FEDERAL MARITIME BOARD

No. S-39

FARRELL LINES INCORPORATED—DETERMINATION OF FINAL SUBSIDY RATES FOR 1949

Submitted September 22, 1953. Decided October 2, 1953

Case remanded to examiner to afford parties an opportunity to obtain and offer further evidence.

Harold B. Finn for Farrell Lines Incorporated.
Thomas Lisi and *Edward Aptaker* for the Board.

REPORT OF THE BOARD

BY THE BOARD:

Farrell Lines Incorporated (the Operator) was unable to reach an agreement with us as to the rate of operating-differential subsidy for subsistence of officers and crews for the year 1949 upon the Operator's South and East African Service, Trade Route No. 15A. After considering staff memoranda and hearing testimony from staff members, we tentatively determined by interlocutory order dated February 17, 1953, that the Operator was not entitled to subsidy for subsistence on the service. The Operator filed objections and a statement, and thereafter a hearing was held before an examiner pursuant to section 606 (1) of the Merchant Marine Act, 1936 (the Act). The examiner recommended approval of our tentative findings, and the Operator excepted. We find it necessary to remand the case for further evidence.

Section 603 (b) of the Act, under which we acted in making the tentative determination regarding rates, provides:

> . . . the operating-differential subsidy shall not exceed the excess of the fair and reasonable cost of . . . subsistence of officers and crews, . . . in the operation under United States registry of the vessel . . . covered by the contract, over the estimated fair and reasonable cost of the same items of expense . . . if such

vessel . . . were operated under the registry of a foreign country whose vessels are substantial competitors of the vessel . . . covered by the contract.

The Operator's American-flag subsistence costs were compared with the estimated subsistence costs of the foreign-flag competitors on the route, and the following determination was tentatively made:

Type of vessel	Subsidy for subsistence of officers and crews (percent of United States cost)	Effective for approved voyages commencing on and after—
C2-S-B1	0.0	Jan. 1, 1949
C3-S-BH2	0.0	Do.

Section 606 (1) of the Act provides that, in case of disagreement, the Board is authorized, after proper hearing, to

determine the facts and make such readjustment in the amount of . . . future payments as it may determine to be fair and reasonable and in the public interest.

A similar provision is contained in the Operator's subsidy agreement.

The Operator's exceptions to the examiner's report assigned the following errors:

1. He erroneously placed on the Operator the burden of proof to show that the tentative rate proposed by the Board was not fair and reasonable and in the public interest;

2. He failed to make findings of fact regarding domestic and foreign subsistence costs on which the Board could base a readjustment of subsidy rates for 1949;

3. He failed to consider the controverted issues of fact and law raised in the Operator's statement;

4. He failed to determine what changes had occurred since the date of the Operator's original contract of April 23, 1940;

5. He failed to find fair and reasonable meal-day costs applicable to the Operator's vessels as operated under the American flag and as if operated under a competing foreign flag, and the difference between them;

6. He erroneously recommended that the Board's tentative rate of zero percent be adopted.

Exception 1—Burden of Proof. The hearing ordered by section 606 (1) of the Act is to determine what, if any, readjustment in the amount of the pre-existing subsidy shall be made. The section provides that such a readjustment may be made not more frequently than once a year at the instance of the Board or the Operator. In this case, the rate for the prior year was also zero percent. Although our staff

reviewed this prior rate before the Operator made formal request for readjustment, the controversy arises because the Operator is not satisfied to have the prior year's rate continue in 1949. The tentative rate constitutes our offer for a rate for 1949. When an operator fails within the time limit of our tentative order to show cause to the contrary, the tentative rate becomes final by mutual agreement. Where, however, as in this case, an operator makes seasonable objections and the case is set for hearing, the issues become the statutory issues under section 606 (1) of the Act, and whichever party (Board or operator) is the one moving for a readjustment of the prior year's rate, has the burden of proof on the statutory issues. Here the Operator seeks upward revision of the prior year's rate, and, for this reason, the burden is upon it.

Exceptions 2, 3, 5, and 6—The Necessary Facts. The examiner set forth in detail the method by which the staff recommended the zero percent rate which we tentatively adopted for 1949. The separate computation of the staff for both C–2 vessels and C–3 vessels is contained in his report, which, in each case, showed a negative rate, i. e., that the foreign costs were, in fact, higher than the American costs for subsistence, and that, therefore, there was no excess American cost to be subsidized by the Government pursuant to section 603 (b) of the Act. The staff computation for C–2 cargo vessels is set forth below, showing comparison between United States-flag meal-day cost and meal-day cost under the flags of foreign operators offering competition on the route:

C–2 CARGO VESSELS

	Flag—			
	United States	United Kingdom (mixed crew)	United Kingdom (white crew)	Union of South Africa
Complement	50	82	44	48
Officers and white crew		22		
Nonwhite crew		60		
Subsistence cost per meal day	$1.54	$0.855	$1.315	$2.274
Officers and white crew		$1.315		
Nonwhite crew		$0.686		
Subsistence cost per vessel day	$77 00	$70.09	$57.86	$109.15
Differential in dollars		$6.91	$19.14	−$32.15
Unweighted differential—percent		8.97	24.86	−41.75
Competition weight factor—percent		47.91	22.19	29.9
Weighted differential—percent		4.30	5.52	−12.48
Composite weighted differential—percent		−2.66		

The computation was made pursuant to the Manual of General Procedures for Determining Operating Differential Subsidy Rates (the Manual), a manual adopted by the Board on September 26, 1951, designed to simplify methods of cost data collection and computation

without sacrificing any of the essential data necessary to comply adequately with the Act. It was adopted only after consultation with Government agencies interested and with representatives of the various subsidized lines. Pursuant to these procedures, foreign-flag competition on the route in the year in question was determined according to the tons of cargo carried by vessels of each foreign flag, and in the computation above was shown under "Competition weight factor" to be as follows:

	Percent
United Kingdom (using mixed crews)	47.91
United Kingdom (using all white crews)	22.19
Union of South Africa	29.9
Total	100.0

The differential for subsistence (United States versus foreign) per vessel day for each foreign flag was multiplied by the competition factor described above, to provide a weighted differential for each foreign competing flag. The combination of the three weighted differentials, in this case +4.30 percent, +5.52 percent, and −12.48 percent, made the composite weighted differential of −2.66 percent. In effect this was a finding that the United States-flag subsistence cost was 2.66 percent lower than the cost of subsistence on the foreign-flag competing vessels, weighted in accordance with their respective carryings. This −2.66 percent differential supported the staff's zero percent rate as recommended. Farrell's chief objection is to the inclusion of the figure of $2.274 as the meal-day cost on competing vessels under the South African flag during the year in question. This rate was derived from the actual experience of three vessels operated under the flag of the Union of South Africa for the year 1949, as reported to the staff. The Operator says that while a South African-flag competitor may have reported meal-day costs, these should not be adopted as the basis of computing the fair and reasonable cost of subsistence of vessels under that flag. In short, the Operator urges that actual costs are not the same thing as estimated fair and reasonable costs which the Act refers to. Furthermore, the Operator urges that the estimate of foreign costs should be based on an estimate of what they would be if Farrell and not a foreign operator operated the vessel under the foreign flag.

The cost comparison is, of course, between the subsidized ship as operated by Farrell under the American flag and as if the same vessel were operated under the foreign flag. But neither the statute nor the Manual contemplates an estimate based on hypothetical operation by Farrell under the foreign flag. Subsidy rates for subsistence as well as wages and other items are based on a comparison of the Ameri-

can operator's costs with the foreign competitor's cost for the same ship. The Manual, Part Three, expressly so provides:

IV. C. *Foreign Meal-Day Cost—Primary Method of Computation*

Wherever possible a meal-day cost of the competitive foreign operators shall be developed by the Board with as many of the following details as practicable: name of vessel; name of operator; flag of vessel; trade route or voyage itinerary; period covered by meal-day cost; number of voyages.

The Board shall determine in each case the period for which the most adequate foreign information is available on subsistence costs, and may index retrospectively and prospectively for years during which less adequate information is available * * *.

D. *Foreign Meal-day Costs—Secondary Method of Computation*

Whenever the evidence is inadequate to support a meal-day cost for a particular foreign competitor by the primary method of computation, the Board may adjust the most comparable * * *.

A factual basis for the foreign-cost estimate can be derived from the foreign competitor's actual experience, whereas a speculation only can be derived from an estimate of the American operator's costs on the assumption that it sailed under a foreign flag.

The operator introduced evidence of South African food price lists for 1949, which tended to show that a substantial part of a vessel's subsistence requirements could be purchased in South Africa at prices 23.6 percent less than in the United States. From this, the Operator argued that all stores could be bought by Farrell in South Africa at the same percentage below United States prices if Farrell were operating under the South African flag, and, in such case, its meal-day costs for 1949 would have been $1.17 per man. Such a computation falls into the error already indicated, and also fails to give effect to the undisputed testimony that the actual practice of the South African competitor in 1949 was to buy 60 percent of subsistence stores in the United States and 40 percent in South African ports.

The estimated meal-day cost of $2.274, on which the recommended rate is based, was reported to the staff as the meal-day cost of South African-flag vessels competing on the route. This cost appears to be approximately 50 percent greater than the actual meal-day cost of the Operator's American-flag vessels which purchased all of their stores in the United States. The extent of this difference suggests that the South African figure should be subjected to careful scrutiny. The record shows that the figure was derived from a written report from an informed and reliable source showing the average meal-day cost of the one South African-flag operator on the route for the period from August 1, 1947, to April 30, 1950, to be 125 units of the local currency. Another written report from the same source, dated approximately 2 months earlier, stated the average meal-day cost of

the same operator for the same ships from January 1, 1948, to December 31, 1951, to be only 85 units of the same local currency. It appears that after April 30, 1950, the South African operator's route was changed so as to include British ports, and that an average meal-day cost after April 30, 1950, was only 66 units of local currency. The staff's computations, set forth above, are based on the meal-day cost of 125 units. No reconciliation of this average meal-day cost with the much lower average meal-day cost of 85 units is apparent to the Board, nor was any effort toward a reconciliation of the two figures or a verification of either made by counsel. The level of the South African food prices indicated by the price lists introduced by the Operator, together with the conflict between the two figures reported to be the South African average meal-day cost, throws substantial doubt on the staff's figure of $2.274 per day, derived exclusively from the report showing the meal-day cost to be 125 units of the local currency. The Board feels that the difference between the two figures should be cleared up before a final decision is made. Accordingly, the case is referred back to the examiner to afford the parties an opportunity to obtain and offer further evidence on this point.

Exception 4—Changes since 1940. Since the Operator by its resumption contract dated as of January 1, 1947, accepted the zero subsistence rate for 1948, and agreed that such rate would not be reviewed until as of January 1, 1949, any changes occurring between April 23, 1940, and January 1, 1949, are not material.

An order will be entered remanding the case for further proceeding.

Chairman Rothschild, being absent, did not take part in this decision.

ORDER

At a Session of the FEDERAL MARITIME BOARD, held at its office in Washington, D. C., on the 2d day of October A. D. 1953

No. S-39

FARRELL LINES INCORPORATED—DETERMINATION OF FINAL SUBSIDY RATES FOR 1949

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.

FEDERAL MARITIME BOARD

No. 707

THE HUBER MANUFACTURING COMPANY

v.

N. V. STOOMVAART MAATSCHAPPIJ "NEDERLAND" ET AL [1]

Submitted November 10, 1953. Decided November 13, 1953

Complainant not shown to have suffered damage due to alleged unjust discrimination on rates for transportation of road rollers from United States Atlantic ports to Indonesia, and not entitled to reparation under sections 16 and 17 of the Shipping Act, 1916.

Paul L. Glasener and *Oliver L. Onion* for complainant.
Cletus Keating and *David Dawson* for respondents.

REPORT OF THE BOARD

BY THE BOARD:

The complaint filed December 13, 1950, alleged that respondents' tariff rates for the transportation of road rollers and accessories from United States Atlantic and Gulf ports to Indonesia were unduly and unreasonably preferential, prejudicial, and disadvantageous, in violation of section 16 of the Shipping Act, 1916 (the Act), and unjustly discriminatory and prejudicial in violation of section 17 of the Act. Complainant demanded entry of a cease and desist order and reparation of $2,210.24, with interest.

The case was originally submitted to the examiner upon a stipulation of facts. In his original report the examiner recommended that reparation be recovered from respondents N. V. Stoomvaart Maatschappij "Nederland" (Nederland) and Ocean Steam Ship Company, Ltd. (Ocean), and that the complaint should be dismissed as to the other respondents. Deletion of one of the tariff rates by

[1] Koninklijke Rotterdamsche Lloyd, N. V. (formerly known as N. V. Rotterdamsche Lloyd); N. V. Nederlandsch-Amerikaansche Stoomvart-Maatschappij Holland-Amerika Lijn; The Ocean Steam Ship Company, Ltd.; The China Mutual Steam Navigation Co., Ltd.; Funch, Edye & Co., Inc.; and Strachan Shipping Company.

respondents on October 1, 1951, made the issuance of a cease and desist order unnecessary.

Exceptions were filed by the two respondents mentioned, and the matter was argued orally before us in September 1952. During the course of argument it appeared that some facts which were deemed material to a decision were not contained in the pleadings or stipulation of evidence, and, accordingly, permission was granted to complainant to take further testimony on such facts. Before completing the record complainant moved to amend the complaint to bring in additional parties respondent, and this motion was heard by the Board and denied on the ground that more than the 2 years prescribed in section 22 of the Act had elapsed between the date of the alleged cause of action and the motion to bring in new parties.

The examiner's supplemental report, based on the amended record, found that respondents did not charge complainant a higher rate for the transportation of road rollers than was charged to other shippers of the same articles, and that the rate charged did not subject complainant to unreasonable prejudice and was not unjustly discriminatory, and, accordingly, recommended that the complaint be dismissed. We agree with the examiner's conclusions.

We find from the record:

1. Complainant manufactures and sells road rollers and other road-building equipment. Respondents are common carriers by water from United States Atlantic and Gulf ports to Indonesia, and are members of the Atlantic and Gulf–Dutch East Indies Conference. During the period when the shipments hereinafter referred to were made, the conference had on file its Freight Tariff No. 10, which included the following two items:

1782 Road Making Implements and Parts, N O. S. viz:

	Contract rate
* * * * Road Rollers	$37.00

1425 Oil Producing and Refining Machinery, Materials and Supplies, viz:

	Contract rate
* * * * Rollers, Road	$33.00

2. Item No. 1782 was the original tariff provision covering the transportation of road rollers. Item No. 1425 was added by the conference so as to retain the business of an oil company which was making large shipments of oil producing machinery from the United States for use on its Indonesian properties. The said oil company had a European subsidiary which purchased oil producing machinery in Europe which it shipped directly to Indonesia. The quantity of such articles which the oil company would continue to purchase in the United States was

reported to the conference to depend on how the total cost from the United States, including ocean freight, compared with the costs from Europe. The oil company informed the conference that unless certain adjustments in rates were adopted by the conference, including the insertion of Item No. 1425, it would cease to ship on conference vessels. The conference decided that it could not afford the possible loss of revenue, and, accordingly, acceded to the request and adopted Tariff Item No. 1425.

3. Between October 6, 1948, and March 4, 1949, complainant shipped on respondents' vessels ten consignments of road rollers from New York and Savannah to Indonesia. During this entire period the $33.00 rate covered by Item No. 1425 was in effect for oil producing and refining machinery, materials, and supplies, including road rollers, if such articles were shipped for use in oil producing or refining and were designated by the shipper as oil-producing machinery. None of complainant's shipments above mentioned were so described in the applicable bills of lading nor did complainant ever claim that its shipments were shipped for use in oil producing or refining. Accordingly, complainant's shipments were charged and paid the higher rate specified in Item No. 1782.

4. Complainant made two shipments prior to December 13, 1948, more than 2 years prior to the filing of the complaint in this case, and eight shipments on and after that date, the last shipment being made March 4, 1949. The difference between the freight actually collected by respondents under Item No. 1782 and the amount complainant would have paid if it had been charged the lower rate provided in Item No. 1425 was $2,210.24 on all shipments above mentioned, and $2,103.04 on shipments made on and after December 13, 1948, the latter amount arising $1,468.14 from shipments on vessels of Nederland and $634.90 on vessels of Ocean.

5. The records of respondents show that between September 15, 1948, and October 1, 1951, when the lower rate was discontinued, 29 shipments of road rollers and road roller parts and accessories were made on respondents' vessels from U. S. Atlantic and Gulf ports to Indonesia, including complainant's 10 shipments, and the said 29 shipments consisted of 50 road rollers and several cases of parts and accessories. All of these 29 shipments moved under the higher rate provided by Item No. 1782, and none of said shipments moved under the lower rate provided by Item No. 1425. Each shipper was charged freight at the same rate per ton and no adjustment in freight rates has been made on any of said shipments. One of the 29 shipments was made by an oil company but not the oil company at whose instance Item No. 1425 was adopted by respondents.

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Before concluding the case before the examiner, complainant filed a motion to permit the taking of evidence from officials of the Bureau of the Census and from nonrespondent members of the conference as to any shipments made by the particular oil company for whom the lower rate on road rollers was established under Item No. 1425. Such evidence was not covered by our earlier permission. Complainant contended that such evidence might show that the respondent conference members could be held responsible for the acts of nonrespondent members by reason of common membership in the conference. After oral argument we denied this motion, holding that any such additional evidence would not concern shipments made on any vessels of any of the respondents in the case and could not be relevant to issues raised by the complaint.

POSITIONS OF THE PARTIES

Complainant takes the position that the road rollers shipped by it under Item No. 1782 were in all respects identical with road rollers described in Item No. 1425 taking the lower rate, and, therefore, complainant was entitled to the lower rate, and that respondents in charging the higher rate subjected complainant to undue prejudice and unjust discrimination in violation of the Act. Complainant does not now urge the entry of any cease and desist order nor does it urge the award of reparation for the two shipments made more than 2 years prior to the filing of the complaint.[2] It claims to be entitled to reparation on the remaining eight shipments in the amount of $2,103.04, with interest.

Respondents claim that no case of unreasonable prejudice or unjust discrimination is made out by complainant because respondents accorded no different or better treatment to any competing shipper.

DISCUSSION

Section 16, First, of the Act declares it unlawful for any common carrier within the purview thereof, directly or indirectly,

> To make or give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever, or to subject any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

Section 17 of the Act provides:

> That no common carrier by water in foreign commerce shall demand, charge, or collect any rate, fare or charge which is unjustly discriminatory between shippers * * *.

[2] See section 22 of Act; also *Plomb Tool Co.* v. *American-Hawaiian Steamship Co.*, 2 U. S. M. C. 523.

It will be seen that the language of section 16, First, makes it a violation to give any undue preference *to any particular person* or to subject *any particular person* to any undue or unreasonable prejudice. The undue preference and the undue prejudice mentioned in this section is always a relative matter, that is, the preferring of one person to another or the deferring of one person to another. To constitute a violation of this section there must always be two persons given unequal treatment by the carrier or other person subject to the Act, for any unjust discrimination when found to exist may be cured by raising the low rate as well as lowering the high rate or bringing both rates to a common point, and likewise under section 17 there must be unequal treatment between competing shippers or ports to constitute a violation. Here complainant paid the higher of two rates, but no other shipper received any lower rate or better treatment. Complainant was, therefore, not treated worse than a competitor, and respondents have, therefore, not been guilty of the statutory violations mentioned in the complaint.

As we pointed out in the case of *Afghan-Amer. Trading Co., Inc.* v. *Isbrandtsen Co., Inc.*, 3 F. M. B. 622:

> Since it is stipulated that no other shipper paid lower rates than were charged complainant in this case, there is no showing of undue prejudice in violation of section 16 of the Act or of unjust discrimination in violation of section 17 of the Act.

In *United Nations et al.* v. *Hellenic Lines Limited et al.*, 3 F. M. B. 781, we said:

> . . . there is no evidence of a competitive shipper of cotton who received from respondent a different rate from that actually charged complainant. Under the circumstances, it must follow in this case, as in the *Afghan* case, that there has been no showing of any violation of the Act, . . .

In *Port of New York Authority* v. *Ab Svenska et al.*, 4 F. M. B. 202, we said:

> In order to sustain the charge of unjust discrimination, under these provisions of the Shipping Act, complainant must prove (1) that the preferred port, cargo, or shipper is actually competitive with complainant, (2) that the discrimination complained of is the proximate cause of injury to complainant, and (3) that such discrimination is undue, unreasonable, or unjust. *Phila. Ocean Traffic Bureau* v. *Export S. S. Corp.*, 1 U. S. S. B. 538, 541 (1936); *H. Kramer & Co.*, v. *Inland Waterways Corp. et al.*, 1 U. S. M. C. 630, 633 (1937).

We have carefully examined the authorities referred to us in complainant's briefs and we do not find the holdings therein in any way inconsistent with the conclusions above set forth.

CONCLUSIONS

Under the facts and circumstances in this case, we conclude that the rate for the transportation of road rollers from United States Atlantic ports to Indonesia charged by respondents against complainant did not result in undue or unreasonable preference or advantage to any person, and did not subject complainant to any undue or unreasonable prejudice or disadvantage in violation of section 16 of the Act, nor were such rates unjustly discriminatory or prejudicial to complainant in violation of section 17 of the Act.

An order will be entered dismissing the complaint.

ORDER

At a Session of the FEDERAL MARITIME BOARD, held at its office in Washington, D. C., on the 13th day of November A. D. 1953

No. 707

THE HUBER MANUFACTURING COMPANY

v.

N. V. STOOMVAART MAATSCHAPPIJ "NEDERLAND" 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.

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

FEDERAL MARITIME BOARD

No. S-34

BLOOMFIELD STEAMSHIP COMPANY—APPLICATION FOR OPERATING-DIFFERENTIAL SUBSIDY ON TRADE ROUTE NO. 13, SERVICE 1, AND TRADE ROUTE NO. 21, SERVICE 5

Submitted November 3, 1953. Decided November 18, 1953

On reargument, conclusion in prior report, 4 F. M. B. 305—that service already provided by vessels of United States registry on Trade Route No. 13, Service 1, is inadequate, and, in the accomplishment of the purposes and policies of the Merchant Marine Act, 1936, additional vessels should be operated thereon—reversed.

The provisions of section 605 (c) of the Act interpose a bar to the granting to Bloomfield Steamship Company of an operating-differential subsidy contract covering the operation of cargo vessels on Trade Route No. 13, Service 1.

Paul D. Page, Jr., and *Malcolm R. Wilkey* for Bloomfield Steamship Company.

Joseph M. Rault and *Odell Kominers* for Lykes Bros. Steamship Co., Inc., and *Sterling F. Stoudenmire, Jr.*, for Waterman Steamship Corporation, interveners.

Edward Aptaker for the Board.

REPORT OF THE BOARD ON REARGUMENT

Interveners Lykes Bros. Steamship Co., Inc., and Waterman Steamship Corporation petitioned to reopen this proceeding to take further evidence and to present reargument on our decision of June 30, 1953 (4 F. M. B. 305). We denied the petition to reopen but granted reargument.

We adhere to our earlier decision as to Trade Route No. 21, Service 5, and modify it as to Trade Route No. 13, Service 1.

