an operating-differential subsidy is required to meet such competition. This conclusion is based on statistics of foreign-flag passenger accommodations offered on the route and the corresponding foreign-flag companies as set forth in Appendix A.

We find that substantial foreign-flag competition has been encountered on the route since 1947 and that an operating subsidy for the six combination vessels of Grace is necessary to meet such competition and to promote the commerce of the United States in furtherance of the purposes and policy of the Act.

Although we rest our decision in the present proceeding on the finding of substantial direct foreign-flag competition for both cargo and passengers treated separately, we should reach the same result in this case even though substantial foreign-flag competition for passengers were lacking. It is our opinion that insofar as the question of foreign-flag competition is concerned, the individual combination vessel may be treated as one element, and an essential element, of the entire Grace fleet serving the route, which integrated fleet of vessels is required to meet the foreign-flag competition on the route.

The administration of the subsidy program under Title VI of the Act requires the establishment of essential foreign trade routes under section 211 (a) of the Act, and as a correlative determination, the Secretary of Commerce through the Maritime Administrator has been authorized and directed to investigate, determine, and keep current records of

> (b) The type, size, speed, and other requirements of the vessels, including express-liner or super-liner vessels, which should be employed in such services or on such routes or lines, and the frequency and regularity of the sailings of such vessels, with a view to furnishing adequate, regular, certain, and permanent service.

Such action is required to carry out the purposes and policy of the Act, for as stated in the preamble, the purpose of the Act is

> To further the development and maintenance of an adequate and well-balanced American merchant marine, to promote the commerce of the United States, to aid in the national defense * * *

It is, furthermore, the policy of the Act, as stated in section 101

> * * * That the United States shall have a merchant marine * * * composed of the best-equipped, safest, and most suitable types of vessels, constructed in the United States and manned with a trained and efficient citizen personnel. It is hereby declared to be the policy of the United States to foster the development and encourage the maintenance of such a merchant marine.

The determination having been made under section 211 (b) that it is in the furtherance of the purposes and policy of the Act to operate a certain number and certain types of vessels on each essential foreign trade route, and the finding having been made that there are foreign-flag vessels competing on the route, it is not a requirement to the awarding of an operating-differential subsidy that the foreign-flag competitors must offer exactly the same type of service with the same types of vessels or carry exactly the same kinds of traffic as the United States-flag operator.[1]

In determining the types, sizes, speeds, and other requirements of the vessels to be operated on the route, under section 211 of the Act, the administrators of the Act are directed to consider "conditions that a prudent business man would consider when dealing with his own business, with the added consideration, however, of the intangible benefit the maintenance of any such line may afford to the foreign commerce of the United States and to the national defense." Those are the policies which give life and meaning to the entire Act. In making those determinations under section 211 the administrators of the Act cannot be content only to meet the immediate competitive situation, but like the prudent businessman, must also consider the reasonable probabilities of the future.

If the Act is to be given a consistent interpretation and application, the foregoing are considerations of which sight must not be lost in the administration of the operating-differential subsidy provisions which are so essential to American-flag operators facing substantial foreign-flag competition of any type.

We believe, therefore, that where the foreign-flag operator is a substantial competitor for traffic on the route, be it for cargo or passenger traffic, the policy of the Act, both as to the selecting of the best types of ships to meet the competition and as to subsidizing the types of ships when selected, does not require the existence of foreign-

[1] The following language in sec. 605 (c) is by its terms limited to that section, which section is primarily intended to preserve competition between United States-flag operators on the route involved: "The Commission, in determining for the purposes of this section whether services are competitive, shall take into consideration the type, size, and speed of the vessels employed, whether passenger or cargo, or combination passenger and cargo, vessels, the ports or ranges between which they run, the character of cargo carried, and such other facts as it may deem proper."

flag competition in each category (passenger and freight) any more than in each specialized category of freight carrying. If the American operator can engage and excel in the battle of competition, if, as in the case of Grace on Trade Route No. 2, he has an integrated fleet of 6 combination freight and passenger ships (each carrying, say 52 passengers) plus 3 freighters (each carrying 12 passengers), rather than a fleet of 9 freighters, it would be indeed strange to make it a condition of subsidy support for him that he shall have a less-effective fleet with inadequate passenger accommodations because the foreign-flag operator is only so equipped. To do so would, in effect, allow the foreign-flag competitor to dictate the determination as to what number and types of vessels should be employed on the essential foreign-trade route by compelling the subsidized United States-flag operator to operate at the level of the foreign-flag competition and thus defeat the objectives of section 211 of the Act.

We feel that the American-flag operator, to be successful in the competitive struggle, must be encouraged to build better ships than his foreign-flag competitor. As already indicated, the Act expressly so provides. Certainly the framers of the Act never contemplated a policy that would forever hold the American-flag operator in the wake of his foreign competitors, permitted to obtain a better or newer or faster ship only if a foreign competitor built one first. Nor should the United States operator be denied the benefits of an operating-subsidy contract for a diversified fleet on his route because he is carrying and developing particular types of traffic which a foreign-flag competitor carries in a different manner or does not carry at all. Moreover, in fixing the amount of subsidy under section 603 (b) of the Act, the Board is directed to consider such items of expense as to which the applicant is at a "substantial disadvantage" in competing with the vessels of a foreign country whose vessels are "substantial competitors" of the vessels covered by the contract. There is no requirement under the Act nor could we imply that the only foreign-flag competitors, considered as competitors, must offer a service which is substantially similar to that offered by the United States-flag operator. In fact, the differential is computed, not by using a foreign-flag vessel as the basis for foreign costs, but by estimating such foreign costs as if the vessel to be subsidized "were operated under the registry of the foreign country."

The requirements for successful operation on a route may even demand greater specialization and separation of traffic within a fleet than is provided in the Grace fleet so as to make necessary specialized ships for passengers and for cargo, and even for different types of cargo.

We therefore believe that substantial foreign-flag competition on an essential trade route is sufficient under the Act to permit the establishment and support of a United States-flag service to meet it. Such a United States-flag service, we believe, may and should be composed of the "best-equipped, safest, and most suitable types of vessels." It is only in this way that there is the possibility of a consistent application of the policy of the Act taken as a whole, and the possibility of the establishment of "an adequate and well-balanced American merchant marine" which will develop, rather than hold static, the foreign commerce of the United States.

CONCLUSIONS

The Board therefore concludes:

1. Grace Line Inc., in the operation of its combination passenger and freight service on Service 1 of Trade Route No. 2, has encountered substantial direct foreign-flag competition for both cargo and passengers from January 1, 1947, to the present.

2. An operating-differential subsidy to Grace Line Inc. for operation of combination vessels on Service 1 of Trade Route No. 2 has been since 1947 and is necessary to meet competition from foreign-flag vessels and to promote the foreign commerce of the United States in furtherance of the purposes and policy of the Merchant Marine Act, 1936, as amended.

(Sgd.) A. J. WILLIAMS,
Secretary.

APPENDIX A

TABLE 1.—*The total movement of cargo by liner services on the route from Jan. 1, 1947, to June 30, 1951*

Year	Total tonnage	United States	Foreign
1947	1,143,171	735,763	407,408
1948	1,274,437	759,463	514,974
1949	1,306,541	723,823	582,718
1950	1,097,551	649,047	448,504
1951 (first half)	562,163	351,983	173,826

TABLE 2.—*Percentage of total passenger accommodations represented by accommodations offered on foreign-flag vessels*

	1947	1948	1949	1950	First half of 1951
Outbound from New York	16.8	18.8	20.4	20.9	19.3
Inbound to New York	14.7	18.9	19.6	20.9	18.7

TABLE 3.—*Passengers carried by Grace combination vessels and freighters and the vessels of foreign-flag lines*

Year	Grace Line combinations	Grace Line freighters	Foreign-flag lines
1947	4,366	171	413
1948	4,222	225	521
1949	3,943	211	517
1950	3,855	178	435
1951 (first half)	1,876	67	153
Total	18,262	852	2,039

TABLE 4.—*Passenger carryings between New York and Valparaiso (the principal port in Chile and the southernmost regular port on the route) by the combination vessels of Grace and foreign-flag lines from 1947 to 1950*

Year	Grace Line combinations		Foreign-flag lines		Total
	Number	Percent	Number	Percent	
1947	1,586	81	372	19	1,958
1948	1,299	76	406	24	1,705
1949	1,000	72	388	28	1,388
1950	1,120	77	329	23	1,449
Total	5,005	77	1,495	23	6,500

TABLE 5.—*Percentage of freight and passenger revenue derived from the operation of the combination vessels of Grace from 1947 to 1950*

	1947	1948	1949	1950
Freight	90.7	91.0	91.5	90.5
Passengers	9.3	9.0	8.5	9.5

The figures in this table relate to round voyages terminated by Grace subsidized ships in Service 1. They are based on revenue from freight and passengers carried between United States Atlantic ports and the West coast of South America but exclude revenue from way-port traffic, ad valorem shipments, mail, and other miscellaneous income.

FEDERAL MARITIME BOARD

No. S–26

APPLICATION OF AMERICAN PRESIDENT LINES, LTD., FOR RESUMPTION OF OPERATING-DIFFERENTIAL SUBSIDY ON TRADE ROUTE NO. 29, SERVICE 1

Submitted May 5, 1952. Decided September 3, 1952

American President Lines, Ltd., has encountered substantial direct foreign-flag competition since January 1, 1947, in the operation of its four P2 passenger-freight vessels on Service 1 of Trade Route No. 29, in connection with the operation of its freight vessels on Service 2 of that route.

An operating-differential subsidy to American President Lines, Ltd., for operation of the four P2 type combination vessels on Service 1 of Trade Route No. 29 is necessary to meet competition from foreign-flag vessels and to promote the commerce of the United States in furtherance of the purposes and policy of the Merchant Marine Act, 1936.

No reason has been found to disturb the March 21, 1949, action of the Maritime Commission with respect to the four P2 type vessels.

Reginald S. Laughlin and *Ira L. Ewers* for respondent.

Walter A. Rohde for San Francisco Chamber of Commerce, intervener.

Max E. Halpern, *Joseph A. Klausner*, *John Mason*, and *Allen Dawson* for the Board.

REPORT OF THE BOARD

This proceeding concerns the application of American President Lines, Ltd. (hereinafter referred to as APL), filed on July 12, 1946, for resumption of operating-differential subsidy under Title VI of the Merchant Marine Act, 1936, as amended (hereinafter referred to as the Act), for operations performed since January 1, 1947, on Service 1 of Trade Route No. 29.

This proceeding was instituted on our own motion in conjunction with similar proceedings in other cases, in order to resolve doubts raised by the Comptroller General of the United States concerning

the propriety of the former Maritime Commission's action in granting operating-differential subsidies in certain instances, where the foreign-flag competition was not considered by him to be substantial. (See Comptroller General's Audit Report of the Maritime Commission to Congress for fiscal year 1950, H. Doc. No. 93, 82d Cong., 1st sess.) APL has not been asked to waive any legal rights it may have, and its voluntary appearance in this proceeding is not so construed.

Notice of hearing was published in the Federal Register of June 12, 1951, the stated purpose of which was to receive evidence relative to the following: (1) Whether, and to what extent, the passenger services of APL on Trade Route No. 29, Service 1, have been subject to foreign-flag competition between January 1, 1947, and the present date, or any part of that period; (2) whether such competition, if any, was (*a*) direct foreign-flag competition, or (*b*) competition other than direct foreign-flag competition; and (3) whether an operating subsidy to APL for its passenger services on Trade Route No. 29, Service 1, is necessary to meet competition of foreign-flag vessels.

The notice of hearing provided for the intervention of all interested parties. Hearings before an examiner were held in San Francisco, Calif., on August 7, 8, 9, 10, 13, and 14, 1951. The San Francisco Chamber of Commerce, the only intervener, supported the application but offered no evidence.

The examiner, in his recommended decision served on February 8, 1952, found that: (1) The passenger services of APL on Trade Route No. 29, Service 1, have been subject to foreign competition since January 1, 1947; (2) such competition has been and continues to be direct and other than direct, "direct" being on the route itself and "indirect" being over competing routes; and (3) an operating subsidy to APL for its passenger services on the route is necessary to meet competition of foreign-flag vessels.

Exceptions to the examiner's recommended decision were filed by Board counsel, and oral argument was had before the Board on May 5, 1952.

APL presently operates two services on Trade Route No. 29: On Service 2 it operates a subsidized freight service with five vessels; and on Service 1 it operates a passenger-freight service with two P2–SE2–R3 type vessels.[1] The latter service is the only one presently under consideration. Service 1 of Trade Route No. 29 (hereinafter sometimes referred to as the route) is described in the report of the

[1] In addition to its Trade Route No. 29 services, APL operates a subsidized round-the-world passenger-freight service and an unsubsidized Atlantic-Straits freight service (Trade Route No. 17).

Maritime Commission on *Essential Foreign Trade Routes of the American Merchant Marine* (1949) as follows:

> Passenger-Freight Service[2] (Subsidized):
>
> Itinerary: Between Los Angeles, San Francisco (via Honolulu in each direction) and Yokohama, Kobe, Shanghai, Hong Kong, and Manila.
>
> Sailing Frequency: 24–26 sailings per year.
>
> Number and Type of Ships: Of the four P2 passenger-freight vessels specified for this service, two are at present in operation supplemented by one P2 type troop vessel.

In order to put these proceedings in their proper background, it is necessary to present a brief review of the relations between APL and the former Maritime Commission with respect to operating-differential subsidy on Trade Route No. 29. A temporary operating-differential subsidy contract was entered into with Dollar Steamship Lines, Inc., Ltd., the predecessor of APL,[3] on January 25, 1938, for combination vessels on what is now Trade Route No. 29. This contract was replaced by a long-range contract, dated October 6, 1938, for the continued operation of combination passenger-freight vessels on the same route as well as other routes. This contract ran to September 1943 and was extended by various addenda to December 31, 1947. All subsidized operations of APL were, however, interrupted in 1942 when its vessels were requisitioned by the Government for war service.

For a considerable period prior to 1942, APL operated on the route generally with seven combination vessels, including five of the "535" type. The "535" type, originally laid down as transports during World War I, had accommodations for about 800 passengers, cargo capacity of about 450,000 bale cubic feet, and a speed of about 17½ knots. In addition, APL operated the S. S. *President Hoover* and S. S. *President Coolidge*, sister ships, which had accommodations for about 840 passengers, cargo capacity of about 550,000 bale cubic feet, and a speed of about 20 knots. The *President Hoover* was lost in 1937 off the coast of Formosa, two of the "535's" were sold by the company in 1939, the *President Coolidge* was lost through mine damage during the war, and the remaining three ships were requisitioned during World War II and retained permanently by the Government. In any event, none of those combination vessels was available to APL after the war.

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[2] To be coordinated out of California ports with round-the-world service to provide weekly sailings.

[3] The Dollar Steamship Lines, Inc., Ltd., was incorporated under Delaware laws on August 2, 1929. The name was changed to American President Lines, Ltd., in November 1938 incident to consummation of a financial and management reorganization sponsored by the Maritime Commission.

While the war was in progress, in order to be in a position to facilitate the restoration of commercial operations immediately upon the termination of the war, the Commission appointed a Trade Routes Committee to investigate and determine from past experience and from new trends and techniques the number of sailings, type, size, speed, and characteristics of ships necessary in the postwar period for each essential trade route. With respect to Trade Route No. 29, the Committee reported that the use of combination vessels only on the route in accordance with prewar practice was not conducive to an efficient operation. The Committee indicated that the flexibility required in a cargo operation, such as optional service to outports, rearrangement of port rotation, elimination or addition of ports, reduction or addition of port time, intraharbor shifts, and the handling of large quantities of cargoes offensive to passengers, could not well be furnished by vessels meeting the requirements of a highly integrated and comprehensive passenger service.

The Trade Routes Committee accordingly recommended that the traffic requirements of the route should be met by two separate services:

(1) A passenger-freight service provided by 4 combination vessels, making from 24 to 26 sailings per year; and

(2) A freight service with 5 cargo vessels, also making from 24 to 26 sailings per year.

The Committee recommended further that the two services be integrated so as to allow for the balancing of the entire fleet on the route and the employment of vessels capable of meeting both passenger and cargo requirements with flexibility of operation.

The above recommendations of the Trade Routes Committee were adopted by the Maritime Commission in its report released on May 22, 1946, describing "Essential Foreign Trade Routes and Services Recommended for United States-Flag Operation"; that report recommends a passenger-freight service "E" and a freight service "F" for Trade Route No. 29. The Commission on June 9, 1947, issued an order which, inter alia, approved the application of APL for operating-differential subsidy on Freight Service "F" of Trade Route No. 29. The Commission, in its report on this and various other applications, *U. S. Lines Co.—Subsidy, Routes 12, 17, 22, 28, 29, 30*, 3 U. S. M. C. 325 (1947), made the following statement at page 342 concerning the interrelation between the freight service and the passenger-freight service on Trade Route 29:

* * * the Commission does not believe that adequate American-flag freight service can be maintained on a permanent long-range basis over this route

without subsidy. *The freight and passenger services on Trade Route No. 29 are so interrelated that it would not be in furtherance of the purposes and policies of the 1936 Act to have one of the services operated on a subsidized basis and the other on an unsubsidized basis.* Under the circumstances, the Commission believes financial aid should be granted to the American President Lines, Ltd., for the operation of Service "F." (Service "E" was covered by the original contract.) [Emphasis supplied.]

As stated above, none of the combination vessels operated by APL on this service prior to 1942 were returned to APL after the termination of the war. In 1946, however, APL moved to reestablish its transpacific passenger freight service with such vessels as were then available. APL has, at various times since 1946, operated six vessels on the route, the details of which are as follows:

Name	Type	Speed, knots	Passenger capacity		Entered service	Withdrawn
			First	Third		
Marine Lynx	C4 Trooper	17	226	716	1946	December 1947.
Marine Adder	do	17	276	874	1946	January 1948.
General Meigs	P2 Trooper	19	324	1,320	1946	March 1949.
General Gordon	do	19	324	1,320	1946	November 1950.
President Cleveland	P2-SE2-R3	19	251	506	1947	Operating.
President Wilson	P2-SE2-R3	19	251	506	1948	Do.

The first two vessels mentioned above, Government-owned troopers (converted cargo ships) released from military service and chartered to APL, were not suitable for the transportation of commercial passengers and were placed on the service as a temporary measure to meet an emergency situation. The *Meigs* and *Gordon*, although also released from Government troop service, are fundamentally P2-type combination ships and were considerably superior to the *Marine Lynx* and the *Marine Adder*. On December 9, 1947, the Commission approved the charter to APL for operation on this service of the S. S. *President Cleveland* and the S. S. *President Wilson*, P2–SE2–R3 type vessels, originally ordered as troopers but completed after the end of the war as combination passenger-freight ships. In contrast to the *Meigs* and the *Gordon*, which were somewhat austere as to passenger accommodations and deficient in safety standards, the *Wilson* and *Cleveland* were redesigned as combination cargo-passenger ships and the passenger accommodations are excellent in every respect.

At the time that the Commission approved the charter of the *Cleveland* and *Wilson* to APL, it also affirmed the following: (1) The determination, pursuant to section 211 (a) of the Act, that a passenger-freight service on Trade Route No. 29 is essential to the foreign commerce of the United States; (2) the determination, pursuant to section

601 (a) of the Act, that the operation of P2-type vessels (inclusive of the *Meigs* and the *Gordon*, as well as the *Cleveland* and *Wilson*) on the passenger-freight service is required to meet foreign-flag competition and to promote the foreign commerce of the United States; (3) the extension of the permanent subsidy contract to June 30, 1949, subject to all necessary findings required by title VI of the Act and also subject to congressional appropriations; and (4) the inclusion of a provision in the permanent contract providing for cancellation in the event that APL failed to provide a satisfactory vessel replacement program.

The Commission, on March 21, 1949, also approved the following determinations, under section 601 (a) and other applicable provisions of Title VI of the Act: (1) That the operation of the *Meigs*, *Gordon*, *Wilson*, and *Cleveland* on these services is required to meet foreign-flag competition and to promote the foreign commerce of the United States; (2) that the vessels proposed to be operated in such services by APL are of a size, type, speed, and number required to operate and maintain such services, routes, and lines in such manner as may be necessary to meet competitive conditions and to promote the foreign commerce of the United States; and (3) that the granting of financial aid to APL is necessary to place the proposed operations of the vessels (owned or chartered) on a parity with those of foreign competitors and is reasonably calculated to carry out effectively the purposes and policy of the Act. The Commission, also on the same date, approved the extension of the permanent contract to September 30, 1958 (20 years from the effective commencement of operations), on the condition that a satisfactory replacement program for passenger and/or passenger-freight vessels for operation in the subsidized transpacific and round-the-world services of APL would be presented and mutually agreed to by the Commission and the operator on or before December 31, 1949.

The Commission's action of March 21, 1949, was communicated to APL and accepted by it with the reservation, however, that "certain minor needed refinements" with respect to service description, voyage lengths, itineraries, and number of required voyages would be made. A memorandum from the Commission's staff, dated September 2, 1949, recommended that the Commission, prior to the consummation of a formal contract, conduct a section-602 hearing on the APL application and an administrative hearing to determine the scope and weight of the direct foreign-flag passenger competition on the route. The Commission, on December 20, 1949, determined that there was no

necessity nor requirement, in order to pay an operating subsidy to APL, that a hearing be held under section 602 of the Act.

APL has continued to operate chartered combination vessels on the route with the expectation that a formal contract for operating subsidy would be forthcoming in response to its instant application.

Because of the background, as outlined above, and because of the reasons hereinafter stated, we have not confined ourselves to a consideration only of the foreign-flag competition encountered by APL passenger services, but we have undertaken to conduct an independent inquiry into the extent of foreign-flag competition, if any, that has been encountered by APL on this route since January 1, 1947. As we have recently stated in *Review of Grace Subsidy, Route 2*, 4 F. M. B. 40, the questions presented in the notice of hearing relate to the appropriate sections of the Merchant Marine Act, 1936, as amended, as follows: Question 1 to section 601(a)(1), question 2 to section 602, and question 3 to section 601(a)(4). The primary questions thus raised are whether the combination passenger-freight vessels of APL have encountered substantial foreign-flag competition on the route since January 1, 1947, and whether an operating-differential subsidy for such vessels is necessary to meet foreign-flag competition and to promote the foreign commerce of the United States in furtherance of the purposes and policy of the Act. The facts are clear that Trade Route No. 29 is of essential importance to the promotion of the foreign commerce of the United States. Both the cargo and passenger movements on this route are and have been substantial. We consequently have no difficulty in finding that the operation of the subject combination vessels on the route is and has been, since January 1, 1947, necessary to promote the foreign commerce of the United States.

General Traffic Data.—The basic traffic statistics received in evidence indicate, inter alia, that: (1) The total movement of cargo on the route since January 1, 1947, has far exceeded one million tons per annum; (2) from January 1, 1947, to December 31, 1950, United States-flag vessels have carried approximately 70 percent of the total cargo movement; and (3) during the period of record, a total of 113,022 direct passengers moved over the route, of which the combination vessels of APL carried 104,455, or 92.5 percent, foreign-flag vessels, 2,742, or 2.4 percent, and other United States-flag vessels (including APL's freighters), 5,825, or 5.1 percent.

Freight Traffic.—The evidence in this record with respect to freight traffic on the route, as well as our recent detailed analysis thereof in *Pac. Transp. Lines, Inc.—Subsidy, Route 29*, 4 F. M. B. 7, indicates

that there has been since January 1, 1947, and there continues to be active and substantial competition from foreign-flag vessels for both outbound and inbound cargo offerings. The following table shows the relative carryings by foreign-flag carriers and all U. S.-flag carriers for the year 1938, and for the years 1947 to 1950 inclusive:

Long tons of commercial cargo carried by foreign-flag and United States-flag carriers (both inbound and outbound)

Year	Foreign-flag carriers	United States-flag carriers	Total
1938	724,000	234,000	958,000
1947	325,000	726,000	1,051,000
1948	320,000	725,000	1,045,000
1949	362,000	900,000	1,262,000
1950	456,115	813,895	1,270,000

Passenger Traffic.—During the period of record, the respective passenger carryings of the combination vessels of APL, other United States-flag vessels (including APL freighters), and other direct foreign-flag competitors on Trade Route No. 29 are shown below:

Total passengers carried and accommodations available on all ships

	1947 [1]				1948 [1]			
	Accommodations available	Percent	Passengers carried	Percent	Accommodations available	Percent	Passengers carried	Percent
United States-flag:								
APL combination vessels:								
First and second class	17,556	25.4	13,808	29.3	13,332	25.4	10,097	30.6
Third class	46,639	67.4	31,000	65.8	34,231	65.3	20,732	62.8
Freighters (including APL)	3,385	4.9	1,710	3.6	3,283	6.3	1,508	4.6
Foreign-flag:								
Combination vessels:								
First and second class	137	.2	0	0	147	.3	17	--------
Third class	52	.1	0	0	0	0	0	0
Freighters	1,365	2.0	636	1.3	1,434	2.7	635	2.0
Total for all vessels	69,134	100.0	47,154	100.0	52,427	100.0	32,989	100.0
	First half of 1949 [2]				1950			
United States-flag:								
APL combination vessels:								
First and second class	6,056	22.3	3,687	26.7	12,154	27.7	5,579	29.3
Third class	17,972	66.0	8,944	64.7	24,509	55.8	10,608	55.6
Freighters (including APL)	1,951	7.2	796	5.7	4,072	9.3	1,811	9.5
Foreign-flag:								
Combination vessels:								
First and second class	128	.5	4	--------	194	.4	32	.2
Third class	24	.1	7	--------	234	.5	14	.1
Freighters	1,072	3.9	385	2.9	2,761	6.3	1,012	5.3
Total for all vessels	27,203	100.0	13,823	100.0	43,924	100.0	19,056	100.0

[1] Includes *Marine Lynx* and *Marine Adder* while in service.
[2] This data is developed from an exhibit introduced by the Maritime Administration staff. Second half of 1949 statistics were not available from this exhibit.

Although the foreign-flag competition on this route has been extensive and may be expected to increase greatly in the near future, there is a question whether, since January 1, 1947, the foreign-flag passenger competition directly on the route, standing alone, could be called substantial.

In addition to the passenger competition it encounters from foreign-flag vessels operating on Trade Route No. 29, APL contends that it is subject to foreign-flag competition from the following operations: (1) Between the Far East and United States Pacific coast ports other than on Trade Route No. 29; (2) between the Far East and United States Atlantic and Gulf ports; (3) between the Far East and Canada and Latin America; (4) between the Far East and Europe; and (5) cruise operation.

Since adequate statistics with respect to this other-than-direct competition have not been and perhaps could not be furnished, a precise evaluation thereof is not possible, although it is obvious that more travelers would travel on the subject combination vessels of APL if these foreign-flag services were not available. Whether the valid elements of the other-than-direct competition themselves, or when added to the direct competition, would constitute substantial passenger competition, cannot in this case be determined.

The payment to APL of an operating subsidy for these combination vessels is, however, not dependent upon the substantiality of foreign-flag passenger competition standing alone. While we have discussed the foreign-flag competition for passengers and for cargo separately, under Title VI of the Act separate treatment of any element of traffic was not specified or inferred by the framers of the Act. We have found that substantial direct foreign-flag competition has been encountered on the route from January 1, 1947, to the present. As we have recently stated in *Review of Grace Subsidy, Route 2, supra*, we view the United States-flag operator's fleet on an essential foreign trade route as an operating unit in so far as this fleet is necessary to promote the foreign commerce of the United States thereon.

We believe that the existence of substantial foreign-flag competition on an essential foreign trade route allows for the support of the United States-flag service best calculated to meet the flow of commerce thereon, a service, to quote the words of the Act, "composed of the best-equipped, safest, and most suitable type of vessels." This conclusion is required by the announced purposes and policy of the Act as stated in Titles I and II thereof. As stated in the preamble, the purpose of the Act is—

To further the development and maintenance of an adequate and well-balanced American merchant marine, to promote the commerce of the United States, to aid in the national defense * * *

The policy of the Act, as stated in section 101, is—

* * * that the United States shall have a merchant marine * * * to provide shipping service on all routes essential for maintaining the flow of such domestic and foreign water-borne commerce at all times, * * * composed of the best-equipped, safest, and most suitable types of vessels, constructed in the United States and manned with a trained and efficient citizen personnel. It is hereby declared to be the policy of the United States to foster the development and encourage the maintenance of such a merchant marine.

The administration of the subsidy program under Title VI of the Act requires the precedent establishment of essential foreign trade routes under section 211 (a), and, as a correlative determination under section 211 (b), the administrators of the Act have been authorized and directed to investigate, determine, and keep current records of—

The type, size, speed, and other requirements of the vessels, including express-liner or super-liner vessels, which should be employed in such services or on such routes or lines, and the frequency and regularity of the sailings of such vessels, with a view to furnishing adequate, regular, certain, and permanent service.

In the establishment of essential foreign trade routes, under section 211 (a), the administrators of the Act are directed to—

* * * consider and give due weight to the cost of maintaining each of such steamship lines, the probability that any such line cannot be maintained except at a heavy loss disproportionate to the benefit accruing to foreign trade, the number of sailings and types of vessels that should be employed in such lines, and any other facts and conditions that a prudent businessman would consider when dealing with his own business, with the added consideration, however, of the intangible benefit the maintenance of any such line may afford to the foreign commerce of the United States and to the national defense.

The general purposes and policy of the Act, as announced in Titles I and II thereof, must control the specific implementation of the operating-differential subsidy program provided for in Title VI.

It is provided in Title VI of the Act that the United States-flag operator may be placed on a parity of costs with his foreign-flag competitor when there is, inter alia, substantial foreign-flag competition, and accordingly we believe that the subsidy is to be calculated to carry out the purposes and policy of the Act and to promote the foreign commerce of the United States. In establishing a subsidized United States-flag service on an essential foreign trade route, the Act does not require or contemplate that this service should be identical with or even substantially similar to that offered by the foreign-flag competitors thereon; such a requirement would not only be contrary to the pur-

poses and policy of the Act but would, in fact, allow the foreign-flag competitor to dictate the determinations to be made under section 211 as to what services should be established on each essential foreign trade route and the number and types of vessels to be operated thereon, by compelling the subsidized United States-flag operator to operate at the level of the foreign-flag competition.

We have stated that the traffic requirements on this route before World War II were met only by combination vessels; it has since been determined, pursuant to section 211 (a) of the Act, that separate passenger-freight and freight services are necessary to provide adequate and well-balanced and efficient United States-flag service with the most suitable types of vessels. The physical traffic requirements could perhaps still be met by a large number of combination vessels, carrying a limited number of passengers and mostly cargo. In such event, we could, under a narrower interpretation of the Act, grant an operating subsidy to each vessel as being predominantly a cargo unit, required to meet the substantial foreign-flag cargo competition. See *Review of Grace Subsidy, Route 2, supra.* It should make no difference, for subsidy purposes, whether the particular route requires the operation of combination vessels or the separate operation of both cargo and passenger vessels. The passenger and cargo operations on each essential foreign trade route are interdependent and complementary when both types of operation are required to provide the most suitable United States-flag service on the route involved in order to participate in the great flow of foreign commerce thereon. It is, consequently, not in accordance with the purposes and policy of the Act that one of such services should be subsidized and the other unsubsidized, in a situation where the whole United States-flag operation is found to be operating at a substantial economic disadvantage.

We find, therefore, that American President Lines, Ltd., in the operation of its four P2 passenger-freight vessels on Service 1 of Trade Route No. 29, in connection with the operation of its freight vessels on Service 2 of the route, has encountered substantial direct foreign-flag competition since January 1, 1947, and that an operating-differential subsidy to American President Lines, Ltd., for operation of those vessels on Service 1 of Trade Route No. 29, in connection with the operation of its freight vessels on Service 2, is necessary to meet competition from foreign-flag vessels and to promote the foreign commerce of the United States in furtherance of the purposes and policy of the Merchant Marine Act, 1936, as amended.

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CONCLUSION

The Board therefore concludes:

There is no reason to disturb the March 21, 1949, action of the Maritime Commission with respect to the four P2-type vessels.

(Sgd.) A. J. WILLIAMS,
Secretary.

FEDERAL MARITIME BOARD

No. S–33

APPLICATION OF AMERICAN PRESIDENT LINES, LTD., FOR OPERATING-DIFFERENTIAL SUBSIDY ON SERVICE C–2 OF TRADE ROUTE NO. 17

No. S–17 (Sub. No. 1)

APPLICATION OF AMERICAN PRESIDENT LINES, LTD., FOR EXTENSION OF EXISTING AUTHORITY TO OPERATE WITHOUT SUBSIDY ON SERVICE C–2 OF TRADE ROUTE NO. 17

Submitted September 4, 1952. Decided September 17, 1952

Considerations of convenience to the Board and to the parties found to justify the determination by the Board of particular legal questions on motion prior to hearing before the examiner.

The word "Orient" in section 605 (a) of the Merchant Marine Act, 1936, is broad enough to include Malaya and Indonesia.

REPORT OF THE BOARD ON MOTION

This matter is presented on a motion by Luckenbach Steamship Co., Inc. (herein called "Luckenbach"), which is engaged in the intercoastal trade, for a ruling that American President Lines, Ltd. (herein called "APL"), may receive no subsidy for its vessels operating on Service C–2 of Trade Route No. 17 (herein called "the route")[1] if such vessels also engage in the intercoastal trade.[2] We have set for hearing before

[1] The itinerary of Service C–2 on Trade Route No. 17 is described in the Report of the United States Maritime Commission on *Essential Foreign Trade Routes of the American Merchant Marine* as follows:

New York (other Atlantic ports as traffic offers) via Panama Canal; Los Angeles, San Francisco to Manila, Hong Kong, Singapore, Belawan, Batavia, Soerabaja, Hong Kong and Philippine Islands (as traffic offers) to San Francisco, Los Angeles and via Panama Canal to New York; privilege of calling at French Indo China and Siam as traffic offers.

[2] Luckenbach's motion is in the alternative: (a) to dismiss the applications of APL to the extent they apply for operating-differential subsidy for the operation of vessels on Trade Route No. 17, Freight Service C–2, on voyages in which they engage in intercoastal trade; or (b) for an order in advance of hearing on the applications of APL finally determining that no intercoastal cargo may be carried on a voyage on said trade route for which operating-differential subsidy is paid or accrued to APL.

the examiner on a single record the application of APL for extension of its temporary authority to operate without subsidy on the route and its application for an operating-differential subsidy on the route, to receive evidence relative to determinations which the Board is required to make pursuant to sections 605 (c) and 805 (a) of the Merchant Marine Act, 1936, as amended (herein called "the Act"). Luckenbach relies on section 605 (a) of the Act and raises a single issue under that section which is quite distinct from the issues to be determined under the other sections mentioned. We might broaden the issues to be heard before the examiner to include the point now raised by Luckenbach under section 605 (a). However, Luckenbach points out that if this issue is decided in its favor, it will not be further interested in the proceedings. The issue raised by the motion has been carefully considered in briefs filed by Luckenbach, APL, and counsel for the Board, and we believe that considerations of convenience to the Board and to the parties interested favor the determination of the issue by us at this time.

Section 605 (a) of the Act, in so far as relevant to the issue presented on motion, reads as follows:

> No operating-differential subsidy shall be paid for the operation of any vessel on a voyage on which it engages in coastwise or intercoastal trade: *Provided, however,* That such subsidy may be paid (1) on a round-the-world voyage or (2) a round voyage from the west coast of the United States to a European port or ports or (3) a round voyage from the Atlantic coast to the Orient which includes intercoastal ports of the United States or (4) a voyage in foreign trade on which the vessel may stop at an island possession or island territory of the United States, . . . [Numerals supplied.]

Luckenbach contends that service on the route, which is intended primarily to provide service between the United States Atlantic coast and Malaya-Indonesia, is not "a round voyage from the Atlantic coast to the Orient" within the meaning of section 605 (a). If this contention is sound, then, as a matter of law, no subsidy can be granted to APL unless its vessels on the route cease all intercoastal carryings, for clearly APL's service under consideration comes only under clause (3) above. The single question to be decided is whether the APL service described in note 1 is a "round voyage from the Atlantic coast to the Orient."

It may be noted in passing that section 506 of the Act contains requirements somewhat similar to section 605 (a), with application, however, to the granting of construction-differential subsidies; also, that section 805 (a) of the Act gives certain protection to intercoastal and coastwise services from competition by subsidized operators or their affiliates in the foreign trades.

Luckenbach contends that the word "Orient" as used in the Act refers to trade routes serving primarily Japan, China, and the Philippines and does not apply to trade routes serving primarily Malaya and Indonesia. The Act refers to voyages, not routes. Luckenbach argues for a strict construction of the word "Orient", claiming that the legislative history of the section and the administrative interpretations of the word lead to such a result. We believe the word should be given its usual and well-settled meaning. *United States* v. *Stewart*, 311 U. S. 60 (1940). While the word "Orient" has doubtless had different meanings during various eras in history, and has progressively included areas more to the East as geographical discoveries have broadened the world's geographical knowledge, we believe that as of 1936, when the Act was passed, the words "Orient" and "Far East" had, in shipping circles, substantially the same meaning and included the Malayan and Indonesian ports here involved.

Webster's New International Dictionary (2d ed., 1937) defines the "Orient" as "The East; eastern countries, or, less commonly, the eastern part of a country; esp., the countries east of the Mediterranean or the ancient Roman empire; also, the countries of Asia generally; sometimes, eastern Asiatic countries."

Webster's Geographical Dictionary (1949) contains the following definitions:

Orient, the. The East; generally, eastern countries. In ancient times, the countries E of the Mediterranean; today the countries of Asia generally, esp. the countries of E Asia; the Far East. See the East, 1.

East, the. 1 The countries of Asia and of the Asiatic archipelagoes; the countries E of Europe; the Orient; "the East" usually connotes the civilized Asiatic countries, either ancient or modern. See Far East, Middle East, Near East.

Far East. 1 The countries of E Asia bordering on Pacific Ocean; China, Japan, E Siberia, Korea, Indochina, Malay Archipelago (including the Philippine Is., etc.); the Orient.

The same Geographical Dictionary defines Malay Archipelago, which is included in the definition of "FarEast so as to include the islands in the Malay area between Java and Sumatra on the west and the Philippines on the east, as follows:

Malay Archipelago. The largest of island groups in the world, off SE coast of Asia bet. the Pacific and Indian Oceans, *comprising the islands of the East Indies, including Sumatra, Java, Lesser Sunda Is., Moluccas, Timor, New Guinea, Borneo, Celebes, Philippine Is.* [Emphasis supplied.]

Luckenbach contends that the legislative history of section 605 (a) of the Act supports its contention that the word "Orient", as used

therein, does not include Malaya and Indonesia. Luckenbach points out that the exception concerning "a round voyage from the Atlantic coast to the Orient" was added on the floor of the Senate during the last stages of the legislation and argues that this was done merely to protect the then-established Atlantic-Orient services, and the Congress did not contemplate that a service not then in existence would come under the exception.

When the words were added on the floor of the Senate the following explanation was given by Senator McNary (Cong. Record, Vol. 80, p. 9904):

> The purpose of these amendments is to protect the trade routes that have been established between the Atlantic Coast of the United States and the Orient. As you are aware, Japan has established regular direct freight service between Japan and the Orient to the Atlantic Coast of the United States. Therefore, it is most important that we meet this competition, and protect the American services which have been established in this trade.
>
> The omission is probably an oversight, because you will observe in these sections the west coast to European countries is mentioned but not the Atlantic Coast to the Orient.

At that time Dollar Steamship Lines and American Pioneer Line had services running from the Atlantic coast to Japan and China and return, but not making round voyages to Malayan or Indonesian ports. While it is doubtless true that the framers of the Act had in mind primarily the protection of existing services running between the Atlantic coast and the Orient, as well as existing services between the West coast of the United States and Europe, we do not think the words of the statute import an intent to protect exclusively the existing lines or a geographical area limited to the ports then being served. At that time Isthmian Steamship Company was the only line making voyages from the West coast of the United States to Europe, and its services then covered the British Isles only. The word "Europe" in the statute, we believe, covers an area far wider than the ports of Europe then being served, and, similarly, we believe that the word "Orient" covers an area wider than the ports of the Orient then being served. If the Congress had intended the protection of section 605 (a) for only existing services, it could readily have so provided by giving "grandfather" rights as it did in section 805 (a).

The meaning given to the word "Orient" by Government and industry in 1936 throws light on its then-accepted meaning in shipping circles. American Pioneer Line's operation to China and the Philip-

pines was then called a "Far East Service."[3] Dollar Steamship Line's operation to China, Japan, and the Philippines was then called a Trans-Pacific Service.[3]

The foregoing indicate that the foreign area reached in each case was commonly known as the "Far East" or the "Orient", but this, in our judgment, does not indicate the converse, i. e., that the "Orient" includes only these areas. Ocean Mail Contract Route No. 57, operated by Lykes Bros.-Ripley S. S. Co., shows that Batavia (Jakarta) and Singapore were both ports of call on the company's American Gulf Orient Line.[3] Other indications that the word "Orient" in 1936 included Malaya and Indonesia may be found in Agreements No. 131, approved by the Board's predecessor on April 2, 1930, and No. 5585, approved May 3, 1938. The first of these established the Trans-Pacific Passenger Conference, and in the bylaws of the conference the "Orient Group" was defined to include lines serving Japan, China, the Philippines, and Malaysia. The second agreement relates to passengers moving to the "Orient", which word was used therein to describe Japan, China, the Philippines, and Straits Settlements.

In a publication prepared by Mr. A. Lane Cricher, Secretary of the Subcommittee of the Secretary of the Interdepartmental Ocean Lines Contract Committee, issued by the Department of Commerce in 1930, and entitled "Ocean Routes in United States Foreign Trade", the author, on page 30, under the term, "Far Eastern Countries", includes both British Malaya and the Netherlands East Indies.

The Commission's publications of the essential trade routes in 1946 and 1949 disclose that the Commission was not attempting to limit the meaning of "Far East" but was defining the area to be served by each route. This is shown by the use of the words "Far East" in naming three routes, two of which, viz. Nos. 22 and 30, authorized service to the Straits Settlements and Netherlands East Indies whereas No. 29 did not include those two localities.

We may also add that the register of the Department of State, July 1936, and that Department's organization chart for that year showed that its Division of Far Eastern Affairs had under its general charge our relations with both the Dutch East Indies and British Malaya, the jurisdictions which are now known as Indonesia and Straits Settlements.

An order will be entered denying the motion.

(*Sgd.*) A. J. WILLIAMS,
Secretary.

[3] These appellations are taken from United States Maritime Commission's publication, "American-Flag Services in Foreign Trade; 1936."

ORDER

At a Session of the FEDERAL MARITIME BOARD, held at its office in Washington, D. C., on the 17th day of September A. D. 1952.

No. S-33

AMERICAN PRESIDENT LINES, LTD.—APPLICATION FOR OPERATING-DIFFERENTIAL SUBSIDY, TRADE ROUTE NO. 17, SERVICE C-2

No. S-17 (Sub. No. 1)

AMERICAN PRESIDENT LINES, LTD.—APPLICATION FOR EXTENSION OF EXISTING AUTHORITY TO OPERATE WITHOUT SUBSIDY ON TRADE ROUTE NO. 17, SERVICE C-2

A motion having been filed by Luckenbach Steamship Company, Inc., under section 605 (a) of the Merchant Marine Act, 1936, (a) to dismiss the applications herein to the extent they apply for operating-differential subsidy on Trade Route No. 17, Freight Service C-2, on voyages in which they engage in intercoastal trade, or, in the alternative, (b) for an order in advance of hearing on the applications finally determining that no intercoastal cargo may be carried on a voyage on said route for which operating-differential subsidy is paid or accrued to American President Lines, Ltd., and briefs having been filed by counsel for Luckenbach Steamship Company, Inc., American President Lines, Ltd., and the Board, and the Board, on the date hereof, having made and entered of record a preliminary report containing its conclusions and decision on such motion, which report is hereby referred to and made a part hereof:

It is ordered, That the said motion to dismiss be, and it is hereby, denied.

By the Board.

(Sgd.) A. J. WILLIAMS, *Secretary.*

FEDERAL MARITIME BOARD

No. S–28

REVIEW OF THE OPERATING-DIFFERENTIAL SUBSIDY CONTRACT WITH MISSISSIPPI SHIPPING COMPANY, INC., FOR TRADE ROUTE NO. 20

Submitted July 23, 1952. Decided September 17, 1952

Mississippi Shipping Company, Inc., in the operation of its three combination vessels on Line A (1) of Trade Route No. 20, in connection with its freight services on that route, has encountered substantial direct foreign-flag competition since January 1, 1947.

An operating-differential subsidy to Mississippi Shipping Company, Inc., for operation of these combination vessels on Line A (1) of Trade Route No. 20, in connection with the operation of its freight services on the route, is necessary to meet competition from foreign-flag vessels and to promote the foreign commerce of the United States in furtherance of the purposes and policy of the Merchant Marine Act, 1936, as amended.

Donald R. Macleay and *Joseph M. Rault* for Mississippi Shipping Company, Inc.

Joseph A. Klausner and *Edward A. Aptaker* for the Board.

REPORT OF THE BOARD

This proceeding concerns a review, on our own motion, of the operating-differential subsidy agreement of Mississippi Shipping Company, Inc. (hereinafter referred to as "Mississippi"), for three C3–S1–BR1 type combination vessels operated by the company on Line A (1) of Trade Route No. 20.

Notice of hearing was published in the Federal Register, the stated purpose of which was to receive evidence relative to the following: (1) whether, and to what extent, the operation of such combination passenger and freight vessels by Mississippi on Line A (1) of Trade Route No. 20 was required to meet foreign-flag competition and to promote the foreign commerce of the United States between January 1, 1947, and the present date, or any part thereof; (2) whether such competition, if any, was (a) direct foreign-flag competition, or (b) other than direct foreign-flag competition; and (3) the extent to

which the payment of subsidy in respect to the combination passenger and freight service afforded by the operation of the above-mentioned combination vessels on Trade Route No. 20 is necessary to place such vessels on a parity with those of foreign-flag competitors, and is reasonably calculated to carry out effectively the purposes and policy of the Merchant Marine Act, 1936, as amended.

Hearing was held before an examiner on November 30, 1951, and December 5, 6, and 7, 1951, and the recommended decision of the examiner, which contains a full and careful analysis of traffic data on Trade Route No. 20, and which we incorporate by reference for details not herein recited, was served on June 6, 1952. The examiner recommended that the Board should find that (1) the operation of three combination vessels by Mississippi on Line A (1) of Trade Route No. 20 was required to meet foreign-flag competition and to promote the foreign commerce of the United States since January 1, 1947; (2) such competition for both cargo and passengers was substantial direct foreign-flag competition, both parallel and nonparallel, during such entire period; (3) the extent to which payment of subsidy for such vessels is necessary under section 603 (b) of the Merchant Marine Act, 1936, as amended, is the amount which would apply if they were operated under foreign registry; and (4) for purposes of subsidy, the combination vessels should not be divided into freight and passenger parts, with each part treated separately, but each vessel should be regarded as a single operating unit. A memorandum partly supporting and partly excepting to the examiner's recommended decision was filed by Board counsel, and the matter was submitted to us without oral argument. We agree generally with the recommended findings of the examiner.

Mississippi is the only United States-flag operator offering a regular berth service on Trade Route No. 20. Pursuant to an extended operating-differential subsidy agreement entered into between Mississippi and the Maritime Commission on April 5, 1950, effective January 1, 1947,[1] Mississippi operates the following subsidized services on Trade Route No. 20: not fewer than 17 and not more than 20 sailings per year with three C3–S1–BR1 type combination passenger and freight vessels, nor fewer than 16 and not more than 20 sailings per year with five C–2 type cargo vessels, and not fewer than 10 and not more than 12 sailings per year with three C1–A type cargo vessels, all on the service designated as Line A of Trade Route No. 20, which is described in the subsidy agreement as follows:

[1] The agreement of April 5, 1950, extends the original "Long Range Subsidy Agreement" of December 31, 1937, with this operator to December 31, 1957.

U. S. Gulf Ports—East Coast South America

Between New Orleans and other United States Gulf ports and ports on the East Coast of South America with the privilege of calling at Puerto Rican ports to load and discharge cargo to or from East Coast of South America ports, and with the further privilege of making calls at Martinique outbound and Trinidad inbound, provided that neither freight nor passengers shall be carried between United States ports and Martinique or between Trinidad and United States ports, except with prior privilege of making calls on both outward and inward voyages with both cargo and combination passenger and cargo vessels at other West Indies ports with the prior consent of the Administration.

The above-mentioned combination vessels are the only ones presently under consideration. They began operations on Trade Route No. 20 as follows: *Del Norte*, November 1946; *Del Sud*, February 1947; *Del Mar*, April 1, 1947.

These vessels are of 9,627 deadweight tons, have dry cargo bale space of 455,202 cubic feet, refrigerator space of 61,390 cubic feet, accommodations for 119 passengers, and maintain an average speed of 17.5 knots.

As we have recently stated in *Review of Grace Line Subsidy, Route 2*, 4 F. M. B. 40, the questions presented in the notice of hearing relate to the appropriate sections of the Merchant Marine Act, 1936, as amended, as follows: question 1 to section 601 (a) (1), question 2 to section 602, and question 3 to section 601 (a) (4). The primary questions thus raised are whether the subject combination vessels of Mississippi have encountered substantial foreign-flag competition on Trade Route No. 20 since January 1, 1947, and whether an operating-differential subsidy for such vessels is necessary to meet foreign-flag competition and to promote the foreign commerce of the United States in furtherance of the purposes and policy of the Merchant Marine Act, 1936, as amended.

General traffic data.—The basic traffic statistics received in evidence indicate, inter alia, that: (1) during the years 1948, 1950, and the first half of 1951, foreign-flag vessels carried approximately 40 percent of the total cargo movement on Trade Route No. 20; (2) competition for passengers from foreign-flag vessels operating on Trade Route No. 20 has, since January 1, 1947, been confined to freighters, which have carried about 2 percent of the total passengers moving over the route from January 1, 1947, to June 30, 1951; and (3) Mississippi has encountered some measure of foreign-flag competition for passengers from cruise operations and from vessels operating on Trade Routes No. 1 and No. 24.

The facts are clear that Trade Route No. 20 is, and has traditionally been, of essential importance to the promotion of the foreign commerce

of the United States. Both the cargo and passenger movements on this route have been substantial from January 1, 1947, to the present. Among the commodities shipped outbound on Mississippi's combination vessels are drugs and medicines, prepared foods, fresh fruits, automobiles, automobile parts, washing machines, refrigerators, freezers, food machines, sewing machines, radios, canned goods, machine tools, cotton piece goods, medical equipment, and tire fabric. The inbound freight movement includes many South American products, such as coffee, which are transported in large quantities. The essentiality of the passenger service is evidenced by the large number of passengers transported during the period under review. Consequently we have no difficulty in finding that the operation of the subject combination vessels on Trade Route No. 20 is, and since January 1, 1947, has been, necessary to promote the foreign commerce of the United States.

Freight traffic.—The outbound and inbound cargo carryings on Trade Route No. 20 of Mississippi's combination vessels and freighters, and of foreign-flag vessels, for the years 1948, 1950, and the first half of 1951, are as follows:

[Cargo tonnage expressed in thousands of tons]

	1948		1950		First half of 1951	
	Cargo tonnage	Percent	Cargo tonnage	Percent	Cargo tonnage	Percent
Mississippi—Total	568	60.4	369	53.2	262	65.0
Freighters	408	43.4	261	37.6	178	44.4
Combinations	160	17.0	108	15.6	83	20.6
Foreign-flag	373	39.6	325	46.8	141	35.0

The figures for 1947 and 1949 are not included since they are not complete, but the evidence indicates that the relative carryings of Mississippi and the foreign-flag carriers during 1949 were not greatly different from those disclosed above. The evidence for 1947 indicates that the foreign-flag carriers transported about 22 percent, or 172,000 tons out of 796,000 tons.

There is no real distinction between the type of freight transported in the combination vessels of Mississippi and that transported in the freight vessels. The combination vessels do, however, tend to carry a greater volume of high value commodities and those for which speedy transportation is necessary, thus accounting for a somewhat higher revenue per weight ton. On this route, as well as on Trade Route No. 2, the combination vessels receive special port privileges in several foreign ports, thus expediting their entry and clearance and

avoiding the delays suffered by freighters in congested ports. See *Review of Grace Line Subsidy, Route 2, supra.* Gross revenues of the combination vessels from January 1, 1947, to June 30, 1951, were derived as follows:

		Percent
From freight	$23,725,676	73.9
From passengers	8,378,171	26.1
Total	32,103,847	100.0

The record is thus convincing that Mississippi's combination vessels have from January 1, 1947, to the present time encountered substantian foreign-flag competition for cargo on Trade Route No. 20.

Passenger traffic.—The only foreign-flag passenger competition from vessels operating on Trade Route No. 20 is, as above stated, confined to freighters. During the years 1947, 1948, 1950, and the first half of 1951, a total of 13,318 passengers moved outbound and inbound over Trade Route No. 20, of which the combination vessels of Mississippi carried 10,714; foreign-flag vessels carried 316, and 2,288 moved on Mississippi's freighters.

In addition to the passenger competition encountered from foreign-flag vessels operating on Trade Route No. 20, Mississippi contends that it is subject to foreign-flag passenger competition from three other sources, viz, (1) operations on Trade Route No. 1, (2) operations on Trade Route No. 24, and (3) cruise operations.

Trade Route No. 1 serves United States Atlantic ports and ports on the East coast of South America. Moore-McCormack Lines, Inc., operates a regular passenger-freight service on this route with its "Good Neighbor Fleet." Foreign-flag passenger service is provided by the Argentine State Line, which instituted service in 1950 and 1951 with three newly built combination vessels, and by foreign-flag freighters. Trade Route No. 24 serves the United States Pacific coast ports and ports on the East coast of South America. There are no regular passenger or combination vessels operating on that route. During 1947, 1948, 1950, and the first half of 1951, a total of 1,341 passengers moved outbound and inbound on United States-flag and foreign-flag freighters, operating on Trade Route No. 24, of which foreign-flag freighters carried 515 and United States-flag freighters carried 826. Mississippi contends that cruise passengers are not particularly concerned with any definite destination, and that, consequently, it has encountered severe competition from all sorts of foreign-flag cruises, sailing from ports on the Gulf, Atlantic, and Pacific coasts of the United States.

The number of passengers carried to and from the East coast of South America by foreign-flag vessels operating on Trade Routes No. 1, No. 20, and No. 24, during the years 1948, 1950, and the first half of 1951, is as follows:

	1948	1950	1st half of 1951
Trade Route No. 1 (North Atlantic)	1,604	1,323	1,197
Trade Route No. 20 (Gulf)	122	98	29
Trade Route No. 24 (Pacific)	185	160	44

Passengers originating from, or destined to, various areas in the United States can, of course, move through Pacific coast or North Atlantic coast ports as well as through Gulf coast ports, or vice versa. Mississippi solicits passengers on a Nation-wide basis and maintains agency relations throughout the United States as well as in the principal ports on the East coast of South America. Its foreign-flag competitors do exactly the same. Unquestionably, the foreign-flag vessels operating on Trade Routes No. 1 and No. 24 and foreign-flag cruise ships offer some measure of passenger competition to Mississippi on Trade Route No. 20. Whether the above-described foreign-flag passenger operations, both on and off Trade Route No. 20, standing alone, have offered substantial competition to the subject combination vessels of Mississippi is doubtful and need not be the basis of findings in this case.

Board counsel, although concurring in the recommended decision of the examiner, except to his finding that foreign-flag competition for passengers was substantial. They contend that such a finding is not supported by the evidence and, in any event, is not necessary. Board counsel point to the fact that 74 percent of the revenue earned by the combination vessels is derived from cargo carryings, and that the vessels can, therefore, properly be regarded as predominantly cargo carrying units, and that substantial competition for cargo constitutes substantial competition for the operation of each ship as a whole. We recognize the strength and validity of this argument and believe that, under the facts of this particular case, foreign-flag cargo competition is sufficient under the Act to authorize the award of an operating-differential subsidy for operation of the subject vessels.