As pointed out in our earlier report, the issue before us is whether section 605 (c) of the Merchant Marine Act, 1936 (the Act), interposes a bar to our approval of an operating-differential subsidy contract with applicant covering either or both of the routes presently involved. Section 605 (c) provides in part as follows:

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

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. [Paragraphing supplied.]

Our earlier report concluded that applicant's proposed services on both routes would be in addition to existing services thereon, that on each of the trade routes involved the United States-flag service was inadequate and that additional vessels should be operated thereon to accomplish the purposes and policies of the Act, and that therefore section 605 (c) of the Act did not impose a bar to the granting of an operating-differential subsidy contract to applicant for operation on either route.

Our basic approach now to the application is substantially the same as the approach taken in the earlier report; but our present judgment is that with respect to Trade Route No. 13, Service 1, it has not been shown that the service already provided by vessels of United States registry is inadequate and that additional vessels are required to be operated thereon to accomplish the purposes and policies of the Act. In consequence, we find that section 605 (c) of the Act interposes a bar to the granting of an operating-differential subsidy contract to applicant for operation on Trade Route No. 13, Service 1.

In view of the fact that our conclusions differ from those of the earlier report on the effect of section 605 (c) on Bloomfield's application for subsidy for operation on Trade Route No. 13, Service 1, we now briefly review the determinative facts and estimates as to that service.

1. The Trade Route No. 13, Service 1, itinerary is described in the Report of the United States Maritime Commission on Essential Foreign Trade Routes (1949) as follows:

Between a United States Gulf port or ports and a port or ports in Spain and/or Portugal and/or the Mediterranean and/or the Black Sea, with the privilege of calling at Casablanca, Spanish Morocco, and at ports in the United States South Atlantic, south of Norfolk, and at ports in the West Indies and Mexico.

2. United States-flag participation in liner exports from the Gulf in general have, since 1948, averaged around 60 percent. In 1948 it was 75 percent; in 1949, 67 percent; in 1950, 54 percent; and in 1951, 46 percent, as shown by Census Bureau statistics in the record.

3. The cargo that will be available for movement by liner vessels on Trade Route No. 13 is estimated to be 700,000 tons annually. This estimate is based on Lykes' projection of 400,000 tons of liner-type commodities (which includes cargo from South Atlantic privilege ports) plus 43/57ths of this forecast (300,000 tons) for tramp-type commodities estimated to be available for movement on liner vessels.

4. Total annual estimated liner capacity of Isthmian Steamship Co. is 18,000 tons, based on 18 annual sailings at an average lift of 1,000 tons per vessel.

5. Total annual estimated liner capacity of States Marine Lines is 54,000 tons, based on eight annual sailings of owned vessels, each carrying approximately the same average amount of Trade Route No. 13 cargo as was carried by the vessels operated by States Marine during the years 1950 and 1951.

6. Total annual estimated liner capacity for Lykes is 273,000 tons. We estimate that Lykes will provide 39 sailings per year on this route, at an average carrying capacity of at least 7,000 tons per sailing. This figure is greater than the 6,400 tons per sailing estimated in the earlier report. Because our earlier 6,400-ton estimate was based upon data which excluded traffic originating at the privilege ports, we now correct that estimate so as to assign to Lykes a future vessel capacity reflective of the average amount of cargo actually carried in 1950 and 1951, whether originating at the principal ports or at the privilege ports.[1]

7. Total amount estimated liner capacity of all United States-flag operators presently on Trade Route No. 13 is 345,000 tons.

DISCUSSION

From our findings it will be seen that the estimated annual liner capacity of United States-flag operators on the route, 345,000 tons, amounts to 49 percent of the estimated total liner cargo available annually, 700,000 tons. The determinative question before us is whether, in the words of the statute, "* * * the service already provided

[1] Inclusion of privilege port capacity of Lykes' vessels on Trade Route No. 21, Service 5, increases total annual estimated liner capacity of all United States-flag operators on that route from 859,000 tons to 887,600 tons. The resulting increase in estimated United States-flag liner vessel participation, however, amounts to only 0.35 percent, and this is not sufficient to change our decision with respect to future adequacy of United States-flag service on that route.

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 * * *." Put in terms of the estimates we have considered, the questions are whether 49 percent participation in carryings on Trade Route No. 13, Service 1, is inadequate, and whether additional vessels should be operated thereon for the period of the proposed contract.

Section 101 of the Act declares that it is necessary for the national defense and development of the foreign and domestic commerce of the United States that this country shall have a merchant marine which is

> 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 * * *.

The earlier decision of the Board held that "substantial portion" was intended by the Congress to mean more than half of the water-borne foreign commerce of the United States. Our present judgment is that while 50 percent participation by vessels of United States registry in our total foreign commerce was intended by Congress to be a generally desirable goal, Congress never intended to establish 50 percent as an absolute level below which we, in the exercise of our discretion, might never descend in determining adequacy for any particular trade route under the Act.

The award of subsidy is a function inherently stamped with the exercise of discretion, and to follow rigid mathematical formulae alone would largely frustrate the application of our independent judgment as contemplated by the Legislature.

This view is supported by the Act's pattern with regard to our study of individual trade routes. It is true that the Declaration of Policy in Title I establishes as a goal that we have a merchant marine sufficient to carry a "substantial portion" of the water-borne foreign commerce of the United States, and that for "diplomatic reasons" alone this language was adopted in place of the 50-percent standard set forth in earlier drafts of the bill.[2] But it is clear that this goal was intended as a general guide with respect to the over-all participation of United States-flag vessels, and that other controlling considerations ought to be specifically invoked when we deal with individual trade routes. Thus, section 211 (a) enjoins, in determining essential services, routes, and lines, consideration of, among other things, the number of sailings and types of vessels that should be employed in such lines, and any other facts and conditions that a prudent business-

[2] H. R. 7521, S. 2582, H. R. 8555, 75th Cong., 1st Sess. See 80 Cong. Rec. 10076.

man would consider when dealing with his own business. In determining whether service is adequate on a particular trade route, this and other provisions of Titles II and VI place their principal emphasis upon the needs of the specific trade route under consideration. Had there been the intention to extend an absolute mathematical standard to specific trade routes, Congress could well have found the necessary language, as it has done in subsequent legislation.[3] Not unmindful of the general goal established in Title I, we consider it our duty to exercise our own discretion in fixing the appropriate level of participation reasonably to be sought by means of the operating-differential subsidy program in respect of any particular trade route.

Turning to Trade Route No. 13, we are impressed with the margin of possible error inherent in estimating future capacities and traffic. There has been no such showing as would convince us that service is inadequate and that in the accomplishment of the purposes and policy of the Act additional vessels should be operated on Trade Route No. 13.

By declining to find inadequacy of service here, we do not mean to establish that under other circumstances we would be unable to reach a different conclusion where a similar estimate of United States-flag participation was made. The question of adequacy must be resolved on the basis of the particular facts in each case.

CONCLUSIONS

We therefore conclude:

1. The service already provided by vessels of United States registry on Trade Route No. 13, Service 1, is adequate, and additional vessels need not be operated thereon to accomplish the purposes and policies of the Act.

2. The provisions of section 605 (c) of the Act interpose a bar to the granting to applicant, Bloomfield Steamship Company, of an operating-differential subsidy contract covering the operation of cargo vessels on Trade Route No. 13, Service 1.

In all other respects, we adopt the findings and conclusions set forth in the earlier report of the Board in this case.

By the Board.

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

[3] In the Economic Cooperation Act of 1948, as amended (Act of April 3, 1948, c. 169, Title I, 62 Stat. 137, as amended by Act of April 19, 1949, c. 77, 63 Stat. 50), there is the express requirement that not less than 50 percent of selected cargoes move overseas in United States-flag vessels.

WILLIAMS, *Vice Chairman*, dissenting:

I adhere to the decision of the Board on June 30, 1953, for the reasons therein set forth. While Lykes' projection of 400,000 tons of liner-type cargo on the route is said to include privilege port cargo, *actual* carryings on the route of liner-type cargo *exclusive* of privilege port cargo ran, 1948, 781,000 tons; 1949, 812,000 tons; 1950, 592,000 tons; 1951, 614,000 tons, or an actual average, *exclusive* of privilege port cargo, for 1950 and 1951 of 603,000 tons. The actual average carryings for the latest two years available, *exclusive* of privilege port cargo, being 50 percent greater than Lykes' estimate, *inclusive* of such cargo, it is deemed that a fair estimate of Lykes' capacity can only be made (as the Board originally made it) by excluding Lykes' privilege port capacity.

FEDERAL MARITIME BOARD

No. 724

CONTRACT RATES—NORTH ATLANTIC CONTINENTAL FREIGHT CONFERENCE ET AL.[1]

Submitted September 21, 1953. Decided January 6, 1954

A differential of 10 percent between contract and noncontract rates proposed by North Atlantic Continental Freight Conference and its members for a dual-rate exclusive-patronage system on general cargo in liner service in the trade from United States North Atlantic ports to ports in Belgium, Holland, and Germany (excluding German Baltic ports) is, under the circumstances disclosed by the record of this case, not arbitrary or unreasonable or unjustly discriminatory and is not in violation of the Shipping Act, 1916.

Roscoe H. Hupper, *Burton H. White*, and *Elliott B. Nixon* for respondents.

John J. O'Connor, Sr., and *John J. O'Connor, Jr.*, for Isbrandtsen Company, Inc., *Edward Knuff* for Department of Justice, *Henry A. Cockrum* for Secretary of Agriculture, and *Stephen F. Dunn*, *C. D. Williams*, and *S. W. Earnshaw* for Secretary of Commerce, interveners.

Max E. Halpern and *Joseph A. Klausner* for the Board.

REPORT OF THE BOARD

BY THE BOARD:

This proceeding arises out of our order of investigation, dated September 19, 1952 (amended October 3, 1952), in which we proposed to determine whether the differential between contract and non-

[1] A/S J. Ludwig Mowinckels Rederi (Cosmopolitan Line), Black Diamond Steamship Corporation, Compagnie 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), Home Lines Inc. (Home Lines), (A. P. Moller-Maersk Line)—Joint Service of Dampskibsselskabet af 1912 A/S and A/S Dampskibsselskabet Svendborg, N. V. Nederlandsch-Amerikaansche Stoomvaart-Maatschappij "Holland-Amerika Lijn," South Atlantic Steamship Line, Inc., United States Lines Company (United States Lines), and Waterman Steamship Corporation.

At the present time, the conference also includes the Fjell Line—Joint Service of Atkieselkapet Lukesfjell, Atkieselkapet Dovrefjell, Atkieselkapet Falkefjell, Atkieselkapet Rudolf. This line was admitted to the Conference after institution of these proceedings.

contract rates of an exclusive-patronage contract and dual-rate system sought to be instituted by respondent ocean carriers in the eastbound North Atlantic trade is arbitrary and unreasonable, and the rates therefore unjustly discriminatory, in violation of the Shipping Act, 1916 (the Act). Isbrandtsen Company, Inc., the Department of Justice, the Secretary of Agriculture, and the Secretary of Commerce (Isbrandtsen, Justice, Agriculture, Commerce) intervened, and hearings were held in New York and Washington. The examiner has recommended that the proposed differential of 10 percent be found reasonable and not arbitrary, and, therefore, not unjustly discriminatory, and the interveners have excepted. We agree, in general, with the result recommended by the examiner.

The controversy between the respondents on the one hand and the interveners on the other hand began some 5 years ago and is reviewed in part in *Isbrandtsen Co.* v. *N. Atlantic Continental Frt. Conf. et al.*, 3 F. M. B. 235 (Docket 684). The background may be summarized as follows:

On October 1, 1948, respondents advised shippers in the trade that the carriers proposed to reinstate the exclusive-patronage contract and dual-rate system which had been in use in the trade prior to World War II. Isbrandtsen brought suit in the United States District Court for the Southern District of New York seeking an injunction and an order to set aside certain rulings of our predecessor, the United States Maritime Commission, which purported to authorize the dual-rate system. The District Court granted a temporary injunction to preserve the status quo and directed Isbrandtsen to file a complaint before us to challenge the validity of the system. This complaint was filed, and, after due proceedings, we issued our report in Docket 684 upholding the system and finding at p. 247:

> 3. The use of the dual rate system by the two conferences and their members is not unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or betwen exporters from the United States and their foreign competitors, and does not operate to the detriment of the commerce of the United States, and is not in violation of the Shipping Act, 1916, * * *.

Our order in Docket 684 was appealed to the District Court by Isbrandtsen, who urged that the dual-rate system was unlawful *per se* because in violation of section 14 (Third) of the Act. The court declined to find that the system could under no circumstances be valid, but granted a permanent injunction against the system on a point not argued before us, holding that the differential between the contract and noncontract rates offered to shippers had been arbitrarily deter-

mined and was therefore based on unreasoned conduct and so was unreasonable and unjustly discriminatory.[2]

In July 1952 we instituted a rule-making proceeding to provide machinery for securing information from conferences of ocean carriers as to the circumstances and justification for the use of dual rates and the basis for the amount of any differential between contract and noncontract rates to be charged. Before our rule-making proceeding had been completed and a rule promulgated,[3] respondents announced their intention to institute a new exclusive-patronage dual-rate system effective October 1, 1952.

Our order of investigation, issued as above stated on September 19, 1952, initiated these proceedings, and by our report filed September 29, 1952 (*Contract Rates—North Atlantic Cont'l Frt. Conf.*, 4 F. M. B. 98), we in effect directed the respondent carriers to defer the institution of the dual-rate system until the conclusion of these proceedings. Our order of September 19, 1952, as amended on October 3, 1952, outlined the scope of the investigation to embrace only the issue of "whether the differential in the rates of the proposed system is arbitrary and unreasonable and therefore unjustly discriminatory." The determination in each case of the kind here involved must depend on the special facts of such case and, accordingly, we set forth below our findings of material facts in this case.

FINDINGS OF FACT

1. Respondent North Atlantic Continental Freight Conference is a voluntary association of the 12 other named respondents who are bound together under Conference Agreement No. 4490, approved August 24, 1935, and subsequently modified by amendments, all approved pursuant to section 15 of the Act. This conference and its predecessors on the trade route have been in existence for about 100 years.

2. Intervener Isbrandtsen is a United States corporation owned by United States citizens, which operates owned United States-flag vessels on several United States trade routes and has operated a number of chartered vessels on various trade routes both under United States flag and foreign flags. In 1952 Isbrandtsen operated five United States-flag vessels on the trade route here under consideration. Isbrandtsen operates on this and other routes as a nonconference carrier and is not interested in joining the respondent conference.

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[2] *Isbrandtsen* v. *United States*, 96 F. Supp. 883 (1951), affirmed by an equally divided Supreme Court *sub nom. A/S J. Ludwig Mowinckels Rederi et al.* v. *Isbrandtsen Co., Inc., et al.*, 342 U. S. 950 (1952).

[3] Our General Order 76 was issued November 10, 1952.

3. The conference agreement relates to general cargo in liner service in the trade from United States North Atlantic ports—Portland, Maine/Hampton Roads range—to ports in Belgium, Holland, and Germany (excluding German Baltic ports). The agreement provides that the members may establish by unanimous vote uniform rates, and expressly authorizes the dual-rate system with exclusive-patronage contracts with shippers. The agreement also provides for the admission to the conference of any other carriers who may provide a regular service in the trade covered by the conference agreement.

4. The new dual-rate contract proposed to be offered by the respondent lines to shippers is in general form similar to the prior contract of the same conference referred to in Docket 684, at page 238. The new contract provides that the contracting merchant will ship by vessels of the conference carriers all commodities which the merchant may ship during specific periods, excluding, however, bulk cargoes, household goods, explosives, hay, livestock, precious metals, or human remains. The carrier agrees that the rate to be paid by contracting shippers shall be 10 percent below the applicable conference rate existing when the contract is signed, with benefit to the shipper of any further reductions made by the conference. The contract is to run for an initial period not exceeding 3 months and continue in force for successive periods of 6 months unless either party gives 60 days' prior notice of termination. The carrier agrees not to increase the contract rates in any contract period unless it gives at least 75 days' notice before the expiration of the contract period, and if the conference and the merchant do not agree to such increase, by the end of the current contract period, the contract terminates. The carrier agrees to transport all commodities which the merchant tenders and agrees to maintain adequate service. The merchant agrees to make application for space as early as practicable before sailing dates, and if the conference carrier cannot reserve space within 3 days after the application, on a vessel sailing within 15 days of the desired time, the merchant is free to make other arrangements. The contract expressly provides:

> These contract rates are deemed reasonable and made commercially possible in contemplation of savings expected by the Carriers from assurance of the Merchant's patronage.
>
> Inasmuch as the Conference is open to all Carriers providing a regular service in the trade specified * * * any additional Carriers which shall become members of said Conference shall thereupon thereby automatically become parties to this Contract and the Merchant shall have thereupon the right to avail of their services under this contract.

5. Of the 12 conference lines in the trade, 5 are relatively active [4] and 7 carry less than 5 percent of the liner-type cargo.[5] Nonconference carriers operating in the trade number six, of whom three are relatively active [6] and three are not.[7] Only one of the nonconference lines, Isbrandtsen, has intervened in this case.

6. The amount of general export cargo in long tons carried by liner services on the route and the number of eastbound sailings on the route for the years 1948 to 1952 are set forth in the following table:

TABLE I—*General Cargo Liner Carryings and Sailings on the Route*

Year	1,000 tons	Conference	Nonconference	Total sailings	Conference sailings	Nonconference sailings
		Percent	*Percent*		*Percent*	*Percent*
1948	1,485	76	24	621	89	11
1949		66	34	642	84	16
1950	1,812	57	43	613	80	20
1951	2,590	74	26	559	83	17
1952	[1] 990	[2] 66	[2] 34	[3] 688	[3] 79	[3] 21

[1] January–June 1952 only.
[2] Percentage figures based on 9 months' statistics for conference lines and 11 months for nonconference lines.
[3] Estimated for full year, based on statistics mentioned in footnote 2.

From the foregoing table and other evidence in the case, we find that the total general cargo carryings by liner services on the route increased between 1948 and 1951 and dropped off in 1952. The percentage of conference participation dropped from 76 percent in 1948 to an estimated 66 percent in 1952, and conversely, nonconference participation increased by a corresponding percentage. The conference sailings showed a percentage decrease during the period. In each year the nonconference percentage of sailings was less than the nonconference percentage of cargo carried.

7. Forecasts made by the Acting Director of the International Economic Analysis Division of the Office of International Trade, Department of Commerce, who presented an economic summary of Europe for the past several years, indicated that during 1952 American exports to Europe would, if anything, probably increase to a small extent; that the European countries would be in a better dollar position; and that some of the fiscal and other restrictions on imports in Europe probably would be eased; that the volume of military cargo would remain about the same or increase; that the offshore military procurement program of the United States, whereby this country buys for dollars products

[4] Black Diamond, U. S. Lines, Waterman, Belgian Line, Holland-America.
[5] Maersk, Home Line, Cosmopolitan, French Line, Cunard, Ellerman's Wilson
[6] Meyer Line, Hamburg American, and North German Lloyd carried, on liner service, approximately 90 percent of the total cargo carried on liner services by the independents.
[7] States Marine, Isbrandtsen, U. S. Navigation.

688-650 O - 63 - 26

of foreign factories, would place more dollars in the hands of the European countries, especially Belgium; and that economic aid to Europe would probably not decline to any great extent. The witness pointed out that Germany, Belgium, and the Netherlands were probably in better fiscal condition than any other country.

8. Nonconference rates are in general around 10 percent lower than conference rates. On most important commodities moving in the trade, one nonconference line's rates were between 7.5 percent and 15.1 percent below conference rates, and on 225 out of about 1,500 commodities these rates were almost exactly 10 percent below conference rates and on 1,464 rate listings were 9.88 percent below conference rates.

9. After the issuance of our order of September 29, 1952, above referred to, barring dual rates by the conference, the conference made effective on October 1, 1952, a single schedule of rates 10 percent below its rates previously in effect, thus giving to all shippers the lower contract rate proposed under the dual-rate system.

10. The rates of nonconference carriers in the trade are generally lower than conference rates, usually by about 10 percent. When the conference lowered its rates on October 1, 1952, the nonconference carriers followed with reductions to place their rates at a level generally about 10 percent below the new conference rates.

11. The nonconference carriers, in order to secure business, pay brokers double the brokerage fees paid by the conference carriers.

12. The conference is open for membership, in accordance with article 9 of the conference agreement, to any common carrier "who has been regularly engaged as such common carrier in the trade covered by this Agreement or who furnishes evidence of ability and intention in good faith to institute and maintain a regular service * * *" None of the nonconference carriers in the trade has applied for membership in the conference. New members of the conference would be entitled to all privileges of existing conference members, including the benefit of article 2 of the proposed shipper contract that "The Merchant agrees to ship by vessels of the Conference Carriers with equitable division of shipments among them * * *"

13. Nonconference carriers have operated in this trade in the past, and intervener Isbrandtsen or its predecessor in interest was in the trade as a nonconference operator prior to World War II, at which time the conference maintained the exclusive-patronage dual-rate system covering a substantial number of commodities and involving a differential of approximately 20 percent. At such time prior to World War II, nonconference operators carried commodities covered by the conference dual rates.

14. Before the conference announced its intention to institute the proposed dual-rate system with a 10 percent differential, a special committee of representatives of conference members was appointed, including representatives of 4 out of the 5 active lines, to consider the form of dual-rate contract and the amount of differential between contract and noncontract rates. This committee held 15 meetings (sometimes in conjunction with representatives of every member of the conference) on April 25, May 8, 19, 21, and 27, June 9, 13, and 26, July 8, 9, 17, and 18, and August 6, 11, and 26, 1952. The minutes of the meetings of this committee, which resulted in the adoption of the form of contract and the determination of a 10 percent differential between contract and noncontract rates, were placed in the record. The more important deliberations and determinations made by the committee include:

(a) On April 25, 1952, the committee agreed:

That, the fundamental purposes of conference are:
To promote and develop American foreign commerce.
To stabilize rates and competitive practices so as to provide and encourage regular and dependable sailings and services.
To maintain harmony among the regular established Lines.

That, the objective of Conference is to prevent self destruction among the regular established Carriers by adoption of uniform stabilized rates * * *.

That, the regular established steamship Lines * * * develop a policy of self regulation for the industry which, from time to time, may be threatened with self destruction by rate wars, uncontrolled competition and/or competitive methods or practices. * * *.

That, Conference is open to all carriers to join and any new member automatically becomes a party to all contracts.

The general feeling of the committee was recorded that any new merchant's rate agreement be clear-cut, concise, and should employ sound rate-making principles.

The minutes of May 8, 1952, set forth that the contract form formerly used by the conference [8] should be revised and improved, and that the contract rates should reflect reasonable and lawful concessions from the conference noncontract rates as established from time to time, and that the lower rates and also the differentials between rates should be fair and reasonable, nonretaliatory and noncoercive, and not unfair or unjustly discriminatory, and should in all other respects conform to the provisions of the Act. These minutes show that it was agreed that the contract-rate practice and the agreements thereunder should take into consideration all relevant factors, including without limitation the advantage both to carriers and shippers of such contracts and dual-rate system for the benefit of a stabilizing effect upon rates, in contrast with the detriments to trade and commerce produced by widespread destruction or irresponsible rate cutting.

[8] Referred to in Docket 684

The minutes disclosed that nonconference operators in the trade have customarily carried general cargo at rates 10 percent below the existing conference tariff rates, and that it was agreed that if nonconference lines could attract cargo from conference lines at a level 10 percent below conference rates, the conference might be able to regain this cargo by the same measure of reduction; also that it was thought that a contract reduction of more than 10 percent would be unwarranted in view of mounting costs, and that a lesser reduction might not interest merchants, and that a 10-percent discount would undoubtedly result in increased shipments and would offset reduced earnings.

The minutes of May 19, 1952, disclose consideration of conference rates and the rates of two nonconference carriers, Isbrandtsen and Meyer, on a list of 26 representative commodities in the trade. Except for 1 item (cotton seed pulp), the discount of Isbrandtsen ran from 7.5 percent to 15.1 percent under conference rates, and in 19 of the 26 items the discount was between 9 percent and 11 percent. Similarly, the rates of Meyer, except for the item of cotton seed pulp, showed a discount from 9.1 percent to 12.5 percent under conference rates, and 22 of the 26 items showed a discount of between 9 percent and 10.3 percent. These minutes recorded the following:

> It was thought that while it would be difficult, if not impossible, to estimate with any degree of accuracy the benefit resulting to the carriers from a contract with any individual shipper, there are definite and clear benefits to the conference carriers resulting from the collective assurance of the continued and exclusive patronage of a wide range of shippers interested in the transportation of many commodities.

The employment of some well-known economist was suggested to advise on the differential discount, but it was decided that the survey of this feature could more properly be conducted, in the first instance at least, by the member lines collectively, based on their experience and judgment.

It was pointed out that exclusive patronage of shippers gave the carriers better assurance of cargoes and the prospect of better distribution of cargoes throughout bad times as well as good, providing some insurance against loss. The committee agreed that "the dollar benefit or the amount of the per unit cost reduction is for many obvious reasons difficult of precise determination, but it was the best judgment of those present, based on their past experience, that the saving could be safely calculated to amount to at least 10 percent, which could be passed on to shippers by way of discount from the basic rates."

Minutes of May 20, 1952: With regard to the differential discount, it was pointed out that precise standards, such as railroad fares and

charges, public utilities rates, etc., where the rate levels are related to matters of investments, valuation, reasonable return, etc., are not controlling in ocean transportation.

Minutes of May 27, 1952: It was agreed that certain items of cargoes should be eliminated from the dual-rate contracts.

Minutes of June 13, 1952: The details regarding the form of the dual-rate contract were discussed. Virtual agreement was reached that the differential or exclusive-patronage agreement should be 10 percent.

Minutes of July 18, 1952: The committee considered the desirability of employment of experienced and competent economists to review the committee's record of the factors substantiating the proposed differential for the exclusive-patronage contract.

Minutes of August 6, 1952: The committee determined to invite Professors Rosenthal, Trumbower, and Henry for consultation regarding differential discount spread.

Minutes of August 11, 1952: The committee met with Professors Trumbower and Henry. Professor Trumbower expressed the belief that it was impossible to arrive at a mathematical formula for the discount; that there would be benefits to both merchants and carriers under a dual-rate contract; that such a contract induces rate stability and carriers would have more assurance of better loads, a factor more important to ocean shipping than to railroads where freight cars can be added or taken off. Professor Trumbower stated the discount should be somewhere between 10 percent and 20 percent, and that 10 percent would be a good inducement to merchants for contracts.

Professor Henry stated that the differential must be something that would attract business, but not unreasonably high. He indicated that a differential of 12 percent to 12½ percent should survive objections.

It was pointed out that the principal nonconference lines quoted rates 10 percent less than the conference established rates to induce merchants to ship by nonconference lines, and that, accordingly, a 10 percent differential in the proposed exclusive-patronage contract should recoup some of the business lost by the undercutting of nonconference lines.

15. The chairman of the conference as well as representatives of a number of the conference lines, including members of the special committee, testified at the proceeding, including Mr. C. R. Andrews, conference chairman, Mr. T. C. Hopkins of the Cosmopolitan Line, Mr. Ib Alvin of the Maersk Line, Mr. C. E. Kenick of the Cunard Line, Mr. P. E. McIntyre of the United States Lines, and Mr. W. B.

Garner of Waterman Steamship Corp. In addition to the expressions recorded in the committee meetings, one or more of the conference witnesses testified that in their opinion:

A 10-percent differential left a reasonable choice with the merchant as to whether he would or would not sign a contract.

A 10-percent differential was small enough to avoid disastrous losses and would recoup business lost to nonconference lines.

That since the nonconference lines had obtained a considerable volume of business by quoting rates 10 percent under conference rates, a similar differential would regain at least some part of this business, provided there was a contract with the shipper.

That additional cargo would be drawn to the conference lines by exclusive-patronage contracts which would make up loss of revenue due to the 10-percent differential.

16. Mr. W. B. Garner of Waterman, which is one of the five active lines in the trade, stated that, in his judgment, volume, value, care in handling, and risk were relevant in establishing basic rates, but not factors to be considered in establishing a differential. Mr. Garner pointed out that the sole purpose of a conference is to stabilize rates, and he felt that a shipper's agreement to patronize only the conference vesseles was worth at least 10 percent to the conference lines, and that a lesser figure was not much of an inducement to the shipper to help in rate stabilization. Mr. Garner felt that the 10-percent differential was reasonable because about as little, based on common fair business judgment, as the conference could offer to the shipper to induce him to sign the contract.

17. The two experts consulted by the conference, Mr. Henry Trumbower, retired professor of transportation at the University of Wisconsin and at one time chairman of the Wisconsin Public Utilities Commission, and Mr. Morris Rosenthal, a professor and lecturer on transportation at Columbia University and the president of a large United States importing company, also testified. Mr. Trumbower, although not basing his opinion on statistics or data, stated that on general principles applicable to ascertaining reasonableness, the 10-percent differential as proposed by the conference was reasonable. He said the standards of reasonableness which he applied were based on the effect of the differential upon the carriers' earnings in business and the extent to which the shippers would benefit by signing the contract. In his judgment the problem was whether the differential imposed any undue burden on interests of both shipper and carrier. The differential, in his judgment, must be enough to attract business. On the other hand, it should not be so great as to be a weapon against shippers who refuse to sign. Mr. Rosenthal, relying

upon his business judgment and without statistical data, testified that in his opinion a reasonable spread for the route under discussion would be from 10 to 15 percent. He said that in approaching the problem he sought to find a fair base for shippers which would make shippers feel warranted in signing an exclusive patronage contract and not breaking it. Mr. Rosenthal had experience with many conferences serving different parts of the world, and those with dual-rate systems have differentials in effect ranging between 10 and 20 percent. He felt that the concept of the differential was a matter of business judgment as to what was practical and fair.

18. The various witnesses for the conference agreed generally that the purpose of the dual-rate system was to promote stability of ocean rates and prevent rate-cutting practices, and, if established, would do so.

19. We find from the evidence that the conference determined that dual rates should be adopted generally to promote stability of rates, and that the determination of the differential in this case was made after considerable deliberation and with expert advice, and the 10-percent differential was selected by the conference, based on the business judgment of its members, as being (1) no larger than was necessary to induce shippers to sign and abide by contracts for stabilized rates; (2) not so great as to be coercive to shippers to prevent them from patronizing nonconference lines if they so desired, in view of the general practice of nonconference carriers to set rates at approximately 10 percent below lowest conference rates; and (3) not so great as to cause loss of revenue to conference carriers which would be crippling to their business operations.

20. Witnesses for nonconformance lines explained that their rates are usually lower than conference rates and that their rates are set on a basis to earn a profit and get the business. A number of these witnesses stated that the amount of reduction of their respective nonconference rates below conference levels depended on good judgment and a number agreed that the nonconference rates of their lines were about 10 percent lower than conference rates. Isbrandtsen produced two shipper witnesses who were exporters of petroleum products from Philadelphia. They were familiar with the dual-rate system, and both said that the 10-percent differential proposed by the conference was unjustly discriminatory to shippers. One of these witnesses stated further that he was against any differential and felt that the entire conference system was discriminatory. He agreed that the guarantee of a stable rate over a 6-month period was useful to shippers and that the 6-month period was a reasonable period of time. The other shipper, exporting approximately 150 tons a month, stated that there were

about three conference vessels to each nonconference vessel on the route calling at Philadelphia, and that he could so arrange his shipments to ship 75 percent or possibly all his shipments on nonconference vessels, and with nonconference rates 10 percent below prospective contract rates and 20 percent below prospective noncontract rates, he would not sign a conference contract but would hold himself free to use nonconference ships.

POSITIONS OF THE PARTIES

Interveners Justice and Agriculture take the position that the differential here involved is discriminatory because all dual-rate systems are discriminatory and retaliatory and therefore unlawful *per se* in violation of section 14 (Third) of the Act. Furthermore, Justice urges that the Board is without power to approve the proposed dual-rate system since the system is in violation of the Act, as aforesaid, and the Board's statutory power to approve agreements under section 15 of the Act is limited to such agreements as are not violative of the statute. Both of these interveners urge that the proposed contract system should be disapproved by the Board on these grounds. Commerce intervened generally.

Intervener Isbrandtsen does not attack the respondent conference as such. It argues that the differential proposed by the conference is unreasonable, arbitrary, and unjustly discriminatory for a number of reasons which may be summarized as follows:

(a) Because the dual-rate system of which the differential is a part violates section 14 (Third) of the Act and constitutes retaliation;

(b) Because there is no difference in the service performed for the contract shipper and noncontract shipper, and no transportation justification for the differential;

(c) Because the differential was not adopted by reference to any adequately determined principle or standard;

(d) Because the differential and the exclusive-patronage contract of which it is a part is coercive against shippers;

(e) Because the differential and the exclusive patronage contract of which it is a part is intended to and would be effective to put the nonconference carriers out of business and create a monopoly for the conference carriers.

Counsel for respondents urges that the differential has been determined, after careful deliberation and study by men of experience in the field of shipping, at a figure carefully calculated not to be coercive or punitive upon shippers nor confiscatory to carriers, yet suf-

ficiently large to meet nonconference competition, to induce shippers to enter into and keep agreements permitting the carriers to maintain stability of the rate system, and is, therefore, not unjustly discriminatory or otherwise unlawful.

Counsel for the Board takes the position that a differential may be justified if there is a difference in the cost of the respective services or their values or may be justified by some other transportation condition, but urges that the examiner's report fails to find any such justification or to indicate his inability to do so. He argues, therefore, that the case should be remanded to the examiner for further study and report.

DISCUSSION

Respondents have in the recent past charged uniform rates. The nonconference lines have quoted rates lower than the conference, and in the 5-year period 1948 to 1952, inclusive, have increased their percentage of export carryings on the route from 24 percent to 34 percent at the expense of the conference. The conference lines appear to be facing continuing diminution of cargoes and, in our judgment, the possibility of the withdrawal of members from conference membership to engage in a battle for survival. Stable and dependable rates, regular sailings, and the possibility of "forward trading" by merchants is jeopardized, but during the period mentioned there have not been violent and frequent rate changes typical of an all-out competitive struggle for existence. The nonconference lines suggest that the dual-rate system is not necessary to insure stability of rates or service to the public, claiming that they themselves, without such system, maintain uniform and stable rates and service. Such stability no doubt exists as long as the conference lines allow themselves to be underquoted and refrain from taking active competitive steps, but the threat of rate disorganization cannot be overlooked.

Congress well understood the problem here presented when the Act was passed. As we pointed out in Docket 684, at p. 237:

> . . . Congress, as is well known, has chosen to approve a policy of regulated monopoly rather than cutthroat competition. Section 15 of the Act recognized carrier agreements
>
> "fixing or regulating transportation rates . . . ; controlling, regulating, preventing, or destroying competition;" . . .;

and at p. 238:

> . . . The reasons which led to the adoption of this congressional policy are set forth in full in the Alexander Committee Report, H. R. Doc. 805, 63d Cong., 2d Sess., which was issued prior to the Shipping Act, 1916, and on which the latter was largely patterned. The Committee recognized that conditions of ocean transportation were such as to permit recurrent rate wars, which disorganized

service, impaired its quality, permitted discrimination against small shippers, discouraged "forward trading" by merchants, and ultimately resulted in monopoly through the process of extermination or absorption of the weaker units by the stronger (Report 295–303; 416), and stated, p. 416;

> "It is the view of the Committee that open competition can not be assured for any length of time by ordering existing agreements terminated,"

and further observed, p. 298:

> the conference system largely results in placing rates outside the influence of competition.

Congress thus by section 15 of the Act authorized ocean carriers to combine their efforts and regulate their rates, and the carriers were given exemption from the penalties of the antitrust laws if their agreements met with our approval. The control thus given to us over conference carriers in foreign trade is an extension of a well understood domestic transportation policy, which, through the laws passed over the years since the original Interstate Commerce Act of 1887, has replaced cutthroat competition with regulation, securing stability of rates and dependability of service. By the Transportation Act of 1920, the Interstate Commerce Commission was given authority to establish minimum as well as maximum rates in domestic commerce in order to prevent rate fluctuation and competitive practice which was not deemed beneficial to the shipping public. Representative Esch, speaking before the House Committee of the Whole, stated (58 Cong. Rec. 8309):

> You know the story—you can read it upon every mile of every inland waterway of the United States—how the water carrier started, and the rail carrier paralleled the river bank and made a rate so low that the water carrier had to abandon its line and its route, and after such abandonment the rail carrier raised the rate and the public was no better off and was, in fact, worse off than before.

In foreign as in domestic commerce agreements between carriers resulting in elimination of competition are not permitted without government regulation. We have, as is well known, complete power to approve and disapprove new or existing conference agreements so that we may see to it that these agreements and the conference actions from time to time taken under them are not unjustly discriminatory or unfair and do not operate to the detriment of the commerce of the United States or violate the law.[9] The inquiry in this case as to whether the proposed conference differential is arbitrary or unreason-

[9] See our report in this case dated September 29, 1952 (referred to supra, p. 357).
Also *Contract Routing Restrictions*, 2 U. S. M. C. 220, at 227.
Also order of October 7, 1953, in *Docket No. 743, Trans-Pacific Freight Conference of Japan.*

able and therefore unjustly discriminatory was undertaken pursuant to this regulatory authority.

We first take up the arguments of Justice and Agriculture and the corresponding argument of Isbrandtsen that the system violates section 14 (Third) of the Act, and that therefore both the system and the differential are unjustly discriminatory. This argument raises issues outside the scope of this investigation, instituted, as above stated, to determine only whether the *differential* is arbitrary and unreasonable and therefore unjustly discriminatory. The issues in this investigation may not be broadened to include the issues raised by Justice and Agriculture, and the section 14 (Third) issue raised by Isbrandtsen. Interested parties are entitled to raise these issues by appropriate plenary proceedings, and, as the parties know, a plenary proceeding is now pending before us, known as Docket No. 725, *The Secretary of Agriculture of the United States* v. *North Atlantic Continental Freight Conference et al.*

We next take up the argument of Board counsel that there is no difference in cost or value of the service rendered, or in any transportation or traffic condition which will prevent the differential here proposed from being unjustly discriminatory. It is suggested that some statistical forecast should be made to determine the transportation effect which the differential would have upon the carryings of the respective carriers, and to indicate among other things whether the conference carriers' loss of revenue from a contract rate would be offset by sufficient additional business to make up the difference. We do not think dependable forecasts can be made in this area, and even if attempted, would throw little additional light on the over-all effect of the differential upon the commerce of the United States as a whole, including the small as well as the large shippers and the nonconference as well as the conference carriers. And for reasons indicated in earlier reports, the regulative agency cannot well postpone a decision as to the validity of the differential until statistics are gathered after a trial period.

In any event we do not think that the answer to the problem, as suggested by Board counsel, lies in statistics. A guide to the principles which we must here follow with respect to the differential is to be found in the analysis of a dual-rate system made by the Supreme Court in *Swayne & Hoyt, Ltd.* v. *U. S.*, 300 U. S. 297. The court there pointed out that whether a discrimination in rates was in the last analysis undue or unreasonable was a matter peculiarly within the judgment of the administrative body charged with responsibility, saying that such body, after considering all the facts and circumstances

affecting the traffic, must determine whether the advantages will outweigh the disadvantages. And we understand that the court had in mind the advantages or disadvantages to the public economy as a whole and not to any separate element thereof. The court said, p. 304:

> Whether a discrimination in rates or services of a carrier is undue or unreasonable has always been regarded as peculiarly a question committed to the judgment of the administrative body, based upon an appreciation of all the facts and circumstances affecting the traffic.
>
> * * * * * * *
>
> In determining whether the present discrimination was undue or unreasonable the Secretary was called upon to ascertain whether its effect was to exclude other carriers from the traffic, and if so, whether, as appellants urge, it operated to secure stability of rates with consequent stability of service, and, so far as either effect was found to ensue, to weigh the disadvantages of the former against the advantages of the latter.

With such general guidance we approach the consideration of whether the differential proposed in this case is or is not unjustly discriminatory. We can start with the premise that under *some* circumstances, and with *some* percentage differential a dual-rate system may be valid. Such a possibility is implied in the opinion of the Supreme Court in *Swayne & Hoyt, Ltd.* v. *U. S.*, *supra.* Furthermore, our holding to that effect in Docket 684 was not set aside by the court in *Isbrandtsen* v. *United States*, *supra*, where the court said, p. 885:

> For the purpose of this decision we shall assume that, as the Board contends, in some circumstances, the Board may, pursuant to 46 U. S. C. 814, approve a conference agreement containing such a provision (i. e., dual-rate provisions).[10]

The issue is thus narrowed to whether the 10 percent differential is unjustly discriminatory.

To make the general rule outlined by the Supreme Court more specific, we believe that the validity of any differential proposed for a dual-rate system must, after consideration of all the facts, be judged in the light of the same considerations which section 15 of the Act

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[10] See also footnote 3 to the opinion in *Swayne & Hoyt, Ltd.* v. *U. S.*, *supra.*

[3] The report of the House Committee on Merchant Marine & Fisheries, H. R. Doc. 805, 63d Cong., 2d Sess. (1914), recommended (p. 307) the prohibition of deferred rebates, adopted in section 14 of the Shipping Act, because it operated to tie shippers to a group of lines for successive periods, and because the system "is unnecessary to secure excellence and regularity of service, a considerable number of conferences being operated today without this feature." See, e. g., pp. 103–105, 200 The Committee recognized that the exclusive contract system does not necessarily tie up the shipper as completely as "deferred rebates," since it does not place him in "continual dependence" on the carrier by forcing his exclusive patronage for one contract period under threats of forfeit of differentials accumulated during a previous contract period. Accordingly, the Committee did not condemn the contract system completely. Cf. *W. T. Rawleigh Co.* v. *Stoomvaart*, 1 U. S. S. B. 285.

sets up for judging the validity of carrier agreements submitted to us for approval. By section 15, if a proposed agreement between carriers is unjustly discriminatory or unfair as betweeen carriers, shippers, etc., or if it operates to the detriment of the commerce of the United States, or if it is in violation of the Act, it may be disapproved; if it does not transgress these standards it may be approved. And while the differential of a dual-rate system may appear to be *prima facie* discriminatory, we believe that in a case such as this it will not be *unjustly* discriminatory unless it also violates the standards which section 15 of the Act establishes, that is, unless it is unfair as between carriers, or unfair as between shippers or the other groups mentioned in the Act, or unless it operates to the detriment of the commerce of the United States, or unless it is in violation of the Act.

We will therefore consider in detail the possible unfairness of the differential as between carriers (in this case between intervener Isbrandtsen and other nonconference carriers, on the one hand, and respondent conference carriers, on the other hand, including the charge of monopoly) and possible unfairness as between shippers, including exporters and importers (represented by those paying the low conference rate, on the one hand, and those denied the low conference rate, on the other hand, including the charge of coercion). There is no charge that the differential involves unfairness between ports or between exporters from the United States and their foreign competitors, or that the differential as such and apart from the system violates any provision of the Act. In the last analysis, the question of fairness or unfairness to carriers or shippers or to any other class of persons must be weighed in the light of all the circumstances and with a view to determining whether the differential proposed is beneficial or detrimental to the commerce of the United States and to our economy as a whole.

The minutes of the conference committee showed that the conference, in selecting the differential, had in mind the public interest as well as the business needs of the conference. The committee adopted certain guiding principles, including a statement that the differentials between the rates should be "fair and reasonable, nonretaliatory and noncoercive, and not unfair or unjustly discriminatory", and further, that the dual rate practice should take into consideration all relevant factors, including advantages both to carriers and shippers, in order to promote a stabilizing effect upon rates in contrast with the detriments to trade and commerce produced by destructive rate cutting.

Of course, the validity of the differential cannot depend upon the mere declarations of its proponents, and, accordingly, we pass from

the expressed motives of the conference to the arguments of the interveners that the differential is unfair as between shippers because coercive, and unfair as between carriers because monopolistic.

Regarding the charge of unfairness as between shippers, here called coercion, Isbrandtsen's counsel explained what he means by coercion, stating that the conference has more sailings than the nonconference competitors so that the big shippers have to go to the conference to get service, and so, according to the argument, the conference has "the whip hand over them, and that is the coercion we are talking about, and that proves our case."

When related to a dual-rate contract of the type here involved, however, effective for a period of not over 6 months, we do not think that a differential, generally comparable to the percentage by which substantial and effective nonconference competitors are under-quoting conference rates, amounts to coercion, or that such a differential is unjustly discriminatory or unfair between shippers.

Every competitive act which is an inducement to shippers is not necessarily a coercive measure against them. The Alexander Committee, already referred to, considered the pre-1916 carrier practices and outlawed deferred rebates as coercive because they kept the shippers continuously tied to the conference for successive periods of exclusive-patronage agreements. The inducement to a shipper becomes coercive upon him if it unduly forces his original choice, or places unreasonable restrictions upon his subsequent freedom to choose any carrier that he may later prefer. The nonconference offer of a rate 10 percent below the conference rate is an inducement to shippers and not a coercion, although it also may be compelling upon them, and shippers, or some of them, may have to arrange their shipment dates so that they can take advantage of such lower rates. Similarly, the conference rate with a 10-percent differential for 6 months of exclusive patronage is an inducement, but if the period is not too long or the differential not too high, it is an inducement only and not a coercion. The shipper thereafter is under no compulsion to enter into a conference agreement for a successive period, and at the end of the period for which he originally signs he is free to weigh the relative inducements of all competitors seeking his business.

Under the conditions disclosed by this record, the agreement proposed by the conference carriers not to increase rates for a period of 6 months is in the interest of the commerce of the United States for it promotes forward trading and is a stabilizing influence on rates and service. Even nonconference shippers agree that such a carrier un-

dertaking works to shippers' advantage and that the period is reasonable. If a 6 months' period under the conditions here described is a desirable restriction on the carrier's freedom of action, we believe that a corresponding restriction upon the shipper, binding him to give his exclusive patronage, does not hold him for too long a period, nor is it for that reason coercive. The length of the period during which the carrier may be able to guarantee against increased rates depends in a real sense upon assurance to the carrier that during that period he will receive some dependable volume of traffic.