The payment to Mississippi of an operating subsidy for these combination vessels need not rest, however, on the foregoing analysis and determination that they be considered predominantly cargo vessels. As we have stated in *Review of Grace Line Subsidy, Route 2, supra*, and in *American President Lines, Ltd.—Subsidy,*

Route 29, 4 F. M. B. 51, it is our opinion that, in so far as the question of foreign-flag competition is concerned, individual combination vessels may be treated as an element of an entire fleet serving a route, which integrated fleet of vessels is required to meet the foreign-flag competition there existing.

In this case, as in the cases referred to in the paragraph next above, there has been a determination that the route is an essential foreign trade route under section 211 (a) of the Act, and that the vessels now constituting the Mississippi fleet, including the three combination vessels, above described, are of the type, size, speed, and number required to enable Mississippi to operate and maintain the service on the route in such manner as is necessary to meet competitive conditions and promote foreign commerce. As we said in *American President Lines, Ltd.—Subsidy, Route 29, supra:*

> In establishing a subsidized United States-flag service on an essential foreign trade route, the Act does not require or contemplate that this service should be identical with or even substantially similar to that offered by the foreign-flag competitors thereon; such a requirement would not only be contrary to the purposes and policy of the Act but would, in fact, allow the foreign-flag competitor to dictate the determinations to be made under section 211, as to what services should be established on each essential foreign trade route and the number and types of vessels to be operated thereon, by compelling the subsidized United States-flag operator to operate at the level of the foreign-flag competition.

We find, therefore, that Mississippi, in the operation of its three combination vessels on Line A (1) of Trade Route No. 20, in connection with its freight services on that route, has encountered substantial direct foreign-flag competition since January 1, 1947; and that an operating-differential subsidy to Mississippi for operation of those vessels on Line A (1) of Trade Route No. 20, in connection with the operation of its freight services on the route, is necessary to meet competition from foreign-flag vessels and to promote the foreign commerce of the United States, in furtherance of the purposes and policy of the Merchant Marine Act, 1936, as amended.

Conclusions

The Board therefore concludes that: The competitive conditions encountered by the subject combination vessels of Mississippi Shipping Company, Inc., since January 1, 1947, do not warrant any modification of the operating-differential subsidy contract with this operator for Trade Route No. 20.

(Sgd.) A. J. Williams,
Secretary.

FEDERAL MARITIME BOARD

No. S–28

MISSISSIPPI SHIPPING COMPANY, INC., OPERATING SUBSIDY DIFFERENTIALS WITH RESPECT TO COMBINATION PASSENGER AND FREIGHT VESSELS OPERATED ON TRADE ROUTE NO. 20

1. Operation of combination passenger and freight vessels by Mississippi Shipping Company, Inc., on Service 1 of Trade Route No. 20 was required to meet foreign-flag competition and to promote the foreign commerce of the United States during all of the period between January 1, 1947, and the present date;
2. Such competition was substantial direct foreign-flag competition, both parallel and non-parallel, during such entire period;
3. Extent to which payment of subsidy is necessary is the amount which would apply if Mississippi's combination vessels were operated under foreign registry; and
4. Each of such combination vessels, for purposes of subsidy, should be regarded as a single operating unit.

Donald R. Macleay and *Joseph M. Rault* for Mississippi Shipping Company, Inc.

Joseph A. Klausner and *Edward Aptaker* for the Board.

RECOMMENDED DECISION OF A. L. JORDAN, EXAMINER

This proceeding was instituted by the Board on its own motion pursuant to Title VI of the Merchant Marine Act, 1936, as amended, for the purpose of reviewing the operating-differential subsidy agreement of Mississippi Shipping Company, Inc., with a view to determining the basis for permanent subsidy rates to be applicable to the C–3 combination passenger and freight vessels *Del Norte*, *Del Sud*, and *Del Mar* operated by the company on Service 1 of Trade Route No. 20 (U. S. Gulf-East coast South America).

Hearing was held pursuant to notices in the Federal Register of October 5 and November 27, 1951, to receive evidence relative to the following:

1. Whether, and to what extent, the operation of such combination passenger and freight vessels by Mississippi Shipping Company, Inc., on Service 1 of Trade Route No. 20 was required to meet foreign-flag competition and to promote the foreign commerce of the United States between January 1, 1947, and the present date, or any part thereof;

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2. Whether such competition, if any, was (a) direct foreign-flag competition, or (b) other than direct foreign-flag competition; and
3. The extent to which the payment of subsidy in respect to the combination passenger and freight service afforded by the operation of the above-mentioned combination vessels on Trade Route No. 20 is necessary to place such vessels on a parity with those of foreign-flag competitors, and is reasonably calculated to carry out effectively the purposes and policy of the Merchant Marine Act, 1936, as amended.

The subsidy agreement, No. MCc–62433, was executed April 5, 1950, covering the period from January 1, 1947, through December 31, 1957. It covers other vessels, freighters, and another trade route, but only the three combination passenger and freight vessels are here involved.

No one appeared in this proceeding to oppose the agreement under review.

Mississippi Shipping Company, Inc., hereinafter referred to as Mississippi, or the company, participated in the proceeding, without prejudice to its contract, to cooperate with the Board in the development and presentation of the pertinent facts relating to the competitive situation of the company's combination vessels.

Trade Route No. 20 was found to be one of the essential trade routes of the United States merchant marine in the United States Maritime Commission's May 1946 report on "Essential Foreign Trade Routes and Services Recommended for United States Flag Operation." The subsidized passenger and freight service on this route is provided, pursuant to the contract under review, by three C–3 combination passenger-freight type vessels, with 17 to 20 sailings per year. Among the commodities shipped outbound in the combination vessels are drugs, prepared foods, automobiles, washing machines, refrigerators, freezers, sewing machines, radios, canned goods, machine tools, luxury items and general cargo. Inbound, products such as coffee are transported in large quantities. The essentiality of the service is indicated by the substantial freight and passenger carryings effected by the operation in the period 1947 to the present, as shown by the statistics herein. Thus the operation, as to both freight and passenger carryings, was necessary to promote the foreign commerce of the United States.

Mississippi's three C–3 combination passenger-freight type vessels are of 9627 deadweight tons, and have bale cubic dry cargo space of 455,202 feet and refrigerated space of 61,390 cubic feet. They have accommodations for 119 passengers and a rated speed of 16.5 knots. To meet their schedule they are actually operated at an average speed of 17.5 knots. They began passenger-cargo operations on Trade

Route No. 20 as follows: *Del Norte*, November 1946; *Del Sud*, February 1947; *Del Mar*, April 1947.

The company's combination service is operated between New Orleans and Rio de Janeiro, Santos, Montevideo, and Buenos Aires. In addition, the vessels call at St. Thomas southbound and at Curacao northbound. Sailings are made every two weeks, but every fourth sailing is effected by a C–2 freighter sailing in lieu of the fourth C–3 vessel which Mississippi intends to build eventually. Turnaround time on the voyage is 47 days. These ships are granted packet privileges in South American ports, permitting them to enter and clear within 24 hours or less. This enables the company to maintain a rigid schedule, resulting in the expressed desire of many shippers that their cargo be transported in these vessels. Regularity of service is especially important in view of the Brazilian practice of issuing import licenses for all shipments for a limited period of time. In addition, the combination ships succeed in attracting a substantial volume of way-port passengers and cargo because of their regularity.

There is no real distinction between the type of freight transported in the combination vessels and in the freight vessels generally. The combination vessels tend, however, to carry a greater volume of high value commodities and those for which speedy transportation is necessary. This is reflected in a somewhat higher revenue per weight ton carried by the combination vessels as compared with freight-vessel cargoes. The passenger vessels also carry mail, which returns a high revenue but which moves in volumes so small that the overall revenue per weight ton is not materally affected. Inflammables, explosives, and certain acids are prohibited by Coast Guard regulations from transportation aboard passenger vessels. The combination vessels form the nucleus of Mississippi's service to South America.

Mississippi's president testified that the company has made an earnest attempt to carry out its obligations to build up and maintain both passenger and cargo service, believing the one complements the other; that it has been the company's experience that well-maintained passenger service makes satisfied patrons of many who have the direction of exports and imports; and that the prestige and the reputation for regularity and dependability that flow from the operation of such a service are of great value in the constant competitive struggle for freight service. It was also testified that the combination service gives the shippers the opportunity of being aboard and watching their cargo handled. They see how the vessel operates, and see the general efficiency of the line at first hand. The company's Chicago passenger agent testified that the tie-up between the freight and pas-

senger business is definite and valuable, and many passengers come through shipping connections. Mississippi has an extensive advertising program. A representative for the agency handling it, in describing the various passenger advertisements, emphasized the value and prestige to the line of its combination vessels in the attraction of freight traffic.

It was testified that the combination vessels, on account of their passenger carriage, operate on a fast and dependable schedule, sailing on dates announced long in advance and arriving, barring accidents, on fixed dates at every port of call; that from time to time there has been acute congestion in the principal South American ports, causing great delays (up to 60 days) to American freighters, but Mississippi's combination vessels, on account of their passenger carriage, obtain immediate berthing privileges and are able to avoid such delays, which is of great value to the importer and exporter; that regularity and dependability of service enables the exporter to conform to the time limits of his foreign import permits and of his letters of credit, reducing the financing involved; and that inventories of commodities imported or exported can be regulated and kept at a lower level because of the certainty of the date when additional supplies will be delivered. The importance of this was emphasized by freight forwarders, export traffic managers, a coffee importer, and others. Typically, a forwarder testified that his firm shipped everything on these vessels it possible could; that without these vessels the Gulf would be at a distinct disadvantage in comparison with foreign competition that prevails at the Atlantic coast; and that his customers constantly express a preference for the combination vessels, about 80 percent of his principals requesting that their exports be booked on these vessels.

The Export Traffic Manager, Abbott Laboratories, Chicago, testified that the combination vessel is of great importance to his company; that its use helps them with their distribution and inventories; and that if they had to revert to complete freighter operations from New Orleans they would quickly survey the probability of sending all their cargo via New York for passenger ship handling. The business of that company in South America during 1951 totaled around $5,000,000.

The Traffic Manager in charge of imports and exports for Sears, Roebuck testified that his company ships to their stores in Rio de Janeiro and Santos some 10,000 items, including furniture, household appliances, wearing apparel, plumbing, and roofing supplies; that they feel there is a very definite advantage in using these vessels because they know when the vessels are sailing and reaching destinations,

and can make necessary arrangements to have their merchandise aboard. This, he says, is invaluable in controlling inventories, and they feel that use of these vessels has contributed to the success of their South American venture. Sears, he stated, occasionally uses the Lloyd Brasileiro line for shipments to Brazil because the Brazilian authorities charge against the dollar limit in the import license only the value of the commodity whereas if the shipment is on an American vessel the dollar freight is also charged against the amount in the import license, resulting in less goods imported under the same license.

A New Orleans coffee importer testified that about 2,000,000 bags of coffee are annually brought into New Orleans from Brazil; that he imports from Brazil through New Orleans annually about 300,000 bags of coffee of a value of about $20,000,000. While he uses all the lines in the service he prefers Mississippi's combination vessels for the same general reasons of dependability, reduction of inventories, and lessened dollar investment thereby brought about; and he tries to ship as much as he can by the combination vessels.

The C–3 combination vessels have averaged greater revenues per weight ton of cargo than the C–2 or C–1 freight vessels. During all the voyages completed by the C–3s from January 1, 1947, to June 30, 1951, the gross revenues were as follows:

		Percent
Freight	$23, 725, 676	73.9
Passenger	8, 378, 171	26.1
Total	32, 103, 847	100.0

The ratio of freight revenues to passenger revenues is about 3 to 1.

Foreign-flag competition (cargo).—Mississippi's principal foreign-flag competitors, operating substantially parallel, are as follows:

1. Brazilian Line (Lloyd Brasileiro), operating several types of vessels of which the newest are comparable in their general characteristics to Mississippi's C–2s. They have: length 425 feet, beam 65 feet, horsepower 6,600, speed 15.5 knots, cubic capacity 400,000 cubic feet, reefer capacity 16,000 cubic feet, and deep tanks for oil. A sailing frequency of every two weeks is attempted but not met. The following table shows the number of sailings on Trade Route 20 by this line during part of the period under consideration:

	Sailings outbound	Sailings inbound
1st half 1951	6	10
1950	14	18
1948	26	20
1947 [1]	3	3

[1] Sailings include only those in which passengers were carried since the reports required at that time were limited to such sailings.

The usual itinerary of this line, on Trade Route 20, extends between Gulf ports and Brazilian ports as far south as Rio Grande. Calls frequently are made at United States Atlantic ports. The estimated average turnaround time for all foreign flag Trade Route 20 operations is 94 days. This line has developed substantial traffic between the United States and Brazil.

2. There are two Argentine government services: Flota Mercante (Argentine State Line) and Dodero Line. The former operates generally on Trade Route No. 1, but occasionally its vessels are put in service over Trade Route No. 20 Dodero Line is generally used in Trade Route 20 service. It uses Victory-type vessels principally, with speed of 17 to 18 knots. Their passenger accommodations, with a capacity of 12, are well appointed. They average one sailing per month from Gulf ports and call at Santos and Rio de Janeiro as well as the Argentine ports.

3. Nopal Line (Norwegian) operates chartered Norwegian vessels that carry approximately 4,000 tons, have a cubic capacity of 270,000 cubic feet, a speed of 12 knots, and attractive accommodations for a maximum of 12 passengers. The service is not very regular, but since World War II the sailings have been about one per month over Trade Route No. 20.

The cargo and passenger statistics herein may not always check out to exactness, due to different sources from which obtained; and data for certain periods is not shown because reports for such periods had not been processed at date of hearing.

The following table shows the volume of cargo carryings of Mississippi and foreign-flag operators on Trade Route 20 during the calendar years 1948, 1950, and first 6 months of 1951, in cargo tons of 2,240 pounds:

TABLE 1

	1948		1950		1st 6 months 1951	
	Sailings	Cargo tonnage (000)	Sailings	Cargo tonnage (000)	Sailings	Cargo tonnage (000)
OUTBOUND AND INBOUND						
Total carryings	231	941.7	205	695.2	89	403.3
Mississippi—total	128	568.1	103	369.5	49	262.1
Combination ships	39	160.0	39	108.4	19	83.2
Freighters	89	408.1	64	261.1	30	178.9
Foreign-flag ships	103	373.6	102	325.6	40	141.2
OUTBOUND						
Total carryings	132	604.7	108	411.5	42	229.2
Mississippi—total	68	311.9	52	176.5	24	142.9
Combination ships	20	83.9	20	48.1	9	41.0
Freighters	48	228.0	32	128.4	15	101.9
Foreign-flag ships	64	292.7	56	234.8	18	86.1
INBOUND						
Total carryings	99	337.0	97	283.7	47	174.1
Mississippi—total	60	256.1	51	192.8	25	119.0
Combination ships	19	76.1	19	60.2	10	42.1
Freighters	41	180.0	32	132.6	15	76.9
Foreign-flag ships	39	80.8	46	90.7	22	55.0

Mississippi's combination vessels are also in competition for freight with foreign-flag vessels plying between the ports served by the company on the East coast of South America and ports located on the Atlantic and Pacific coasts of the United States (Trade Routes 1 and 24). This competition, although not parallel, is characterized as direct competition; and while there are no cargo statistics of record, witnesses representing shippers in the mid-continental area of the United States testified that in the absence of Mississippi's combination vessel service to and from the Gulf a larger amount of the mid-continent area traffic would move via other ports.

Computations from the figures in Table 1, above, reveal that the following were the percentages of the total freight movement transported by foreign-flag line vessels on Trade Route No. 20:

	Inbound	Outbound	Inbound and Outbound
	Percent	*Percent*	*Percent*
1948	24	48	39.5
1950	32	57	46.8
1951 (1st 6 months)	32	38	35.0

On the basis of the foregoing it must be determined whether, in the transportation of cargo, Mississippi was required to meet direct foreign-flag competition. One of the mandatory provisions of the Act, section 603 (b), is that the amount of subsidy must be reckoned in the light of substantial competition. Thus, some measurable degree of real competition must exist. The competition relied on must meet the criterion of substantiality. What "substantial competition" would be, in any particular case, would necessarily depend upon the facts, but in every case it would have to be competition which has a measurable and significant economic effect upon the United States operator. Although Mississippi is the major single operator in the carriage of freight on Trade Route 20, the parallel foreign freight line operators carried 39.5 percent, 46.8 percent, and 35 percent of the total cargo in 1948, 1950, and the first half of 1951, respectively. The volume of such carryings by foreign lines is sufficiently great to have had a considerable competitive impact upon Mississippi. Further, some of the success of the foreign-flag lines in attracting traffic is attributable to restrictive practices put into effect by the South American governments, thereby accentuating the effect upon Mississippi's operations. Some of such practices are: a requirement that all freight for national entities be carried on the ships of that nation—some of the entities in Argentina, for instance, being railroads, airlines, water, gas and electric plants, surface transportation and subways; credit arrangements through the Argentine Central Bank, particularly in respect of agricultural implements and road machinery; preferential berthing for their freighters; port dues and disparities in pilotage and harbor dues and consular charges. The principal consular charges are made in Brazil, where half of the consular fee is remitted if the traffic moves in Brazilian ships. It was testified that if Mississippi absorbed half of the consular fees, as is done by the Brazilians, it would have cost about $150,000 in 6 months.

The effectiveness of the restrictive practices referred to is indicated by the testimony that southbound in 1948 Mississippi, with 45 sailings to Argentine ports, carried about 48 percent of the traffic while foreign-flag vessels, with 22 sailings, carried about 51 percent; and in 1950 Mississippi, with a total of 43 sailings, carried only 20 percent of the Argentine traffic while foreign-flag vessels, with 34 sailings, carried 80 percent.

Had the competition herein described not existed Mississippi undoubtedly would have had a much more satisfactory utilization of its combination vessel cargo space.

It is clear from the foregoing that, in the transportation of cargo,

Mississippi's combination vessels were required to meet substantial direct foreign-flag competition from the beginning of the service to the present time.

Passenger traffic.—The company's combination vessels are equipped with first class accommodations for 119 passengers. All cabins are air conditioned and luxuriously appointed.

In soliciting passenger traffic Mississippi is represented in the western States by an agent, the General Steamship Corporation at San Francisco. The northern and mid-western States are under the jurisdiction of a Chicago office; the southern and eastern States are served directly through the home office at New Orleans; and the South American territory is served through a subsidiary, Delta Line, Inc., which maintains passenger offices at Rio de Janeiro, Santos, and Buenos Aires. In addition, Mississippi maintains agency representation in Sao Paulo, Montevideo, and Recife. Each of the offices in the United States and in South America functions as a supervisor of relations with local travel agents. Typically, such travel agents sell for a great number of shipping companies and provide the public with general travel counsel and facilities through which all kinds of travel accommodations are furnished. Mississippi is represented by about 2,000 such agents in the United States. In South America it has similar representation in the major cities, but to a smaller extent. It also has representatives in Canada, Cuba, Guatemala, Hawaii, and Mexico.

Travelers on Mississippi's combination vessels may be regarded as being in two broad categories, those who travel as pure vacationers and those whose affairs require a trip specifically to a South American destination. There are some travelers in the former category to whom the destination of a cruise vessel is said not to be a controlling factor in their choice. Other considerations, such as duration of voyage, cost of accommodations, reputation of the ship itself, its entertainment and atmosphere, seamanship, port of departure, climate of destination territory, and alternative methods of return travel might, in such cases, control the traveler's choice as between a Mississippi cruise and other cruises or destinations.

Mississippi's combination vessel passengers are drawn in varying degrees from all areas of the United States. The number of passengers carried in these vessels during the period of record is represented in the following table:

TABLE 2

	Voyages	Southbound		Northbound		Intermediate	Percent of space utilized
		Cruise	One-way	Cruise	One-way		
First half 1951	9	240	426	240	296	498	74.8
1950	20	531	1,069	531	779	1,141	61.2
1949	19	481	1,159	481	972	1.020	68.4
1948	20	631	1,198	631	1,151	1,011	75.9
1947	16	489	1,022	489	1,059	1,073	80.4
Total	84	2,372	4,874	2,372	4,257	4,743	

The following table represents the number of unsold cabins on sailings for the period 1947 through the first half of 1951:

TABLE 3

	Southbound		Northbound	
	Total	Average per voyage	Total	Average per voyage
1st half, 1951 (9 voyages)	53	5.9	98	10.9
1950 (20 voyages)	75	3.75	181	9.05
1949 (19 voyages)	41	2.16	95	5.0
1948 (20 voyages)	6	.30	17	.85
1947 (16 voyages)	2	.13	4	.25
Total	177		395	

Individual voyage records show that the greatest numbers of unsold cabins occur in April and May sailings southbound, and in August and September northbound. A scarcity of dollars in Argentina has been reflected in lower northbound ticket sales in that country in 1950 and 1951.

Mississippi's advertising budget for 1951 was about $150,000 and it will be about the same or slightly more for 1952 to include 12 insertions in an Argentine publication. Mississippi's advertisements appear in national newspapers published in such cities as New York, Chicago, Los Angeles, San Francisco, Cleveland, Houston, Dallas, Kansas City, St. Louis, and many other places throughout the nation. They also appear in national magazines such as Holiday, Time, Newsweek, and Esquire.

The Argentine State Line is embarking upon an advertising campaign of similar scope using many of the same newspapers and magazines as is Mississippi. Also, its brochures are widely distributed by travel agents throughout the country. Their vessels have been in operation only a short time, but the influence of their competition is beginning to be felt.

The principal initial impact of the Argentine competition has been on the northbound traffic of Mississippi and proportionately that has suffered a notable reduction since the introduction of the new competitive service, reflected in the comparison of northbound and southbound traffic. During 1948 and 1949 Mississippi's passenger traffic was well balanced, but during 1950 and the first half of 1951 it became predominantly southbound.

Mississippi's operating results (financial).—The following table shows the estimated net operating profits (losses) before subsidy, taxes on income, and recapture, of the company's combination vessels for the period under consideration:

TABLE 4

	Total	Freight	Passenger
1st half 1951 (9 voyages)	522, 509	638, 689	(116, 180)
1950 (19 voyages)	(518, 746)	(354, 511)	(164, 235)
1949 (20 voyages)	70, 032	159, 439	(89, 407)
1948 (19 voyages)	1, 126, 756	1, 082, 510	44, 246
1947 (15 voyages)	1, 687, 461	1, 748, 859	(61, 398)

With the exception of 1950, the above table shows that the operation of the combination vessels resulted in an overall profit in the transporation of both passengers and freight. The table also shows that in the transportation of passengers alone the company incurred a loss each year except 1948. However, no cost analysis was made. Instead, the expense categories of stores, supplies, equipment, repairs, maintenance, insurance, and other vessel expenses were allocated one-third to passenger operations and two-thirds to freight operations. This division is based upon a comparison of the cost of construction of the passenger facilities, approximately $1,000,000, with the cost of construction of the vessel as a whole, approximately $3,000,000.

There is no necessarily consistent relationship between the capital investment involved in the construction of a vessel and in its regular operating costs incurred from day-to-day operation. However, the company's auditor testified that he could not find any better basis of making an equitable proration. By employing the same method of allocation of costs on passenger carriage of its 14 completed combination vessel voyages in the first three quarters of 1951, Mississippi shows an average loss, before subsidy, of $19,572.

Intermediate or way-to-way traffic.—Approximately 7 percent of Mississippi's passenger revenue is derived from its intermediate or way-to-way passenger traffic. During the four years 1947 through 1950 the passenger fares from this traffic on the company's combina-

tion vessels totaled $492,525. Mississippi has foreign-flag competition for this intermediate traffic, and the revenue the company derives from it has a substantial effect upon its financial results and upon subsidy recapture. However, this intermediate or way-to-way traffic is not within the meaning of "foreign commerce" of the United States, sections 905 (a) and 601 (a) of the Act, and it is not included in the further findings herein.

Foreign-flag competition (passenger).—This falls in the categories of parallel competition between the South American ports and the Gulf, nonparallel competition between the South American ports and ports on the Atlantic and Pacific coasts of the United States, and cruise competition from ports on the Atlantic, Gulf, and Pacific coasts of the United States and on the East coast of South America.

Prior to World War II, parallel competition was provided northbound by vessels of the Japanese flag as part of their round-the-world service. In December 1951 the Japanese line Osaka Shosken Kaisha made application for admission to the northbound conferences embracing operations from the East coast of South America to United States ports, including New Orleans, Galveston, Houston, and Los Angeles, with ten freighters having a capacity of not more than 12 passengers each.

A combination vessel, *Jose Menendez*, of Argentine flag made its last sailing on Trade Route 20 in January 1947 from New Orleans with 97 first class passengers. In 1947 Argentina launched upon a building program constructing new combination vessels similar to those operated by Mississippi, with the announced intention of putting them into the South America-Gulf service. Since their construction, however, the vessels have been operated in the service from New York to the East coast of South America.

The foreign-flag lines use only freighter vessels in their operations on Trade Route 20, as hereinabove described. Brazilian Line's newer vessels, with only two small cabins, can carry only four passengers comfortably. Its older vessels carry 12 passengers. The Argentine Line vessels have space for 12 passengers, with well-appointed accommodations. Similarly, the Nopal vessels have attractive accommodations for a maximum of 12 passengers.

The following table shows the number of passengers carried and sailings made (inbound and outbound separately) by United States and foreign-flag freighters and combination type ships in liner service on Trade Route No. 20 during the calendar years 1947, 1948, 1950, and the first half of 1951:

TABLE 5

	Total	United States flag ships			Foreign flag ships
		Mississippi Shipping Co.			
		Total	Combination	Freighters	
1947					
Outbound:					
Number of sailings	83	73	16	57	10
Number of passengers	2,100	2,051	1,532	519	49
Percent	100.0	97.7	73.0	24.7	2.3
Inbound:					
Number of sailings	65	58	14	44	7
Number of passengers	1,751	1,733	1,368	365	18
Percent	100.0	99.0	78.1	20.9	1.0
1948					
Outbound:					
Number of sailings	86	61	20	41	25
Number of passengers	2,287	2,223	1,854	369	64
Percent	100.0	97 2	81.1	16.1	2.8
Inbound:					
Number of sailings	70	59	19	40	11
Number of passengers	2,103	2,045	1,714	331	58
Percent	100.0	97.2	81 5	15.7	2.
1950					
Outbound:					
Number of sailings	71	52	20	32	19
Number of passengers	1,997	1,921	1,623	298	76
Percent	100.0	96.2	81 3	14.9	3.8
Inbound:					
Number of sailings	58	49	19	30	9
Number of passengers	1,537	1,515	1,331	184	22
Percent	100.0	98.6	86.6	12.0	1.4
1951 (1st half)					
Outbound:					
Number of sailings	27	24	9	15	3
Number of passengers	825	814	683	131	11
Percent	100.0	98.7	82.8	15.9	1 3
Inbound:					
Number of sailings	31	25	10	15	6
Number of passengers	718	700	609	91	18
Percent	100.0	97.5	84.8	12.7	2.5

Comparison of percentages of occupancy of passenger accommodations available on Mississippi's combination vessels with percentages of its foreign-flag competitors on Trade Route No. 20, is as follows:

	Mississippi	Foreign
1947	Outbound 80.5 Inbound 82.1	Outbound 49.5. Inbound 41 9.
1948	Outbound 78.0 Inbound 75.8	Outbound 26.0. Inbound 34.3.
1950	Outbound 68.3 Inbound 58.9	Outbound 89 4. Inbound 71.0.
1951 (1st half)	Outbound 66.8 Inbound 51.4	Outbound 8.7. Inbound 17 6.

In addition to the foreign-flag passenger competition on Trade Route No. 20, described above, Mississippi had passenger competition from three other sources, namely, the foreign-flag operations on Trade

Route No. 24, Trade Route No. 1, and cruises hereinafter separately described.

Trade Route No. 24, U. S. Pacific ports.—East coast South America (Brazil, Uruguay, and Argentina), is served by both American and foreign-flag freight vessels, and no passenger vessels are used in line operations thereon. A comparison of the United States and foreign-flag passenger carryings on Trade Route No. 24 is shown in the following table:

TABLE 6

	1947		1948		1950		Jan.–June 1951	
	Sailings	Passengers	Sailings	Passengers	Sailings	Passengers	Sailings	Passengers
OUTBOUND AND INBOUND								
(a) Total carryings	35	243	58	382	90	525	32	191
(b) United States flag ships	18	117	28	197	56	365	23	147
(c) Foreign flag ships	17	126	30	185	34	160	9	44
Percent (c) of (a)		52		43		31		23
OUTBOUND								
(a) Total carryings	19	123	25	170	39	265	17	101
(b) United States flag ships	10	64	15	120	28	210	12	85
(c) Foreign flag ships	9	59	10	50	11	55	5	16
Percent (c) of (a)		48		29		21		16
INBOUND								
(a) Total carryings	16	120	33	212	51	260	15	90
(b) United States flag ships	8	53	13	77	28	155	11	62
(c) Foreign flag ships	8	67	20	135	23	105	4	28
Percent (c) of (a)		56		64		40		31

Trade Route No. 1, U. S. Atlantic ports.—East coast South America (Brazil, Uruguay, Argentina), has a passenger service by Moore-McCormack Lines, Inc., and Argentine State Line, hereinafter referred to as Mormac and ASL, respectively.

Mormac operates three combination vessels with capacity of about 350 first-class passengers and about 50 cabin-class passengers each, comprising the "Good Neighbor Fleet." Cruises are advertised in the United States and Canada. South American ports of call are Buenos Aires, Montevideo, Santos, Rio de Janeiro, and, recently, Punta del Este; occasional calls are made at Bahia. The cruises are 38 days in duration with a turnaround of 42 days.

ASL is the only foreign-flag operator providing passenger service on Trade Route 1. It uses three combination vessels equipped with single-class accommodations for 116 passengers, with fares generally

comparable to Mississippi's. The vessels call at the South American ports of Rio de Janeiro, Santos, Montevideo, and Buenos Aires. The first of these vessels made its maiden voyage in June 1950. The other two were put in service in the latter part of 1950 and in 1951, respectively. Their passenger carryings to October 15, 1951, have been as follows: 19 sailings outbound, 999 passengers; 19 sailings inbound, 686 pasengers. Their average percent of occupancy was 43 percent outbound and 28.5 percent inbound. This shows a low degree of utilization for the vessels in their early voyages, but it is too soon to reach any conclusion as to the ultimate popularity of the service.

Mormac's passenger carryings on Trade Route 1 were as follows:

	Outbound		Inbound	
	Sailings	Passengers	Sailings	Passengers
1948	22	8,112	19	6,484
1949	26	7,108	26	6,707
1950	24	6,782	24	5,570
1951 (1st ½)	13	3,063	13	3,433

The 1951 passenger statistics cover the first 6 months for Mississippi and the first 9½ months for ASL. In those respective periods, Mississippi carried 683 passengers outbound and 609 inbound, and ASL carried 742 outbound and 580 inbound. In the following table the 1951 period is equalized in the proportion 9½ months to 6 months. Thus, the table compares Mississippi's combination vessel passenger carryings on Trade Route No. 20 with ASL's passenger carryings on Trade Route No. 1 for the periods shown.

TABLE 7

	Total	Mississippi's carryings	ASL's carryings	Percent carried by ASL
1951				
Outbound	1,152	683	469	40.7
Inbound	975	609	366	37.5
Total	2,127	1,292	835	39.3
1950				
Outbound	1,880	1,623	257	15.8
Inbound	1,467	1,331	136	10.2
Total	3,347	2,954	393	11.7

If Mormac's total passenger carryings should be included in the above comparisons, ASL's percentages would be approximately 9.6 and 2.5 for 1951 and 1950, respectively.

The vessels of the principal foreign-flag operators between the port

of New York and the East coast of South America fly the flags of Argentina, Brazil, Great Britain, Denmark, Netherlands, Norway, Panama, and Sweden. The volume of their passenger carryings in that trade is shown by the following table:

TABLE 8

	Sailings	Passengers out (south)	Arrivals	Passengers in (north)	Total passengers
1951 (9½ months)	164	1,042	165	853	1,895
1950	197	711	217	512	1,223
1949	213	569	223	557	1,126
1948	287	974	289	630	1,604
Total	861	3,296	894	2,552	[1] 5,848

[1] 1947 figures are incomplete but show at least 814 passengers carried during the year.

Consolidating the known foreign-flag carryings for the periods available results in the following:

TABLE 9.—*Foreign Flag Sailings, Arrivals, and Passenger Carryings Between New York and United States Gulf and Pacific Coast Ports, and the East Coast of South America*

	Sailings	Passengers southbound	Arrivals	Passengers northbound	Total passengers
1951 (½)					
Gulf	3	11	6	18	29
Pacific	5	16	3	28	44
New York	104	658	104	539	1,197
Total	112	685	113	585	1,270
1950					
Gulf	19	76	9	22	98
Pacific	8	55	20	105	160
New York	197	711	217	512	1,323
Total	224	842	246	639	1,581
1948					
Gulf	25	64	11	58	122
Pacific	9	50	20	135	185
New York	287	974	289	630	1,604
Total	321	1,088	320	823	1,911

Comparison of the totals in the foregoing table to Mississippi's carryings shows that the foreign-flag passenger carryings between all United States coasts and the East coast of South America constituted 45.6 percent in the first half of 1951, 30.1 percent in 1950, and 30.8 percent in 1948.

The following table is a comparison of the sources, geographically, of the passenger traffic of Mississippi, Mormac, and ASL, southbound, for the first 6 months of 1951. They are actual as to Mississippi and Mormac, but, in the absence of evidence directly bearing on the geo-

graphical origins of ASL's passengers, it is assumed that they would approximate those of Mormac since both services have their main United States terminus at New York. ASL's passengers are allocated to the appropriate States in the same proportion as Mormac's passengers. While the information as to all of the States is of record, only those which provided 1 percent or more of ASL's or Mormac's total southbound passenger traffic are included in the table:

TABLE 10

State	ASL		Mormac		Mississippi	
	Percent	Number	Percent	Number	Percent	Number
California	6.1	29	6.1	187	24.8	165
District of Columbia	6.6	31	6.6	202	.5	3
Illinois	4.3	20	4.3	132	12.6	84
Massachusetts	2.8	13	2.8	86	1.4	9
Michigan	1.4	7	1.4	43	3.0	20
New Jersey	1.6	7	1.6	49	.8	5
New York	61.6	289	61.6	1,887	2.1	14
Ohio	2.1	10	2.1	64	2.5	17
Pennsylvania	4.0	19	4.0	123	.5	3
Utah	1.3	6	1.3	40	1.2	8
Total	91 8	431	91.8	2,813	49.4	328

In the analysis of the effect of the "geographical factor" upon the competitiveness between ASL's service and that of Mississippi, some insight may be derived from a comparison of the sources of traffic shown in the table. The northeastern States of New York, New Jersey, Pennsylvania, Massachusetts, and the District of Columbia together provide 76.6 percent of the ASL and Mormac carriage, or 2,706 passengers; and the same States provide 5.3 percent of Mississippi's carryings, or 34 passengers.

Of the 7,336 passengers carried (southbound) by Mississippi's combination vessels in 85 sailings in the period November 29, 1946–June 30, 1951, 6,292 originated in the United States and included residents from each of the 48 States and the District of Columbia. Many of these passengers, both cruise and one way, came from New York and nearby States. New York furnished 472 of the passengers on Mississippi's combination vessels, including 70 cruise passengers; Pennsylvania 49, including 14 cruise; Massachusetts 83, including 11 cruise; Connecticut 24, including 9 cruise; New Jersey 66, including 16 cruise; Maryland 36, including 6 cruise; Virginia 65, including 7 cruise; and Ohio 301, including 97 cruise. These eight States alone furnished 1,096 passengers.

Significantly, a large number of passengers come from the Pacific coast. California furnished 1,602—more than any other State—and

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the three Pacific coast States, California, Oregon, and Washington, were the source of 1,775.

Another heavy source of passengers was Illinois and the surrounding States, Illinois alone furnishing 859. The distribution was widespread; a similar distribution existed in the origin of passengers carried on Trade Route No. 1 by Mormac.

Cruises. The evidence shows that for the period January 1, 1947, through June 30, 1951, Mississippi's cruise traffic provided 2,415 passengers, as compared with 4,921 southbound and 4,297 northbound one-way passengers, and 4,798 intermediate passengers. Thus, approximately 34 percent of the through passengers were cruise.

The 2,415 round-trip or cruise passengers originated from every State except Delaware, Idaho, New Hampshire, and Vermont. Some were from Canada, Hawaii, Mexico, and Cuba. Large numbers came from the Pacific coast, from the upper Mississippi Valley and Great Lakes area, and from the North Atlantic coast, including, particularly, New York.

The foreign-flag cruise and passenger services which Mississippi claims compete with its service are of two classes: those from United States eastern ports (Boston and New York) and New Orleans to foreign destinations,[1] and those from East coast of South American ports to foreign destinations, principally Europe. There are about 12 foreign-flag lines so operating with about 18 vessels with capacity of from 45 to 1,067 passengers each. During the period under consideration they carried 3,788 passengers inbound and 3,749 outbound. However, this is incomplete as the record does not show the number of passengers carried on several sailings. The fares ranged from $210 to $2,400 (average about $730) and the voyage durations were from 10 to 164 days (average about 41 days).

Of the foreign-flag cruises referred to, one was a world cruise by the *Caronia* (British). She sailed from New York in January 1950 with 585 passengers, drawn from 38 States.

Of the total passenger carryings of record by the cruise services referred to, a little more than half of the number was carried in and out of New Orleans on the M. V. *Stella Polaris* of the Bergen Line

[1] Aden, Bahia, Balboa, Barbados, Barcelona, Bergen, Bermuda, Bridgetown, Brisa, British Guiana, Buenos Aires, Cadiz, Calleo, Cap Haitien, Cape Town, Cartegina, Casablanca, Castros, Colania, Colon, Copenhagen, Cuidad Trujillo, Curacao, Cristobal, Dunban, Fort de France, Funchal, Gothenberg, Georgetown, Gibraltar, Grenada, Halifax, Havana, Harwick, Kingston, La Guaira, La Havre, Lisbon, Liston, London, Malago, Martinique, Messina, Mombasa, Monte Carlo, Montevideo, Naples, Nassau, Oslo, Palma, Punta Delgada, Port Elizabeth, Port of Spain, Port de Heirro, Punta Arenas, Rio de Janeiro, San Blas, San Juan, Santa Lucia, Santos, Southampton, St. Croix, St. Kitts, St. Pierre, St. Thomas, St. Vincent, Tangiers, Tillsbury, Trinidad, Tripoli, Triston da Cunha, Tunis, Valleta, Valparaiso, Vera Cruz, Willemstad, and Zanzibar.

(Swedish), on 27 voyages over the period of record. The capacity of this vessel is 170 passengers. This is the only cruise vessel of this type calling at New Orleans, the others calling at Boston and New York.

Several of the operators (British, French, Italian, Dutch) issue numerous color folders and otherwise elaborately and extensively advertise their services as being de luxe cruises and tours, showing sailing dates, rates, and fares. Mississippi also widely advertises its cruise services to Brazil, Uraguay, and Argentina on its combination vessels.

Officers of the company and other witnesses, long experienced and thoroughly informed on the travel business, testified that the foreign-flag cruises referred to provided competition for Mississippi's combination vessels; that short cruises, with lay-overs, or in combination with other cruises, are sold in competition with Mississippi's cruises; and that cruises are competitive one with another regardless of the port of sailing and regardless of specific destination.

Position of Mississippi's counsel.—They state that the company has continuously and in strict accord within the terms of the contract operated its three combination vessels on Trade Route No. 20; that during the period of record, in all of the categories of freight and passenger traffic described, these vessels have been subject to continuous and keen foreign-flag competition; that such competition has been substantial; and that the evidence adduced in this proceeding sustains the determinations and findings heretofore made by the Maritime Commission and fully warrants an independent determination by the Board supporting and establishing the need and propriety of the operating-differential subsidy provided in the contract.

Position of Board counsel.—They state that Mississippi's combination vessel operation was required to promote the foreign commerce of the United States during the period under consideration; that in the transportation of cargo the operation was necessary to meet substantial direct foreign-flag competition during the period under consideration; but, with respect to the transportation of passengers the operation was not required to meet substantial direct, nor other than direct, foreign-flag competition in either or all of the categories of passenger traffic described.

With respect to the practically parallel competition on Trade Route No. 20, they point out that Mississippi is the only operator of luxury combination vessels thereon. There are, counsel state, obviously such differences between the foreign-flag freighter services and Mississippi's combination vessel service as to tend to create two separate classes of appeal to the traveling public; that considerable differences

exist between the accommodations, atmosphere, services, and facilities offered; that the foreign-flag freighters have no fixed itinerary; that the frequency, duration, and dependability of the services are dissimilar; and that differences obtain between the fares. Consequently, they state, it is probable that only a portion of the foreign-flag freighter passengers would have traveled on Mississippi's combination vessels had they no other alternative; that, as to some travelers, only a freighter service would suit their needs or preferences; and that in any event the number of these passengers is insignificant as compared with Mississippi's carryings, pointing out that in 1950 the foreign freighters carried 3.8 percent of the outbound passenger traffic on Trade Route 20 (table 5), and in the other years, less than 3 percent of the total in either direction. Thus, in the view of counsel for the Board, Mississippi was not required to meet substantial direct foreign-flag competition in the transportation of passengers, in its practically parallel service, during the period involved.

Board counsel characterize as indirect competition the foreign-flag operations on Trade Route No. 24, Trade Route No. 1, and the cruises herein described.

As to Trade Route 24, counsel contend, as in the case of Trade Route 20 foreign-flag services, that there is good reason to regard a freighter service as not wholly competitive in its passenger operations with combination vessel service. They also contend that the total foreign-flag passenger carriage over Trade Route 24 was insignificant in comparison with Mississippi's carryings; for instance, in 1950 the carryings were 160 and 3436 passengers respectively (tables 5 and 6); and therefore that no substantial indirect competition was provided by foreign-flag operators on Trade Route 24.

As to Trade Route 1, counsel state that (*a*) no substantial competition existed in the period January 1947 to December 1949, for the reason that the ASL operation was not then in existence; (*b*) no substantial competition existed in 1950, for the reason that the new ASL service carried an insignificant number of passengers in that year; and (*c*) no substantial competition existed in the first half of 1951, for the reason that substantial portions of their respective carryings emanate from areas in which the one is virtually free from the competition of the other, and that as to the rest of the traffic, ASL's competitive impact is principally felt by Mormac and not Mississippi.

With respect to the cruise competition, counsel state that the degree of this varies with the comparability of the destinations, rates, durations, accommodations, ports of departure, and other factors of the

respective cruises; that cruises on other trade routes cannot attract travelers whose itinerary is dictated by the demands of business or personal obligations; that as to pure vacationers generally there is probably an indeterminate number to whom the destination of a cruise is immaterial; that it is only as to a minority of passengers that competitiveness between cruises is engendered, and within that minority it is impossible to identify or measure the elements of competition; and that such widespread operations do not constitute competition within the meaning of the act.

Board counsel contend that the various foreign-flag operations discussed herein, taken in the aggregate, do not provide substantial passenger competition.

In their position as stated, Board counsel suggest two considerations:

1. Subsidize the freighter aspect of the combination vessel service but not the passenger aspect;

2. Regard the combination vessel service as a unit and consider the impact of foreign-flag competition upon the total operation; thus, should it be determined that substantial competition exists as to the vessels as a whole, the entire unit would then be subsidized.

On the question of whether the operation of the vessels was required to meet foreign-flag competition in the transportation of cargo and to promote the foreign commerce of the United States, there is no disagreement. It is clear upon the record that the operation of the combination vessels by Mississippi on Trade Route 20, in the transportation of cargo, was required to meet foreign-flag competition and to promote the foreign commerce of the United States from January 1, 1947, to the present time.

Concerning the position of Board counsel with respect to passenger competition, the Act does not prevent the granting of operating subsidy to United States-flag vessels merely because they are different or superior to the foreign-flag vessels on the same route, nor should the concept of competition and its substantiality be construed in a way permitting foreign-flag competitors to control the type, size, speed, and characteristics of vessels of the American merchant marine.

In giving effect to operating subsidy under Title VI the basic policy of the Act should be considered. This policy, as declared in section 101, calls for the "encouragement and maintenance" of a privately owned United States merchant marine sufficient "to provide shipping service on all routes essential for maintaining the flow of * * * domestic and foreign water-borne commerce at all times" and "capable of serving as a naval and military auxiliary in time of war or national

emergency," and "composed of the best-equipped, safest, and most suitable types of vessels."

There is no requirement in the awarding of subsidy that foreign-flag competitors must carry exactly the same kind of traffic as that carried by the United States-flag operator. The policy under Title VI is to place the operation of the United States-flag vessels on a parity with those of foreign competitors when it is found that the payment of subsidy is reasonably calculated to carry out effectively the purposes and policy of the Act. Thus, the fundamental purpose is to place United States-flag transportation on a parity with foreign-flag transportation, not to set apart certain kinds of traffic and weigh each kind against the foreign-flag competition for it. For example, in a freight service where the United States-flag vessel has tanks or reefer space and the foreign-flag competitor does not, the United States-flag operator should be subsidized for its whole operation. Similarly, with respect to combination vessels, if there is substantial competition from foreign-flag transportation the subsidy to the United States-flag operator should not be reduced because the foreign-flag competitor carries only a limited number of or even no passengers.

In fixing the subsidy under section 603 (b) of the Act it is provided that the Board shall consider such items as to which the United States operator "is at a substantial disadvantage in competition with vessels of the foreign country" whose vessels are "substantial competitors" of the vessel or vessels covered by the contract. There is no requirement under that section that the foreign-flag competitor offer a service which is substantially similar to that offered by the United States-flag operator. In fact, the differential is to be computed under section 603 (b) not by using an actual foreign-flag vessel as the basis for foreign costs but by estimating such foreign costs if the vessel or vessels to be subsidized "were operated under the registry of a foreign country whose vessels are substantial competitors of the vessel or vessels covered by the contract."

Upon consideration of these factors of purpose and policy, and the statistics and testimony of company officials and other witnesses, summarized herein, it is concluded that the foreign-flag passenger competition described herein, both parallel and nonparallel, was substantial and direct, and the company's combination vessels were required to meet it during all of the period from January 1, 1947, to the present date; and for subsidy purposes, each of the combination vessels should be regarded as a single operating unit.

Recommended Findings

The Board should find:

1. That the operation of the three combination passenger and freight vessels by Mississippi Shipping Company, Inc., on Service 1 of Trade Route No. 20 was required to meet foreign-flag competition and to promote the foreign commerce of the United States during all of the time between January 1, 1947, and the present date;

2. That such competition for cargo and passengers, parallel and nonparallel, was substantial direct foreign-flag competition during such entire period;

3. That the extent to which the payment of subsidy in respect to the said combination vessels is necessary to place them on a parity with those of foreign-flag competitors, and is reasonably calculated to carry out effectively the purpose and policy of the Merchant Marine Act, 1936, is the amount, under section 603 (b) of the Act, that would apply if the combination vessels were operated under the registry of the foreign countries whose vessels are substantial competitors that operate, or have operated, on Trade Route No. 20 since January 1, 1947; and

4. That for purposes of subsidy the combination vessels should not be divided into the freight part and the passenger part, and then these parts be treated separately, but each of the vessels should be regarded as a single operating unit.

FEDERAL MARITIME BOARD

No. 724

CONTRACT RATES—NORTH ATLANTIC CONTINENTAL FREIGHT CONFERENCE ET AL.

Submitted September 26, 1952. Decided September 29, 1952

The Board has authority to direct the North Atlantic Continental Freight Conference to hold in abeyance its proposed dual-rate system pending an investigation by the Board under section 22 of the Shipping Act, 1916, as to whether the differential in rates of the proposed system is arbitrary or unreasonable. For the conference to put its dual-rate system into effect prior to the completion of the Board's investigation of the proposed system would result in detriment to the commerce of the United States. Irreparable injury to the conference would not result by requiring it to hold its proposed dual-rate system in abeyance pending the Board's investigation.

REPORT OF THE BOARD ON MOTION

This matter is presented on motion of North Atlantic Continental Freight Conference (hereinafter called "the Conference") and its several members,[1] filed September 19, 1952, for an order to the effect that (1) the Board has no jurisdiction or lawful power to request or direct holding in abeyance the effectiveness of the contract-rate system

[1] North Atlantic Continental Freight Conference Agreement No. 4490 was first approved by the Assistant Secretary of Commerce on August 24, 1935, and now includes the following transatlantic carriers:

A/S J. Ludwig Mowinckels Rederi (Cosmopolitan Line).
Black Diamond Steamship Corporation.
Campagnie Generale Transatlantique.
Compagnie Maritime Belge, S. A/ Compagnie Maritime Congolaise S. C. R. L. (Joint Service).
The Cunard Steam-Ship Company Limited (Cunard White Star).
Ellerman's Wilson Line, Ltd. (Wilson Line).
(A. P. Moller-Maersk Line).—Joint Service of Dampskibsselskabet af 1912 A/S, A/S Dampskibsselskabet Svendborg.
Mediterranean Lines. Inc. (Home Lines).
N. V. Nederlandsch-Amerikaansche Stoomvaart-Maatschappij "Holland-Amerika Lijn."
South Atlantic Steamship Line, Inc.
United States Lines Company (United States Lines).
Waterman Steamship Corporation.

proposed by the Conference to go into effect on October 1, 1952; and (2) the Board, in the exercise of its discretion, should in any event not require that the system be held in abeyance because irreparable damage would be caused to the Conference members should they comply.

The Conference on September 4, 1952, filed with the Board notice of a proposal to initiate a system of dual rates effective October 1, 1952, under which a differential of 10 percent is to be allowed shippers who enter into contracts to patronize members of the Conference exclusively, under the rate charged those who do not enter into such contracts. On September 15, 1952, pursuant to section 22 of the Shipping Act, 1916 (hereinafter called "the Act"), the Board instituted an investigation on its own motion to determine whether the differential in rates of the proposed system is arbitrary or unreasonable, and the lawfulness of the proposed system of dual rates under section 15 of the Act. Contemporaneously with instituting the investigation the Board addressed a letter to Mr. C. R. Andrews, Chairman of the Conference, calling attention to the fact that the Board already had under advisement the adoption of a procedural rule governing the initiation or modification of dual-rate systems by conferences, and that notice that this proposed rule had been published in the Federal Register on July 31, 1952, inviting comments on or before September 19, 1952. The letter concluded:

> The North Atlantic Continental Freight Conference is, therefore, requested to hold its proposed contract system in abeyance until the Board's further direction. Assurance of compliance herewith should be filed with the Board not later than the close of business September 20, 1952.

The Conference's motion above described was thus filed as a challenge to the Board's authority to request or direct that the system be held in abeyance and the status quo maintained pending the inquiry thus instituted by the present proceeding. The motion was set down for prompt hearing on September 24, 1952, and at the request of the Conference the Board relieved the Conference from assurance of compliance on the September 20 deadline.

Hearing was held on September 24, 1952. Argument in support of the motion was made by counsel for the Conference, and in opposition to the motion by counsel for the Board. Counsel for the Department of Commerce, the Department of Agriculture, the Anti-Trust Division of the Department of Justice, and Isbrandtsen Company, Inc., interveners, also argued against the motion, and all parties were given an opportunity to file briefs not later than September 26, 1952.

In order to have a proper understanding of the motion and of this proceeding some background is necessary. As far back as October 1,

1948, the Conference members gave notice to shippers in the North Atlantic trade of a proposed dual rate exclusive contract system. Before the effective date thereof, Isbrandtsen filed suit in the United States District Court for the Southern District of New York against the Conference and a similar Westbound Conference for an injunction against the institution of the system on the ground that the system was unlawful, being in violation of various provisions of the Act. The District Court granted a temporary injunction restraining the Conference carriers from instituting the system, conditioned upon Isbrandtsen prosecuting before the Maritime Commission a complaint challenging the validity of the system. *Isbrandtsen Co., Inc.* v. *U. S. A. et al.*, 81 F. Supp. 544. Such complaint was filed, and this Board, as the successor of the Maritime Commission, after full hearing, on December 1, 1950, issued its report (Docket No. 684). *Isbrandtsen Co.* v. *N. Atlantic Continental Frt. Conf. et al.*, 3 F. M. B. 235, approving the system with slight modification. Thereafter Isbrandtsen again brought suit in the same District Court to enjoin and set aside the order of the Board so far as it approved the provisions of the Conference agreement establishing the dual-rate system. The District Court in March 1951 granted a permanent injunction against the establishment of the proposed system, holding that the spread between the contract and noncontract rates was arbitrarily determined and therefore arbitrary and, consequently, unlawfully discriminatory between shippers and a violation of the Act. *Isbrandtsen Co., Inc.* v. *U. S. A. et al.*, 96 F. Supp. 883. On direct appeal to the Supreme Court of the United States the decision of the District Court was affirmed by an equally divided court. *A/S J. Ludwig Mowinckels Rederi et al.* v. *Isbrandtsen Co., Inc., et al.*, 342 U. S. 950 (1952). The Conference's basic conference agreement now in force, approved by our predecessor, the Assistant Secretary of Commerce, on August 24, 1935, pursuant to section 15 of the Act, authorized the conference members to establish uniform freight rates, and expressly authorized the Conference to provide for dual rates in the following language:

> The Conference may provide specific contract and noncontract rates in an effort to stabilize rates and permit of forward trading for the common good of the Members and Exporters and the permanent Chairman and/or Secretary is hereby empowered to negotiate and execute such contracts as may be authorized by the Conference. Power to negotiate and/or execute contracts on behalf of the Members may also be delegated to a member or group of members as conditions in the opinion of the Conference may warrant.

The validity of dual rates and the exclusive patronage contract system has, from time to time since the passage of the Act, been chal-

lenged both in the courts and before our predecessors. Decisions on the point were reviewed in our report in Docket No. 684, *supra.* However, prior to the decision of the District Court in March 1951, the system had not been challenged or held invalid on the ground that the spread between the contract and noncontract rates was arbitrary or unreasonable. Investigation of our records made after the District Court's decision showed that there were 98 active conferences subject to the Board's jurisdiction which were authorized to establish uniform rates by reason of the fact that their conference agreements permitting such action had been approved by the Board or its predecessors pursuant to section 15 of the Act. Of these it was found that 64 conferences made use of the dual-rate system in one form or another, and that there was no uniformity as to the spread between contract and noncontract rates where the system was used. Accordingly, after some study, the Board, acting pursuant to section 15 of the Act, section 204 of the Merchant Marine Act, 1936, and section 3 of the Administrative Procedure Act, instituted a rule-making procedure looking to the adoption of a rule which would require conferences proposing to initiate or modify any dual-rate system to give to the Board 60 days advance notice, together with a statement containing (a) the proposed spread or differential between contract and noncontract rates, (b) the effective date of the institution of the system, (c) the reasons for the use of the system in the particular trade involved and the basis for the spread or differential between the rates, and (d) copies of all contracts pertaining thereto; and similarly would require conferences which at the time of the promulgation of the proposed rule were using the dual-rate system to supply similar information within 60 days after the effective date of the rule. The form of the proposed rule was duly published in the Federal Register on July 31, 1952, inviting interested parties to file statements and comments thereon on or before a date which was ultimately fixed as September 19, 1952. The Board contemplated consideration of any comments which might thus be elicited, and in due course, the promulgation of a rule which would result in supplying the Board with information as to the basis of the differential between contract and noncontract rates as charged or proposed.

On September 4, 1952, when the Conference advised the Board that it proposed to establish a dual-rate system on October 1, 1952, with a differential of 10 percent, the proposed rule of the Board was, of course, not in effect, nor is it yet in effect. The Conference is the only one which has given notice to the Board since the institution of

the Board's rule-making procedure, above described, that it proposes to institute a dual-rate system.