In our judgment, the amount of the differential here proposed cannot under the conditions here described be said to be coercive so as unduly to force a shipper to contract or to tie the contracting shipper to the conference beyond the agreed 6 months' period, or to deprive him of complete freedom of choice. Conference witnesses have testified that a 10-percent differential is about as low as will be effective to attract shippers to their lines. It is to the carrier's advantage, of course, whether he be a conference or a nonconference carrier, to give as small an inducement as possible to attract shipper customers. In the trade here involved the nonconference carriers offer an inducement of a differential about 10 percent below conference rates, and this nonconference practice is perhaps some confirmation of the conference's contention as to what is commercially expedient. If the conference dual-rate percentage were far in excess of the nonconference competitive differential, we might well find it excessive, unnecessary, or unjustly discriminatory as having a tendency to force the shipper to an original contract or to tie him to the conference for successive periods. Where, as here, the shipper may, on the one hand, use nonconference as well as conference carriers and ship part of his exports at about 10 percent below and part at about 10 percent above the conference contract rate, or, on the other hand, use only the conference carriers and ship all his exports at the intermediate contract rate, he has a reasonable freedom of choice, and, in our judgment, is coerced neither for nor against making contracts with the conference.

Next, regarding alleged unfairness between carriers, Isbrandtsen's counsel argues that the differential is unjustly discriminatory because it is intended to and will have the effect of putting the nonconference carriers out of business and creating a monopoly. We think that the differential proposed by the conference cannot be said to be intended to drive competitors out of business. We believe that the primary intent of the proposers of the system and the differential is, as already stated by the conference committee, "to stabilize rates and competitive practices so as to provide and encourage regular and dependable

sailings and service." If the conference's intent had been to eliminate its nonconference competitors, it would hardly have included in its basic agreement a provision for the admission of nonconference members offering regular service in the trade, nor included in the proposed shipper agreement a provision that new lines joining the conference should automatically become parties to all existing conference shipper contracts. Nor do we think that the introduction of a dual-rate system with a 10-percent differential will have the effect of putting the nonconference carriers out of business. The nonconference lines over the past 5 years have in this trade shown every sign of health and vigor. They have not only attracted increasing cargoes by offering lower rates, as already pointed out, but also by offering to brokers double the fees paid by conference lines. As already stated, the proposed 10-percent differential is not so high in the circumstances of this case as to take away from the shipper a reasonable choice, and hence, in our judgment, not so high as to impair unreasonably the ability of the nonconference carriers to continue successfully in business. While our decision does not rest thereon, our views in this regard are perhaps supported by the fact that our records show that Isbrandtsen has for a number of years continued its operation on one or more other trade routes against conference lines where a dual-rate system is in force with a differential as great or greater than the 10 percent here involved.

In summary, we find that the differential proposed by the conference was adopted after due deliberation and consideration of relevant factors and cannot be said to have been determined arbitrarily or to be based on unreasoned conduct. If there are disadvantages to the 10-percent differential, we believe, as already indicated, there are also clear advantages tending to promote and strengthen the commerce of the United States, and, in our judgment, the advantages clearly outweigh the disadvantages.

CONCLUSION

The differential of 10 percent between contract and noncontract rates proposed by respondent conference for a dual-rate exclusive-patronage system is, under the circumstances disclosed by the record of this case, not arbitrary or unreasonable, nor unjustly discriminatory, and is not in violation of the Act.

Nothing in this report shall be deemed to relieve the respondent conference from full compliance with the provisions of General Order 76, referred to in footnote 3.

An order will be entered discontinuing the proceeding.

FEDERAL MARITIME BOARD

ORDER

At a Session of the FEDERAL MARITIME BOARD, held at its office in Washington, D. C., on the 6th day of January A. D. 1954

No. 724

CONTRACT RATES—NORTH ATLANTIC CONTINENTAL FREIGHT CONFERENCE ET AL.

This proceeding, instituted by the Board on its own motion by order of September 19, 1952 (amended October 3, 1952), 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 containing its conclusions and decision thereon, 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.

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

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FEDERAL MARITIME BOARD

No. 737

GALVESTON CHAMBER OF COMMERCE, CITY OF GALVESTON, AND THE BOARD OF TRUSTEES OF GALVESTON WHARVES [1]

v.

SAGUENAY TERMINALS, LIMITED, ALUMINUM COMPANY OF CANADA, LIMITED, ALCOA STEAMSHIP COMPANY, INC., AND THE ALUMINUM COMPANY OF AMERICA [2]

Submitted January 5, 1954. Decided February 3, 1954

Respondent Saguenay Terminals, Limited, found not to be a common carrier in the operation of its vessels in the trades from British Guiana to United States Atlantic and Gulf ports, and therefore not subject to regulation under the Shipping Act, 1916, as to that operation.

E. H. Thornton and *F. G. Robinson* for complainants.

Thomas K. Roche for respondents Saguenay Terminals, Limited, and Aluminum Company of Canada, Limited, *R. D. Weeks* for respondent Alcoa Steamship Company, Inc., and *Thos. D. Jolly* and *William K. Unverzagt* for respondent Aluminum Company of America.

REPORT OF THE BOARD

BY THE BOARD:

This case arose on complaint that respondent Saguenay Terminals, Limited (Saguenay), is a common carrier by water; that Saguenay has contracted to carry bauxite ore from British Guiana to Galveston,

[1] The Galveston Chamber of Commerce is a Texas corporation devoted to the protection and welfare of its members, who are businessmen and firms of the city of Galveston. The city of Galveston is a municipality of the State of Texas and owns the Galveston Wharves. The Board of Trustees of Galveston Wharves controls and operates water front port facilities in the city of Galveston.

[2] Aluminum Company of Canada, Limited, Alcoa Steamship Company, Inc., and Aluminum Company of America, all denied that they had any interest in or relation to the facts complained of. No evidence was presented in support of any violation of the Shipping Act, 1916, by any of these respondents, and the complaint as to them will therefore be dismissed without further consideration.

Texas, Mobile, Alabama, and New York, N. Y., at rates that are (1) unduly prejudicial to the port of Galveston, in violation of section 16 of the Shipping Act, 1916 (the Act), and (2) unjustly discriminatory in violation of section 17 of the Act; and that the contract of carriage is unjustly discriminatory as between Mobile and New York on the one hand and the port of Galveston on the other, in contravention of section 15 of the Act.

The case has been conducted under Rule 11 of the Board's Rules of Practice and Procedure (18 F. R. 3716 *et seq.*), which provides that on consent of the parties a case may be presented on written memoranda of facts and argument. The examiner has issued a recommended decision recommending that the complaint be dismissed as to all respondents. Complainants have excepted to the recommended decision, and Saguenay has replied to the exception. No party has requested oral argument and none has been had. We agree with the examiner's conclusions.

The record shows that the facts on which the dispute arose are as follows:

1. On March 12, 1953, Saguenay executed a contract with the United States of America, represented by General Services Administration (GSA), under which it agreed to furnish to GSA ocean transportation for a large quantity of refractory grade bauxite from Mackenzie, British Guiana, to United States Atlantic and Gulf ports. The Government agreed to pay $6.95 per ton to New York, $7.45 per ton to Mobile, and $7.65 per ton to Galveston and other west Gulf of Mexico ports. The contract provides that Saguenay will accept cargoes varying from 4,000 to 10,000 long tons. It incorporates by reference all the essential terms and conditions of the Voyage Charter Party Form designated "WARSHIPVOY," revised August 15, 1944, and provides that Saguenay shall issue negotiable on-board bills of lading for each shipment, showing the appropriate government agency as consignee and shipper. The contract makes no reference to the ultimate destination of cargoes after unloading.

2. Saguenay owns 11 vessels and in August 1953 had 50 additional vessels under charter. All of these vessels are operated primarily under private contracts of carriage, and for the most part are engaged in the transportation of bauxite from British Guiana for aluminum smelters in eastern Canada and the United States.

3. Saguenay also operates as a common carrier and carries general cargo on the following services: (a) from eastern Canadian ports to West Indies and Caribbean basin ports; (b) from United Kingdom and European ports to West Indies and Caribbean basin ports; and (c) between eastern Canadian ports and west coast of North America

ports, touching at Caribbean basin ports. Saguenay carries no general cargo from Caribbean basin ports, including ports in British Guiana, to ports on the Atlantic or Gulf coasts of the United States.

4. Saguenay carries, out of the Caribbean, raw materials in bulk cargoes for its parent company, Aluminum Company of Canada, Limited, and associates, and sometimes for others. Saguenay neither advertises for nor solicits cargo out of the Caribbean. Vessels carrying general cargo into the Caribbean in services (a) and (b) above are always spotted to load bulk cargoes under private contracts going out of the Caribbean, and on such outward voyages do not act as carriers of general cargo.

5. In addition to bauxite, Saguenay occasionally carries out of the Caribbean some other cargoes such as sugar, molasses, and phosphate. These are bulk cargoes, one cargo usually filling a ship, and are always carried under private contracts arranged through brokers on the chartering markets.

POSITIONS OF THE PARTIES

Saguenay argues that it is not a common carrier in any of the trades mentioned in the complaint because it has not held itself out nor has it advertised itself as being ready and willing to carry cargoes for all, nor has it in fact carried cargoes except in bulk and on private contract, and that, therefore, it is not, insofar as the trades mentioned in the complaint are concerned, a common carrier subject to regulation under the Act.

Complainants argue that advertising for and soliciting cargo for the trades here involved are not essential factors in determining common carrier status, and that Saguenay is a common carrier on the trades here involved by virtue of its activities described in the findings of fact above set forth. The essence of complainants' argument is that (1) the term "common carrier" as used in the Act includes all ocean carriers except ferry boats and tramps, and (2) in the alternative, since Saguenay operates as a common carrier in some of its services, it is, therefore, a common carrier in the trades here involved.

DISCUSSION

We think it is clear that Saguenay is not a common carrier in the trades out of the Caribbean to the Atlantic and Gulf ports mentioned in the complaint. Ferry boats on regular routes and ocean tramps, referred to in section 1 of the Act, insofar as they might come within the common-law definition of common carriers, are excluded from those common carriers which are subject to regulation under the Act.

However, and subject to such exception, our power of regulation extends only to common carriers by water as the term is understood at common law. We said recently that

> The term "common carrier" is not defined in the Act, but the legislative history indicates that the person to be regulated is the "common carrier" at common law. *Agreement No. 7620* 2 U. S. M. C. 749 at 752 (1945). In *The Wildenfels*, 161 Fed. 864 (C. C. A. 2d, 1908), the court said, p. 866:
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> > "According to all the authorities, the essential characteristics of the common carrier are that he holds himself out as such to the world; that he undertakes generally, and for all persons indifferently, to carry goods and deliver them, for hire; and that his public profession of his employment to be such that, if he refuse, without some just ground, to carry goods for any one, in the course of his employment and for a reasonable and customary price, he will be liable to an action." [3]

And the Supreme Court in *United States* v. *California*, 297 U. S. 175, 181 (1936), said

> Whether a transportation agency is a common carrier depends not upon its corporate charter or declared purpose, but upon what it does.

Application of this standard to the facts of record leads inescapably to the conclusion that Saguenay's services in the trades here involved are not common-carrier services and are therefore not subject to regulation by us under the Act. *New York Marine Co.* v. *Buffalo Barge Towing Corp.*, 2 U. S. M. C. 216, 219 (1939).

The fact that Saguenay held out its vessels to carry general cargo for all persons indifferently on some routes, particularly those designated as (a), (b), and (c) in the foregoing findings of fact, does not mean that Saguenay does, or is required to, make a similar holding out of its other vessels in other trades in which they may be engaged, such as the trades mentioned in the complaint. The common-carrier status attaches to the carrier only for such trade or route as to which it holds itself out to carry for all persons indifferently. In *Transp. By Mendez & Co., Inc., Between U. S. and Puerto Rico*, 2 U. S. M. C. 717, 721 (1944), the Maritime Commission said:

> A carrier may be both a common and a contract carrier, not, however, on one vessel on the same voyage.

CONCLUSION

We therefore conclude that respondent Saguenay, in the operation of its vessels in the trades from British Guiana to United States Atlantic and Gulf ports, is not a common carrier by water as that term is used in the Act, and its rates and agreements in such trades are therefore not subject to regulation by us.

An order will be entered dismissing the complaint.

[3] *Philip R. Consolo* v. *Grace Line Inc.*, 4 F. M. B. 293.

Order

At a Session of the FEDERAL MARITIME BOARD, held at its office in Washington, D. C., on the 3d day of February A. D. 1954

No. 737

GALVESTON CHAMBER OF COMMERCE, CITY OF GALVESTON, AND THE BOARD OF TRUSTEES OF GALVESTON WHARVES

v.

SAGUENAY TERMINALS, LIMITED, ALUMINUM COMPANY OF CANADA, LIMITED, ALCOA STEAMSHIP COMPANY, INC., AND THE ALUMINUM COMPANY OF AMERICA

This case being at issue upon complaint and answer on file, and having been duly submitted by the parties, and full consideration 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.

MARITIME ADMINISTRATION

No. S–43

AMERICAN EXPORT LINES, INC.—APPLICATION FOR EXTENSION OF WAIVER UNDER SECTION 804 OF THE MERCHANT MARINE ACT, 1936, AS AMENDED (ITALIAN LINE)

Submitted January 27, 1954. Decided February 15, 1954

Neither special circumstances nor good cause shown to justify waiver of provisions of section 804, Merchant Marine Act, 1936, as amended, to permit American Export Lines, Inc., to act as agent in this country for passenger combination vessels of Italia, Società per Azioni di Navigazione con Sede in Genova.

Gerald B. Brophy and *Carl S. Rowe* for applicant.

John J. O'Connor and *John J. O'Connor, Jr.*, for Isbrandtsen Co., Inc.

Allen C. Dawson and *William D. Mitchell* for the Maritime Administration.

REPORT OF THE MARITIME ADMINISTRATOR

American Export Lines, Inc. (Export), a subsidized operator of combination and cargo vessels on United States Trade Routes Nos. 10 and 18 to and through the Mediterranean, has applied to me to extend until December 31, 1956, a previously granted waiver of the provisions of section 804 of the Merchant Marine Act, 1936, as amended (the Act). Unless so extended, the waiver will expire March 1, 1954.

The waiver sought to be extended is for Export to act as general agent in the United States and Canada for all matters, except brokerage and the solicitation of freight, for the passenger combination vessels operated by Italia, Società per Azioni di Navigazione con Sede in Genova (Italia). Italia is a citizen of Italy and operates Italian-flag passenger combination vessels between Mediterranean ports and North American Atlantic ports.

Isbrandtsen Co., Inc. (Isbrandtsen), a United States citizen which operates steamships under the American and other flags on the route

between United States North Atlantic ports and Mediterranean ports and on other routes throughout the world, has intervened against the application.

Section 804 of the Act provides that

> It shall be unlawful for any contractor receiving an operating-differential subsidy under the title VI * * * of this Act * * * directly or indirectly to own, charter, act as agent or broker for, or operate any foreign-flag vessel which competes with any American-flag service determined by the Commission to be essential as provided in section 211 of this Act: *Provided, however,* That under special circumstances and for good cause shown the Commission may, in its discretion, waive the provisions of this section as to any contractor, for a specific period of time * * *.[1]

In order to insure a complete record a public hearing was ordered before an examiner of the Federal Maritime Board. Counsel for Export, Isbrandtsen, and the Maritime Administration appeared at such hearing. The examiner has issued a recommended decision recommending that the waiver be extended. Oral argument has been presented, briefs have been filed by all counsel on the issues involved, and the matter has been duly considered.[2] I disagree with the conclusion of the examiner.

The significant facts in the case are as follows:

1. Export has been the general agent for Italia's passenger combination vessels for North America for all matters except solicitation of freight since World War II, pursuant to permission granted from time to time under section 804 waivers given by the Maritime Administrator or the United States Maritime Commission. Export operates the two large passenger combination vessels *Independence* and *Constitution* and four small passenger combination vessels on Trade Route No. 10, under the terms of operating-differential subsidy contract FMB–1. In addition, Export operates a number of cargo vessels on Trade Routes Nos. 10 and 18 under the same contract, as well as a number of unsubsidized cargo vessels on various routes.

2. Italia is a wholly owned subsidiary of Finmare, an Italian company which has interests in a number of Italian ship-operating cor-

[1] By the terms of Reorganization Plan No. 21 of 1950, the Secretary of Commerce succeeded to certain functions of the United States Maritime Commission, including *inter alia,* "the making of all determinations and the taking of all action (other than amending or terminating any subsidy contract), subsequent to entering into any subsidy contract, which are involved in administering such contract * * *." The Secretary of Commerce has authorized the Maritime Administrator to perform such functions by Department of Commerce Department Order No. 117 (Amended).

[2] The two other members of the Federal Maritime Board also considered the examiner's recommended decision and the briefs of counsel and heard the oral argument with me, and, although they have not participated officially as Board members in my decision herein, I am authorized to state that they, as Special Assistants to the Maritime Administrator, fully concur in the result I have reached.

porations. Finmare is substantially financed by an agency of the Government of Italy. Italia operates four passenger combination vessels on liner service between the Mediterranean and United States and Canadian ports, including the new *Andrea Doria* and the well-known *Saturnia*, *Vulcania*, and *Conte Biancamano*. It is for these vessels that Export now acts as general agent.

3. In July of 1949, Export and Italia entered into a reciprocal agency agreement whereby Export was to act as general agent in North America for the passenger combination vessels of Italia, and Italia was to act for Export in certain matters in Italy. This agreement was split into two parts, one relating to Export's agency for Italia requiring a waiver under section 804, and the other relating to Italia's agency for Export requiring no such waiver.

4. The latest effective agreement, covering Export's agency for Italia (requiring the waiver) and authorized by waiver of March 31, 1952, and previous waivers, provides that its purpose is to promote and cultivate transatlantic travel, that Export is to act as general agent for Italia in North America with respect to Italia's passenger vessels, that Export's responsibility is limited to the responsibilities usually attached to the services of general agents, that Export is to receive a per diem fee for days Italia vessels are in North American ports, that Italia is to share the use of pier 84 in New York with Export, that Export is to be compensated for expenses incurred with respect to each voyage of Italia's vessels, that Export's remuneration is to be calculated on the gross eastbound and westbound passenger revenues of Italia which are collected in North America, and that Export's remuneration for freight on Italia's passenger combination vessels is to be 5 percent of gross eastbound freight revenue.

5. The 1952 waiver mentioned above provided that Export might act for Italia in the manner set forth in the agreement just described. The waiver further provided that Export might not engage in brokerage of any kind nor in the solicitation of cargo, that the compensation received by Export for the performance of agency services should be accounted for in determining recapture by the Government under Export's subsidy agreement, that Export should file with the Maritime Administration quarterly reports showing in detail the financial transactions of the agency agreement, that Export might not change the character of the services rendered pursuant to the waiver, that the Maritime Administrator on his own motion might modify and on 90 days' notice cancel the waiver, and that the conditions of use by Italia's vessels of Export's pier in New York should be subject to the approval of the Administrator.

6. The latest effective counter agreement covering Italia's agency for Export provides that Export may use Italia's authorized emigration representatives in Italy to procure and process passengers for the two large passenger ships of Export's fleet, the *Independence* and the *Constitution*, that Export, in general, is to use Italia's representatives in Italy as its agents, but may use its own appointed representatives where it chooses to do so, that with respect to Export representation in Europe outside Italy, Export may use Italia's representatives or may choose its own, that Export and Italia are to coordinate sailings and passenger fares to the "fullest possible extent," that Export and Italia "will develop a common general advertising and publicity plan in North America and Europe but in a manner to conserve the identity of each company."

7. Export and Italia now propose to modify the presently effective agreements described above in certain respects, principally in respect of the compensation to be paid by Italia to Export, and to provide for exclusive representation of Export by Italia in Italy.

8. It appears that Italia's emigration agent organization is the best such organization in Italy, and that it has been and will continue to be to Export's advantage to have Italia's agents soliciting and processing Italian emigrants for Export vessels. To transport emigrants from Italy, a carrier must be represented in Italian villages by Government-licensed agents. Italia has some 1800 such agents in Italy, of which Export uses about 1100. These agents produced for Export: in 1951, 1,332 westbound passengers; in 1952, 2,168; in the first 6 months of 1953, 939. These carryings represent approximately 7 percent of Export's westbound carryings for the years involved. Revenue from passengers produced by Italia's emigration agents in 1952 amounted to a little over 4 percent of Export's estimated gross revenues from operation of the *Independence* and *Constitution*.

Witnesses for both Italia and Export testified that if Export were forced to establish its own emigration agent organization in Italy its emigrant traffic business would decrease sharply.

Witnesses for Export further testified that Export secures some passengers, both eastbound and westbound, because of the association of its name with that of Italia. This is ascribed to the fact that while Italian nationals, as well as Americans of Italian descent, are intensely loyal to Italian-flag vessels, Export, because of its association with Italia, has become acceptable to such persons as a means of travel between Italy and the United States.

9. Italia has acted as agent for Export in Bologna, Florence, Milan, and Turin, in Italy, and in Paris, Vienna, and Zurich. In 1952 and

the first 6 months of 1953, these offices produced respectively, $654,011 and $303,210 in passenger revenue for Export.

10. Italia and Export share the use of pier 84 in New York, and Italia contributes to the expense of renting and operating the pier. In 1952 Italia contributed approximately 25 percent of the costs of operating the pier, and during that year berthed 25 vessels to Export's 29 and carried about 40,000 passengers over the pier as against Export's 44,664.

11. Export's witnesses testified that Export purchases voyage stores for Italia's vessels in New York and, by combining orders for such purchases with its own requirements, is able to secure volume discounts on its own purchases as well as on the purchases made for Italia. The amount of Export's savings on this account were not shown.

12. Both Export and Italia advertise separately in this country, and they also do a relatively small amount of joint advertising. Export handles all advertising for both companies and claims to be able to get reduced lineage rates on all such advertising, but the saving to Export does not appear in the record.

13. Export's net profit (before Federal taxes) for acting as Italia's agent was in 1952, $354,000, and for the first 9 months of 1953, $682,568.

14. Prior to World War II, ocean passenger travel from United States North Atlantic ports to the Mediterranean amounted to approximately 12 percent of total passenger travel from such ports to Europe and the United Kingdom. In 1952, the percentage was 16.4, and for the first 10 months of 1953, it was 17.6. The record does not disclose what the percentages were between 1946 and 1952. The first full year of operation for the *Independence* and *Constitution* was 1952.

15. In the performance of its agency duties for Italia in New York, Export comes in contact with the pursers, masters, and other officials aboard Italia vessels and obtains from them comments of passengers on the service rendered by Italia, thereby obtaining information which Export claims enables it to improve its own efficiency in serving its own passengers.

16. The record does not reveal whether any American-flag carrier has been deprived of a substantial amount of passenger traffic by Export's activities as agent for Italia.[3] Isbrandtsen showed that its ships have accommodations for 12 passengers each, that in a normal year

[3] American President Lines, Ltd., Prudential Steamship Corporation, T. J. Stevenson & Co., Inc., Isthmian Steamship Co., Levant Line, and States Marine Lines, in addition to Isbrandtsen, compete to some extent with Export and Italia, but the nature and extent of such competition is not of record herein.

its total passenger capacity on the route is 312 passengers, and that in 1952 Isbrandsten ships carried 33 passengers to Genoa. However, Isbrandtsen has not been able to provide figures on the total number of passengers lifted by its ships from United States ports in that year for all ports between New York and Genoa, and it further appears that Isbrandtsen's passenger capacity is fully booked now for several months in the future. It was conceded by Isbrandtsen's executive vice president that the passenger service offered by his company is not generally comparable with the service offered by Export or Italia.