At the argument on the motion held on September 24, 1952, counsel for the Conference argued, first, that the matters brought up for consideration by the motion were moot because the Conference members had already entered into many contracts with shippers for their exclusive patronage in return for reduced rates, and because the Board had, by its action of September 15, 1952, entered upon a general investigation of the Conference's dual-rate system. Counsel for the Conference challenged the power and jurisdiction of the Board to request or direct that the Conference should hold the operation of its dual-rate system in abeyance pending the investigation because the Act gave the Board no such power either by its express terms or by implication. Conference counsel argued that the Board's authority to approve or disapprove conference agreements under section 15 of the Act was limited to so-called "basic agreements" and did not apply to such matters as an agreement to establish a dual-rate system. He also argued that the Board had full power under section 21 to require carriers to file with the Board any reports or information which the Board might require, but that the Board was without authority to proceed under other sections of the Act until it had fully exhausted its powers under section 21. Finally, counsel for the Conference argued that any order of the Board requiring a deferment of the effective date of the Conference's proposed dual-rate system would subject Conference members to irreparable damage, and that they would thereby subject themselves to liability for breach of contract to shippers who had executed contracts and who would expect performance beginning October 1, 1952.

We do not think the question of our authority to require the Conference to withhold putting the system into effect until we have an opportunity to investigate it is moot. On the contrary, it is ancillary to the general investigation. Although the approval heretofore given to the basic conference agreement implies permission to the Conference to institute the system, such authority is clearly limited to permission for a lawful system only. If, as here, there is uncertainty as to whether the system may, like the earlier proposal, include an arbitrary spread or be unjustly discriminatory as between shippers, such doubts should be resolved before the system goes into effect and not after. A practical test of the proposed system will not aid in determining whether the spread is arbitrary or whether it is unjustly discriminatory as between shippers. Nor is there any basis for limiting the Board's

authority to proceed under section 21 if authority under other sections of the Act are found more appropriate.

Nor do we agree with counsel's argument on irreparable damage. There are a number of answers to this argument, but the most complete may be found in the shipper's contract itself, which by paragraph 9 provides:

> 9. In the event of * * * regulations of governmental authorities or other official interference which affect or, in the judgment of the Carriers, threaten to affect their operations in the trade covered by this contract, then the Carriers or any one or more of them may at their option cancel this contract * * *. Neither the Carriers nor the Merchant shall be liable to the other for any loss or damage thereby caused or occasioned.

Finally and most important is the question of authority and jurisdiction to require postponement of the effective date of the proposed system. Counsel for the Conference argues that the dual-rate system as proposed is not an agreement between the carriers requiring prior approval under section 15. Actually the proposed system is evidenced by a notice to the merchants in the trade, accompanied by a form of contract to be entered into on behalf of the member carriers, under which they agree to charge 10 percent less that the tariff rates to merchants who agree to give to the Conference members their exclusive patronage, all subject to certain conditions and exceptions set forth in the form of contract.

Counsel for the Department of Commerce and for the Board point to section 15 of the Act, requiring the filing with the Board of "every agreement with another such carrier or other person subject to this Act * * * to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; * * *." The term "agreement" in the section is defined to include "understandings, conferences, and other arrangements." Under our rules (Manual of Orders, Order No. 166, revised to March 10, 1952), all proposed agreements submitted to the Board for approval are promptly posted for public inspection at a designated place, and notice of the filing of the agreement with abstract in published in the Federal Register, providing for written comments within a period of 20 days, and for a request for hearing should a hearing be desired. In due course the Board considers the proposed agreement with any statements of interested parties and other available information, and thereafter, if the Board's examination fails to show that the proposed agreement is unjustly discriminatory or unfair, detrimental to the commerce of the United States, or violative of the Shipping Act, 1916, or related acts, it may be approved.

Under section 15 the Board may "* * * by order disapprove, cancel, or modify any agreement, or any modification * * * thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, * * * or to operate to the detriment of the commerce of the United States, or to be in violation of this Act * * *."

Under this section we have the broadest power to disapprove new or existing agreements. Only "when and as long as approved" are agreements lawful, "* * * and before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement * * *." Lawful, i. e., approved agreements only, are excepted from the anti-trust laws. The penalty for carrying out agreements which are not lawful (i. e., before approval or after disapproval) is $1,000 per day recoverable by the United States in a civil action. Our power to approve, disapprove, cancel, or modify an agreement between carriers is derived from section 15 as above set forth, as amplified by section 25 providing,

> That the board may reverse, suspend, or modify, upon such notice and in such manner as it deems proper, any order made by it.

The provisions of section 23 requiring complaint or formal Board proceedings and a full hearing apply to orders relating to violations of the Act referred to in section 22, and not to orders approving or disapproving agreements between carriers referred to in section 15. If the withdrawal of approval of an agreement between carriers is a "sanction" under section 9 of the Administrative Procedure Act, the imposition of the sanction is clearly "authorized by law."

We find it unnecessary in this case to decide whether the Board has authority to forbid parties from acting under an agreement not approved by the Board. At least one court has said such authority exists.[2]

The question remains: Is the establishment of uniform dual rates by concerted action of carriers an "agreement" requiring section 15 approval by the Board? If the basic conference agreement already approved had not expressly authorized the carriers to establish uniform rates, clearly the arrangement to do so would be an agreement requiring our approval. *Wharfage Charges and Practices at Boston, Mass.*, 2 U. S. M. C. 245. However, where basic conference agreements have been approved authorizing uniform rates, tariff activities pursuant thereto have been considered over a long period of years to

[2] "The Shipping Board may determine whether any agreement such as is described in the bill has actually been made, and, if it has may order it filed and require the parties to cease from acting under it unless and until its approval." *U. S. Nav. Co.* v. *Cunard SS. Co.*, 50 F. 2d 83, 89.

be routine operations as to which separate Board approval has not generally been deemed required by the statute. In *Section 15 Inquiry*, 1 U. S. S. B. 121, our predecessors said at p. 125:

> As contended by conference representatives in this proceeding, a too literal interpretation of the word "every" to include routine operations relating to current rate changes and other day-to-day transactions between the carriers under conference agreements would result in delays and inconvenience to both carriers and shippers.

A rule with respect to section 15 agreements, adopted in connection with that case, effective September 1, 1927, and still in force, provides:

> 6. Statements of routine arrangements for carrying out authorized agreements will not be accepted for formal filing by the Board but may be received as information.

Our settled administrative practice in this regard is, we believe, something which respondent conferences and others similarly situated are entitled to rely on. *United States* v. *Eaton*, 169 U. S. 331, 343; *National Labor Relations Board* v. *Virginia Electric Power Co.*, 314 U. S. 469, 479. However, we may say in passing that we see no reason why administrative practice under the Act may not be changed if changing conditions so require and if the change can be accomplished without injustice. The decision in *Isbrandtsen* v. *United States*, 96 F. Supp. 883, as affirmed by the Supreme Court, necessarily has had its impact on the practices of the Board. Unless the Board is fully advised in respect to the spread between dual rates, it cannot be sure that the spread is not arbitrary and the system free of discrimination. As we said in *Contract Routing Restrictions*, 2 U. S. M. C. 220, at p. 227:

> The conference agreements make the contracts possible, and if the contracts[3] are unjustly discriminatory or otherwise unlawful, it follows that the conference agreements too may be canceled under section 15 if such discrimination is not removed.

In the present case we find that our predecessor's approval of respondent's basic agreement in 1935 may, because of the possibility of an arbitrary spread in the dual rates now proposed, permit unjust discrimination. We believe that this possibility is of such importance that the status quo of the Conference carriers with respect to dual rates should not be changed pending the completion of the investigation into this matter which we have instituted. For the carriers to put the dual-rate system into effect prior to the completion of our inquiry would, in our judgment, operate to the detriment of the

[3] The contracts here referred to are the agreements between carriers and shippers where by the latter receives lower rates.

commerce of the United States. We cannot view with complacency any such result flowing from the continued approval of the Conference's basic agreement which alone makes the initiation of the proposed dual rates possible.

The record will be held open for a period of 10 days from the date hereof to permit respondents to arrange for the continuance of the present status quo and the deferment or cancellation of any dual rates which they may put into effect pursuant to the present proposal, and to notify the Board that such action has been taken. Failing this, the Board will take such further action as it deems appropriate.

The motion is denied.

By order of the Board.

(Sgd.) A. J. WILLIAMS,
Secretary.

FEDERAL MARITIME BOARD

No. S–30

REVIEW OF THE OPERATING–DIFFERENTIAL SUBSIDY CONTRACT WITH MISSISSIPPI SHIPPING COMPANY, INC., FOR SERVICE 2 OF TRADE ROUTE No. 14

Submitted July 14, 1952. Decided September 30, 1952

The vessels of Mississippi Shipping Company, Inc., operating on Service 2 of Trade Route No. 14, have encountered substantial foreign-flag competition from January 1, 1948, to the present.

No change has been shown in the character or extent of foreign-flag competition since January 1, 1948, which would require or warrant an adjustment in operating-differential subsidy payments to this operator.

Donald Macleay for Mississippi Shipping Company, Inc.
Max E. Halpern and *Joseph A. Klausner* for the Board.

REPORT OF THE BOARD

BY THE BOARD:

This proceeding concerns a review, on our own motion, of the operating-differential subsidy agreement of Mississippi Shipping Company, Inc. (hereinafter referred to as "Mississippi"), for three C–1 type freighters operated by the company on Service 2 of Trade Route No. 14.

Amended notice of hearing was published in the Federal Register of January 9, 1952, the stated purpose of which was to receive evidence relevant to the following: (*a*) Whether Mississippi's vessels have encountered substantial competition from foreign-flag vessels from January 1, 1948, to the present, and (*b*) whether, and to what extent, adjustment in subsidy payments is required.

Hearing was held before an examiner on February 6 and 7, 1952. The recommended decision of the examiner was served on July 7, 1952, in which he recommended that we should find: (1) that the subject vessels of Mississippi have encountered substantial competition since January 1, 1948, from foreign-flag vessels; and (2) that no change has been shown herein in competitive conditions since that date which would warrant adjustment in operating-differential subsidy payments. Counsel for Mississippi and Board counsel, the only parties appearing in the proceeding, advised the Board that no exceptions or memoranda would be filed in connection with the examiner's decision.

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We are in agreement with the recommended decision of the examiner.

Before discussing the questions raised by this record, we believe it desirable to describe briefly the historical background of United States-flag operations on Services 1 and 2 of Trade Route No. 14. A more detailed discussion of this background may be found in *Am. Sou. African Line, Inc.—Subsidy, Route 14*, 3 U. S. M. C. 314 (1947). A United States-flag service between United States Atlantic and Gulf ports and ports on the West coast of Africa was established by the United States Shipping Board in 1921. This service was subsequently designated as Trade Route No. 14 in the "Report of the United States Maritime Commission on Essential Foreign Trade Routes and Services Recommended for United States Flag Operation," dated May 22, 1946. In *Am. Sou. African Line, Inc.—Subsidy, Route 14, supra*, the Maritime Commission determined that better results would be obtained if the route were divided into two services, viz., (*a*) a Service 1 from United States Atlantic ports to the West coast of Africa, and (*b*) a Service 2 from United States Gulf ports to the West coast of Africa. Pursuant to the order of the Maritime Commission in that case, dated January 9, 1947, an operating-differential subsidy agreement with Farrell Lines, Inc. (formerly named American South African Line, Inc., and hereinafter referred to as "Farrell"), was entered into for operation of vessels on Service 1, and an operating-differential subsidy agreement was concluded with Mississippi for Service 2. The subsidy agreement of Mississippi provides for a minimum of 14 and a maximum of 18 sailings per year with three C1-type freighters on Service 2, which is presently described as follows:

> Between U. S. Gulf ports and ports on the West coast of Africa (from the Southern border of French Morocco to Cape Frio, including Madeira, Canary, Cape Verde and other islands adjacent to the West African coast) with the privilege of calling at St. Thomas and at North Brazilian ports (Para-Pernambuco range) outbound.

Service 1 of the route covers the same ports on the West coast of Africa, but serves United States Atlantic ports (Portland, Maine, to Key West, Fla.).

Although the description of Service 1 includes the privilege of calling outbound at St. Thomas and North Brazilian ports, the Brazilian calls were eliminated by Mississippi in 1949 because the operator believed that outbound African traffic would develop faster with a direct service. Elimination of the Brazilian privilege was confirmed by letter of the Maritime Commission to Mississippi, dated May 8, 1950.

At the time of the report of the Maritime Commission in 1947 in

Am. Sou. African Line, Inc.—Subsidy, Route 14, supra, no United States-flag or foreign-flag liner services were operating between the United States Gulf coast and the West coast of Africa, although there was an inbound tramp movement. All liner service between the United States and the West coast of Africa, therefore, was confined to movement through Atlantic ports. The Maritime Commission, in approving the application of Mississippi for subsidy on Service 2 of the route, clearly premised its action on the competition from foreign-flag vessels serving Atlantic ports on Service 1, the Commission observing at page 319 of its report in that case that "to the extent that traffic could move by a Gulf service, the foreign flag competition from the Atlantic ports is considered as indirect competition with Gulf port services."

Mississippi is presently the only United States-flag operator on Service 2 and it operates a foreign-flag feeder service which permits shipments on through bills of lading to all secondary ports on the West African coast; this feeder service effects a saving of from 15 to 25 days per voyage of its vessels. The sole regular foreign-flag line on Service 2 operates only an outbound service, but its carryings are primarily bulk grain to the Canary and Madeira Islands, which are not regularly served by Mississippi. Mississippi's president testified that "except for one or two commodities tramp competition has virtually gone out." The record discloses that by far the most significant foreign-flag competition confronting Mississippi is from vessels operating on Service 1 of the route.

The total liner cargo carryings on the two services for the years 1948 through 1951 are shown below:

Outbound and inbound

[Thousands of long tons]

	1948	1949	1950	1951
Service 2:				
Mississippi	46.8	69	70.2	121.2
Service 1:				
Farrell	203.9	189.6	218.3	[1] 232.6
Foreign Flag	521.8	503.6	519.8	[1] 592.4

[1] Figures for 1951 are available only for the first 6 months of the year; the figures in the table are therefore stimates reached by doubling the figures for the first half of 1951.

A comparison of the liner, irregular, and in-transit movements by United States and foreign-flag vessels on Service 1, and the liner movements by Mississippi (the only United States-flag operator) on Service 2, of the more important commodities, during the years 1947 through 1950, is as follows:

	Cargo tons of 2,240 lbs.							
	1947		1948		1949		1950	
	Gulf	Atlantic	Gulf	Atlantic	Gulf	Atlantic	Gulf	Atlantic
	EXPORTS							
1. Wheat flour	144	43,599	2,827	42,570	6,433	37,099	6,496	41,012
2. Cotton, etc	307	27,890	157	12,689	241	6,634	73	4,933
3. Petroleum products	9,117	30,379	15,210	28,738	33,691	29,028	19,542	22,229
4. Iron and steel	351	32,071	833	37,112	740	29,817	1,076	22,761
5. Machinery	314	12,335	1,007	21,846	2,206	31,602	3,070	22,101
6. Vehicles	91	24,486	492	23,283	258	23,972	265	21,501
7. Chemicals	185	4,551	483	3,680	396	5,128	623	5,284
	IMPORTS							
8. Coffee	549	16,591	1,385	10,710	913	11,111	2,080	13,655
9. Cocoa	-------	137,658	407	114,838	252	123,517	151	131,051
10. Rubber	1,072	25,850	4,665	24,067	4,833	24,460	4,794	32,078
11. Logs	5,713	66,873	5,490	71,018	3,602	26,749	9,218	60,678
12. Manganese	-------	178,357	5,067	111,782	4,000	192,218	2,990	160,927
13. "Other"	-------	86,472	-------	35,912	-------	36,414	-------	37,357

NOTE.—Gulf movements represent the carryings of Mississippi only. The following are movements of appreciable size from the Gulf via foreign-flag vessels: 1947—wheat (6,000 tons), wheat flour (5,633 tons), coal (16,273 tons); 1948—wheat (5,580 tons), wheat flour (884 tons); 1949—wheat (1,500 tons), iron and steel products (2,466 tons); 1950—corn (16,294 tons).

These statistics disclose that the Atlantic lines transport many more items, and in considerably larger quantity, than does Mississippi. The participation of Mississippi in the total movement of traffic to West Africa has, however, steadily increased since the institution of its Gulf service; conversely, the relative participation of Atlantic lines in this total movement has steadily decreased. It is obvious, from the record, that but for the Gulf service of Mississippi the majority of the traffic handled by it would have moved over the Atlantic service. The increase in the carryings of Mississippi is due partly to the diversion of traffic to the Gulf, as well as the building up of some new traffic by this operator.

Both services on this route are interdependent and complimentary; they serve common ports in West Africa and are intended to meet the flow of traffic between this area and the United States. It appears that certain commodities find their natural movement through only one of the two services. Certain other commodities, however, can move just as conveniently either through the Gulf or the Atlantic service. The movement of commodities on the route, either through Gulf or Atlantic ports, is controlled by several factors, such as: comparative interior freight rates, frequency, regularity, and type of service offered by the water carriers, financial practices, marketing or manufacturing conditions, settled traffic patterns, preference of for-

eign consignees for their national vessels, solicitation, and various other less tangible factors.

Concerning the comparative costs of transportation to or from inland points via Gulf or Atlantic ports, the so-called "rate-break" line for rail rates extends from Lake Michigan (just east of Chicago) through Indianapolis, Cincinnati, Knoxville, Atlanta, to Panama City, Florida. Shipments originating north or east of this line have a lower rail rate to Atlantic ports, while shipments originating south or west of the line have a lower rail rate to Gulf ports. The apparent rate advantage of the Gulf for some of the latter shipments is offset, to some extent, by car pool arrangements, which permit consolidation of less-than-carload shipments and movement to Atlantic ports at carload rates which are lower than the rate that would apply to car pool shipments to the Gulf.

There is substantially greater frequency of service from the Atlantic than from the Gulf: thus, in 1950, there were 61 foreign-flag and 22 United States-flag outbound sailings on Service 1, as compared with 14 outbound sailings for Mississippi on Service 2. Foreign-flag sailings alone averaged more than five per month, whereas Mississippi's sailings averaged slightly more than one per month. The greater frequency of sailings from the Atlantic, therefore, constitutes a disadvantage to Mississippi. The evidence shows that Mississippi has been able to obtain only sporadic and unusual movements from areas north or east of the "rate-break" line, but that Atlantic lines have consistently drawn traffic from the western and southern areas.

Exports.—The major export of Mississippi has been petroleum products, which originate in the Gulf area. The examiner has found that there is substantial competition from foreign-flag vessels on the Atlantic service for this commodity. Some oil companies operate refineries both in the Gulf and Atlantic areas and they ship via the Gulf or the Atlantic to suit their needs. The export movement from the Atlantic consists of the products of eastern refineries, normally from crude oil originating in Texas and Venezuela. Movement out of the Gulf is more economical since the crude oil need not first be shipped to Atlantic refineries before the finished product is exported. Here competition is admittedly not for the same ton of cargo; it arises rather from the fungible nature of the commodity, which can be supplied by the same exporter from either Gulf or Atlantic ports. It is significant that, prior to the institution of Mississippi's Gulf service, Gulf production found no outlet to West Africa except via the North Atlantic.

The second largest export commodity of Mississippi is wheat flour. The Atlantic movement of this item has remained relatively stable, while Mississippi's carryings have increased from 144 long tons in 1947 to 6,496 long tons in 1950. Here, as in the case of petroleum products, the commodity is of a fungible nature, and the main exporters are firms that can ship from mills that they own along the North Atlantic or from their mills in the Middle West or Southwest. Thus, the shippers will consign the production of their mills according to their business judgment. Most of these shipments apparently originate in territory tributary to the Gulf. Flour from Kansas, however, the largest single source, may move either through Gulf or Atlantic ports with equal facility. It is fair to infer that Mississippi has taken some traffic away from the Atlantic lines in view of the upward trend of its carryings and slightly downward trend of the carryings on Service 1. Indeed, the testimony is that some flour exporters who formerly shipped out of New York exclusively now ship out of the Gulf from the Midwest except where frequency of service is the controlling factor.

The next major export group consists of machinery and iron and steel products. These commodities originate primarily in the areas contiguous to Atlantic ports, and the predominant movement has been via the Atlantic service. However, there are iron and steel products that originate in the southern industrial area centering around Birmingham, and various types of machinery are produced there and in the Middle West. Although export from this area through Gulf ports is quicker and more economical than through Atlantic ports, it appears that there is a tendency for shipments to go out via New York notwithstanding that the rail differential amounts to a real penalty. Many shipments of these commodities are controlled by foreign consignees who desire to patronize their national lines. While the participation of Mississippi in the movement of these commodities to West Africa has amounted to a small percentage of the total movement to West Africa, the competition here offered to Mississippi is substantial, since the commodities comprise a significant proportion of its total carryings on Service 2, and since this is high revenue cargo important to Mississippi's new and developing service.

Imports.—The leading imports to the Gulf have been mahogany logs, rubber, and manganese. The largest single import of Mississippi has been mahogany logs. Prior to the inauguration of Mississippi's service, practically the whole movement of mahogany logs came in via Norfolk. Most of the mills, which use this commodity as a fine veneer, are located within the triangle of Evansville, Louisville,

and Indianapolis; there are also mills in Knoxville, Memphis; Chicago, Wichita, and New Orleans. These mills are largely within the rail area favorable to the Gulf, but as to this commodity frequency of service is often a compelling factor because the logs deteriorate if long exposed to the sun, and because shippers are anxious for early loading in order to procure payment as promptly as possible. It is clear from the record that the Gulf service is competitive with the Atlantic service for this commodity.

The import rubber movement on Service 2 has been destined largely to areas contiguous to the Gulf. However, it appears that foreign-flag competition for the transportation of this commodity exists. The largest importer of rubber on Service 2 owns mills in both Memphis and Akron, and, although the importation of rubber is presently controlled by the United States Government, it appears that the importer still has the choice of routing his shipments via the Atlantic or Gulf service.

Although Mississippi has not actively sought the manganese traffic, because of low rates and delays in loading, it is interested in, and does obtain small quantities of, such cargo when delays can be avoided. Mississippi contends that the type and extent of the competition have made it difficult for it to obtain any large amount of the manganese traffic.

The record discloses that there is some competition from foreign-flag lines, operating on the Atlantic service, for various other commodities which are carried in smaller amounts by Mississippi. It will be unnecessary, for purposes of this report, to analyze each of these commodities separately since we find that, on the basis of the commodities considered, the vessels of Mississippi operating on the Gulf service have encountered substantial foreign-flag competition.

Conclusions

The Board therefore concludes:

1. The three C1-type vessels of Mississippi Shipping Company, Inc., operated on Service 2 of Trade Route No. 14 pursuant to its operating-differential subsidy agreement, have encountered substantial foreign-flag competition from January 1, 1948, to the present.

2. No change has been shown in the character or extent of foreign-flag competition since January 1, 1948, which would require or warrant an adjustment in operating-differential subsidy payments to this operator.

(Sgd.) A. J. Williams,
Secretary.

The parties differ greatly over the effect that a finding of present inadequacy ought to have on the same determination with regard to the future. Waterman maintains that although some "prognosis of the future" is necessary, the Board should give more weight to the immediate past. Sea-Land maintains that the present level of U.S.-flag participation has little relevance to this proceeding.

Because Waterman requests subsidy for 20 years of operations and the shipping business on the trades is not static, it is essential in this proceeding to determine as best we may the future adequacy of U.S.-flag service.[8] The fact of present inadequacy of U.S.-flag participation must be considered in this determination. It presents a base from which to project future U.S.-flag service and since it is a product of shipping realities, it is a useful check of projections of future U.S.-flag service derived from a comparison of the expected cargo pool and cargo lift capacity.

2. Future Inadequacy

Judge Hunt used as a standard for determining the adequacy of future U.S.-flag service a measurement of the total available U.S.-flag liner capacity on TRs 12 and 22 against the share of the liner cargo pool which U.S.-flag operators may reasonably be expected to carry. He used a base year of 1973 and made projections to 1980. He found that in 1980 the U.S.-flag capacity available without Waterman's proposed service on the routes would substantially exceed that necessary to carry 50 percent of the relevant cargo pool.

Sea-Land raises two concerns with this general approach of the Judge. Sea-Land's first concern is that the findings of the Initial Decision may be construed to be limited to a determination that Section 605(c) bars Waterman's applications only for the period 1975 through 1980. Sea-Land argues that if the Initial Decision is so construed, Waterman failed to carry its burden of proof for the time span after 1980, since the record is devoid of any evidence on cargo and capacity projections beyond 1980.

We find that the Judge's Initial Decision did not find Section 605(c) was a bar to Waterman's applications only to 1980. There is no expression in the Initial Decision to that effect. The Judge stated, "it is appropriate to focus on 1980, the presently scheduled time for the introduction of applicant's LASH service." (I.D. at 23). The Judge was following the same procedure he used in Docket S-267, an earlier proceeding under Section 605(c) in which Sea-Land participated as a party, where a projection year was agreed upon by the parties "because by then the conversion process

[8] Public Counsel's objection that no future projections are reliable for these trade routes subject to the imponderables of political events is noted but rejected. Section 605(c) of the Act has consistently been interpreted to require that the projection effort be made. Whether Waterman's application should be granted as a matter of policy in this "unsettled area of the globe", to quote Public Counsel, is a matter considered under Section 601 of the Act and not this proceeding.

to modern capital-intensive vessels would be expected to be stabilized."[9] Significantly, when the Judge repeatedly stated in a prehearing conference during the instant proceeding that his adequacy determination would be based on 1980 forecasts, Sea-Land raised no objections.[10]

Sea-Land's other concern is the Judge's choice of 50% as the level of U.S.-flag participation determining adequate U.S.-flag service. Sea-Land argues that 40% is the highest practical level of U.S.-flag participation on TRs 12 and 22 and that a 50% level will not be achieved because of recent growth of third flag operations on the routes and mounting interest in bilateralism, demonstrated by the proposals at several UNCTAD conferences which would set a "40/40/20" division in trade participation, i.e., 40% participation by each of the national flags and 20% by third flags.

We do not accept practically attainable U.S.-flag participation in the routes as being limited to only 40% merely because of additional foreign-flag activities and UNCTAD conference proposals which have not been adopted by the U.S. We have found on occasion that in excess of 50% U.S.-flag participation in a trade was practically attainable.[11] For present purposes, given the historical U.S.-flag participation on these routes, we agree that 50% is the proper standard of adequate U.S.-flag participation. We now consider the relevant cargo pool and cargo lift capacity.

Cargo Pool

The exceptions to the Initial Decision present two issues regarding the cargo pool; namely, the type of cargo constituting the pool and the amount of cargo projected to exist in 1980 on the routes. Judge Hunt held:

> That the pool of cargo relevant to applicant's proposed service on both trade routes and which past experience indicates is and will for the future be reasonably susceptible to carriage in U.S.-flag liner vessels on these routes is found to be *substantially the same* for the different methods of vessel operation involved, including LASH, container and breakbulk, based upon evidence which shows that even where breakbulk or LASH operators are at a service disadvantage in competing routes, competitive opportunities for such cargo have been equalized through freight rate reductions. (I.D. at 55-56, emphasis added.)

This holding is apparently based on Judge Hunt's statement that although at comparable rate levels container service would predominate over breakbulk service, at lower rates the parties "generally agree that . . . there is no basis . . . for allocating cargo pools between LASH/breakbulk and container." (I.D. at 43.) He nonetheless excluded from the pool of cargo "cargoes not reasonably susceptible to movement on either the applicant's Mariner service or the proposed LASH service." *(Id.)*

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[9] *Additional Service on Trade Routes 29 and 17*, 14 SRR 387, 399 (1974).

[10] Transcript, Prehearing Conference, February 4, 1975 at 7 and 19.

[11] *United States Lines—Subsidy, Route 18*, 5 SRR 969, 977 (1967); *American President Lines, Ltd.*, 6 SRR 1031, 1042 (1966).

Judge Hunt considered trade forecasts of the amount of the relevant cargo pool by Mr. Vroman of Central Gulf, Mr. Graham of Sea-Land, Dr. Sheldon and Mr. Gorman of Harbridge House, Inc. on behalf of USL and Mr. Rifas of Manalytics, Inc. on behalf of Waterman. The Judge noted several deficiencies in these forecasts and adopted the premise of Harbridge House that by 1980 there will be moving on TR 12 no more cargo than moved in 1973. He applied the same premise to TR 22. The Judge's findings resulted in the following cargo pool:

TABLE II
(000 L/T)

	Outbound	Inbound
Trade Route 22:		
[000 L/T]		
1973 Liner Total	2,108	671
Not Susceptible	−46	−241
Vietnam-Cambodia	−362	
Mariner Pool	1,700	430
Not Susceptible—LASH	−12	−19
LASH Pool	1,688	411
Trade Route 12:		
1973 Liner Total	1,798	2,590
Not Susceptible	−147	−518
Vietnam-Cambodia	99	
Mariner Pool	1,552	2,072
Not Susceptible—LASH	−90	−435
LASH Pool	1,462	1,637

Source: I.D. at 44.