17. Export's witnesses testified that, through their friendship and close association with Italia, they had been able to reduce the required stay of Export ships in the port of Naples by 20 hours. Italian regulations provide that each vessel carrying emigrants from Italy must establish a terminus at an Italian port and must lie in such terminus on each voyage for 48 hours. It was a relaxation of this requirement which enabled Export to effect the 20-hour saving.

18. Under proposed modifications to the Italian counteragency agreement, whereby Italia will act as Export's exclusive agent in Italy, Export's witnesses all agreed that Export will save, by reducing its own establishment in Italy, at least as much as it will have to pay Italia to expand its organization.

DISCUSSION

Section 804 of the Act prohibits a subsidized American operator from acting as agent for any foreign-flag vessel which competes with an essential American-flag service. The Maritime Administrator is vested with discretionary power, however, to waive this prohibition when he feels that special circumstances exist and that good cause has been shown that such waiver will promote the purposes and policy of the Act. The legislative history of section 804 shows clearly that Congress did not intend waivers would be granted except for compelling reasons. The circumstances and causes Export has advanced in support of its request for an extension are not, it seems to me, sufficient to justify extension of this special waiver of the statutory prohibition.

Export asserts that the waiver enables it to obtain preference as to passengers that would otherwise move in foreign vessels, citing as examples the Italian emigrants produced by Italia's agents and the Italian-type passengers it carries on its ships. However, emigrants accounted for only slightly over 4 percent of Export's estimated gross revenue from the *Independence* and *Constitution* in 1952, and in my view the emigrant traffic from Italy to the United States depends more on the counter-agreement of Italia to act as agent for Export

than upon Export's representation of Italia, for which a section 804 waiver is required. Nor has Export shown to my satisfaction that Italian-type passengers or passengers produced by Italia offices in Europe patronize Export's vessels as a consequence of the waiver or of circumstances flowing from the waiver. The termination of Export's agency for Italia might not necessarily result in the termination of the counter agency, but even so, it is quite possible that Export's passenger carryings would be increased even if it lost the small number of emigrants produced for it by Italia's agents, if it were free to promote passengers exclusively for its own vessels instead of being obliged (as it is under its agency for Italia) to promote business for Italia.

Export further urges as a special circumstance that it has, by virtue of the waiver, increased its operating efficiency and decreased its operating costs. The financial advantage to Export of obtaining quantity discounts on voyage stores and advertising cannot be large, and in any event, since no figures of actual discounts obtained have been presented for the record, I have no means of weighing this advantage. The financial advantage to Export from spreading pier operating costs over two lines is real and measurable, but I am not convinced that the pier-sharing arrangement necessarily depends upon a section 804 waiver.

Export urges as another special circumstance the receipt of earnings from the agency, as set forth in my findings of fact. However, I regard the receipt of earnings as an ordinary rather than a special circumstance of doing business. It follows that Export's earnings from the agency, unsupported by other special circumstances, cannot be considered in themselves a special circumstance.

An advantage asserted by Export to increase its efficiency and to reduce turnaround, is the reduction of port time in Naples. But not even Export's witnesses were able to state that this advantage was related except in a most tenuous way to the section 804 waiver. I do not consider it so related.

Another circumstance urged by Export in support of its application is that the waiver enables it to more effectively compete with its foreign-flag competitors. Export states that Italia and Export together have offered increasingly effective competition to lines operating between United States North Atlantic ports and northern European ports. This is shown, asserts Export, by the increase after World War II of the percentage of ocean passengers traveling direct to the Mediterranean, described in the findings of fact set forth above. I cannot agree that such increase has been the result of Export's section 804 waiver granted from time to time since the end of the War.

Surely, both Export and Italia are interested in promoting travel direct to the Mediterranean, on a cooperative basis, whether or not Export is Italia's representative in this country. Moreover, I regard it as significant that the first postwar year for which an increase is shown of record is also the first full year of operation for the *Independence* and *Constitution.*

I do not consider the benefit claimed by Export from consultation with officers and crew of Italia's vessels, as to services and facilities, to be weighty enough to justify waiving the provisions of section 804.

CONCLUSION

I therefore conclude that neither special circumstances nor good cause have been shown which would move me, in the exercise of the discretion entrusted to me, to waive the provisions of section 804 of the Act to permit Export to act as agent in this country for the passenger combination vessels of Italia. In view of the special circumstance, however, that Export is now general agent for Italia in this country, and in order for Export to terminate the arrangement in an orderly way, I will extend the currently effective waiver of the provisions of section 804 until the close of business, June 30, 1954.

By order of the Maritime Administrator.

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

FEDERAL MARITIME BOARD

No. 720

INTERCOASTAL STEAMSHIP FREIGHT ASSOCIATION ET AL.[1]

v.

NORTHWEST MARINE TERMINAL ASSOCIATION ET AL.[2]

Submitted July 8, 1953. Decided September 22, 1953

The assessment by certain of the respondents of their tariff service charge against the ship in conection with lumber transported from the States of Oregon and Washington, via the Panama Canal, to Atlantic coast ports, found to be an unjust and unreasonable regulation or practice in violation of section 17 of the Shipping Act, 1916. Cease and desist order entered, and case referred for consideration of reparation.

Erskine B. Wood and *W. M. Carney* for complainants.
Thomas J. White and *Donald E. Leland* for respondents.

REPORT OF THE BOARD

BY THE BOARD:

Complainants, common carriers by water in the intercoastal trade and their association, filed complaint against respondents, terminal operators in the Pacific Northwest area, alleging that the assessment of respondents' tariff service charge, insofar as the charge applies to vessels carrying eastbound intercoastal lumber, violates section 17 of the Shipping Act, 1916 (hereinafter referred to as the Act).[3] A cease and desist order and reparation are demanded.

[1] American-Hawaiian Steamship Company, American President Lines, Ltd., Calmar Steamship Corporation, Isthmian Steamship Company, Luckenbach Steamship Company, Inc., Pope & Talbot, Inc., States Steamship Company, Pacific-Atlantic Steamship Co., United States Lines Company, Waterman Steamship Corporation, and Weyerhaeuser Steamship Company.

[2] Alaska Terminal & Stevedoring Co., Albina Dock Co., Inc., Ames Terminal Co., Arlington Dock Co., Baker Dock Company, Columbia Basin Terminals, The Commission of Public Docks of Portland, Oregon, G & S Handling Co., Interstate Terminals, Olympic Steamship Co., Port of Astoria, Port of Longview, Port of Port Angeles, Port of Seattle, Port of Tacoma, Port of Vancouver, Salmon Terminals, Inc., Shaffer Terminals, Inc., Tait Tidewater Terminals, Virginia Dock & Trading Co., West Coast Terminals, Inc., and Williams, Dimond & Company.

[3] A further allegation that the service charge on lumber subjected complainants to undue and unreasonable prejudice and disadvantage in violation of section 16 of the Act was abandoned after the serving of the examiner's recommended decision.

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The examiner recommended that eight items included in the service charge so applied should be held unjust and unreasonable regulations relating to the receiving, handling, storing, or delivering of property, in violation of section 17 of the Act. Both parties excepted. We agree generally with the examiner.

We find the facts as follows:

1. The service charge complained of was established by respondents' tariffs in 1946 and 1947 to meet increased costs of operation. It applies to all cargo handled through respondents' terminals and is collectible from the ship as distinguished from the cargo.

2. Seattle Terminals Tariff No. 2–C, Item No. 49–1–F, is typical of the tariff provisions imposing the service charge and provides in part as follows:

(A) Except as otherwise provided in individual item, service charge is the charge assessed against ocean vessels, their owners, agents or operators, which load or discharge cargo at the terminals for performing one or more of the following services * * *.

1. Providing terminal facilities.
2. Arranging berth for vessel.
3. Arranging terminal space for cargo.
4. Check cargo.
5. Receive cargo from shippers or connecting lines and give receipts therefor.
6. Deliver cargo to consignees or connecting lines and take receipts therefor.
7. Prepare dock manifests, loading lists, or tags covering cargo loaded aboard vessels.
8. Prepare over, short and damage reports.
9. Order cars, barges or lighters as requested or required by vessels.
10. Give information to shippers and consignees regarding cargo, sailing and arrival dates of vesels, etc.
11. Lighting the terminal.

It is to be noted that the tariff provision quoted shows liability of the vessel for the whole charge even though the terminal performs only one of the services listed. The basic rate set forth in the tariff is charged for cargo unloaded onto the terminal from trucks or railroad cars—one-half of the rate for cargo unloaded from open railroad cars directly into the ship by ship's tackle, and one-quarter of the rate for cargo brought alongside the terminal in barges and unloaded directly into the ship by ship's tackle.

3. In February and March 1952, three of the respondents operating Columbia River terminals, respectively, at Portland, Oregon, Longview, Washington, and Vancouver, Washington, modified their pre-existing tariffs which were similar to the Seattle tariff, above set forth, so that bills for the service charge with respect to intercoastal lumber specified the shippers involved, thus permitting the carriers

to pass the bills on to the shippers for payment direct to the terminal. Complainants do not attack the Columbia River tariffs as revised.

4. Complainants have paid the service charge on intercoastal *general cargo* without protest. They have for the most part declined to pay the charge on intercoastal lumber. Insofar as such charges have been paid, complainants seek to recover the amounts thereof by way of reparation.

5. All eastbound intercoastal lumber moves under complainants' tariffs providing only "tackle to tackle" rates whereby the carriers' responsibility purports not to attach until the lumber is placed under the ship's hook, as appears from Rule L–1 of complainants' Eastbound Freight Tariff No. 2–C, applicable to lumber, which provides in part as follows:

> (d) Except as otherwise provided in this tariff, rates named in this section of the tariff apply from end of ship's tackle at loading port to end of ship's tackle at port of discharge. Rates do not include tolls, carloading or car unloading, handling, side wharfage, top wharfage, lighterage, storage, back piling, staking and piling on lighters, any charge prior to the receipt of cargo by vessel's tackle at loading port and/or after leaving vessel's tackle at port of discharge, transfer charges, or other expenses beyond ship's tackle except as otherwise provided for in this tariff. * * *
>
> (e) The term "end of ship's tackle" as used in this tariff means within reach of ship's hook. It does not include any handling or services of any character either by manual or machine power preceding attachment of hook or after release from hook.

6. All eastbound lumber moves on the basis of shipper's load and count. Rule L–12 (b) of the same tariff provides:

> Unless cargo is specifically tallied by vessel, each bill of lading shall be claused: "One lot of lumber said to contain ____, Shipper's count, all on board to be delivered."

7. Lumber for intercoastal transportation is assembled in several ways in the Pacific Northwest. About 85 percent of the shipments originate at the larger supplying mills, which are usually located on navigable waters and operate docks of their own. These mills make no charge for berthage or dockage, nor do they assess any service charge against the ship similar to the one under attack. All work connected with delivering lumber to the ship's hook is performed by the regular employees of the supplying mills, and any cost is figured in the overall production cost of the lumber. Respondents' terminals are not used for the shipment of such lumber.

8. The balance of intercoastal lumber shipped from the Pacific Northwest comes from smaller mills usually located inland and without waterside facilities of their own. Here the shipper sends orders to one or more of such mills with instructions to make delivery at a

particular public waterside terminal. In such cases, copies of the purchase orders are sent to the terminal, which thereupon sets up its own records for the receipt and handling of the various parcels of lumber which constitute the shipment, in preparation for eventual delivery to the ship. The greater part of the lumber from such smaller mills is trucked to the terminals; smaller quantities come by rail, and some arrives on barges for loading directly into the ships. Frequently, ship's space has not been booked by the shipper at the time the lumber begins to arrive at the terminal. As a result, lumber sometimes accumulates at the terminal for as long as ninety days before it moves out by ship, the shipper frequently taking no steps to book space until most of the parcels constituting his shipment have been delivered to the terminal.

9. When an entire shipment of lumber is assembled at a public terminal the shipper issues a "line-up" to the carrier stating the number of lots, the order number, the net and gross footage, and the destination. The line-up is used by the carrier to order the cargo alongside for loading, and the carrier's supercarpo issues a mate's receipt therefor. A bill of lading is issued from the mate's receipt and mill manifest or Lumber Inspection Bureau Certificate delivered to the carrier by the shipper.

10. When lumber is unloaded from trucks or railroad cars to a point of rest on the terminal it is checked by the terminal and a receipt given. This checking is done on behalf of the shipper. The checking is not requested by the carrier and the terminal's receipt is not issued on behalf of the carrier. From point of rest the lumber is moved to the ship's tackle as required. This movement, known as "handling", is performed by the terminal for the shipper, and the terminal's charges for handling are paid by the shipper. It is clearly impracticable to have trucks deliver lumber directly under the ship's hook, as such practice would cause delay and confusion. The impracticability of such an operation is conceded by all parties and shipside delivery by trucks is not resorted to.

11. When lumber is shipped to the terminal in open railroad cars for direct unloading under ship's tackle, the ship's supercargo requests the terminal to call in particular cars alongside the ship as needed, sometimes a list of the cars being given and sometimes the request being made orally where only a few cars are involved. The car numbers themselves are obtained by the carrier from the shipper and not from the terminal. The supercargo is not permitted to order cars from the railroad. It is necessary for the terminals to take control of all rail cars entering their premises to avoid confusion, except perhaps

where there are no other lumber operations going on at the time. It is the usual practice, nationally, for terminals to order rail cars in and out.

12. The use of barges (or lighters) for direct transfer of lumber to the ship varies in the different localities. In the Puget Sound area most lumber comes to the ship on barges; a moderate quantity comes this way on the Columbia River; and a small quantity at Portland. The shipper usually makes the arrangements for the use of barges, the ship's supercargo requesting actual delivery alongside ship when needed. The terminal does not take possession of lumber delivered by barge. At times the terminal does not know that barges are being used, the carrier eventually informing the terminal of the quantity loaded by that method to permit the terminal to compute its wharfage charges thereon.

13. Ships using respondents' terminals to load intercoastal lumber pay respondents a "dockage" or "berthage" charge for the use of the berthing space at wharf. Charges for unloading railroad cars or trucks onto the terminal, for storage as well as for "handling" from the place of rest on the dock to the ship's tackle, are paid by the shipper.

14. The separate services included in respondents' tariff service charge are generally self-descriptive, and, except for No. 11, "Lighting the Terminal", have been discussed in the report of the Maritime Commission in *Terminal Rate Increases—Puget Sound Ports*, 3 U. S. M. C. 21, at p. 26. The Commission in that case stated:

> The principal item * * * is checking, which involves the counting and measuring of packages, recording any identifying marks, and making notations as to the apparent condition of the packages.

Here also, the principal expense entering into the service charge is the receiving and checking of cargo from shippers and giving receipts therefor (Items Nos. 4 and 5). Items Nos. 3, 7, 8, and 11 are shown to be incidental thereto. Item No. 1, if not incidental to the receiving and checking of cargo, is a charge for administrative expense or for special services, and, as stated in *Terminal Rate Increases—Puget Sound Ports*, *supra*, page 26, should not be included as a part of the "service charge". Item No. 2 is clearly an administrative expense connected with dockage or berthage, and for like reasons should be eliminated from the "service charge". Item No. 9, so far as it covers "Ordering Cars as Requested by Vessels", is for the benefit of the ship, and will be discussed more in detail later, but the balance of Item No. 9, "Ordering Barges and Lighters," and Item No. 10, "Giving Information to Shippers and Consignees Regarding Cargo Sailing and Arrival Dates of Vessels, etc.", cover services neither requested by nor bene-

ficial to the ship. The ship's supercargo himself orders barges and lighters alongside when lumber is brought in that manner. The ship's own office or agent has all information as to the ship's movements where authoritative information as to ship's movements is available, thus making Item No. 10 of the service charge unnecessary to the ship. It thus appears that, except for part of Item No. 9, "Ordering Cars as Requested by Vessels," the various items of respondents' service charge insofar as they are not disapproved, as above indicated, are essentially connected with the primary service of receiving and checking cargo and giving receipts to the shipper.

DISCUSSION

No issue is raised in this proceeding as to the level or amount of the service charge imposed with respect to the shipment of lumber, nor as to the necessity of the imposition of such charge by respondent terminal operators in order to obtain a fair return on their investment. The issue is solely whether such a service charge may be lawfully imposed by respondents against the carriers. The carriers, relying on their tariff provisions, urge that they have no responsibility for any service to cargo before it is placed under the ship's hook, and that since the various items of respondents' service charge are rendered before the attachment of the ship's hook, the carrier is not responsible. The terminals reply that the evidence in the case clearly shows that it is physically and economically impracticable for the ship to receive lumber at the end of the ship's tackle directly from trucks delivering at the terminal, and hence that the carrier's obligation with respect to receiving the lumber must begin where the trucks put it down on the terminal, i. e., at the point of rest. Respondents argue that under the decisions of our predecessors, carriers are required to receive general cargo at the "point of rest" where it is deposited from trucks or railroad cars, and pay the service charge, and that the same rule is logically applicable to lumber.

In *Terminal Rate Increases—Puget Sound Ports*, *supra*, at page 23, the Maritime Commission said:

> It is thus necessary to delineate clearly the obligations of the carrier to the shipper or consignee in performing its transportation. The carrier must furnish a convenient and safe place at which to receive cargo from the shipper and to deliver cargo to the consignee. If this can be done at end of ship's tackle, then it can be so stated and the contracts of carriage may be limited to such service. On the other hand, if such receipt and delivery is impracticable or impossible, the carrier must assume as part of its carrier obligation the cost of moving the cargo to where it can be delivered to the consignee or from where it can be received from the shipper—referred to generally as the place of rest. The carrier cannot

divest itself of this obligation by offering a service which it is not prepared to perform. * * * The carrier's obligations also include the receiving of cargo from shipper and the giving of a receipt therefor, and delivery of cargo to those entitled to it, together with the handling of the necessary papers.

In *Terminal Rate Structure—California Ports*, 3 U. S. M. C. 57, in explaining and approving a formula for the allocation of terminal charges between ship and cargo, the Maritime Commission said at p. 59:

All expenditures were apportioned to vessel and cargo in proportion to the use made of the facilities provided and of the services rendered. The vessel was held responsible to the wharfinger for all usages and services from, but not including, the point of rest on outbound traffic and to, but not including, the point of rest on inbound traffic. All other wharfinger costs were assessed against the cargo. The point of rest is the location at which the inbound cargo is deposited and outbound cargo is picked up by the steamship company.

In applying to general cargo the formula developed in that case, the Commission found that the terminal's service charge was a proper cost to be charged to the vessel. The service charge was described in that case substantially as set forth in respondents' tariff in this case, although not analyzed with the detail set forth in *Terminal Rate Increases—Puget Sound Ports*, *supra*.

We do not think that respondents' argument is sound because it overlooks an important distinction between the handling of general cargo and the handling of lumber at respondents' terminals. The evidence in this case shows that all lumber passing over the terminals is accepted and carried by the ship without check as to the amount of lumber in the shipment. Whereas the terminal company actually checks the shipper's lumber and gives a receipt therefor, this receipt is shown to be issued for shipper's benefit and not for the carrier. The only receipts given by the carrier are the mate's receipt and the bill of lading, and these are expressly based on the shipper's count. The lumber is never tallied by the vessel. This custom of receiving and loading lumber without checking or tallying by the carrier is, of course, entirely contrary to the carrier's duty and practice in handling general cargo, where an exact check and tally must be made. We refer again to the precise statement, quoted above, from *Terminal Rate Increases—Puget Sound Ports*, where the Commission said:

The carrier's obligations also include the receiving of cargo from shipper and the giving of a receipt therefor, * * * together with the handling of the necessary papers.

This general statement, in our opinion, applies both to general cargo and to lumber, the difference being that the receipt given by the carrier for general cargo includes the carrier's count after checking

and tallying, whereas for lumber it includes the shipper's count only, without any checking or tallying by the carrier. If, as above stated by the Commission in *Terminal Rate Structure—California Ports*, the terminal's expenditures for services are to be apportioned between vessel and cargo "in proportion to the use" made of the facilities or services, and the vessel has no duty to check or issue an exact receipt for lumber, and in fact does not do so, it naturally follows that respondents' service for which the service charge is imposed is not for the use of the vessel in so far as the handling of lumber is concerned. We hold, therefore, that the imposition of the service charge described in this case against complainant carriers with respect to lumber shipments is not a just or reasonable regulation or practice.

Respondents urge nevertheless the reasonableness of a literal application of their service charge tariff which requires the payment of the full charge for performing "one or more" of the services described. The carriers do not except to the examiner's ruling that part of Item No. 9, "Ordering Cars as Requested by Vessels", is a service which the terminal performs for their benefit. The terminal company urges that this alone is sufficient to justify the charge. We have, in *Terminal Rate Increases—Puget Sound Ports*, *supra*, pointed out the importance of uniform and clear definitions of various terminal services, and in *Terminal Rate Structure—California Ports*, *supra*, the formula which we approved divides the costs allocable to vessels into (a) dockage, (b) the services rendered to the vessel under the service charge (which we have heretofore pointed out is principally for receiving and checking cargo from shippers and giving receipts therefor), and (c) furnishing other facilities or labor for the benefit of the vessel. In the interest of uniform and clear definitions, we think the services included in respondents' service charge should be limited to those concerned with or incidental to the receiving and checking of cargo (the principal item going into the service charge). If respondents desire to make a charge against the vessel for ordering railroad cars alongside, it should be set up as a special charge and not included in the service charge.

CONCLUSIONS

Under the circumstances, we find that the imposition of respondents' service charge against complainants with respect to transportation of intercoastal lumber eastbound is an unreasonable regulation or practice relating to the receiving, handling, storing, or delivering of property, in violation of section 17 of the Act, and that respondents should cease and desist from the imposition of such service charge

against complainant carriers with respect to the handling of intercoastal lumber eastbound.

A cease and desist order will be entered, and the case will be referred to the examiner for further proceedings on complainants' claim for reparation, unless the parties agree among themselves as to the amount of reparation due.

ORDER

At a Session of the FEDERAL MARITIME BOARD, held at its office in Washington, D. C., on the 22d day of September A. D. 1953

No. 720

INTERCOASTAL STEAMSHIP FREIGHT ASSOCIATION ET AL.

v.

NORTHWEST MARINE TERMINAL ASSOCIATION 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 respondents herein be, and they are hereby, notified and required to cease and desist and hereafter to abstain from imposing a service charge as defined herein against complainants with respect to the handling of intercoastal lumber eastbound; and

It is further ordered, That this case be held open for further proceedings on the claims of complainants herein for reparation in accordance with applicable Rules of Procedure.

By the Board.

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

FEDERAL MARITIME BOARD

No. S–48

AMERICAN PRESIDENT LINES, LTD., MISSISSIPPI SHIPPING CO., INC., MOORE-MCCORMACK LINES, INC.—REDETERMINATION OF RECONDITIONING SUBSIDY.

Staff hearing September 17, 1953. Decided February 4, 1954[1]

Francis T. Greene and *John F. Harrell* for the Board.

REPORT OF THE BOARD

This inquiry has been occasioned as a result of criticisms by the Comptroller General in his Report, dated February 6, 1950, and recommendations of the House Committee on Expenditures in the Executive Departments contained in its Sixth Intermediate Report (H. R. Rep. No. 2104, 81st Congress, 2nd Session (the Hardy Report), of actions of the former Maritime Commission (the Commission) in granting subsidy aid for reconditioning work. The authority for granting subsidy aid for reconstructing or reconditioning merchant vessels of the United States is contained in section 501 (c) of the Merchant Marine Act, 1936 (the Act). In general, the requirements are the same as for the granting of subsidy assistance for the construction of a new vessel, with the additional requirement that aid for reconditioning shall be granted only in exceptional cases and after a thorough study and a formal determination that the proposed reconditioning is consistent with the purposes and policies of the Act.

The Hardy Committee reported that the Commission made the necessary technical finding of "exceptional cases" and "consistency with the purposes and policy of the Act," but questioned the basis therefor. The Committee also questioned the selection of the Netherlands as the foreign shipbuilding center furnishing a fair and representative example for the determination of the estimated foreign cost of the work on some of the vessels, and questioned the calculations upon which the subsidy rates were determined. The amounts allowed as subsidy to the three lines by the Commission under its findings totaled as follows:

[1] As amended May 7, 1954.

American President Lines, Ltd	$608,214.00
Mississippi Shipping Co., Inc	753,854.22
Moore-McCormack Lines, Inc	542,805.00

The three operators here involved agreed to a review and redetermination of the subsidy rates by the Board, subject to their right to submit evidence and comments on their own part and subject to the right of each operator either to accept the redetermined subsidy rate, making proper adjustment with the Government, or rejecting all subsidy resulting from the reconditioning work, and promptly refunding to the Government any amount allowed to the operator under the original award made by the Commission and relinquishing any further claim for subsidy in connection therewith.

All the vessels herein referred to were sold by the Commission to the operators under the Merchant Ship Sales Act of 1946, and under that Act are not subject to repurchase by the Government at their construction cost less depreciation under section 802 of the Merchant Marine Act, but become subject to such provision if the vessels are reconditioned with subsidy aid granted under section 501 (c) of the latter Act. The operators' reservation of the privilege of rejecting the subsidies for reconstruction thus left them free, if they so elect, of the price ceiling set forth in section 802 of the Act.

Recommendations as to new findings in respect to the foreign shipbuilding centers and the rates of subsidy were made to us by our staff on April 16, 1952, as to American President Lines, Ltd. (APL), vessels and on August 8, 1952, as to Moore-McCormack Lines, Inc. (Mormac), vessels, and on July 21, 1953, as to Mississippi Shipping Company, Inc. (Mississippi), vessels; and on September 17, 1953, we heard testimony of various members of the staff in support and explanation of the recommendations referred to. For purposes of comparison, there is below set forth the amounts and rates of subsidy as originally determined by the Commission and as recomputed by our staff and recommended to us.

AMERICAN PRESIDENT LINES, LTD.

Vessel	U. S. M. C.		Recommended		Date of contract	Date work completed
	Base subsidy	Rate	Base subsidy	Rate		
		Percent		*Percent*		
President Van Buren	$118,000	46.64	$73,488	30.56	Sept. 30, 1948	Mar. 5, 1949
President Harrison	220,500	38.31	178,438	32.24	Sept. 30, 1948	Apr. 5, 1949
President Johnson	220,500	38.31	193,932	34.09	Sept. 30, 1948	Mar. 18, 1949

MISSISSIPPI SHIPPING COMPANY, INC.

Vessel	U. S. M. C.		Recommended		Date of contract	Date work completed
	Base subsidy	Rate	Base subsidy	Rate		
Del Alba	$14,815	34.10	$10,570	24.33	Aug. 13, 1946	Dec. 21, 1946
Del Valle	15,677	34.10	11,185	24.33	Dec. 13, 1946	Mar. 10, 1947
Del Santos	18,904	34.10	13,487	24.33	Dec. 13, 1946	Apr. 22, 1947
Del Mundo	17,778	34.10	12,684	24.33	Dec. 13, 1946	June 10, 1947
Del Rio	123,693	41.93	71,773	24.33	Sept. 30, 1948	Feb. 9, 1949
Del Sol	123,693	41.93	71,773	24.33	Sept. 30, 1948	June 23, 1949
Del Oro	123,693	41.93	71,773	24.33	Sept. 30, 1948	July 30, 1949
Del Campo	78,496	35.68	55,106	25.05	Sept. 30, 1948	May 21, 1949
Del Viento	78,496	35.68	55,106	25.05	Sept. 30, 1948	Mar. 17, 1949
Del Monte	78,496	35.68	55,106	25.05	Sept. 30, 1948	Dec. 16, 1948
MOORE-McCORMACK LINES, INC.						
Mormacmar	$219,408	35.57	$182,908	29.65	Apr. 25, 1947	Apr. 19, 1948
Mormacrev	189,070	32.23	152,570	26.02	Apr. 25, 1947	Apr. 21, 1948
Mormacsurf	189,070	32.23	152,570	26.02	Apr. 25, 1947	May 27, 1948

The subsidy amounts and rates as recommended by our staff were discussed with the three operators. Mississippi objected to the rates and amounts recommended for the *Del Alba*, *Del Valle*, *Del Santos*, and *Del Mundo* on the ground that the recommended figures were not properly substantiated. All three operators objected to the recommended rates and amounts on the ground that the estimated costs of reconditioning in the foreign shipyard as computed in foreign currency were converted into American dollars at the official rates of exchange prevailing at the times the reconditioning contracts were executed, all of which were prior to September 1949, when the official rate of exchange for the foreign currency was reduced, and not at a lower rate.

REVIEW OF SECTION 501 (C) FINDINGS

The Commission considered the requirements of section 501 (c) of the Act that the proposed reconditioning was exceptional and consistant with the purposes and policy of the Act, on six occasions, and these actions are considered separately. All the vesels here considered were built by the Government for war purposes, and after the war were sold, as above stated, to the respective operators.

A. On January 14, 1947, the Commission reviewed the application of Mississippi for subsidy for reconditioning four C–2 vessels (being the first four vessels named in the Mississippi list above set forth) for use in the trade between New Orleans and the east coast of South America. The additional facilities to be installed included facilities for carrying liquid bulk cargo alternatively with dry cargo in No. 2 lower hold, with facilities for heating oil cargoes to maintain

liquidity. The applicant as early as October 12, 1943, when the vessels were still under construction, had requested that these facilities be installed, but was advised that the vessels were then in an advanced stage of construction and that the changes could not be effected without seriously interrupting the production schedules made necessary by the war. It was brought to the attention of the Commission that the application for subsidy aid made January 3, 1946, on the four vessels was exceptional in view of the fact that the reconditioning work would enable the vessels more fully to meet the needs of the services into which they were to be placed and of the foreign commerce of the United States, and that the performance of the work had been requested in 1943 when the ships were under construction but at that time had been refused.

The Commission determined with respect to the four Mississippi vessels on January 14, 1947, that:

> The case as hereinabove set forth is an exceptional one and that the proposed reconstruction is consistent with the purposes and policy of the Act; * * *.

B. On April 25, 1947, the Commission considered the applications of Mormac dated October 28, November 2, and November 6, 1946, for subsidy and for reconditioning the three C–3 vessels above mentioned to operate on Trade Route No. 1 between United States Atlantic ports and ports on the east coast of South America. The main items of the work included (1) installation of 36,000 cubic feet of cargo refrigeration, (2) building two extra passenger staterooms, (3) installing deep tanks and piping system for transportation of cargo oil, (4) installing special steel lockers, (5) installing Cargocaire system, (6) installing additional cargo gear, including two 10-ton booms and one 30-ton boom. It was brought to the attention of the Commission that these three vessels were used by the Navy during the war for transports and that such reconditioning would enable the vessels more fully to meet the needs of the service in which they were to be employed and of the foreign commerce of the United States. It was also brought to the attention of the Commission that if these ships had been originally constructed for use on the service specified, the facilities now requested would have been included in the original construction. It was further brought to the attention of the Commission that the installation of the facilities would enhance the operating efficiency of the vessels and assist in attracting high-paying cargo and meeting foreign competition. The Commission determined as to these three vessels on April 25, 1947:

The case as herein set forth is an exceptional one and that the proposed reconstructing and reconditioning is consistent with the purposes and policy of the Act; * * *.

C. The Commission on June 13, 1947, considered the application of APL dated February 26, 1947, for subsidy for reconditioning of the three C–3 vessels above mentioned, constructed by the Commission in 1943. The facilities to be installed on each vessel included (1) four king posts with heavy lift booms and appurtenances, (2) air-conditioning or Cargocaire in all cargo holds, (3) special cargo lockers and specie tank, (4) air compressor emergency generator and heating system for tanks carrying cargo oil. It was brought to the attention of the Commission that the facilities were necessary and desirable for commercial operation of the vessels in the transpacific trade routes or round-the-world service of the applicant where the vessels were to be employed. The Commission determined on June 13, 1947:

* * * that a thorough study of the application and surrounding circumstances indicates the case to be an exceptional one justifying a construction-differential subsidy predicated upon estimated foreign costs chargeable to the Applicant as may hereafter be determined, and that the granting of such financial aid is reasonably calculated to carry out effectively the purposes and policy of the Act; * * *

The Commission on June 10, 1948, considered the same operator's supplemental application for reconditioning the three vessels under consideration, dated October 22, 1947, requesting subsidy for the following additional facilities: (5) installation of special cargo oil tanks, (6) relocation of heavy lift boom at No. 2 hatch, and (7) installation of 65,000 cubic feet of cargo refrigeration (later reduced to 58,000 cubic feet) on the *President Harrison* and *President Johnson*, and installation of 10,000 (later reduced to 3,000) additional cubic feet of refrigeration on the *President Van Buren*, all with sliding door access. The Commission on June 10, 1948, determined to

Confirm and expand the findings and determinations set forth in its action of June 13, 1947 that the proposed reconstruction of said vessels * * * for operation in an essential trade route served by vessels of American President Lines, Ltd., is consistent with the purposes and policy of the Act, and that a thorough study of said application, as amended, and the surrounding circumstances indicates the case to be an exceptional one justifying a construction-differential subsidy predicated upon estimated foreign costs chargeable to the Applicant as may hereafter be determined, and that the granting of such financial aid is reasonably calculated to carry out effectively the purposes and policy of the Act; * * *.

On September 30, 1948, the Commission again considered this reconstruction subsidy application, and, after considering bids for the work, ratified and confirmed its prior action.

D. The Commission on July 13, 1948, considered the further application of Mississippi dated July 1, 1947, for subsidy assistance for reconditioning six C–1 vessels, being the last mentioned six vessels on the foregoing Mississippi list, of which the first three, *Del Rio*, *Del Sol*, and *Del Oro*, were to be employed in the service between United States Gulf ports and ports on the west coast of Africa, and the last three mentioned, the *Del Campo*, *Del Viento*, and *Del Monte*, were to be employed between United States Gulf ports and ports on the east coast of South America. The facilities to be installed on all vessels included the installation of Cargocaire system, refrigerated cargo space, additional booms, king posts, and winches. Additional facilities for the vessels to be engaged in the West African trade included installation of facilities for carrying liquid bulk cargo, and for those in the South American trade certain passenger facilities.

It was pointed out to the Commission that the facilities requested would enable the vessels more fully to meet the needs of the services for which they were intended and the foreign commerce of the United States, and that the cases were exceptional since the vessels had been built during the war as standard C–1 vessels without the features specially required to meet the needs of the services.

The Commission found with respect to said ships on July 13, 1948, that:

> The case as herein set forth is an exceptional one and that the proposed reconstructing is consistent with the purposes and policy of the Act.

Various members of the Commission testified before the Hardy Committee as to their understanding of the legislative history of the provisions of the 1936 Act requiring that reconstruction and reconditioning subsidy should be extended only in exceptional cases. They pointed out that this statutory provision passed before the second World War was designed to avoid committing Government funds to the reconstruction of relatively older vessels. They pointed out also that the great construction program of the Government during the war and the transition from war to peace conditions that immediately followed, created exceptional circumstances, and that the installation of the particular facilities referred to in each of these cases under the circumstances of the postwar transition period appeared to them to warrant the statutory finding that they were exceptional cases. It is our view with respect to the C–2 vessels of Mississippi that since the applicant operator actually requested the installation of the desired facilities when the vessels were under construction in wartime (which request was denied) and with respect to all the vessels here involved, since they were built by the Govern-

688-650 O - 63 - 29

ment primarily to meet the war emergency and not designed for the special commercial needs of the services in which they were ultimately to be employed, that there was a reasonable basis on which the Commission could properly have made the findings that applications for reconditioning presented exceptional cases and that such reconditioning was consistent with the purposes and policy of the Act. This conclusion seems especially fortified in view of the provisions of the Act as it read at the time these applications for subsidy were under consideration, that a subsidy should be granted for the construction of a new ship where "the plans and specifications call for a new vessel which will meet the needs of the service, route, or line and the requirements of commerce." It thus appears that if the vessels here involved had not been built for war use but had been originally built for commercial use, the full cost of the vessel, including the facilities here involved, would have been the proper basis for subsidy award under section 501 (a) of the Act.

The determination by the Commission to treat these reconditioning applications as exceptional cases appears to have been expressly within the contemplation of the Congress when section 501 (c) was being enacted. The Congress did not want government subsidy money used to recondition older ships, but indicated that alterations on newly built ships to meet special trade requirements might well be subsidized.

Senator Copeland of New York, Chairman of the Senate Committee on Commerce, speaking on the floor of the Senate in support of his Committee's bill S–2582, said:

> However, as regards reconditioning, let me make emphasis again upon the fact that the bill makes very clear that reconditioning can be done only in exceptional cases. It is the desire of those who have formulated the bill to see to it that we have built up a Merchant Marine of new and modern ships.[2]

In a prior Committee hearing on the same bill, the following colloquy took place between Mr. Walter J. Peterson, representing Pacific coast shipping interests, and Senator Copeland, Chairman of the Committee:

> Mr. PETERSON. Suppose you had a new ship, Senator, a new ship built for a particular trade. There might be reasons why you wanted to change that ship for another trade, while the ship is new, built, perhaps, by Government loans for the foreign trade. If you want to change that ship to meet conditions of another trade, there ought to be some means by which that reconditioning could take place.
>
> The CHAIRMAN. I think you might even go beyond that. I do not know enough about these individual ships to discuss the subject intelligently, but it seems to me that it might happen for one reason or another that the owner of that line

[2] Debate on floor of the Senate, June 27, 1935, 79 Cong. Rec. 10255.

is not prepared to build new ships. I thought there might be put in here at the proper place something like this. I have not settled on the language, but this will give you the spirit of it:

"In exceptional cases, and after thorough study by the Authority in the light of the declared purposes of this Act, the benefits of the Act may be extended to the reconditioning and operation of vessels which for convincing reasons cannot be immediately replaced by new ones."

* * * * * * *

The CHAIRMAN. * * * but I would want it understood that it must be regarded as an exceptional thing, and that it should be so worded that there would be no question that when there was an application for such reconditioning there would have to be abundant reason why it should be done.

Mr. PETERSON. In other words, you would not want to perpetuate an inefficient ship?

The CHAIRMAN. Not at all.[3]

REVIEW OF SELECTION OF REPRESENTATIVE FOREIGN SHIPBUILDING CENTER

The Commission determined that the representative foreign shipbuilding centers for the calculation of the subsidy rates for the vessels under consideration, as of the dates when the various reconstruction and reconditioning contracts were entered into, were as follows:

Operator	Vessels	Date of contract	Shipbuilding cenert
Mississippi	4 C2s	Aug. 13 and Dec. 13, 1946	Sweden.
Moore-McCormack	3 C3s	Apr. 25, 1947	Britain.
Mississippi	6 C1s	Sept. 30, 1948	Netherlands.
American President	3 C3s	Sept. 30, 1948	Netherlands.

Our staff has recommended in connection with the review of the subsidy rates that the Netherlands be approved as the representative foreign shipbuilding center for the computation of reconditioning subsidy rates for all the vessels under consideration. We agree with the staff recommendation in this regard, except with respect to the four C–2 vessels of Mississippi, as to which we believe there is not sufficient evidence on which to base a redetermination of the subsidy rate, as will hereafter be explained more in detail.

With regard to the remaining three groups of vessels for which contracts were let on April 25, 1947, and on September 30, 1948, our staff submitted separate studies supporting the selection of the Netherlands. In each case it was pointed out that the criteria for the selection of

[3] Senate Committee on Commerce, 74th Cong., 1st Sess., Hearings on S. 2582 (3d Committee Print) covering hearings conducted on May 6, 1935. *Merchant Marine Act, 1935; Hearings U. S. Senate, Parts 1–5*, p. 466.

the shipbuilding center on the contract date were the same as those relied upon by the Board in reviewing the sales prices of the *Independence* and *Constitution* (Board's First Report dated February 20, 1952, 4 F. M. B. 216):

1. That the center should have the personnel, facilities, and experience necessary for the work and be regularly engaged in such work;

2. That it have such a political and economic environment as to give reasonable certainty that contractual obligations as to time, quality, and price would be performed;

3. That the center having qualifications 1 and 2 should also be the center where the work would be done at lowest cost.

With these considerations in mind, it was pointed out that the detailed estimates of the work on all the ships showed that materials constituted about two-thirds of the cost and labor one-third. Part of the materials consisted of insulation materials which would have to be imported, so that as to these items there would be no substantial difference in cost in any European country. Steel and much of the hull and deck machinery could be purchased in Great Britain and would be available in other European countries at substantially the same cost as in Great Britain. Such other equipment as was required for the work involved a large amount of labor and, consequently, would be cheapest in the country of the lowest wage rate level.

At the two dates in question there were nine foreign countries where the work might possibly have been done: Germany, Japan, France, Italy, Belgium, Sweden, Denmark, Great Britain, Netherlands.

Germany and Japan were considered at that time unavailable due to unsettled political and economical conditions then prevailing in these two countries, which would have deterred a prudent American operator from placing reconstruction and reconditioning orders in these countries at the time.

Although the French shipyards had been restored to their pre-war capacity by the end of 1947, they could not satisfy the national demand. Since at that time about 38 percent of tonnage under construction for French account was being built in non-French shipyards, they were not considered available for reconstruction work of the type here considered.

In Italy, while the shipyards were technically in a position to do the work, the country was still in an economic and political situation of considerable uncertainty with threats of strikes and industrial

disorders. At this time the shipbuilding costs of Italy were practically the highest in Europe.

Of the remaining countries where the work might have been done, it appears that the comparative levels for the earnings of skilled shipyard labor in the first part of 1947 and for the year 1948 were as follows:

	Belgium	Denmark	Sweden	Britain	Netherlands
1947 (first part)	$0.47	$0.63	$0.67	$0.61	$0.38
1948	[1] 53	74	.78	65	.40

[1] Approximate.

From the above statistics derived from governmental and other authoritative sources, it appears that the Netherlands on both dates had the lowest direct labor costs. Overhead in the Netherlands was reported to be 130 percent of direct labor whereas in the other countries it was somewhat less, although at least 100 percent of direct labor. In any event, the direct labor plus overhead at the appropriate rate shows that the over-all direct and overhead labor costs in the Netherlands was lower than in any of the other available countries. Our review indicates that the Netherlands should have been selected as the representative foreign shipbuilding center for all the ships under consideration excepting the four C–2s of Mississippi not here under consideration.

REVIEW AND REDETERMINATION OF FOREIGN COST FOR MOORE-MCCORMACK LINES, INC., VESSELS—CONTRACT DATED APRIL 25, 1947

The award of subsidy for reconditioning under section 501 (c) of the Act depends, like subsidy for new construction, upon the difference between the domestic cost and the fair and reasonable estimate of cost of the same work performed in the selected foreign shipbuilding center as of the date of the domestic contract. The work here involved was expected to be done and was actually done in a short period of time so that fixed price contracts were made for the work in this country without the need of considering escalation as is customary for construction contracts for new vessels which spread over a much longer period. The contracts for the work on the three vessels of this operator were executed on April 25, 1947. Accordingly, our staff developed an estimate of the Netherlands cost of the reconditioning work as of that date, estimating separately the cost of materials and labor.

In estimating the Netherlands cost of materials used, the staff obtained a detailed breakdown of the successful bid of Bethlehem Steel

Company which performed the work on one of the three vessels of Mormac. The Federal Shipbuilding and Dry Dock Company, which was the successful bidder on the other two vessels, closed down shortly after completing this work, and detailed breakdowns from this yard were not available at the time of our review. In any event, the work on the three vessels was substantially identical and the breakdown of Bethlehem is deemed representative of all. The detailed material items in the Bethlehem breakdown were priced in the Netherlands as of the contract date so far as possible. Approximately 83 percent in value of the material items could be so priced and this showed that the Netherlands cost in florins converted to dollars at the official rate of exchange was 102.2 percent of the United States cost for the same items. The same cost ratio was used for the undocumented items, resulting in an estimated Netherlands cost of material of $276,000 for each vessel as against the Bethlehem cost for the same material of $270,164.

The Bethlehem breakdown also showed the number of man-hours required for the installation of the various material items. While labor in United States yards was at this time more productive than in certain foreign yards in the construction of new vessels by reason of certain specialized construction procedures used in this country, the same is not true for repair or reconditioning jobs such as those here under consideration. By reason of this fact it is deemed that the same number of man-hours would be required to perform the work here under consideration in the Netherlands as in this country. The Bethlehem breakdown showed 135,901 man-hours necessary on each ship, and this computed at the Netherlands rate of $0.38 per hour provides a reasonable estimate of the Netherlands direct labor cost.

The Netherlands overhead charge was estimated at 130 percent of direct labor cost based on reports of our representative in Europe who investigated the matter. This rate of overhead is the same as that used in our review of the Netherlands construction cost of the *Independence* and *Constitution*, already mentioned. Reports from the same source show that the profit of a yard specializing in repair and reconstruction work would run at 10 percent of all other costs, although in the case of other Netherlands yards which took only a small amount of repair and reconstruction work in connection with their main business of new construction, the profit margin was sometimes computed at a higher rate. Under the circumstances here disclosed we deem it fair to use the profit rate customarily used by a yard specializing in the type of work here involved.

From the foregoing, the Netherlands cost of effecting the reconditioning on each of the three vessels of Mormac here involved, con-

verting Dutch florins into United States currency at the official rate of exchange prevailing on the date of the contract, may be summarized as follows:

Material	$276,000
Direct labor (135,901 man-hours×$0.38)	51,600
Overhead at 130 percent of direct labor	67,000
Subtotal	394,600
Profit at 10 percent of subtotal	39,460
Estimated Netherlands base cost	434,060
This is rounded off at	434,000
Comparable United States base cost:	
Mormacmar	586,570
Mormacrey	616,908
Mormacsurf	586,570

REVIEW AND REDETERMINATION OF FOREIGN COST FOR AMERICAN PRESIDENT LINES, LTD., VESSELS—CONTRACT DATED SEPTEMBER 30, 1948

Similarly, in estimating the Netherlands cost of the reconditioning work on the three vessels of APL, the staff obtained a detailed breakdown of the successful bids of Gulf Shipbuilding Company, Mobile, Alabama, which performed the work on these ships. In this case, work on one of the vessels, *President Van Buren*, was substantially less than on the two other vessels, *President Harrison* and *President Johnson*, because the *President Van Buren* was purchased by the operator with 55,000 feet of refrigeration included, whereas the other two vessels were sold without refrigeration, and the installation of such refrigeration substantially increased the reconditioning cost of these two vessels. The difference in work on the three vessels is responsible for a slightly different subsidy rate applicable to each. Approximately 90 percent in value of material items were priced in the Netherlands, showing that the Netherlands material cost was 82 percent of United States material cost and resulting in a Netherlands material cost on the *President Van Buren* of $110,564 and on the *President Harrison* and *President Johnson* of $250,164.