The exceptions to the Initial Decision present two issues regarding the cargo pool, namely the type of cargo constituting the pool and the amount projected in 1980 on the routes.

(i) *Type of Cargo*

As can be seen from Table II, the Judge excluded three types of cargoes from the pool of cargo: (a) cargo not susceptible for liner carriage, (b) cargo not susceptible to LASH carriage and (c) Vietnam-Cambodia/ U.S. Waterman takes exceptions to these deductions while Sea-Land defends them.

a. *Cargo Not Susceptible for Liner Carriage.* The basic rule for defining the cargo pools by which adequacy is to be measured in Section 605(c) proceedings has been expressed as follows by the Secretary of Commerce:

> . . . as a matter of policy the Board should in all Section 605(c) applications consider only such types and amounts of cargoes in the pool of traffic available for U.S.-flag liner carriage as (1) that which past experience indicates is reasonably susceptible to U.S.-flag liner ships, and (2) that which as a practical matter can be reasonably be expected to be carried in U.S.-flag liner ships in the future.[12]

[12] *United States Lines—Subsidy, Route 12*, 5 SRR 671 (1964).

FEDERAL MARITIME BOARD

No. S–31

REVIEW OF THE OPERATING-DIFFERENTIAL SUBSIDY CONTRACT WITH FARRELL LINES INCORPORATED FOR TRADE ROUTE NO. 15A

Decided November 3, 1952

Farrell Lines Incorporated, in the operation of its two combination vessels on Trade Route No. 15A, in connection with its freight service on that route, has since July 1949 encountered substantial direct foreign-flag competition.

An operating-differential subsidy to Farrell Lines Incorporated for operation of its combination vessels on Trade Route No. 15A, in connection with its freight service on the route, is necessary to meet competition from foreign-flag vessels and to promote the foreign commerce of the United States in furtherance of the purposes and policy of the Merchant Marine Act, 1936, as amended.

Donald D. Geary and *Harold B. Finn* for Farrell Lines Incorporated.

Max E. Halpern, *Joseph A. Klausner*, and *Allen C. Dawson* for the Board.

REPORT OF THE BOARD

This proceeding concerns a review, on our own motion, of the operating-differential subsidy agreement of Farrell Lines Incorporated (hereinafter referred to as "Farrell") for two combination passenger-freight vessels operated by the company on Trade Route 15A (hereinafter referred to as "the route").

Notice of hearing was published in the Federal Register of April 26, 1952, the stated purpose of which was to receive evidence relative to the following: (1) whether, and to what extent, the operation of such combination vessels by Farrell on the route was required to meet foreign-flag competition and to promote the foreign commerce of the United States between July 1949 and the present date, or any part of that period; (2) whether such competition, if any, was (a) direct foreign-flag competition, or (b) other-than-direct foreign-flag com-

petition; and (3) the extent to which the payment of subsidy in respect to the combination passenger-freight service afforded by the operation of these combination vessels on the route is necessary to place such vessels on a parity with those of foreign-flag competitors and is reasonably calculated to carry out effectively the purposes and policy of the Merchant Marine Act, 1936, as amended.

Hearing was held before an examiner on May 13, 1952, and his recommended decision was served on October 22, 1952. The examiner recommended that the Board should find that Farrell, in the operation of the *African Enterprise* on the route, in connection with its freight service thereon, has encountered substantial direct foreign-flag competition since July 1949; that in the operation of the *African Endeavor* on the route, in connection with its freight service, Farrell has encountered substantial direct foreign-flag competition since August 1949; and that an operating-differential subsidy to Farrell for operation of those combination vessels on the route, in connection with its freight service thereon, is necessary to meet foreign-flag competition and to promote the foreign commerce of the United States in furtherance of the purposes and policy of the Merchant Marine Act, 1936, as amended. Counsel for Farrell and Board counsel notified the Board that no exceptions to the examiner's recommended decision would be filed. We agree with the recommended findings of the examiner.

Farrell (formerly known as American South African Line, Inc.) is one of the two United States-flag operators offering a regular berth service on the route. An extended operating-differential subsidy agreement, entered into between Farrell and the Maritime Commission on January 5, 1950, effective January 1, 1947, provides for the subsidized operation by Farrell of eleven named vessels, including the *African Endeavor* and the *African Enterprise*, on the route. The *African Endeavor* and the *African Enterprise* have been the only combination vessels operated by Farrell on the route during the period of review. Farrell also operates a freight service on the route with nine freight vessels. The two above-mentioned combination vessels are the only ones presently under consideration.

The *African Enterprise* and the *African Endeavor* commenced operations on the route in July and August 1949, respectively. It is provided in Farrell's extended operating-differential subsidy agreement that the total combined number of sailings to be performed by the combination vessels and the freight vessels of Farrell on the route shall be a minimum of 26 and a maximum of 36 per annum, provided that no fewer than 7 sailings per annum shall be made with the com-

bination vessels. It is contemplated that the combination and freight vessels of this operator will provide an integrated and flexible service on the route.

Trade Route No. 15A provides services between United States Atlantic coast ports (Maine to Key West, inclusive) and South and East African ports (Cape Frio to Cape Guardafui) and Madagascar. It is clear that the route is, and has been for over 30 years, of essential importance to the foreign commerce of the United States. The history of United States-flag operations on the route is stated in *Am. Sou. African Line, Inc.—Subsidy, S. and E. Africa*, 3 U. S. M. C. 277 (1938), and in *Am. Sou. African Line, Inc.—Subsidy, Route 14*, 3 U. S. M. C. 314 (1947). The export commodities moving on the route include textiles, automobiles, steel, lubricating oil, machinery, household equipment, and medicines, and the import commodities include chrome ore, manganese ore, beryl ore, corundum, wool, asbestos, and copper and gold concentrates. During the period from January 1, 1949, to December 31, 1951, the dry-cargo commercial liner traffic on this route averaged over 1,000,000 tons per annum, and, during the same period, an average of approximately 1,760 passengers per annum were transported over the route.

As we have recently stated in *Review of Grace Line Subsidy, Route 2*, 4 F. M. B. 40, the questions presented in the notice of hearing relate to the appropriate sections of the Merchant Marine Act, 1936, as amended, as follows: Question 1 to section 601(a)(1), question 2 to section 602, and question 3 to section 601(a)(4). The primary questions thus raised are whether the subject combination vessels of Farrell have encountered substantial foreign-flag competition on the route since July 1949, and whether an operating-differential subsidy for such vessels is necessary to meet foreign-flag competition and to promote the foreign commerce of the United States in furtherance of the purposes and policy of the Act.

General Traffic Data—The basic traffic statistics received in evidence indicate, inter alia, that: (1) during the years 1949, 1950, and 1951, foreign-flag vessels carried approximately 33 percent of the total outbound cargo movement and 16 percent of the total inbound cargo movement; (2) competition for passengers from foreign-flag vessels operating directly over the route has, since July 1949, been confined to freighters, which have carried about 10 percent of the total number of passengers moving over the route during the years 1949, 1950, and 1951; and (3) Farrell has encountered an undetermined amount of foreign-flag competition for passengers from vessels operating between New York and South Africa via Southhampton, England.

Freight Traffic—During the years 1949, 1950, and 1951, the subject combination vessels, in addition to Farrell's freight vessels operated on the route, have carried approximately 35 percent of the total cargo movement. During this same period, the freight vessels of Seas Shipping Company, the other subsidized United States-flag operator on the route, have carried approximately 40 percent of the total cargo movement. Foreign-flag cargo competition, during this period, has been provided principally by five lines, which have carried, as stated above, approximately 33 percent of the outbound and 16 percent of the inbound cargo movement.

Each of the subject combination vessels is essentially a cargo carrier, with a passenger capacity of 82 persons, bale cubic capacity of 424,000 cubic feet, and a deadweight capacity of 8,602 tons. The gross revenues from the operations of these vessels, during the period of review, have been as follows:

Year	Voyages	Cargo	Passenger	Other
		Percent	*Percent*	*Percent*
1949	3	68. 50	28. 77	2. 73
1950	10	71. 29	25. 97	2. 74
1951	10	79. 54	17. 72	2. 74

Farrell argues that the magnitude of the foreign-flag competition cannot be measured only by the number of vessels actually placed on berth or by the volume of traffic carried. It is pointed out that the foreign-flag lines operating on the route are among the strongest and most successful lines in the world, and that they stand ready at any time to place additional tonnage on the route. Farrell urges, therefore, that we should consider the character and resources of the competing foreign-flag operators, since traffic statistics alone do not disclose the true extent of the competition, but only the results of the "battle of competition" for available traffic.

While we recognize that traffic statistics may not supply the complete answer of the extent of the foreign-flag competition, they do disclose the fact of such competition. The record is thus convincing that Farrell's combination vessels have, from their entry into service in 1949 to the present time, encountered substantial foreign-flag competition for cargo.

Passenger Traffic—The number of passengers carried on foreign-flag vessels, operating directly over the route, has steadily decreased since the entry into service of Farrell's two combination vessels. During the first 6 months of 1949, prior to institution of service by the

subject combination vessels, foreign-flag vessels carried 32.4 percent of the outbound and 13.6 percent of the inbound passengers moving over the route. During the second half of the same year, after Farrell's combination vessels had entered into service, foreign-flag vessels carried only 16.4 percent of the outbound and 9.1 percent of the inbound passengers. In 1951, foreign-flag vessels carried only 4.7 percent of the outbound and 0.6 percent of the inbound passenger movement.

The total movement of passengers on the route, during the years 1949, 1950, and 1951, on vessels sailing directly between the United States and Africa, has averaged, as stated above, about 1,760 persons per annum. The two combination vessels and the freight vessels of Farrell, and competing foreign-flag vessels, have participated in the passenger movement as follows:

Outbound

Year	Farrell				Foreign	
	Combination		Freighters			
	Number	Percent	Number	Percent	Number	Percent
1949	325	27.8	272	23.3	262	22.4
1950	456	48.4	157	16.7	121	12.8
1951	511	49.8	189	18.4	48	4.7

Inbound

Year	Farrell				Foreign	
	Combination		Freighters			
	Number	Percent	Number	Percent	Number	Percent
1949	140	17.4	287	35.6	92	11.4
1950	395	58.3	133	19.7	28	4.1
1951	363	55.0	112	17.0	4	0.6

Farrell contends that it would be a mistake to conclude from these passenger statistics that there is no longer substantial direct foreign-flag passenger competition. It is argued that such competition exists and will continue to exist as long as the foreign-flag lines continue operations on the route. Farrell argues that if its combination vessels, with their superior accommodations, had not been available to the

traveling public, a substantial number of the passengers who traveled on the combination vessels would have utilized the accommodations provided by the foreign-flag freight vessels, as they did before the combination vessels entered service on the route.

Farrell contends further that its principal competition for passengers has been provided by two foreign-flag lines operating between New York and South Africa via Southampton, England. These lines have regularly advertised a weekly passenger service on some of the world's largest and finest passenger liners, and they offer a transit time from New York to Capetown of as little as 20 days (2 days longer than that of Farrell's combination vessels). These lines offer a large range of fares which extend below as well as above the fares of Farrell. The witness for Farrell stated that there "is a tremendous movement of people" to and from South Africa on the vessels of these lines, but he stated that Farrell was unable to offer any specific traffic statistics with respect to this movement. Board counsel was also unable to secure statistics of the amount of passengers moving on these lines from United States Atlantic ports to ports in South and East Africa via the United Kingdom. Because of the lack of specific evidence in the record, we cannot give any weight to this competition. It is questionable whether, apart from this type of foreign-flag competition, the direct passenger competition offered to the subject combination vessels by foreign-flag freight vessels, standing alone, has since July 1949 been substantial.

However, in this case, as in *Review of Grace Line Subsidy, Route 2, supra*, it is appropriate to point out once again that an operator's inability to prove substantial foreign-flag competition for passengers does not preclude the subsidization of the operator's fleet on the route as a unit. We believe that the Merchant Marine Act of 1936 requires that we view the United States-flag operator's fleet on an essential foreign trade route as an operating unit, insofar as this fleet is necessary to promote the foreign commerce of the United States thereon.

The integrated operation of Farrell on this route is intended to meet most satisfactorily the over-all passenger and cargo requirements. The subject combination vessels have been determined, under section 211 of the Act, as necessary to provide "adequate, regular, certain and permanent service" on the route. The success with which these vessels have met the passenger competition is illustrated most graphically by the passenger traffic statistics. It is not the purpose of the Act to maintain a second-rate United States-flag service, tailored to the level of the foreign-flag competition. Our efforts to promote and maintain a modern and efficient United States merchant marine would be

futile if we were required to await improvements in foreign-flag services before improving our own.

We find, therefore, that Farrell, in the operation of its two combination vessels on Trade Route No. 15A, in connection with its freight service on the route, has encountered substantial direct foreign-flag competition since July 1949; and that an operating-differential subsidy to Farrell for operation of those vessels on the route, in connection with the operation of its freight vessels thereon, is necessary to meet competition from foreign-flag vessels and to promote the foreign commerce of the United States, in furtherance of the purposes and policy of the Merchant Marine Act, 1936, as amended.

Conclusions

The Board therefore concludes that:

The competitive conditions encountered by the subject combination vessels of Farrell Lines Incorporated, since July 1949, do not warrant any modification of the operating-differential subsidy contract with this operator for Trade Route No. 15A.

(Sgd.) A. J. Williams,
Secretary.

FEDERAL MARITIME BOARD

No. 722

INCREASED RATES OF SNOW TRANSPORTATION COMPANY BETWEEN POINTS ON THE KUSKOKWIM RIVER, ALASKA

Submitted October 14, 1952. Decided November 4, 1952

Proposed rate for the transportation of freight between ship's landing and Bethel, Alaska, found justified.

Proposed rates for the transportation of freight between ship's landing and Akiak, Alaska, and between Bethel and Akiak found not justified.

John P. Snow for respondent.

Messrs. Earl Shay, Clarence Marsh, and *Clayton* for the Bethel, Alaska, Chamber of Commerce.

REPORT OF THE BOARD

By tariff filed on May 1, 1952, respondent, Snow Transportation Company, proposed to increase its rates, effective May 31, 1952, for the transportation of freight between Bethel, Alaska, and other Kuskokwim River points. Under the proposed tariff the rate between ship's landing [1] and Bethel was increased from $5.00 to $6.00 per ton, and the rates between ship's landing and Akiak, and Bethel and Akiak, from $10.00 to $12.50 per ton. A request was made for justification of the new rates but no statement of justification was received from respondent prior to the hearing. The Governor of Alaska protested the proposed increases generally, and the Bethel Chamber of Commerce opposed the proposed increase of the rate between ship's landing and Bethel. By our order of May 28, 1952, the tariff of respondent, to the extent of the above-mentioned increased rates, was suspended under authority of section 3 of the Intercoastal Shipping Act, 1933, as amended, and a public hearing was ordered to determine the lawfulness of those rates.

[1] Ship's landing is a point on the Kuskokwim River off Bethel where ships from the States load and discharge cargo from and onto an anchored barge serving as a dock.

Hearing was held before an examiner at Bethel on August 11, 1952, at which respondent and Bethel Chamber of Commerce appeared. The recommended decision of the examiner, which was served on September 29, 1952, recommends that we should find that: (1) The proposed rate for the transportation of freight between ship's landing and Bethel is justified; and (2) the proposed rates for the transportation of freight between ship's landing and Akiak, and between Bethel and Akiak, are not justified.

In justification of the proposed rate between ship's landing and Bethel, the carrier testified that the pre-existing rate of $5.00 was established in 1947, and that, since that time, the carrier's expenses have increased 100 percent. It also testified that because of a change in the waterfront at Bethel since 1947 it has become more difficult for the carrier to handle freight at that point.

With respect to the proposed rates between ship's landing and Akiak, and Bethel and Akiak, the carrier testified that, in addition to the over-all increases in expenses, the carrier had experienced unloading difficulties at Akiak "due to shallowing up and beaching of the river," and also that the shippers of Akiak had requested the carrier not only to unload their freight but to haul it to their places of business. Apparently the carrier has acceded to this request, for in the words of the carrier's witness, "this rate is not only water hauling but shore drayage."

There is no provision in the tariff as now submitted for the performance of drayage under the proposed rates between ship's landing and Akiak and between Bethel and Akiak. Without such a provision the tariff fails to comply with the requirement of section 2 of the Intercoastal Shipping Act, 1933, that "each terminal or other charge, privilege, or facility, granted or allowed" shall be separately stated.

There is evidence that would justify a $12.50 rate for the combined water and drayage service. If the carrier desires to put the proposed Akiak rates into effect to include drayage service, new tariffs should be submitted showing the nature of the shore drayage service which is included with the water carriage.

We find that the proposed rate between ship's landing and Bethel has been justified. We further find that the proposed rates between ship's landing and Akiak and between Bethel and Akiak have not been justified as complying with the law.

An appropriate order will be entered.

FEDERAL MARITIME BOARD

ORDER

At a Session of the FEDERAL MARITIME BOARD, held at its office in Washington, D. C., on the 4th day of November A. D. 1952

No. 722

INCREASED RATES OF SNOW TRANSPORTATION COMPANY BETWEEN POINTS ON THE KUSKOKWIM RIVER, ALASKA

It appearing, That by order of May 28, 1952, the Board entered upon a hearing concerning the lawfulness of rates stated in the schedule described in said order, and suspended the operation of the said schedule to the extent of such rates until September 30, 1952; and

It further appearing, That a full investigation of the matters and things involved has been had, and that the Board, on the date hereof, has made and entered of record a report stating its conclusions and decision thereon, which report is hereby referred to and made a part hereof:

It is ordered, That respondent be, and it is hereby, notified and required to cancel the rates between ship's landing and Akiak and between Bethel and Akiak, named in the aforesaid schedule, on or before November 24, 1952, upon not less than one day's posting and filing in the manner required by law.

By the Board.

(Sgd.) A. J. WILLIAMS,
Secretary.

FEDERAL MARITIME BOARD

No. M–55

ANNUAL REVIEW OF BAREBOAT CHARTERS OF GOVERNMENT-OWNED, WAR-BUILT, DRY-CARGO VESSELS, 1952, UNDER PUBLIC LAW 591, EIGHTY-FIRST CONGRESS

Francis B. Goertner and *Marvin J. Coles* for the Committee for the Promotion of Tramp Shipping.

Ira L. Ewers for Alaska Steamship Company and American President Lines, Ltd.

Frank J. Zito and *Robert S. Hope* for Coastwise Line and Pope & Talbot, Inc.

William I. Denning for Pacific-Atlantic Steamship Company.

Robert F. Donoghue for Prudential Steamship Corporation.

David E. Scoll for West Coast Transoceanic Steamship Line, General Steamship Corporation, and Dichman, Wright & Pugh.

Nicholas Manolis for North Eastern Steamship Company.

John S. Parry for Triton Shipping, Inc.

Alan F. Wohlstetter for the Board.

REPORT OF THE BOARD

This proceeding was instituted, on our own motion, in accordance with section 3 of Public Law 591, Eighty-first Congress, which provides that all bareboat charters made thereunder shall be reviewed by us annually for the purpose of determining whether existing conditions justify their continuance.

By notice published in the Federal Register of July 10, 1952, we gave notice to interested parties that an annual review had been made of all such bareboat charters existing as of June 30, 1952. This notice listed the charters that had been reviewed and stated that we had tentatively found that their continuance was justified, but it was therein provided that any interested party might request a

hearing with respect to these tentative findings for any or all of such charters by filing written objections thereto within 15 days from the publication of the notice.

A protest to the continuance of certain charters was filed on behalf of the Committee for the Promotion of Tramp Shipping, and, on July 29, 1952, we ordered a hearing on the charters thus opposed. Since the date of our tentative findings, notices of termination have been received with respect to certain charters. No notice of protest has been received for certain other charters comprehended within our original review, and, by order of October 3, 1952, we certified to the Secretary of Commerce that conditions existed justifying the continuance of those charters, upon the conditions originally certified by us to the Secretary of Commerce; this order was duly published in the Federal Register of October 11, 1952, as Docket No. M–55 (Sub. No. 1).

The remaining charters, within the scope of this proceeding, are as follows:

Charterer	Vessel	Docket No.	Date vessel delivered
Alaska Steamship Company (Alaska Service).	John H. Quick	M–31	June 4, 1951
	George D. Prentice	M–31	July 2, 1951
Coastwise Line (Alaska Service)	Tarleton Brown	M–24	Apr. 3, 1951
	John W. Burgess	M–24	Apr. 13, 1951
	Charles Crocker	M–30	May 28, 1951
Pacific-Atlantic S. S. Co. (Intercoastal Service).	Jeremiah S. Black	M–43	May 1, 1951
	Elmer A. Sperry	M–43	Feb. 15, 1951
	Thomas Nuttall	M–43	Oct. 27, 1951
Pope & Talbot, Inc. (Intercoastal Service)	Albert S. Burleson	M–42	Apr. 10, 1951
	M. M. Guhin	M–42	Apr. 2, 1951
Prudential Steamship Corp. (Atlantic-Mediterranean Service).	Lindwood Victory	M–34	July 27, 1951
	Clarksville Victory	M–45	Jan. 29, 1952
American President Lines (Atlantic-Straits Service).	Anchorage Victory	M–20	Mar. 7, 1951

All of the foregoing vessels are Libertys, except the last three, which are Victorys. Notice of hearing with respect to these charters was published in the Federal Register of August 20, 1952, and a hearing was held to receive evidence relative to the following issues:

1. Whether the services under consideration are required in the public interest;

2. Whether such services will be adequately served without the use therein of the vessels involved; and

3. Whether privately owned American-flag vessels are available for charter by private operators on reasonable conditions and at reasonable rates for use in such services.

The examiner has recommended that conditions exist justifying the continuance of the charters of Alaska Steamship Company, Coastwise Line, American President Lines, Ltd., and Prudential Steamship

Corporation, upon the conditions originally certified by us, except that the charter of Prudential Steamship Corporation should be modified to limit its duration with respect to one of the Victory vessels to such time as the *Newberry Victory* is returned to the company's fleet; and that conditions do not exist justifying the continuance of the charters of Pacific-Atlantic Steamship Company and Pope & Talbot, Inc., because American-flag Liberty vessels are available for charter by private operators on reasonable conditions and at reasonable rates for use in their respective intercoastal services. Exceptions to the examiner's recommended decision were filed, and the matter was argued orally before us. Our conclusions differ in some respects from those of the examiner.

Our findings with respect to Alaska Steamship Company and Coastwise Line are not included herein and will be issued shortly in a supplementary report.

Before considering separately each service here involved, a general statement of the availability of privately owned American-flag vessels is desirable. The examiner has found that, at the conclusion of the hearing on September 26, 1952, there were about 30 American-flag Liberty-type vessels without employment and available for charter by private operators. We may take official notice that an even larger number of such vessels are presently without employment. The Committee for the Promotion of Tramp Shipping (hereinafter referred to as "the Committee") offered approximately 30 Liberty-type vessels for bareboat charter for a period of one year at a monthly bareboat rate of from $10,000 to $12,000, or at a monthly time-charter rate of from $50,000 to $53,000. Six named Libertys, or suitable substitutes, were offered by the Committee at the bareboat rate of $7,987.50 per month for from 8 to 12 months, with an option of East or West coast delivery. The Committee offered two other named Liberty vessels for 12 months at a bareboat rate of $8,000 per month, with East coast delivery. In addition to the specific vessels offered by the Committee, witnesses testified that privately owned Liberty vessels could be time charted at rates ranging from $34,000 to $39,000 per month, for periods of from one and a half to four months, and that long-term time charters could be made as low as $36,000 per month. Furthermore, there is evidence that recently three Libertys have been time chartered to Military Sea Transportation Service at $1,275 a day, and that one Liberty has been time chartered to a private operator for a round voyage in the intercoastal service at $35,500 per month.

There is no evidence that privately owned Victory ships are presently being offered for charter. However, as substitutes, the Committee offered two C–2 type vessels at a time-charter rate of $65,000 per month

and one C1–B type vessel at a bareboat-charter rate of $13,000 per month. The bareboat charters offered by the Committee were generally to follow the Government bareboat form, excluding, however, charter hire subject to profit sharing, financial qualifications, operating limits, the mutual 15-day termination clause, etc.

We have no difficulty in reaffirming that the services in which all the chartered vessels under consideration are engaged are in the public interest. Our findings with respect to adequacy of service and availability of privately owned vessels are separately stated below.

Pacific-Atlantic Steamship Company and Pope & Talbot, Inc.

Pacific-Atlantic Steamship Company (hereinafter referred to as "Pacific-Atlantic") and Pope & Talbot, Inc. (hereinafter referred to as "Pope & Talbot") operate regular berth services in the intercoastal trade. Pacific-Atlantic operates with two owned Victorys and three Libertys chartered from the Government pursuant to our findings in Docket No. M–43. Pope & Talbot operates with four owned Victorys and two Libertys chartered from the Government pursuant to our findings in Docket No. M–42. The vessels of both operators recently have been substantially full on both eastbound and westbound voyages. The record is convincing that the intercoastal trade would not be adequately served without the use therein of the five Liberty vessels under consideration or suitable substitute vessels.

Evidence relating to the state of the present charter market has been stated above. Six Libertys have been offered by the Committee at a bareboat rate of $7,987.50 per month, with an option of East or West coast delivery. This rate is the equivalent of the Government bareboat rate, which is 15 percent of the statutory sales price. The evidence indicates that several other Liberty vessels are available for charter at approximately the same rates.

Pacific-Atlantic, during the last six or eight months, has chartered thirteen privately owned Libertys, for eastbound intercoastal voyages only, at monthly time-charter rates of from $45,000 to $50,000 per month. No efforts were made by Pacific-Atlantic to charter vessels for round-trip intercoastal voyages, although the company's witness stated that such charters were available at a time-charter rate of about $40,000 per month. Pope & Talbot also has chartered privately owned Libertys for eastbound intercoastal voyages only, to accommodate the peak movement of lumber from the Pacific Northwest, including ten within the last two months at a time-charter rate of $45,000 per month.

Counsel for Pacific-Atlantic argues that the Government rate is not necessarily reasonable, and that a reasonable rate should bear

some relation to the ability of the service to pay out of operating income. Counsel for both intercoastal operators argue that the exclusion of the mutual 15-day cancellation clause renders the private charter terms unreasonable. Counsel for Pope & Talbot point out that it has two owned C–3 type vessels under charter to Military Sea Transportation Service.

We hold that the Government bareboat rate of $7,987.50 per month is not an unreasonable rate, and that where vessels are available from private owners at substantially the same rate for as short a time as eight months, or at substantially equivalent time-charter rates for the three-month period required for a round intercoastal voyage, the private charter rates and conditions are reasonable. Further, we hold that the absence of a 15-day cancellation clause does not render the private charters unreasonable. This mutual clause was included in the Government charters primarily to protect the public interest and to permit the protection of privately owned vessels against competition from Government chartered vessels, and is not an usual term in private charters. The Pope & Talbot charters to Military Sea Transportation Service were last renewed in August 1952 for a four-month period, with the mutual right of termination thereafter on 20 days' notice. Pope & Talbot may be able to regain these vessels in the near future, but whether it does so cannot affect our decision here where privately owned Libertys are available on reasonable conditions and at reasonable rates to replace the Government Libertys now chartered. The continued use of these five Government Libertys in the intercoastal services of Pacific-Atlantic and Pope & Talbot cannot be justified under the statute.

Prudential Steamship Corporation

Prudential Steamship Corporation (hereinafter referred to as "Prudential") operates a regular berth service between United States Atlantic ports and Mediterranean ports with two owned Victorys and two Victorys chartered from the Government pursuant to our findings in Docket Nos. M–34 and M–45. Prudential also owns the *Newberry Victory*, now under repairs, which the company intends to put back into service when repairs are completed some time in January 1953. Prudential has recently had under time charter the *Jefferson City Victory*, a privately owned vessel, at a rate of $61,000 per month. This charter is now terminated and the vessel has been redelivered to the owner.

When the vessel presently undergoing repairs is returned to Prudential in January 1953 the company will have three owned Victorys for use in its Mediterranean service. Prudential, in Docket No. M–

45, proved a need for only four vessels for this service. The company would, in any event, have to show an additional need for this service if more than one Government charter were to be continued.

The Committee contends that Libertys can be, and have been, used by Prudential in this service. The Committee contends further that Prudential had an obligation to replace its Government-chartered Victorys with the two C–2 type vessels that the Committee offered for time charter. The Committee also argues that the C1–B type vessel, which it offered, had special features which made it suitable for operation in this service.

We do not believe that Libertys, or the C1–B type vessel offered by the Committee, are suitable for use in this service. The two C–2 type vessels offered by the Committee, however, are suitable for operation in this service, and it is not contended by Prudential that the time-charter rate for those vessels is unreasonable. Prudential argues that the C–2 type vessels were offered by a competitor on a time-charter basis, and that it would be reluctant to time charter vessels from a competitor. The competition claimed by Prudential appears to be extremely remote. We are therefore unable to find that privately owned vessels are not available for charter on reasonable conditions and at reasonable rates for use in this service. We conclude that existing conditions do not justify the continuance of the charter of one of the two Government-owned Victorys herein under consideration, or the continuance of the charter of the other Government-owned Victory beyond the time when repairs are completed on the *Newberry Victory*.

American President Lines, Ltd.

American President Lines, Ltd. (hereinafter referred to as "APL") operates a regular berth service between Atlantic ports and ports in the Straits Settlements and Indonesia (Trade Route No. 17) with three owned Victorys and one Victory chartered from the Government pursuant to our findings in Docket No. M–20. It was testified that five vessels are needed to make the required frequency of thirteen sailings a year, and that it is presently necessary to shut out cargo from time to time. The Government-owned Victory, chartered to APL, sailed in mid-September 1952 from the Atlantic, and her round voyage will require about four months. The company's witness testified that, prior to her sailing, APL attempted to find a privately owned substitute vessel but was unsuccessful, and he indicated that APL was reluctant to time charter either of the C–2 type vessels mentioned above because of their ownership by a competing operator. The wit-

ness stated that new efforts would be made to find a substitute before the Government-owned vessel completed her voyage.

As stated above, the evidence in this case does not disclose that Victory vessels are presently offered for charter by private operators. We do not believe that Libertys, or the C1–B type vessel offered by the Committee, are suitable for this service, for the reason already stated with respect to Prudential. As in the case of Prudential, however, we believe that the claimed competition between APL and the owner of the C–2 type vessels offered by the Committee is remote, and we are unable to find that a privately owned vessel is not available for charter on reasonable conditions and at reasonable rates for use in this service. We conclude that existing conditions do not justify the continuance of the charter of the Government-owned Victory herein under consideration beyond the termination of the current voyage.

FINDINGS, CERTIFICATION, AND RECOMMENDATIONS

On the basis of the evidence considered, we find and hereby certify to the Secretary of Commerce that conditions do not exist justifying the continuance of the charters of three Liberty vessels to Pacific-Atlantic Steamship Company, two Liberty vessels to Pope & Talbot, Inc., two Victory vessels to Prudential Steamship Corporation, and one Victory vessel to American President Lines, Ltd.

(Sgd.) A. J. WILLIAMS,
Secretary.

NOVEMBER 5, 1952.

FEDERAL MARITIME BOARD

No. M–55

ANNUAL REVIEW OF BAREBOAT CHARTERS OF GOVERNMENT-OWNED, WAR-BUILT, DRY-CARGO VESSELS, 1952, UNDER PUBLIC LAW 591, EIGHTY-FIRST CONGRESS

SUPPLEMENTARY REPORT OF THE BOARD

Our previous report in this proceeding was served on November 12, 1952, but our findings with respect to two Libertys chartered to Alaska Steamship Company and three Libertys chartered to Coastwise Line were not included therein. A general statement of the scope of the proceeding and of the availability of privately owned American-flag vessels has been made in our previous report to which this report is a supplement.

Alaska Steamship Company

Alaska Steamship Company (hereinafter referred to as "Alaska Steam") operates a regular berth service between ports on Puget Sound and various ports in Alaska with two reefer vessels, seven C1–MAV–1 type vessels, and two Libertys, all chartered from the Government, and with nine owned vessels. The two Libertys which were chartered to Alaska Steam pursuant to our findings in Docket No. M–31 are the only ones presently under consideration. Those vessels were delivered to Alaska Steam in June and July 1951, and have had radar and other special equipment necessary for the Alaska trade installed at Alaska Steam's expense. The vessels are chartered to Alaska Steam at the basic bareboat rate of 15 percent of the statutory sales price for Government-owned, war-built Libertys under the Merchant Ship Sales Act of 1946, of which 8½ percent is mandatory and 6½ percent is payable if earned. Charter hire for those vessels ceases during periods of idle status.

The witness of Alaska Steam testified that his company's service is of a highly seasonal nature, beginning ordinarily in April and increasing to a peak in May, June, July, and August. He also testified

that the two Liberty vessels here under consideration were going into idle status at the time of hearing because of the "lack of sufficient cargo offerings to warrant their continuance" in service. The record discloses, however, that those vessels have, since the time of their delivery to Alaska Steam, in June and July 1951, to the time of hearing, been continuously operated in the service of Alaska Steam without interruption during the winter months.

Alaska Steam contends that privately owned vessels are not presently available for charter in the Alaska trade on reasonable conditions and at reasonable rates because of the short period for which the vessels are needed, and because it is not possible to charter privately owned Libertys at the minimum rate of 8½ percent of the statutory sales price (approximately $4,500 per month), with charter hire ceasing during periods of idle status. Alaska Steam contends that both the minimum 8½ percent charter rate and the off-hire privilege are necessary for its service in view of the fact that from the time the vessels entered service in June and July 1951 to June 1952 the company has incurred a substantial loss from their operation.

Congress in 1947 and 1948, by Public Law 12, Eightieth Congress, First Session, and by Public Law 866, Eightieth Congress, Second Session, enacted special legislation authorizing the private operation of Government vessels for the rehabilitation of the Alaska service under special conditions, which for all practical purposes involved no cost of hire to the operator. This authority has now expired, and, although Congress recognized that the continuation of the Alaska service might require Government-chartered vessels,[1] an operator in the Alaska service, like any other applicant for the bareboat charter of Government-owned, war-built, dry-cargo vessels, must meet the applicable requirements of Public Law 591.

The two Government-owned Libertys were chartered to Alaska Steam in the summer of 1951 primarily to meet an abnormal movement of military cargo, which was expected to continue for an indefinite period. The record in this proceeding does not disclose that this need is still continuing, but, on the contrary, the witness for Alaska Steam testified that the present lay-up is due to the lack of sufficient cargo offerings. The examiner has correctly found that even without these vessels "the Alaska trade is adequately served at present." We are unable, therefore, to make the statutory finding that the service of Alaska Steam is not adequately served without the two Government-chartered Libertys. Under the circumstances we find it unnecessary to decide whether privately owned vessels are available for charter on reasonable conditions and at reasonable rates for use in this service.

[1] See 81st Cong., 2d sess.: Senate Report No. 1783, p. 5; House Report No. 2353, p. 6.

Coastwise Line

Coastwise Line (hereinafter referred to as "Coastwise") operates a regular berth service between ports in California, Oregon, Washington, British Columbia, and Alaska with two owned Libertys, two Libertys chartered from private owners, and three Libertys chartered from the Government pursuant to our findings in Docket Nos. M–24 and M–30 and delivered to Coastwise in April and June 1951. The three Government-chartered Libertys have also been equipped at charterer's expense with radar and other special equipment necessary for their operation in the Alaska trade. Those vessels are chartered to Coastwise at the bareboat rate of 15 percent of the statutory sales price.

The witness of Coastwise testified that the over-all operation of Coastwise provides (a) a Pacific coastwise service; (b) a service between Pacific coast ports and Alaska ports; (c) a service to British Columbia ports as a part of the above services; and (d) a service between Alaska ports. The witness stated that the Pacific coastwise trade is unbalanced, with southbound cargo predominating, and that the Alaska trade is also unbalanced, with northbound cargo predominating. In 1947 Coastwise added an Alaska service to its other services so as to achieve a balanced operation. Alaska had not previously been provided with regular common-carrier service from California, Oregon, or southwest Washington ports.

The three Government-owned Libertys have, since the time of delivery to Coastwise in April and June 1951, to the time of hearing, been operated continuously in the service of Coastwise. The witness of Coastwise testified that the company expected to place each vessel in idle status as she returned from her current voyage. As in the case of Alaska Steam, we are unable to make the statutory finding, necessary for the continuance of these charters, that the service of Coastwise is not adequately served without the three Government-chartered Libertys.

FINDINGS, CERTIFICATION, AND RECOMMENDATIONS

On the basis of the evidence considered, we find and hereby certify to the Secretary of Commerce that conditions do not exist justifying the continuance of the charters of two Liberty vessels to Alaska Steamship Company and three Liberty vessels to Coastwise Line.

(Sgd.) A. J. WILLIAMS,
Secretary.

NOVEMBER 20, 1952.

FEDERAL MARITIME BOARD

No. S–18

PACIFIC TRANSPORT LINES, INC.—APPLICATION FOR OPERATING-DIFFERENTIAL SUBSIDY ON TRADE ROUTE 29, SERVICE 2

No. S–19

PACIFIC FAR EAST LINE, INC.—APPLICATION FOR OPERATING-DIFFERENTIAL SUBSIDY ON TRADE ROUTE 29, SERVICE 2

REPORT OF THE BOARD ON PETITION FOR RECONSIDERATION

American President Lines, Ltd. (hereinafter called "APL"), an intervener in this proceeding, filed on December 10, 1952, a petition for reconsideration of our decision of April 8, 1952, on the issues under section 605 (c) of the Merchant Marine Act, 1936 (hereinafter called the "Act"), and for reconsideration of our administrative determination of November 21, 1952, under section 601 and other sections of the Act, approving the subsidy applications of the two applicants for operation on Trade Route No. 29, and for public hearing thereon. APL simultaneously applied for leave to introduce as new evidence in the case traffic data for the route for 1950, 1951, and the first half of 1952.

Our decision of April 8, 1952, under section 605 (c) was made after extensive public hearings and arguments participated in by APL. Section 601 and other sections of the Act, upon which our November 21, 1952, action was based, contemplate administrative determinations and do not provide for public hearings. On June 17, 1952, States Steamship Company, an intervener, requested public hearings and oral argument on issues arising under section 601 and other pertinent sections of the Act. This request was denied, and we see no reason now to change our position on this point in the present instance at the request of APL.

Apart from the issue as to a public hearing, we must deny the application of APL for reconsideration of our decision of April 8, 1952, and of our administrative determination of November 21, 1952, and for leave to file additional evidence, for the reasons set forth below:

The application to reconsider the decision of April 8, 1952, is denied on two grounds: first, because it was not filed within the time prescribed by our Rules of Procedure, section 201.233 (6 F.R. 4325), and secondly, because in any event it is without merit.

Section 201.233 of the Rules of Procedure provides:

Time for filing petition for reargument, etc. A petition for reargument or for reconsideration of final Commission (Board) action must be filed within sixty (60) days after the date of such action.

Eight months elapsed between the date of our decision and the APL application. APL argues that the decision of April 8 was not final until the subsequent administrative determination of November 21 approving the subsidy applications. We hold, however, that the findings under section 605 (c) are entirely distinct from findings required under other sections of the Act. The 605 (c) questions were completely and finally decided in April 1952, except for the determination of possible 605 (c) questions arising between applicants Pacific Transport Lines, Inc. (hereinafter called "PTL"), and Pacific Far East Line, Inc. (hereinafter called "PFEL"), if one of them had failed to qualify under section 601, and other pertinent sections of the Act. Since both PTL and PFEL have qualified for subsidy under our November administrative determination, it has become unnecessary to decide any reserved issues under section 605 (c), in which issues APL was in no event interested. This reservation in no way lessened the finality of our April decision on the matters covered thereby, which included a finding that:

2. The effect of the granting of operating-differential subsidy contracts to both of the applicants (PTL and PFEL) to the extent of their operations on Service 2 of Trade Route No. 29 at the time of the filing of their applications (26 outward sailings for PTL and 58 outward sailings for PFEL) would not be to give undue advantage or be unduly prejudicial as between citizens of the United States (including APL) in the operation of vessels on the route. [Bracketed words added.]

Our decision of April 8, 1952, gave careful consideration to the extensive arguments of APL and to its position as a competitor. Compare *I.C.C.* v. *Jersey City*, 322 U. S. 503, 514; *Panhandle Eastern Pipe Line Co.* v. *Public Service Commission*, 332 U. S. 507.

In any event, the petition of APL for reconsideration of our April decision and also of our November administrative determination must be denied on the merits. APL contends that Trade Route 29 is now over-tonnaged and that current traffic data shows that APL and other American-flag lines now provide adequate service to take care of the regular commercial cargoes,

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excluding iron ore, without any service from PTL or PFEL. APL then raises the issue of adequacy of service, and charges that both our April decision and November administrative determination reached conclusions as to the service offered on the route based on traffic data which did not extend beyond 1949, which conclusions APL says are disproved by the later data which APL offers as a supplement to the record.

We may repeat what we said in our April report that under section 605 (c) adequacy of service is not an issue unless we first find that applicant's proposed service is in addition to existing services, or unless we find that the granting of a subsidy would give undue advantage or be unduly prejudicial as between citizens of the United States. But we expressly found to the contrary on both of these issues, so that adequacy of service was not reached as an issue. But APL pursues the argument, contending that neither a decision on the question of undue prejudice under section 605 (c) nor an administrative determination on the needs of the service under section 601 should be made in 1952 on a record which contains evidence running only through 1949. The answer to this contention is that before the April 1952 decision we had traffic data running through June 1951 supplied in part by APL and in part by PFEL, and before the November 1952 administrative determination we had authoritative traffic data from our own records running through 1951 with some supplemental information for 1952, submitted in support of staff recommendations, all of which did not contradict, but, on the contrary, supported the conclusions indicated by the earlier data.

(Sgd.) A. J. WILLIAMS,
Secretary.

DECEMBER 31, 1952.

2. Quid Pro Quo and Related Costs

Three basic agreements cover the so-called "quid pro quo" costs in issue in this proceeding. The first agreement was between the Pacific Maritime Association (PMA), representing West Coast operators, and the Seaman's International Union of America (SIU). It was effective June 16, 1965 and applied to unlicensed West Coast seafarers. Under Section 3(c) of that agreement "[a]s a Quid Pro Quo for any reductions in manning in comparison with existing conventional manning on PMA vessels of comparable class or type in operation on June 16, 1975" the operators agreed to pay into trusteed funds for a maximum of five years (i) "a sum equal to 50% of the base pay of the specific rating or ratings eliminated from conventional manning" and (ii) continued contributions to the "Pension Fund, Welfare Fund, Dispatch Hall Fund and Medical Examination Fund for the rating or ratings eliminated. . . ." AAS Ex. 155, pp. 8-9. Under this agreement the unions agreed to a manning scale of 45 men for new automated PMA vessels as compared to the manning scale of 48 to 52 men crews on conventional ships. Quid pro quo payments were made, however, according to Staff Counsel and unrebutted by the operator for most vessels, on the basis of a 58-man crew. These "quid pro quo" terms have been carried forward into all successive collective bargaining agreements between PMA and SIU. (AAS Ex. 166.)

The second quid pro quo agreement was negotiated by PMA and SIU in December 1969. The agreement provided that for certain automated vessels then under construction (Matson's Hawaiian Enterprise, APL's Pacesetter and PFEL's LASH vessels) a further one-man reduction in manning scales in the three unlicensed departments was authorized, provided the operators created a shoreside job for each of the three eliminated positions. Alternatively, with respect to the Sailor's Union of the Pacific and the Marine Cooks and Stewards Union the operators could continue to make quid pro quo payments under the 1965 agreement, but at a rate of 100% instead of 50% of base wages. (AAS Ex. 160; AAS Ex. 166, pp. 29-32; PFEL Ex. 2.)

The third quid pro quo cost agreement was negotiated between PGL and the National Maritime Union (NMU), effective from December 1, 1970 to June 15, 1972. The agreement permitted the removal of 53 unlicensed ratings on PGL's four MAGDALENA-class combination passenger-cargo ships when operated as cargo vessels in return for "compensatory payments" of $2.47 per day for each such eliminated position.[4] (PGL Ex. B, pp. 2-3.)

[4] The $2.47 per day represents the per diem contributions as of Dec. 1, 1970 required to be made by all NMU carriers into the NMU Welfare, Employment Security Training and Joint Employment Funds. Subsequently, PGL transferred its ships to U.S. West Coast operation and terminated its agreement with the NMU for these vessels as of June 15, 1972.

23, 1952, receiving evidence on the single issue of whether privately owned American-flag vessels were then available for charter from private operators on reasonable conditions and at reasonable rates for use in the service contemplated, and hearing from counsel of interested parties.

Our prior report of November 5, which we are asked to reconsider, modified a recommended decision of the examiner which considered the charter of a number of Government-owned vessels to six operators, including the *Anchorage Victory* to APL. The examiner reviewed the evidence with respect to the three issues arising under Public Law 591 and reported that there was adequate evidence in the record (1) that the respective services of the vessels under consideration continued to be in the public interest; (2) that APL's Atlantic-Straits service would not be adequately served without the use therein of the *Anchorage Victory;* and (3) that there was no suitable privately owned American-flag vessel available for charter by private operators on reasonable conditions and at reasonable rates for use in the service. Based on these findings, the examiner recommended that the Board should certify to the Secretary of Commerce that conditions existed justifying the continuance of the charter of the *Anchorage Victory* to APL.

In our report of November 5 we reached a conclusion different from the examiner on the availability of a suitable vessel to replace the *Anchorage Victory* from private owners because of testimony given at that time that two C–2 type vessels were then available for charter from private owners.

The testimony offered by APL at the latest hearing was in all respects confirmatory of the statements set forth in the affidavit already referred to, that no privately owned vessels are now available for charter (other than Liberty-type vessels not suitable for this trade), and this testimony was not contradicted. No other evidence was offered.

Based on the original testimony in this case reviewed by the examiner, and in accordance with the examiner's recommendations, we can now make the first two findings recommended by the examiner: (1) That the service under consideration is in the public interest; and (2) that the service would not be adequately served without the use therein of a vessel of the type of the *Anchorage Victory*. The only real question to be decided is whether we should reconsider our earlier determination that suitable privately owned vessels were available for charter from private

"PFEL cites the possibility of effecting crew reductions by executing 'quid pro quo' agreements with their affected unions. The Board considered that subsidization of 'quid pro quo' payments made to compensate for crew reductions on PFEL's LASH vessels is inappropriate since PFEL was advised at the time of award of the CDS contract for these LASH vessels that crew quarters for not more than 38 men exclusive of cadets was being approved and the Board has approved herein a crew complement consistent with that CDS action." (*Id.* at 694.)

The statement concluded with a footnote citing the Docket A-42 decision. Based on the decision in A-43, PFEL has not been paid ODS for any quid pro quo costs incurred for its LASH vessels. PGL has no quid pro quo agreement with respect to its LASH vessels.

(iii) *A-44.* In Docket A-44, the Board considered the subsidizable manning scale of four combination passenger-cargo vessels of PGL operated only as freighter vessels and related compensatory payments under the 1970 PGL/NMU agreement. The Board determined on January 4, 1971, that "the requested determinations are not appropriate for consideration under Section 603(c) (1) (A) (ii) [of the 1970 Act] . . ." *Prudential-Grace Lines, Inc.*, 12 SRR 113. On August 20, 1973, the Board (i) approved operation of the MAGDALENA-class vessels as freighter vessels under the subsidy contract, (ii) disallowed the wage and subsistence costs for a crew complement exceeding 53 men when the MAGDALENA-class vessels operated as freighter vessels, and (iii) concluded as follows regarding "compensatory payments":

"The cost incurred by the Operator with respect to 'compensatory payments' to the NMU on account of reduction in crew complement because of conversion of the MAGDALENA-Class vessels from combination passenger and cargo vessels to cargo vessels is not fair and reasonable and shall be disallowed for subsidy rate-making, subsidy payment and reserve fund and recapture purposes." (MSB Minutes 8/20/1973 p. 6039.)

On May 2, 1974, the Board decided to reopen and reconsider the aforesaid actions of August 20, 1973, in *Prudential-Grace-Manning Scales*, 14 SRR 657. On August 7, 1975 the Board approved the subsidized freighter operation of the vessels with a manning scale of 54 men and disallowed the wage and subsistence costs for a greater crew complement. It further determined that:

"The outstanding issue in this docket of the subsidization of PLI's compensatory payments is directly presented in Docket No. S-338. We therefore decide that it is more appropriate to defer the final decision on that matter until a final decision is rendered in Docket S-338 and consequently to terminate Docket A-44.

The final determination whether or not the cost incurred by the operator with respect to 'compensatory payments' to the NMU on account of reduction in crew complement because of conversion of the M-Class vessels from combination passenger and cargo vessels to cargo vessels is fair and reasonable and shall be allowed for subsidy rate-making, subsidy payment and reserve fund and recapture purposes, is deferred until the Board renders decision in the proceeding Docket No. S-338, . . ." (*"Prudential-Grace Lines—Manning Scales*, 16 SRR 201, 202, 203.)

No subsidy has been paid for PGL's compensatory payments.

(iv) *PGL's Jet Class.* On March 12, 1973, the Board considered the subsidizable manning scale of two Jet Class automated vessels of PGL transferred from U.S. Atlantic Coast operation to U.S. Pacific Coast operation and quid pro quo costs incurred in that transfer under the terms of the 1965 PMA/SIU agreement. PGL requested approval of a 39-man crew complement (an increase of one member over that complement used in Atlantic Coast operation). The Board approved for subsidy purposes the requested manning scale but not the quid pro quo costs, with the following statement:

"Note was made of the fact that in the past, Board policy has been to disallow 'quid pro quo' payments where there were negotiations to effect reductions in crews down to a Board approved level. Under certain mitigating circumstances exceptions to this policy have been made and some 'quid quo pro' agreements have been approved by the Board. No similar circumstances exist in the instant case and the Board finds no basis to alter its policy in this instance, particularly in view of the fact that PGL operated these vessels on the Atlantic Coast free of such costly agreements.

* * * * * * *

Found and determined that costs incurred in the form of 'Quid Pro Quo' payments made by Prudential-Grace Lines, Inc., to compensate for crew reductions on the C4-S-64b design type vessels are not necessary for efficient and economical operation and shall be disallowed for all subsidy purposes." (MSB Minutes 3/12/1973, at 5605).

PGL has not received ODS for quid pro quo costs incurred with respect to its Jet Class vessels.

A fifth action of the Board is not subject to review in this proceeding. In Docket A-60 the Board determined the subsidizable manning of four proposed Ro/Ro vessels of States and the possibility of subsidy for any quid pro quo payments with regard to such vessels. The Board, as affirmed by the Secretary of Commerce on August 18, 1972, approved a maximum of 35 men for each of the vessels and tentatively stated with respect to quid pro quo payments:

"It should be clearly understood that consistent with previous Board decisions 'quid pro quo' payments for the purpose of effecting crew reductions to the manning scales approved herein are not eligible for ODS assistance. States is being advised herein, prior to the award of CDS contract, that crew quarters for not more than 35 men exclusive of cadets are approved and that a manning scale for not more than 35 men exclusive of cadets is approved." *States Steamship Co.—Manning Scales*, 13 SRR 99, 107 (tentative decision, finalized June 29, 1972).

The Board's referral to hearing in this proceeding did not contemplate that this disallowance of subsidy for quid pro quo payments would be reconsidered. The quid pro quo disallowance in Docket A-60 did not involve problems of transition from the 1936 Act to the 1970 Act, as did other quid pro quo actions considered herein, and States' request for a Section 606(1) hearing at the time of referral did not include a request for reconsideration of this matter.

Further, the Board's action in Docket A-60 cannot be subject to administrative reconsideration. The intent of Section 603(c) of the 1970 Act is that "[n]o costs incurred in connection with those officers or members of the crew that have been found to be unnecessary for the efficient and economical operation of the vessel by the Secretary of Commerce . . . be allowed if the Secretary has made his finding prior to award of a contract for the construction or reconstruction of a vessel."[5] On June 16 and 29, 1972, the Board found prior to award of a CDS contract that officers and crew members on States' Ro/Ro vessels in excess of 35 were unnecessary for efficient and economical operation and that quid pro quo payments would not be subsidized for effecting crew reductions to the level of Board approved manning.[6] Therefore, under Section 603(c) the costs relating to those excessive men including quid pro quo must be excluded from subsidizable collective bargaining costs. This result is consistent with the legislative purposes of Section 603(c) of the 1970 Act that requires the Board to make a determination of disallowed manning and related costs prior to the time of the CDS contract so that the owner is aware of the subsidy available for his investment planning purposes and so that administrative litigation over disallowed items is concluded.[7]

Aside from these five actions of the Board no other past Board disallowance of subsidy for quid pro quo costs have been brought to the attention of the Board in this proceeding. If there are such other actions, the principles enunciated herein will be used as a guideline in considering whether to reconsider disallowance of subsidy for those actions.

4. *Hearings*

The operators affected consistently sought a hearing under Section 606(1) of the Act on the subsidization of quid pro quo expenses. Section 606(1) of the 1936 Act was changed by the 1970 Act only to substitute the term "Secretary of Commerce" for the term "Commission." The provision now provides:

"Every contract for an operating-differential subsidy under this title shall provide (1) that the amount of the future payments to the contractor shall be subject to review and readjustment from time to time, but not more frequently than once a year, at the instance of the Secretary of Commerce or of the Contractor. If such readjustment cannot be reached by

[5] S. Rep. No. 91-1080, 91st Cong., 2d Sess. 35 (1970). It follows that the determination is not subject to review under Section 606(1) of the Act. *States Steamship Co.—ODS Rates*, 13 SRR 241, 246 (1973), but is subject to whatever judicial review is available.

[6] The Board's finding was as follows: "All collective bargaining costs of those officers and ratings actually employed on these proposed subsidized vessels, to the extent in excess of the costs which would be incurred in the employment of . . . [35] officers and ratings . . . are not necessary for the economical and efficient operation of said vessels, and shall be disallowed for subsidy ratemaking and subsidy payment purposes."

While the Board's finding was addressed to "officers and ratings actually employed on these . . . vessels," it follows *a fortiori* that costs for excessive officers and ratings not actually employed on the ships are also disallowed.

[7] *Hearings on S. 3287 Before the Merchant Marine Subcomm. of the Senate Comm. on Commerce*, 91st Cong., 2d Sess. 79 (1970) (hereinafter referred to as Senate Hearings); *Hearings on H.R. 15424, H.R. 15425 and H.R. 15640 Before the Subcomm. on Merchant Marine of the House Comm. on Merchant Marine and Fisheries*, 91st Cong., 2d Sess. 187, 629, 642 (1970) (hereinafter referred to as House Hearings); see H. Rep. No. 91-1073, 91st Cong., 2d Sess. 41 (1970); 116 Cong. Rec. 16598 col. 2 (1970).

FEDERAL MARITIME BOARD

No. S–18 (Sub. No. 1)

PACIFIC TRANSPORT LINES, INC.—APPLICATION FOR WRITTEN PERMISSION UNDER SECTION 805 (a) OF THE MERCHANT MARINE ACT, 1936, TO CONTINUE TO ENGAGE IN DOMESTIC SERVICE BETWEEN CALIFORNIA PORTS AND THE HAWAIIAN ISLANDS

James L. Adams for applicant.

Alan B. Aldwell for Matson Navigation Company, and *Odell Kominers* and *William F. Ragan* for Pacific Far East Line, Inc., inteveners.

Allen C. Dawson, Joseph A. Klausner, and *Max E. Halpern* for the Board.