The Gulf breakdown also shows the number of man-hours required for the installation of the material on the various ships. On the *President Van Buren* this was 41,124 man-hours and on the other two vessels was 99,000 man-hours. The Netherlands average hourly rate of $0.40 was used to compute the labor cost in each case and to this were added overhead and profit figures computed in the same manner as in the prior computation of foreign cost of the Mormac vessels, since the same rate for overhead and profit was found to be applicable. Accordingly, the following computations of the estimated Netherlands cost of reconditioning the vessels may be given.

President Van Buren

Material	$110,564
Direct labor (41,124 man-hours × $0.40)	16,450
Overhead at 130 percent of direct labor	21,385
Subtotal	148,399
Profit at 10 percent of subtotal	14,840
Estimated Netherlands base cost	163,239
This is rounded off at	163,000
Comparable United States base cost	240,488

President Harrison and President Johnson

Material	$250,164
Direct labor (99,000 man-hours × $0.40)	39,600
Overhead at 130 percent of direct labor	51,500
Subtotal	341,264
Profit at 10 percent of subtotal	34,126
Estimated Netherlands base cost	375,000
This is rounded off at	375,000
Comparable United States base cost:	
President Harrison	553,438
President Johnson	568,932

REVIEW AND REDETERMINATION OF FOREIGN COST FOR MISSISSIPPI SHIPPING COMPANY C–1 VESSELS—CONTRACT DATED SEPTEMBER 30, 1948

As above stated, three of these vessels, of which the *Del Rio* is typical, were to be employed in the West African trade, and three others, of which the *Del Monte* is typical, were to be employed in the South American trade. The reconstruction to be done on the *Del Rio* group was substantially greater than on the *Del Monte* group. The low bidder on all six ships was Bethlehem Steel Company, Sparrows Point, but at the request of the operator the contracts were awarded under section 504 of the Act to Gulf Engineering Company, New Orleans, with the understanding that the operator would assume the difference in cost, and that the subsidy for the reconditioning work would be based on Bethlehem's bid prices for the work. At the time of instituting our review of these foreign construction cost estimates, our staff found that neither Bethlehem nor Gulf had available any breakdown of the bids which either of them had submitted. Accordingly, the staff developed independent detailed estimates of the amount of material and labor required to complete the work on each group

of vessels, and the details of these estimates were priced in the Netherlands in the manner indicated on the jobs already described.

On this basis, the staff was able to price approximately 92 percent in value of the material items estimated to be required for the *Del Rio* group and approximately 93 percent of the materials for the *Del Monte* group. The Netherlands material costs were shown to be 81.4 percent of United States costs for the *Del Rio* group and 79.3 percent for the *Del Monte* group. These cost ratios were used for unpriced items, resulting in total estimated Netherlands material costs of $130,673 for each ship of the *Del Rio* group and $107,318 for each ship of the *Del Monte* group.

The staff estimated a fair and reasonable number of man-hours to do the work on each of the *Del Rio* ships to be 78,547, and on each of the *Del Monte* group, 46,292 man-hours.

The contract date for these vessels being September 30, 1948, the same as for the APL vessels, direct labor, overhead and profit in the Netherlands yard were estimated at the same rates, resulting in the following calculations:

Del Rio, Del Oro, Del Sol

Material	$130,673
Direct labor (78,547 man-hours×$0.40)	31,418
Overhead at 130 percent of direct labor	40,843
Subtotal	202,934
Profit at 10 percent of subtotal	20,293
Estimated Netherlands base cost	223,227
Comparable United States base cost	295,000

Del Monte, Del Campo, Del Viento

Material	$107,318
Direct labor (46,292 man-hours×$0.40)	18,516
Overhead at 130 percent of direct labor	24,070
Subtotal	149,904
Profit at 10 percent of subtotal	14,990
Estimated Netherlands base cost	164,894
Comparable United States base cost	220,000

REVIEW OF FOREIGN COST FOR MISSISSIPPI SHIPPING COMPANY C–2 VESSELS

As already stated, the contracts for reconditioning these vessels were made by the Commission in August and December 1946, and considerably antedated the contracts for reconditioning the other

vessels already discussed. The work on these vessels was limited to the installation of facilities for carrying liquid bulk cargo in No. 2 lower hold alternatively with dry cargo, and, as will be seen from the table at the beginning of this report, the subsidy amounts originally allowed by the Commission ranged from $14,815 to $18,904 and involved much less reconditioning work than was involved on the other ships already discussed. As already indicated, the Commission selected Sweden as the representative foreign shipbuilding center for the calculation of the subsidy rates for these vessels and allowed the amounts above indicated on the basis of a subsidy rate of 34.10 percent.

At the time when these reconditioning contracts were made, there was in effect the Joint Resolution of June 11, 1940, authorizing the Commission to estimate foreign construction costs on the basis of conditions existing prior to September 3, 1939. Because domestic costs climbed rapidly while foreign costs were frozen by this Resolution, the Resolution (which remained effective until July 25, 1947) in effect authorized the Commission to grant 50 percent construction subsidies but did not make such action mandatory. The Commission in fixing the subsidy rate for these four vessels did not use the authority granted by the Resolution. The Commission in the winter of 1946–47 had available to it a "Report on the Investigation of Foreign Ship Construction Costs" by Messrs. Van Riper and Rice, which stated:

* * * If a fair approximation to the answer is acceptable, then we believe we have secured sufficient information to permit the making of an intelligent estimate.

On March 6, 1947, the Chairman of the Commission advised the Senate Committee on the Judiciary that the authority contained in the Resolution should be terminated, and on July 15, 1947, approved a statement advocating the proposed repeal of the Resolution, saying:

There are some difficulties due to unsettled post-war conditions in obtaining dependable estimates as to the degree of differential existing or which may be expected to exist. The Commission, however, is proceeding to compile the necessary information for determining foreign costs for use in passing on applications for subsidized construction as they come before the Commission.

Our staff, in reviewing the Commission's action in selecting Sweden as the representative shipbuilding center and in computing the subsidy rate of 34.10 percent for the work on these ships, reported to us that:

* * * information relative to European shipbuilding costs immediately following the war and in 1946, at which time the contracts were awarded on these

vessels, was of little value. All contracts contained generous escalation provisions because of the economic uncertainties involved during this period of readjustment. For this and other reasons a reliable estimate cannot be prepared by this Division, * * *

The staff therefore recommended that, since the work on these four C–2 ships involved installing liquid cargo facilities which were similar to part of the work done on the *Del Rio* group of C–1 ships of the same operator, based on contracts let nearly two years later, in the absence of better information, the Board should fix the subsidy rate of 24.33 percent recommended for the *Del Rio* ships, for the operator's C–2 vessels. This recommendation, of course, involved the selection of the Netherlands as the representative shipbuilding center in 1946, but it appears uncertain whether Netherlands yards were then taking on repair work for foreign account. We were unable to develop for the 1946 period any specific information as to foreign payrolls or wages, nor could we obtain complete information as to the prices of steel and other things that would normally be used in corroborating foreign material prices. Such information as was available did not prove in any definite manner that Sweden was in fact a low-cost shipbuilding center at that time.

The conditions prevailing in foreign countries in the latter part of 1946 were still fluctuating so as to make sound estimates of foreign costs most difficult to obtain. While it is not possible for us to know every element that went into the subsidy determination made by the Commission in January 1947, we are not in a position to offer any valid substitute nor are we in a position to say that the Commission should have made use of the Joint Resolution's 50 percent rate instead of the 34.10 percent rate which the Commission actually used. Accordingly, we do not find any basis for modifying the 34.10 percent subsidy rate on these vessels.

CURRENCY EXCHANGE RATE

As already stated, the foregoing estimated Netherlands reconditioning costs have been calculated by converting prices of material and labor from Netherlands florins into American dollars at the official rate of exchange prevailing at the respective contract dates. The operators, however, insist that a discounted rate should have been used. They rely primarily on our Supplementary Report in *Sales Prices of "Independence" and "Constitution,"* 4 F. M. B. 263, and argue that the same general exchange situation prevailed on the dates of the contracts here involved. APL offers in addition a letter from Messrs. F. Bleibtrau & Company, Inc., of New York, dealers in for-

eign exchange, stating that the dollar cost of establishing large florin credits in the Netherlands in September 1948 was approximately 18 percent below the cost at the official rate.

We do not think that the evidence presented regarding new construction costs and practices in the *Independence-Constitution* case or the additional evidence here presented provides a basis to justify the use, for the reconditioning work here involved, of any except the official rate of exchange. It is not at all certain what conditions the Netherlands authorities might have imposed for the use of credits arranged through "transferable sterling" or in any other manner at less than official rates for repair or reconstruction work on foreign (i. e., United States) ships. The mere possibility of establishing florin credits at less than official rates would give no assurance that such credits could be used to pay for the kind of work here involved.

We said in our first report in the *Independence-Constitution* case, 4 F. M. B. 216, 228:

> If Export had actually contracted for these ships with a Netherlands shipyard, and would have had the opportunity to contract in dollars at an appreciable discount because of impending devaluation or had been able to provide for progress payments to be made in guilders during the life of the construction contracts, it would in fact have had the benefit of a substantial reduction in dollar cost.

There is no evidence either in this or the *Independence-Constitution* case that a Netherlands shipyard would enter into any contract for dollars. In this case, unlike the *Independence-Constitution* case, all reconstruction work on the vessels involved was completed before September 21, 1949, the date of the official devaluation of Netherlands currency, and hence no progress payments would have been delayed until after official devaluation.

It follows that, as recommended by the staff, the subsidy rate should be based on calculations using the official rate of exchange. By comparing the base contract prices with the estimated foreign cost of the same work, we are able to establish the new subsidy rates which in all cases, excepting for the four C–2 vessels of Mississippi, follow the staff recommendation. The application of the new subsidy rates to the United States cost of changes in the contract work gives the total subsidy allowance for the cases here redetermined, all as set forth in the following table:

AMERICAN PRESIDENT LINES, LTD.

Vessel	Base subsidy	Rate	Changes	Total subsidy
		Percent		
President Van Buren	$77,488	32.23	+$12,869	$90,357
President Harrison	178,438	32.24	+12,837	191,311
President Johnson	193,932	34.09	+13,611	207,543
MISSISSIPPI SHIPPING COMPANY, INC.				
Del Rio	$71,773	24.33	+$11,162.55	$82,935.55
Del Sol	71,773	24.33	+9,284.18	81,057.18
Del Oro	71,773	24.33	+10,019.85	81,792.85
Del Campo	55,106	25.05	+5,624.75	60,730.75
Del Viento	55,106	25.05	+4,534.93	59,640.93
Del Monte	55,106	25.05	+2,254.50	57,360.50
MOORE-McCORMACK LINES, INC.				
Mormacmar	$182,908	29.65	−$10,723	$172,185
Mormacrey	152,570	26.02	−21,580	130,990
Mormacsurf	152,570	26.02	−21,580	130,990

Reference herein to section 802 of the Merchant Marine Act, 1936, as amended, has been made in explanation of the operators' option to reject all subsidy for reconditioning work and is not to be deemed a determination of the extent of the application, if any, of section 802 to the vessels involved, a question not raised or argued before the Board.

The three operators involved will be given thirty days in which to determine whether to accept or reject the redetermined subsidy computations as above set forth.

(Sgd) A. J. WILLIAMS,
Secretary.

FEDERAL MARITIME BOARD

No. S–49

SALES PRICES OF "MARINER" CLASS VESSELS

Staff hearing September 9, 1953. Decided February 18, 1954

Francis T. Greene and *John F. Harrell* for the Board.

REPORT OF THE BOARD

The Maritime Administration, pursuant to authority contained in the Second Supplementary Appropriation Act of 1951, entered into contracts for the construction of 35 fast cargo vessels suitable for use as national auxiliaries, and now known as the "Mariner" class. The preliminary design calling for a 20-knot sustained speed was developed by the Administration in close association with the Department of Defense, and construction was expressly approved by the President on January 10, 1951, as required by the Merchant Marine Act, 1936, as amended, hereafter referred to as the "Act." Five contracts were signed for five ships each on February 7, 1951, followed by two later contracts for five ships each, signed on June 25, 1951, and August 1, 1951, all subject to modification for escalation during the construction period and for changed plans.[1] The contract price of plans and engineering also subject to escalation and changes covered by a separate contract for $1,219,000 is divided among the 35 ships, increasing the cost of each by $34,830.

[1] The shipbuilders' bids on which contract prices were established for all contracts executed on February 7, 1951, were based on December 1950 costs of material and labor, and for all subsequent contracts, on April 1951 costs. The contracts provided for escalation on the contract prices from those months.

TABLE I

Contract date	Yard	Contract price per ship (each of 5 ships)	Plans	Total
Feb. 7, 1951	Newport News SB & DD Co	$7,775,000	$34,830	$7,809,830
Feb. 7, 1951	Ingalls SB Corp	7,898,000	34,830	7,932,830
Feb. 7, 1951	Bethlehem Steel Co., Sparrows Point	7,938,000	34,830	7,972,830
Feb. 7, 1951	Bethlehem Steel Co., Quincy	8,296,000	34,830	8,330,830
Feb. 7, 1951	Sun SB & DD Co	8,399,256	34,830	8,434,086
June 25, 1951	New York SB Co	9,290,000	34,830	9,324,830
Aug. 1, 1951	Bethlehem Steel Co., San Francisco	9,493,000	34,830	9,527,830

The sale of these vessels to American-flag operators is now deemed advisable in keeping with the purpose and policy of the Act. The vessels will thus be economically useful and will be privately maintained so as to be available for requisition in case of national need.

Some of the vessels have not yet been completed and are accordingly available for sale to citizens of the United States, on proper application, for use in foreign commerce pursuant to title V of the Act.

Under section 502 of the Act the cost of national-defense features incorporated in the vessels is paid for in full by the Government. The Board is authorized to sell the vessels at a price corresponding to and not less than the estimated cost, as determined by the Board, of building the vessels, exclusive of such features, in a foreign shipyard. More particularly, section 502 (b) of the Act provides in part as follows:

> The amount of the reduction in selling price which is herein termed "construction differential subsidy" may equal, but not exceed, the excess of the bid of the shipbuilder constructing the proposed vessel (excluding the cost of any features incorporated in the vessel for national-defense uses, which shall be paid by the Commission in addition to the subsidy), over the fair and reasonable estimate of cost, as determined by the Commission, of the construction of the proposed vessel if it were constructed under similar plans and specifications (excluding national-defense features as above provided) in a foreign shipbuilding center which is deemed by the Commission to furnish a fair and representative example for the determination of the estimated foreign cost of construction of vessels of the type proposed to be constructed. The construction differential approved by the Commission shall not exceed 33⅓ per centum of the construction cost of the vessel paid by the Commission (excluding the cost of national-defense features as above provided), except that in cases where the Commission possesses convincing evidence that the actual differential is greater than that percentage, the Commission may approve an allowance not to exceed 50 per centum of such cost * * *.

Others of the Mariners which have been completed and delivered to the United States may be sold to citizens of the United States for use in foreign commerce pursuant to section 705 of the Act. Under this section there must be a competitive sale, and under both title V and section 705 the price for operation in the foreign trade may not be less than the estimated foreign construction cost exclusive of national defense features (determined as of the date the construction contract was executed) less, in the case of sales under section 705, depreciation based on a 20-year life.

Accordingly, we proceed to determine the estimated foreign construction costs of a Mariner, exclusive of the cost of national defense features, as of February 7, 1951, June 25, 1951, and August 1, 1951, which will be the minimum basic prices for Mariner vessels that may be sold for use in foreign commerce.

On June 10, 1952, after consideration of shipbuilding facilities in leading foreign shipbuilding areas, and the relative costs prevailing

therein, we approved the United Kingdom (herein called "Britain") as the foreign shipbuilding center which furnished a fair and representative example for the determination of the estimated foreign cost of construction of the Mariner vessels.

The remaining questions now considered are (1) what are the national-defense features incorporated into the vessels and the cost thereof, and (2) what is the estimated construction cost in Britain of the vessels, excluding national-defense features. We have considered various staff memoranda dealing with these questions, and we heard the testimony of various members of our staff in support thereof.

Considering first the national-defense features, it appears that as early as November 30, 1950, Bethlehem Steel Company, the design agent employed by the Administration for the development of the contract plans and specifications, submitted a list of 20 features in the design, which, apart from speed, were then considered to differ from normal commercial practice for cargo ships. Two of these items were eliminated by the Department of the Navy; one was eliminated by the staff as not a defense feature. Five other items: (e) making gastight boundary bulkheads for midships deckhouse; (f) making changes in ventilating design; (n) increasing deck height between the second and third decks; (o) fitting hold stringers horizontally; and (r) rearranging upper superstructure, were minor and involved no extra cost, thus leaving 12 items for consideration, all of which have been certified by the Secretary of the Navy.

NATIONAL-DEFENSE FEATURES OTHER THAN SPEED

These 12 items (a), (b), (c), (d), (g), (h), (i),[2] (j), (k),[2] (l), (m), and (p), discussed in detail below, appear to be reasonably free from doubt, and, accordingly, we determine that, generally speaking, all these should be paid for by the Government as national-defense features [2] in keeping with the policy heretofore adopted by the Maritime Commission and approved by the Board in its report in *Sales Prices of "Independence" and "Constitution,"* 4 F. M. B. 216, where it said that such features should be paid for as national-defense features "if, and to the extent, such features did not have a commercial utility, or if, and to the extent, their cost was disproportionate to their value for commercial purposes." [3]

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[2] The commercial utility of (i) additional generator capacity and (k) additional evaporator capacity on Mariners converted for use as combination passenger-freight vessels is a possible exception to the above determination and is discussed below in Note 5.

[3] See page 223 of the *Independence-Constitution* report, *supra*. See also Minutes of U. S. Maritime Commission, June 10, 1948. This policy was approved by the Comptroller General of the United States in his letter of July 11, 1949, to the President of the Senate, transmitting and approving a special report of his Director of Corporation Audits.

LIST OF NATIONAL-DEFENSE ITEMS

(a) and (h) The vessel to have 25 percent excess shaft horsepower (at Navy rating of machinery) over normal, instead of the usual 10 percent (i. e., to be able to generate by overload a total of 22,000 s. hp. instead of the American Bureau of Shipping overload limit of 19,250 s. hp.). Extra cost of main and auxiliary machinery, feed and fuel pumps, and blowers, in anticipation of additional steam requirements for Navy use. Estimated additional cost, $13,400.

(b) The vessel to be strengthened for navigation in ice by reinforcement of plating, extra frames, strengthening of rudder and tailshaft. Most commercial trade routes pass through no ice area. This feature has no commercial value, except perhaps for a purchaser operating on a specialized route where the feature has a commercial value. Estimated additional cost, $35,300.

(c) Splinter protection in the form of special treatment steel plating for sides and deck of bridge house. This meets a purely military need. Estimated additional cost, $13,800.

(d) Installation of trunks for wartime carrying of degaussing cables through spaces that will be sealed up and become inaccessible upon completion of vessel. Estimated additional cost, $550.[4]

(g) Vital machinery parts to be made shock resistant requiring exclusion of cast iron or semisteel from certain areas to withstand shock anticipated in defense use. This is in addition to requirements of American commercial standards which exclude cast iron for certain sea connections. Estimated additional cost, $23,700.

(i) Installation of two 600-kw. turbo-generator units instead of two 500-kw. turbo-generator units, with piping and valve connections provided for two additional 600-kw. turbo-generator units to be installed in case of naval conversion. The evidence showed that all marine generator installations require one standby unit of the size installed. For ordinary commercial cargo requirements, one 500-kw. unit is ample for ordinary needs with a second 500-kw. unit available as a standby. Additional generating capacity might be desirable in case a commercial operator installed reefer space in addition to 30,254 cubic feet contemplated in the Mariner design. Conversion of the Mariner to a fully refrigerated ship is impracticable as appears from testimony before the Board, and also before the Potter Subcommittee of the Senate Interstate and Foreign Commerce Committee and the Bender Subcommittee of the House Committee on Government Operations in connection with proposed use by the Navy of the Mariner ship in lieu of specially designed fully refrigerated cargo vessel. The

[4] This item eliminated during construction.

modification of the Mariners to increase reefer space without making the ships fully refrigerated is entirely practicable and is being effected in the three Mariners recently set aside for purchase by Pacific Far East Line, Inc. For such an alteration, two 600-kw. units, of which one would serve as a standby, would be insufficient. Two 500-kw. generators with a third 500-kw. as a standby would, however, be sufficient, and since the standby generator must be of the same size as the service generator or generators, two 500-kw. generators are of greater advantage commercially for such a conversion than two 600-kw. units as installed on the Mariners for naval purposes. Estimated additional cost, $40,100.[5]

(j) The lubricating oil system to be operated by pressure in accordance with Navy practice as well as by gravity in accordance with commercial practice. Estimated additional cost, $970.

(k) Two 12,000 g. p. d. low pressure evaporators instead of two 8,000 g. p. d. units which are ample for commercial cargo ship requirements. Estimated additional cost, $13,000.[5]

(l) Increasing fuel oil transfer system to receive and discharge at 2,100 g. p. m. for fueling at sea instead of normal commercial system having capacity of 350 g. p. m. The increased cost covers increased size of pumps and piping. Possible advantage of oversize fuel oil intake to save time in bunkering is deemed entirely disproportionate to any trifling commercial utility. Estimated additional cost, $61,500.

(m) Increased size of firefighting pumps and piping to 1,200 g. p. m. capacity instead of usual 800 g. p. m. capacity. Estimated additional cost, $10,900.

(p) Two 60-ton booms instead of one 30-ton boom customarily carried on freighters. These heavy-lift booms were installed with particular reference to transportation of Army tanks, and while one or more of them might have a possible commercial utility on rare occasions, the extra cost is disproportionate to its value for commercial purposes. Estimated additional cost, $42,700.

Total estimated cost of above national-defense items, using Bethlehem-Quincy estimates of unit costs, $255,920.[6]

By varying the above Bethlehem-Quincy cost of national-defense features in proportion to the variations among the contract prices of the seven yards, the following table is computed to show the estimated cost of national-defense features, other than speed, at each yard, and

[5] A Mariner, if converted to a combination passenger-cargo vessel to carry several hundred passengers, may require for commercial operation all the generator and evaporator capacity actually installed. In case of sale for such conversion, items (i) and (k) cannot be considered national defense features and the computations of this report would have to be modified accordingly.

[6] Subject to modification in case of sale for use in a service where ice strengthening (b), additional generator capacity (i), or additional evaporator capacity (k) has commercial value.

the corresponding net cost at each yard excluding national-defense features other than speed, all computed without escalation.