FINDINGS AND CONCLUSIONS OF THE BOARD

1. No written permission is required under section 805 (a) of the Merchant Marine Act, 1936, to permit Mrs. Helene Irwin Fagan to continue to hold her present stock interest in Matson Navigation Company.

2. Until further order of the Board, Pacific Transport Lines, Inc., is hereby granted written permission under section 805 (a) of the Act for its C–3 vessels recommended for operating-differential subsidy on Service 2 of Trade Route 29 to call at Hawaii outbound and homebound on approximately alternate sailings not to exceed 13 outbound and 13 homebound sailings annually, each such call to be subject to the prior approval of the Maritime Administrator.

3. The permission herein granted will not result in unfair competition to any person operating exclusively in the California/Hawaii trade, nor will it be prejudicial to the objects and policy of the Act.

The Board's report on this matter will follow (see 4 F.M.B.146).

(Sgd.) A. J. WILLIAMS,
Secretary.

DECEMBER 31, 1952.

FEDERAL MARITIME BOARD

No. M–55

ANNUAL REVIEW OF BAREBOAT CHARTERS OF GOVERNMENT-OWNED, WAR-BUILT, DRY-CARGO VESSELS, 1952, UNDER PUBLIC LAW 591, 81ST CONGRESS

REPORT ON PETITIONS FOR RECONSIDERATION AND TO TAKE FURTHER EVIDENCE (COASTWISE LINE AND ALASKA STEAMSHIP COMPANY)

The Coastwise petition was filed on December 15, 1952, and the Alaska petition on December 19, 1952. These petitions are considered together. Memorandum in opposition to the Coastwise petition was filed December 19, 1952, and in opposition to the petition of Alaska on Januray 2, 1953, by counsel for the Committee for the Promotion of Tramp Shipping. The same counsel filed motions to dismiss the two petitions on January 2, 1953.

All the documents above mentioned, filed in opposition to the petitions, are considered to be replies to the petitions as authorized by our Rules, section 201.234. Some of those documents were not filed until after the expiration of the 10-day limit set by section 201.234, and no consideration has been given to those documents not filed within time.

The petitions for reconsideration and to take further evidence are denied without prejudice to petitioners' right to bring new proceedings under Public Law 591. The Board recommends to the Maritime Administrator that the vessels referred to in the petitions be held without removal of the special Alaska-trade fittings, pending decision by the Board upon new proceedings under Public Law 591, provided petitioners respectively file such proceedings within ten days from the date of service of this report.

By the Board.

(Sgd.) A. J. WILLIAMS,
Secretary.

JANUARY 9, 1953.

FEDERAL MARITIME BOARD

No. S–18 (Sub. No. 1)

PACIFIC TRANSPORT LINES, INC.—APPLICATION FOR WRITTEN PERMISSION UNDER SECTION 805 (a) OF THE MERCHANT MARINE ACT, 1936, TO CONTINUE TO ENGAGE IN DOMESTIC SERVICE BETWEEN CALIFORNIA PORTS AND THE HAWAIIAN ISLANDS

Temporary permission is granted to Pacific Transport Lines, Inc., to continue, as a subsidized operator on Service 2 of Trade Route No. 29, its present Hawaiian service, and permission is granted for its majority stockholder to continue to own a stock interest in Matson Navigation Company.

James L. Adams for applicant.

Alan B. Aldwell for Matson Navigation Company, and *Odell Kominers* and *William F. Ragan* for Pacific Far East Line, Inc., interveners.

Allen C. Dawson, Joseph A. Klausner and *Max E. Halpern* for the Board.

REPORT OF THE BOARD

Pacific Transport Lines, Inc. (hereinafter called ("PTL"), requests our written permission under section 805 (a) of the Merchant Marine Act, 1936, as amended (hereinafter referred to as the "Act"), (1) to continue, as a subsidized operator on Service 2 of Trade Route No. 29,[1] its service to and from the Hawaiian Islands, and (2) for its majority stockholder and wife of a director to continue to own a stock interest in Matson Navigation Company, which company is engaged in the service between California and Hawaii.

A public hearing was held before an examiner after notice published in the Federal Register. Matson Navigating Company (herinafter called "Matson") and Pacific Far East Line, Inc., intervened but did not oppose continuation of PTL's present Hawaiian service, nor did they offer any evidence. Counsel for the board took no position as to whether the application should be granted or denied; he pointed out, however, that since Hawaii

[1] PTL's 805 (a) application was filed on May 22, 1952; on December 31, 1952, we executed an operating-differential subsidy agreement with PTL for (freight) Service 2 of Trade Route No. 29.

is not on Trade Route 29, calls there might interfere with PTL's ability to procure Trade Route No. 29 cargoes and might prejudice the objects and policy of the Act.

The examiner recommended that we should grant the 805 (a) application of PTL. Matson filed exceptions to certain findings and statements in the examiner's recommended decision, but did not object to the examiner's conclusion. We agree generally with the conclusion reached by the examiner, although we do not necessarily agree with his reasoning.

Section 805 (a) of the Act provides in part as follows:

> It shall be unlawful to award or pay any subsidy to any contractor * * * if said contractor * * * or any holding company, subsidiary, affiliate, or associate of such contractor * * * or any officer, director, agent, or executive thereof, directly or indirectly, shall own, operate, or charter any vessel or vessels engaged in the domestic intercoastal or coastwise service, or own any pecuniary interest, directly or indirectly, in any person or concern that owns, charters, or operates any vessel or vessels in the domestic intercoastal or coastwise service, without the written permission of the Commission. Every person, firm, or corporation having any interest in such application shall be permitted to intervene and the Commission shall give a hearing to the applicant and the intervenors. The Commission shall not grant any such application if the Commission finds it will result in unfair competition to any person, firm, or corporation operating exclusively in the coastwise or intercoastal service or that it would be prejudicial to the objects and policy of this Act.

The "coastwise service" mentioned in the Act includes service between United States ports and Hawaii.

Three statutory issues are presented in this proceeding: (1) Does PTL or any officer, director, agent, or executive thereof own, directly or indirectly, any pecuniary interest in Matson, and if so, should we grant permission for the continuance of this interest; (2) would the continuation of PTL's Hawaiian service result in unfair competition to any person, firm, or corporation operating exclusively in the coastwise or intercoastal service; and (3) would the continuation of PTL's Hawaiian service be prejudicial to the objects and policy of the Act.

I. Mrs. Helene Irwin Fagan, the majority stockholder of PTL and wife of Mr. Paul I. Fagan, a director of PTL, owns about one-half of one percent of Matson's stock, which was acquired by her through inheritance. PTL argues that, under the laws of the State of California, where Mrs. Fagan is domiciled, her stock interest in Matson is her separate property and not communty property in which her husband has an interest. California Civil Code, section 162. Mrs. Fagan, although not an officer, director, agent, or executive of PTL, has, however, by virtue of her stock

interest, the possibility of exercising control over PTL. We believe that the spirit of the prohibition in section 805 (a) of the Act should apply whether the contracting corporation or its majority or sole stockholder owns a pecuniary interest in a concern engaging in the domestic intercoastal or coastwise service. In view of the above-related circumstances, we conclude that written permission should be granted for Mrs. Fagan to continue to hold her present stock interest in Matson, and our findings and conclusions of December 31, 1952, are modified accordingly.

II. PTL inaugurated its Hawaiian service in July 1950. Since that time, in conjunction with its service on Trade Route No. 29, PTL has made monthly calls at Hawaiian ports on outbound and inbound voyages. This service of PTL is as follows: (1) From California to Hawaii; (2) from Hawaii to Far East ports on Trade Route No. 29; (3) from Far East ports on Trade Route No. 29 to Hawaii; and (4) from Hawaii to California. In addition to the continuation of this service to Hawaii, PTL seeks permission for (1) additional calls inbound during the seasonal peak of the sugar and pineapple traffic, and (2) additional calls inbound when shipments of cargo from the Far East to Hawaii can be booked. PTL would, in any event, have to obtain specific approval from the Maritime Administrator prior to making such additional calls. Matson points out that requests for additional calls should be timely and that the Maritime Administrator should not approve them unless he were satisfied that Matson was unable to lift all cargo offered.

PTL carries only a very small percentage of the total cargo movement between California and Hawaii, and since no operator in this service objects to the continuation of PTL's present Hawaiian service, we find that, under present conditions, such continuation would not result in unfair competition to any person, firm, or corporation operating exclusively in that service.[2]

III. Trade Route No. 29 is designed to provide service between California ports and ports in the Far East. The primary obliga-

[2] Service between California and Hawaii is provided by Matson, PTL, and American President Lines, Ltd. In 1951 the outbound dry cargo movement was approximately 620,000 short tons and the inbound movement approximately 1,000,000 short tons. Matson, as the only carrier providing a regular, permanent, and frequent service, has carried the great majority of this cargo. PTL's carryings per voyage for the approximate two-year period since the institution of its Hawaiian service have averaged only 1,106 long tons outbound and 871 long tons inbound. Hawaii is a regularly scheduled call for the subsidized combination vessels of American President Lines operating on the Round-the-World service and on Service 1 of Trade Route No. 29, but the carryings of American President Lines have been very small in 1951 and 1952; however, the Hawaiian service of American President Lines will increase when this Company meets its contractual obligations with the Maritime Administration for the construction of additional combination vessels for these services.

tion of PTL as a subsidized operator is the maintenance and development of adequate, frequent, and regular service on this route as a whole. Hawaii is not on this route as now described in the subsidy agreement. A subsidized operator is permitted to depart from the described route or to engage in the protected intercoastal or coastwise service (including the service between California and Hawaii trade) only under the special conditions set forth in the Act.

The evidence is convincing, as the examiner has found, that the Hawaiian service of PTL, under presently existing conditions, does not materially detract from PTL's Trade Route No. 29 freight service. Many shippers on PTL's Trade Route No. 29 service also use PTL's Hawaiian service. Large shippers and forwarders of overland cargo, by routing export cars of mixed cargoes destined to the Far East and Hawaii to PTL's pier, can retain control of their traffic, expedite their shipments, and save the cost of drayage from team track to the different piers of the two carriers otherwise serving the respective areas. This gives PTL some advantage in the solicitation of Trade Route No. 29 traffic. Furthermore, the service between Hawaii and ports in the Far East is a part of the foreign commerce of the United States, and PTL's Hawaiian service contributes to its development.

Permission for the continuation of PTL's present Hawaiian service will be granted, subject to the provisions of its operating-differential subsidy agreement, pending further consideration by the Maritime Administrator of the service requirements of PTL's operations on Service 2 of Trade Route No. 29. This permission may be modified or discontinued at any time if new data, presented by the Maritime Administrator or any other interested party, discloses that the further continuation of this service would result in unfair competition to any operator engaged exclusively in the service between Hawaii and the United States, or would be prejudicial to the purposes and policy of the Act. The permission covers only C–3 type vessels of PTL, employed in its subsidized operations on Service 2 of Trade Route No. 29.

FINDINGS AND CONCLUSIONS

1. Permission is granted under section 805 (a) of the Act to permit Mrs. Helene Irwin Fagan to continue to hold her present stock interest in Matson Navigation Company.

2. Until further order of the Board, Pacific Transport Lines, Inc., is hereby granted written permission under section 805 (a)

of the Act for the C–3 type vessels employed in its subsidized operations on Service 2 of Trade Route No. 29 to call at Hawaii outbound and inbound on approximately alternate sailings not to exceed 13 outbound and 13 inbound sailings annually, each such call to be subject to the prior approval of the Maritime Administrator.

3. Under present conditions, the permission herein granted will not result in unfair competition to any person operating exclusively in the service between California and Hawaii, nor will it be prejudicial to the objects and policy of the Merchant Marine Act, 1936.

(Sgd.) A. J. WILLIAMS,
Secretary.

JANUARY 16, 1953.

FEDERAL MARITIME BOARD

No. M–57

ISBRANDTSEN CO., INC.—APPLICATION FOR BAREBOAT CHARTER OF A GOVERNMENT-OWNED, WAR-BUILT, DRY-CARGO VESSEL FOR USE IN THE SERVICE BETWEEN UNITED STATES ATLANTIC AND GULF PORTS AND EUROPEAN CONTINENTAL PORTS, INCLUDING MEDITERRANEAN PORTS

REPORT OF THE BOARD

This proceeding was instituted pursuant to Public Law 591, 81st Congress, upon the application of Isbrandtsen Co., Inc., for the bareboat charter for a 4 to 6 month period of the Government-owned, war-built, dry-cargo vessel SS *Pass Christian Victory* for use as an animal carrier between United States Atlantic and Gulf ports and European continental ports, including ports in the Mediterranean.

Hearing on the application was held before an examiner on January 21, 1953, pursuant to notice in the Federal Register of January 15, 1953. Because of the urgency of the matter, the usual fifteen days' notice was not given. There was no opposition to the application. The examiner's recommended decision was served on January 22, 1953, in which he recommended that we should make the statutory findings necessary for the charter. Counsel for the Board has advised us that he will not file exceptions to the recommended decision of the examiner.

The record is convincing that the service herein under consideration is in the public interest. Applicant's vice president testified that the vessel is urgently needed for the purpose of transporting livestock, principally horses and mules, from United States ports to Mediterranean ports for a period of about 4 to 6 months, or a minimum of three voyages. The SS *Columbia Heights*, an animal carrier owned by applicant, is under charter to the Military Sea Transportation Service until the end of March 1953. There is no privately operated animal carrier in this trade at present. The animals to be transported are primarily for the account of the Jewish Agency for Palestine, and they

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are urgently needed for the spring plowing and planting of crops by new settlers in Israel.

Applicant's vice president testified that no cargo except the animals here involved would be carried outbound and that no cargo at all would be carried inbound. It was testified by applicant's shipper witness that the animals to be transported originate in all parts of the United States, and that many have been assembled in centralized points ready to be transported by rail to the export yards upon assurance that the vessel is available; he further testified that, if applicant should not be able to charter the vessel herein under consideration, there would not be accommodations for the transportation of this cargo for the period involved.

Applicant's vice president testified that the cost of outfitting another vessel for a 4 to 6 months' period would be prohibitive. There is no privately owned United States-flag vessel suitable for carrying animals available for charter on any terms or conditions.

FINDINGS, CERTIFICATION, AND RECOMMENDATIONS

On the basis of the facts adduced in the record, the Board finds and hereby certifies to the Secretary of Commerce:

1. That the service under consideration is in the public interest;
2. That said service is not adequately served; and
3. That privately owned United States-flag vessels are not available for charter from private operators on reasonable conditions and at reasonable rates for use in such service.

The Board recommends that any charter which may be granted pursuant to the findings in this case be for a period not to exceed six months or a minimum of three voyages, subject to the usual right of cancellation by either party on 15 days' notice.

By the Board.

(Sgd.) GEO. A. VIEHMANN,
Acting Assistant Secretary.

JANUARY 23, 1953.

FEDERAL MARITIME BOARD

No. S–23

LYKES BROS. STEAMSHIP CO., INC.—APPLICATION FOR INCREASE IN MAXIMUM NUMBER OF SUBSIDIZED SAILINGS ON LINE D (LYKES ORIENT LINE), TRADE ROUTE NO. 22

Submitted January 28, 1953. Decided February 27, 1953

Unsubsidized operation of Lykes Bros. Steamship Co., Inc., on its Line D (Lykes Orient Line), Trade Route No. 22, found to be, to some extent, an "existing service." In view of this finding, the time which has elapsed since the close of the hearing before the examiner, and the additional evidence on the issues of the case that is now available, case returned to examiner to permit the parties to offer additional and more recent evidence.

William Radner, Joseph M. Rault, and *Odell Kominers* for applicant.

Francis H. Inge and *Sterling F. Stoudenmire, Jr.*, for Waterman Steamship Coropration, *John Tilney Carpenter* for States Marine Corporation of Delaware, *William G. Dorsch* for Isthmian Steamship Company, *Dale Miller, Mitchell C. Cunningham, John Lee Gainey, John C. White, Robert A. Nesbitt, F. H. Fredricks, George C. Whitney,* and *Lachlen Macleay* for various other parties, interveners.

Alan F. Wohlstetter for the Board.

REPORT OF THE BOARD

This proceeding concerns the application dated January 29, 1951, of Lykes Bros. Steamship Co., Inc. (hereinafter referred to as "Lykes"), for an increase in the maximum number of its subsidized sailings on Trade Route No. 22, Service 1, from 24 to 48 per annum, including the right to have 24 of them cover the Netherlands East Indies and Straits Settlements (hereinafter referred to as "NEI/Straits") ports instead of the 12 previously authorized to call at such ports. The application was filed pursuant to the provisions of Title VI of the Merchant Marine Act, 1936 (hereinafter referred to as the "Act"), and a hearing was held under the provisions of section 605 (c) thereof.

In the 1949 Report entitled "Essential Foreign Trade Routes of the American Merchant Marine", Trade Route No. 22 is described as follows:

U. S. Gulf ports (Key West-Mexican Border)—Far East (Philippine Islands, China, Japan, U. S. S. R. in Asia, French Indo-China, Formosa, Siam, Manchuria and Korea).

Service 1 thereunder is described in footnote[1] and includes calls at NEI/Straits ports.

The States of Alabama, Louisiana, Mississippi, Tennessee, and Texas, the Alabama State Docks (Mobile, Ala.), the Board of Navigation and Canal Commissioners of the Harris County Houston Ship Channel Navigation District (Houston, Tex.), the Hillsborough County Port Authority (Tampa, Fla.), the City of Galveston, Tex., the Port of Beaumont Navigation District of Jefferson County, Tex., the Lake Charles Harbor and Terminal District (Lake Charles, La.), the Nueces County Navigation District No. 1 (Corpus Christi, Tex.), the Mississippi Valley Association, the Chamber of Commerce of the New Orleans Area (La.), Brownsville Navigation District of Cameron County, Tex., the City of Gulfport, Miss., and the Gulfport Port Commission intervened in support of the application, and Waterman Steamship Corporation (hereinafter called "Waterman") and States Marine Corporation of Delaware intervened in opposition thereto. Isthmian Steamship Company also intervened but took no position

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[1] The following description of Service 1 of Trade Route No. 22, appearing on page 23 of "Essential Foreign Trade Routes of the American Merchant Marine" (1949), describes in full Lykes' Line D:

Between a United States Gulf port or ports, via the Panama Canal, to a port or ports in Japan, China, the Philippine Islands, Hong Kong, French Indo-China, Siam (Thailand), the Netherland East Indies, Straits Settlements (including the Malay States); with the privilege of calling at ports in the Hawaiian Islands, U. S. S. R.-in-Asia, Manchuria, Korea and Formosa, also ports in Mexico and the West Indies for the loading and/or discharging of cargo to or from foreign ports on the route, and with the privilege of calling at United States Atlantic ports homeward with sugar, copra and liquid cargo in bulk loaded at ports not in the Netherlands East Indies or Straits Settlements (including the Malay States), provided that in the absence of specific authority of the Commission to the contrary, vessels calling at the Netherlands East Indies or Straits Settlements (including the Malay States, shall return to United States Gulf ports for unloading cargoes destined for such ports before proceeding to United States Atlantic ports, with the privilege (subject to cancellation by the Commission on 60 days notice to the operator) of calling at the following islands in the Pacific area (such privilege not to be considered as modification of the above route description) Caroline Islands, Marianas Islands, Palau Island, Marshall Islands, Okinawa Island, Admiralty Islands, Marcus Island, Wake Island, Gilbert Islands, Sakhalin Island (southern half).

Sailing Frequency: 20 to 24 sailings per year.*

*Subject to the stipulation that a minimum of seven (7) and a maximum of twelve (12) sailings per annum shall include ports in the Netherlands East Indies and Straits Settlements (including the Malay States).

as to the merits of the application. Of the interveners, only Waterman offered any testimony.

The purpose of the hearing held before an examiner was to receive evidence on issues under section 605 (c) of the Act. The examiner's recommended decision, served February 21, 1952, recommended that the Board find: (1) That the sailings for which applicant seeks subsidy would be in addition to the existing services; (2) that it is not shown that the service already provided by vessels of United States registry on the route is inadequate and that additional vessels should be operated thereon. Exceptions were filed by Lykes, memoranda in support of the recommended decision were filed by Waterman and Board counsel, and oral argument was heard by the Board on January 28, 1953, after delays due to granting of various extensions of time to the applicant and an intervener.

The first question, which involves the first recommendation of the examiner, is whether the additional 24 sailings requested by Lykes over and above the 24 sailings now subsidized are an "existing service" within the meaning of section 605 (c) of the Act. That section provides as follows:

(1) No contract shall be made under this title with respect to a vessel to be operated on a service, route, or line served by citizens of the United States which would be in addition to the existing service, or services, unless the Commission shall determine after proper hearing of all parties that the service already provided by vessels of United States registry in such service, route, or line is inadequate, and that in the accomplishment of the purposes and policy of this Act additional vessels shall be operated thereon; and

(2) no contract shall be made with respect to a vessel operated or to be operated in a service, route, or line served by two or more citizens of the United States with vessels of United States registry, if the Commission shall determine the effect of such a contract would be to give undue advantage or be unduly prejudicial, as between citizens of the United States, in the operation of vessels in competitive services, routes, or lines, unless following public hearing, due notice of which shall be given to each line serving the route, the Commission shall find that it is necessary to enter into such contract in order to provide adequate service by vessels of United States registry. The Commission, in determining for the purposes of this section whether services are competitive, shall take into consideration the type, size, and speed of the vessels employed, whether passenger or cargo, or combination passenger and cargo, vessels, the ports or ranges between which they run, the character of cargo carried, and such other facts as it may deem proper. [Numbering and paragraphing supplied.]

Lykes and its predecessors and affiliate have operated on Trade Route No. 22 since 1922, except for the period of World War II.

It has had, since 1937, an operating-differential subsidy contract covering five separate trade routes, of which Trade Route No. 22 is one. The contract calls for a maximum aggregate of 339 sailings per annum and a minimum aggregate of 228 on all routes, and a maximum of 24 sailings per annum and a minimum of 20 on Trade Route No. 22. Lykes has stated that the extra subsidized sailings now requested will not require any increase in the present maximum aggregate, and that Lykes will not reduce the sailings of any of the other four trade routes below the required minimum. Lykes owns 54 vessels of suitable type, size, and speed to live up to its proposal.

Lykes has made an average of 60 outbound sailings per annum on Trade Route No. 22 during the 1946–49 period, making 42 sailings in 1950 and 24 sailings during the first 6 months of 1951. Sailings in excess of the maximum covered by the subsidy contract were performed after securing special permission as required by the contract. Included in the present application was a request for continuation of the special permission to make unsubsidized sailings at the rate of 24 per annum for 6 months pending consideration of the application so that the service would not be disrupted. Such interim permission was granted on February 19, 1951, subject to cancellation on 30 days' notice, and has been renewed from time to time, subject to the terms of the operating-differential subsidy agreement and the following conditions imposed upon the operator:

1. That all other provisions of said agreement are fully complied with;

2. That on these excess unsubsidized sailings, no calls will be made at the Netherlands East Indies and/or Straits Settlements ports except for homeward carriage of bulk cargoes; and

3. That the minimum sailing requirements stipulated in the contract for each of the subsidized services will be maintained with owned subsidized or unsubsidized vessels.

The evidence taken before the examiner did not cover operations beyond July 31, 1951. Upon this evidence counsel for Waterman and for the Board contend that Lykes' "existing service" on the route is limited to its 24 subsidized sailings, because its additional unsubsidized sailings were subject to successive permissions from the Maritime Administrator, which ran only for 6 months' periods and were subject to termination on 30 days' notice at the Administrator's option. It was also contended that because Lykes made

a total of only 42 subsidized and unsubsidized sailings in 1950, the total existing service in no event could exceed that number per year. Lykes explained that the reduction in sailings in that year was due primarily to the Government's request to charter some of its vessels for use to Korea, to which Lykes acceded.

Counsel for the Board argues that none of the interveners had an opportunity at public hearing to contest the permissions granted to Lykes to make sailings in excess of 24 per annum, and that the Administrator could not have intended to confer the status of an "existing service" upon Lykes for its extra sailings without formal consultation with the other operators or consideration of their interests on an official record. It is clear, however, that the interveners knew of the extra sailings on the route from time to time permitted to Lykes and, so far as the Administrator's records show, raised no objection.

It seems that whether or not a service is "existing" within the meaning of the statute should be largely determined by operational facts. It is true that because of its subsidy agreement, Lykes could not operate any vessel in addition to the number subsidized on the route, without the permission of the U. S. Maritime Commission or of the Maritime Administrator. Lykes had secured such permissions as were required for a period of at least 3 years, and had established a history of continuity sufficient to denote a bona fide intention to continue operations substantially in excess of the subsidized service.

No reason is seen why more formalities or consultations should be required for a subsidized operator who starts a new service or expands an established service and seeks to have it qualify as an "existing service" than for a nonsubsidized operator to do the same thing. It is obvious that a nonsubsidized operator may increase an established service or start a new service without consulting the Administrator or other operators on the line, and should he later seek subsidy, this might readily qualify as an "existing service" if it had the necessary elements hereinafter discussed. The requirement for notice and public hearings set forth in section 605 (c) of the Act is not a condition to the establishment of an "existing" service but rather a condition to the making of a subsidy contract on the route served by two or more citizens of the United States operating with vessels of United States registry.

Once a subsidy contract has been made with an operator it is necessary for him to comply with the requirements of the contract

and obtain the Administrator's approval for any sailings in addition to the subsidized sailings. This requirement of administrative permission in such cases is not designed to affect in some manner the ability of an operator to qualify an extra service or even a new service as an "existing service," but is meant to safeguard against possible improper competitive practices and prevent operations prejudicial to the purposes and policies of the Act. By the terms of its subsidy contract, Lykes was required to obtain such administrative permission, but once this permission was granted, Lykes, in our judgment, was in this regard in the same position as an unsubsidized operator, free to develop a new service or expand an established service into one which could become an "existing" service within the meaning of the statute.

While permanency of service is an important factor in determining whether a service is in fact "existing," there are many other factors. As we said in *Pac. Transp. Lines, Inc.—Subsidy, Route 29,* 4, F.M.B. 7, 11:

> The term "service" embraces much more than vessels; it includes the scope, regularity, and probable permanency of the operation, the route covered, the traffic handled, the support given by the shipping public, and other factors which concern the bona fide character of the operation.

The evidence in the case is convincing that each one of these factors mentioned in the excerpt was fulfilled by Lykes with additional sailings, at least so far as they served the Far East ports on Trade Route 22 (other than in NEI/Straits area). It follows, and we so find, that the unsubsidized operation of Lykes was, to some extent at least, an "existing service" within the meaning of section 605 (c). Even though the additional sailings could not be made without the Administrator's consent, the fact that the necessary consents were obtained for a period of over 4 years preceding the close of the hearing and were then still in force is very strong evidence of the permanency of some extra service and of the bona fide intent of Lykes to maintain it.

In view of our finding that the additional service herein considered was, to some extent, an "existing" service, and in view of the time which has elapsed since the close of the hearing before the examiner, and the additional evidence on the issues of the case that is now available, we are returning the case to the examiner to permit the parties to offer additional and more recent evidence, and permit the examiner to make a further recommended decision, in the light thereof, as to the *extent* to which the operator has maintained an "existing service," both

as to the number of additional sailings and as to the geographical limits of the service covered. Upon the entire record the examiner also will be able to make a recommended decision on whether the effect of a subsidy contract for additional subsidized sailings would be to give undue advantage or be unduly prejudicial, as between citizens of the United States, in the operation of vessels in competitive services, routes, or lines, as well as upon any other issues arising under section 605 (c) as the amplified record may make appropriate.

An appropriate order will be issued.

ORDER

At a Session of the FEDERAL MARITIME BOARD, held at its office in Washington, D. C., on the 27th day of February A. D. 1953

No. S-23

LYKES BROS. STEAMSHIP CO., INC.—APPLICATION FOR INCREASE IN MAXIMUM NUMBER OF SUBSIDIZED SAILINGS ON LINE D (LYKES ORIENT LINE), TRADE ROUTE NO. 22

The Board, on the date hereof, having made and entered of record its report in this proceeding, which report is hereby referred to and made a part hereof;

It is ordered, That the case be, and it is hereby, remanded to the examiner for the purposes stated in said report.

By the Board.

(Sgd.) A. J. WILLIAMS,
Secretary.