TABLE II

Yard	Contract price	N. d. f. other than speed	Plans	U. S. cost less n. d. f. other than speed
Newport News	$7,775,000	$239,850	$34,830	$7,569,980
Ingalls	7,898,000	243,640	34,830	7,689,190
Bethlehem, Sparrows Point	7,938,000	244,880	34,830	7,727,950
Bethlehem, Quincy	8,296,000	255,920	34,830	8,074,910
Sun	8,399,256	259,110	34,830	8,174,976
New York	9,290,000	286,580	34,830	9,038,250
Bethlehem, San Francisco	9,493,000	292,850	34,830	9,234,980

SPEED NOT A DEFENSE FEATURE FOR MARINERS USED AS COMBINATION VESSELS

We find that where a Mariner is converted to a combination vessel to operate as a carrier of more than twelve passengers, a sustained speed of 20 knots as a general rule has commercial utility in view of present-day requirements and practices. The extreme importance of time in the transportation of passengers gives a 20-knot speed commercial utility which it does not necessarily have for cargo. We conclude that no national-defense allowance for characteristics in the Mariners designed to produce a sustained speed of 20 knots should be made with respect to any Mariner vessel sold for use as a combination passenger-freight carrier unless a special showing is made with respect to prospective operation on short runs that a lesser speed will provide commercially equivalent service.

SPEED EXCEEDING 18 KNOTS A DEFENSE FEATURE FOR MARINERS USED AS CARGO VESSELS

With respect to Mariners to be used as cargo carriers, the problem of speed is more difficult. The basis of decision, as already indicated, must turn on the extent to which the higher speed does not have a commercial utility, or the extent to which the cost of the higher speed is disproportionate to its value for commercial purposes.

The Director, National Shipping Authority, and the Chief, Office of Ship Construction, have recommended that the cost to provide sustained speed for Mariner cargo vessels in excess of 18 knots should be considered a national-defense feature.

A difference is here noted between sustained speed under ordinary sea conditions, and trial trip or maximum speed under ideal conditions of clean bottom and smooth water. The normal shaft horsepower installed permitting Mariners to maintain a sustained speed of 20

knots is 17,500 s. hp., whereas, for 18 knots, it is 12,000 s. hp.,[7] but such power will, in each case, produce greater speed under trial trip conditions and, of course, even greater speed if the ship is not fully loaded. Speeds of new vessels announced through the press or in trade publications, if given without reference to operating conditions, are therefore not always comparable.

In support of the staff's recommendation supporting an 18-knot sustained speed as the maximum having commercial utility, two estimates were made as to the cost of the additional 2 knots of speed of the Mariner vessels: (1) By extracting the cost of the normal shaft horsepower in excess of 12,000 from the vessel as designed; and (2) by comparing the cost of the Mariner with the cost of a ship designed for commercial purposes only, incorporating the commercial characteristics of the Mariner, and power sufficient only for a sustained speed of 18 knots. It was shown that certain characteristics of hull design of the Mariner, including the lengthening of the ship, were adopted solely to obtain additional speed. The extra cost of such characteristics were shown to be without commercial value in an 18-knot vessel. A comparison of the Mariner with the commercial equivalent vessel as designed by the staff is set forth below:

TABLE III

	Mariner	Commercial equivalent vessel
Length overall	563'-7¾"	529'-0".
Length between perpendiculars	528'-0"	494'-0".
Beam, molded	76'-0"	74'-6".
Depth to main deck	44'-6"	44'-6".
Load line draft (molded)	29'-9"	29'-9".
Displacement at load line	21,093 tons	20,330 tons.
Light ship weight	7,626 tons	6,848 tons.
Deadweight (at load line draft)	13,467 tons	13,482 tons.
Scantling draft, molded	31'-6"	31'-6".
Displacement at scantling draft	22,560 tons	21,750 tons.
Deadweight (at scantling draft)	14,934 tons	14,902 tons.
Bale cubic	736,723 cu. ft	731,617 cu. ft.
Grain cubic	837,305 cu. ft	833,000 cu. ft.
Reefer cubic	30,254 cu. ft	30,373 cu. ft.
Total fuel oil tankage	3,808 tons	3,009 tons.
Cruising radius at design speed (approximate)	18,800 nautical miles	18,800 nautical miles.
Fresh water	257 tons	173 tons.
S. hp., maximum continuous	19,250	13,750.
S. hp., normal	17,500	12,500.
Design speed at 29'-9" draft	20 knots	18 knots.
Number of passengers	12	12.
Number of crew	53 plus 2	53 plus 2.

The two methods of appraising the cost of national-defense features indicated above produce widely different results, as appears from the following figures derived from Bethlehem-Quincy estimates of unit costs:

[7] 12,000 normal s. hp. gives the Mariner design a sustained speed of 18 knots, whereas 12,500 normal s. hp. is required to do the same for the commercial equivalent design.

TABLE IV.—*U. S. estimated cost of all national-defense features, including 2-knot additional speed*

Method 1: By extraction	[8] $713,020
Method 2: By comparison with commercial equivalent	[9] 1,296,500

We find that the design of the commercial equivalent has all the commercial characteristics of the Mariner and that the differences relate to speed and other national defense features only. We find that the estimates of the United States cost of the commercial equivalent are entirely comparable to the costs of Mariners submitted by the Bethlehem-Quincy shipyard. We find that method 2 provides a realistic method of estimating the cost of incorporating into the Mariner design the national defense features referred to above, including speed in excess of 18 knots.

From a consideration of all relevant matters brought to our attention, we are satisfied of the soundness of the staff recommendation and conclude that a sustained speed higher than 18 knots for a cargo vessel does not have commercial utility, and, in any event, the cost thereof is disproportionate to its value for commercial purposes. Our views are sustained by the speeds of presently operating and projected United States and foreign-flag cargo vessels and other considerations enumerated below.

The following statistics reflect the condition in 1952:

TABLE V.—*Vessels in liner service U. S. foreign trade 1952*

Privately owned United States-flag cargo and combination ships	466
Foreign-flag cargo and combination ships	1,073

Of the 466 United States-flag vessels, a few are combination passenger-cargo vessels not material to this discussion. The newer and faster United States-flag cargo vessels operate on the berth services of the various essential United States foreign trade routes. There were, in 1952, 323 United States-flag C-type vessels operating on the principal foreign services as follows:

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[8] Excess cost of 20-knot power plant (exclusive of items (a) and (h)) over 18-knot power plant $457,100
Excess cost of other national-defense items (including items (a) and (h)) 255,920

Total U. S. estimated cost of national-defense features, including 2 knots speed 713,020

[9] Total U. S. estimated cost of Mariner with national-defense features (see Note 1) $8,330,830
Less U. S. estimated cost of commercial equivalent at December 1950 prices—$7,244,590 (p. 428) less $210,260 escalation between December 1950 and February 1951 7,034,330

Difference, or U. S. estimated cost of all national defense features by comparison method 1,296,500

TABLE VI.—*United States C-type cargo vessels on principal berth services, 1952*

Type	Sustained speed	Number of ships
C–1	14 to 14½ knots	47
C–2	15 to 15½ knots	175
C–3	16½ knots	98
C–4	17 knots	3
		Total 323

A public announcement was made by one United States operator claiming a speed of 17½ knots for C–3 vessels and by another United States operator claiming 18 knots for C–3 vessels, but official records maintained by the Maritime Administration show speeds for these vessels of 17½ knots when light and 16½ knots when loaded. C–3 type vessels with a speed of 16½ knots are operated for the most part on routes with long runs where speed has relatively greater commercial value. The deadweight and bale capacities of the Mariners differ only slightly from the corresponding capacities of certain of the C–3 type design.

Although we do not have records of the speeds of all 1,073 foreign-flag ships engaged in liner service of United States foreign commerce, we have a record to show that in 1952 there were only 63 foreign-flag vessels engaged in United States foreign commerce with a reported speed of 17 knots or better. Of these 63 so engaged, nine had a sustained speed (i. e., speed capable of being maintained under normal conditions fully loaded) exceeding 18 knots, as follows: Three a sustained speed of 19 knots, and six a sustained speed of 19½ knots. All of these nine were Swedish-flag vessels with large reefer capacity, of which six traded from the west coasts of the United States and Canada to United Kingdom and Scandinavian ports where no United States-flag line is operating, and the remainder operated from Atlantic and Gulf ports to the Baltic. In 1953, two additional 19½-knot Swedish ships were added to this fleet, making in all 11 foreign-flag vessels engaged in United States foreign commerce with a speed of more than 18 knots. Performance records indicate that this indicated "sustained" speed is not always maintained in actual operation. The average speed of all foreign cargo vessels built since 1947 was substantially lower, as follows:

TABLE VII.—*Average speed of recently built foreign-flag vessels*

Year	Number delivered	Average speed
1948	185	14.14 knots.
1949	205	14.34 knots.
1950	199	14.08 knots.
1951	201	14.05 knots.
1952	236	13.87 knots.
1953 (6 months)	108	14.44 knots.

In the United States during the same period, only three ocean-going dry cargo ships were built other than four 16-knot full reefers and the Mariner vessels. These three were delivered in 1951 and had an average design speed of 16.83 knots. No others, except Mariners, are now under construction in the United States.

FOREIGN SHIPS UNDER CONSTRUCTION

A rumor, reported in 1953 in a British shipping publication, suggested that cargo vessels with a speed of 20 knots were under construction in Japan, but the report was denied from authoritative sources in Japan. On the other hand, we have a definite report that as of June 30, 1953, there were five dry cargo vessels under construction in Swedish and British yards having a design speed of 18 knots or better. Four of these will have an 18-knot speed and one a 19-knot speed. These figures, however, do not give consideration to the number of dry cargo vessels also under construction in foreign yards with a design speed of less than 18 knots.

It thus appears that, except for Mariners and the *Schuyler Otis Bland*,[10] there are no dry-cargo freighters in operation under the United States flag or being built in this country with speeds exceeding 18 knots. The average speed of recently built foreign-flag vessels is not over 15 knots. Of the nine foreign-flag ships operating in the United States commerce with speeds over 18 knots, most operate on routes where there is no United States flag competition, and are especially designed with large refrigerated capacity for special trade requirements, and may thus be considered exceptional in the foreign-flag liner fleets which number over 1,000 vessels trading to United States ports.

From a commercial point of view, high speed has value if it attracts more business or if it results in decreased operating costs. It does not appear that even a saving of two or three days on a long voyage which an additional 2-knot speed might make possible would

[10] The *Schuyler Otis Bland*, a prototype cargo carrier capable of 18½ knots sustained speed, was built by the Government, and since her delivery in July 1951 has been operating under bareboat charter or general agency agreement.

necessarily be of consequence to shippers who, under ordinary circumstances, are paid for goods sold at port of shipment against shipping documents, and without waiting for actual delivery abroad. There is testimony in the record that the primary interest of American C. I. F. shippers is to get the price of the product, which in most cases can be done by depositing on-board bills of lading in bank.

As to operating costs, it appears that the port time of a Mariner is substantially the same as that of a C–3 type vessel. The sea operating cost of a C–3 type vessel at 16½ knots is substantially lower than that of a Mariner at either 18 or 20 knots. The per-ton mile cost of a fully loaded Mariner operated at 20 knots is substantially the same as at 18 knots if the voyage is long enough to effect savings of one or more full days, provided fuel is purchased at the lower west coast rate of $1.70 per barrel. If fuel is purchased at the higher east coast rate of $2.40 per barrel, the operating cost of a Mariner at 20 knots is somewhat greater than at 18 knots. On short runs, the saving of part of a day is of little commercial value, for arrival time in port may necessitate delay until the beginning of the succeeding working day for the shore gangs needed to work the ship. Without in any way detracting from the commercial value of good, efficient, regular, and reasonably fast service, it appears that the element of speed by itself as a competitive element in obtaining cargo is today perhaps of less importance than in prewar days. Factors which today are becoming more important in the competition for United States export cargoes stem from the power of foreign importers and governments which control the foreign purchases to direct the routing of cargo by vessels of their choice. It appears that there are probably relatively few cases, except in respect of limited amounts of high value cargo moving mainly in the North Atlantic trades, where speed is a controlling factor in getting the business.

We are aware of certain estimates made by some members of our staff as to desirable speed that are to some extent in variance with the conclusions above set forth. We believe, however, that our conclusions are supported by the seasoned judgment of experts in the field of commercial operations, well qualified to appraise the commercial utility of the element of speed here under consideration.

COMPUTATION OF ESTIMATED BRITISH BASIC COST OF 20-KNOT MARINER AND 18-KNOT COMMERCIAL EQUIVALENT

We start with the United States contract prices on the 20-knot Mariners, including all defense features, set forth in Note 1, and proceed as more particularly set forth below.

First Step: Computation of Estimated British Cost of Mariner (20 Knots), Including National-Defense Features

The staff sent to Britain the plans, specifications, and material requisitions for the major components going into the Mariner as supplied by Bethlehem-Quincy (which company had prepared the plans and had issued all purchase orders for materials going into the vessels), and an effort was made to price each item in the British market. Of the various hull items, British prices were developed on more than 90 percent in value, and on machinery items on approximately 80 percent in value. As to the unpriced hull items, these were included in the British estimate at the ratio of the priced hull items, and similar treatment was given to the unpriced machinery items, based on the ratio of the priced machinery items. To the British estimated cost of all hull and machinery material so derived was added the British cost of labor necessary to construct the ship. The total man hours in an American yard was also taken from the Bethlehem-Quincy bid, and adjusted for differences in subcontracting practices in British yards. Based on information as to the relative productivity of representative British yards which have not all the labor-saving devices available in American yards, it was determined that on the average 18 percent more direct hours would be required in Britain than in the United States to do the same work. The average cost of labor in Britain was found to be $0.461 per hour, so that by multiplying these factors, a British labor cost of the ship was obtained, and the following computation was then possible:

TABLE VIII

Total material	$3,120,920	
Cost of insurance during construction	45,000	
		$3,165,920
Labor 1,017,860 hours×1.18×$0.461	553,700	
Plans and engineering	[1] 13,560	
		567,260
Indirect labor, including general administration charges and social charges—30 percent of direct labor		170,180
		3,903,360
Establishment charges, including use of plant and equipment, property taxes, and firm's profit—25 percent of above		975,840
Total British estimated cost of 20-knot Mariner, including national defense features, Feb. 7, 1951		4,879,200
This is rounded off at		4,879,000

[1] Itemized separately in this British estimate of cost, since the United States cost of plans and engineering was derived from a separate plans contract and was not in Bethlehem-Quincy ship contract, and, consequently, no allowance for labor or material necessary for producing British plans and engineering was included under those headings in the foregoing British labor and material estimates, which were for ship construction only.

It is to be noted that indirect labor and social charges were estimated at 30 percent, based on information from financial reports of various British shipbuilding companies and also from information derived from cost computations for the construction of a number of tankers then being constructed in Britain. In some the indirect labor and social charges ran as low as 25 percent of direct labor, and in some as high as 35 percent of direct labor, and, accordingly, an intermediate percentage of 30 percent was considered a fair medium. Similarly the basis for establishment charges and firm's profit of 25 percent is based on reports from United States foreign service representatives in Britain, taken from records of British shipyards and also from several large oil companies recently constructing tankers in British shipyards. The staff estimate for February 7, 1951, based on British figures as of that date, is deemed therefore to be as fully documented as is reasonably possible. All estimated British prices herein set forth are subject to escalation for changes in cost of material and labor in Britain during the building period. By applying the British index for materials [11] and the British index for labor [12] to the February 7, 1951, figures, the following three estimates were made of British basic costs of constructing a Mariner ship when built as one of five, and including the national-defense features incorporated in the Mariners (except item (c), special treatment steel for splinter protection), computed at the post-devaluation official rates of exchange prevailing on the dates when the contracts were signed in the United States:

TABLE IX.—*Estimated British cost of 20-knot Mariner, including defense features*

Contract date:	*Cost*
Feb. 7, 1951	$4,879,000
June 25, 1951	5,047,000
Aug. 1, 1951	5,239,000

Second Step: British Cost of 20-Knot Mariner, Excluding National-Defense Features

We next adjusted these costs to exclude costs of national-defense features except speed. The British estimate of the 20-knot Mariner, set forth above, did not include splinter protection. The 12 items of national defense features having an estimated United States cost of $255,920, as set forth above (page 419) were separately priced in

[11] Mechanical Engineering Materials Price Index from British Board of Trade Journal.
[12] Index of Weekly Wage Rates of All Workers (British) from monthly Gazette of British Ministry of Labour.

Britain as of February 7, 1951, and exclusive of splinter protection, had an aggregate British cost on that date of $155,500.[13]

This estimated British cost of national-defense features computed as of February 7, 1951, was adjusted by the same British indices to reflect changes to June 25, 1951, and August 1, 1951, to provide the following British estimated cost of the 20-knot Mariners without the 12 national-defense features referred to.

TABLE XI

Date	Total British cost	N. d. f.	Net British cost
Feb. 7, 1951	$4,879,000	$155,500	$4,723,500
June 25, 1951	5,047,000	160,854	4,886,000
Aug. 1, 1951	5,239,000	166,974	5,072,000

These, then, are the fair and reasonable estimates of basic costs, as determined by us, of construction of the 20-knot Mariners if they had been constructed under similar plans and specifications (excluding national-defense features) in the United Kingdom, and provide the minimum basic prices for the Mariners if sold for use as combination passenger-freight carriers in foreign commerce.

Third Step: Computation of Estimated United States Basic Cost of Commercial Equivalent (18 knots)

The staff next computed an estimate of the basic United States cost of the 18-knot commercial equivalent as of February 7, 1951, based on the Newport News material and labor costs, plus 1/35th of the

[13] The breakdown of this figure follows:

TABLE X

National-defense features	United States	Britain
(a & h) Increased maximum power (Navy rating)	$13,400	$12,525
(b) Ice strengthening	35,300	17,082
(c) Splinter protection (not in British estimate)	13,800	
(d) Degaussing trunks	550	306
(g) Shock resistance	23,700	31,726
(i) Turbo generators	40,100	21,251
(j) L. O. system	970	500
(k) Evaporators	13,000	7,920
(l) F. O. transfer	61,500	36,315
(m) Fire system	10,900	5,199
(p) Heavy-lift booms	42,700	22,673
Total	255,920	155,497
Rounded off to		155,500

estimated cost of plans for the commercial equivalent. Thus computed, the estimated cost of the commercial equivalent and its plans priced at Newport News costs, adjusted to February 7, 1951, was $6,797,990,[14] as is more particularly explained below.

The material cost was, in general, obtained by taking the weight of each of the various material groups going into the design of the commercial equivalent and pricing these as of February 7, 1951, by weight, based on values given by the Newport News company in connection with its original Mariner bid. The foregoing general method was departed from, however, with respect to propulsion machinery, the direct current electric plant, the steering engine, windlass, capstan, and deck winches, since actual estimates for identical equipment had been given by the Newport News company in connection with its bid made over a year earlier to construct the S. S. *Schuyler Otis Bland*, which vessel, however, was actually built in another yard. The *Bland* estimates for these items were corrected for changes of cost due to the time differential and for a five-ship bid instead of a single-ship bid, and for such other variables as were necessary to make the Newport News estimate on *Bland* items in all respects comparable with the February 7, 1951, pricing of the other material items on the Mariners. The labor cost of the commercial equivalent was likewise derived from information in the Newport News bid. From this it was possible to compute the number of man-hours required to fabricate and install a ton of each of the various material groups going into the commercial equivalent, and from such information could be computed the total number of man-hours required to construct the commercial equivalent. From this it was found that 858,720 man-hours would be required to construct the commercial equivalent.

The total United States basic estimate for the commercial equivalent was thus reached as follows:

[14] By using the same ratio of differentials between the Newport News contract price on the Mariners and the corresponding Mariner prices of the 6 other yards to compute base prices and making adjustment for escalation, the following estimates of the basic cost of the commercial equivalent vessel in all 7 American yards is projected for the contract dates.

TABLE XII

Date	Yard	Estimated U. S. cost of commercial equivalent	Plans	Total
Feb. 7, 1951	Newport News	$6,767,080	$30,910	$6,797,990
Do	Ingalls SB Co	6,854,270	30,910	6,885,180
Do	Bethlehem, Sparrows Point	6,879,450	30,910	6,910,360
Do	Bethlehem, Quincy	7,213,680	30,910	7,244,590
Do	Sun SB & DD Co	7,311,550	30,910	7,342,460
June 25, 1951	New York SB Co	7,836,170	31,690	7,867,860
Aug. 1, 1951	Bethlehem, San Francisco	7,976,860	32,330	8,009,190

TABLE XIII

Estimated U. S. cost of material (December 1950 prices)	$3,468,000
Estimated cost of labor—858,720 hours at $1.72 per hour	1,477,000
Estimated overhead and profit based on Newport News Mariner bid	1,620,000
Subtotal	6,565,000
Adjustment to make Newport News bid prices of material and labor effective as of Feb. 7, 1951	[1] 202,080
Subtotal	6,767,080
Estimated cost of plans (December 1950 prices)	29,410
Adjustment to make plans estimate effective as of Feb. 7, 1951	1,500
Total United States basic estimate of commercial equivalent as of Feb. 7, 1951	6,797,990

[1] This adjustment is necessary because in the Newport News bid material and labor are priced as of December 1950 for escalation purposes.

Fourth Step: Computation of Estimated British Cost of 18-Knot Commercial Equivalent February 7, 1951

In connection with establishing the over-all ratios of British to United States cost of the 20-knot Mariners, the process of pricing the items of materials used in the construction of the Mariner in Britain discloses a ratio of British February 7, 1951, material costs to United States material costs estimated as of December 1950, disclosed by Bethlehem-Quincy bid for the 20-knot Mariners to be 68.07 percent. This material ratio was used to estimate the British material cost of the 18-knot commercial equivalent instead of following the more burdensome method of a second separate British pricing of each component item of material entering into the commercial equivalent.

The United States estimated cost of materials for the commercial equivalent was necessarily based, as already explained, on the Newport News figures, and amounted to $3,468,000. In order to use the 68.07 percent ratio thus developed in connection with British cost to Bethlehem-Quincy American costs of materials, it was necessary to translate the Newport News material costs of the commercial equivalent into Bethlehem-Quincy costs. The estimated cost of the commercial equivalent based on the Bethlehem-Quincy contract price for the Mariners based on December 1950 prices was $7,004,920. We have records to show that the basic cost before escalation of material for the 20-knot Mariners constructed at Bethlehem-Quincy was $4,585,000 out of a total ship's cost of $8,296,000, and we are advised that material costs of vessels of the type here involved vary substantially in proportion to total costs. Applying the ratio between these figures, we have

computed the Bethlehem-Quincy material cost of the commercial equivalent to be $\frac{4585}{8296}$ of $7,004,920, or $3,871,451. Sixty-eight and seven hundredths percent of this figure shows the comparable British material costs of the commercial equivalent to be $2,635,297.

Similarly, we have records to show that the total man-hours required to construct the $8,296,000 20-knot Mariner at Bethlehem-Quincy was 990,500 man-hours. We are advised that man-hours likewise vary substantially in proportion to total costs. Accordingly, for a Bethlehem-Quincy commercial equivalent costing $7,004,920, the necessary man-hours can be reasonably estimated to be $\frac{7004}{8296}$ of 990,500, or 836,352 man-hours. This United States man-hour figure for the commercial equivalent, adjusted for differences in subcontracting practices in British yards, already referred to on page 425, gives a British man-hour figure of 859,435 man-hours. The British estimated cost of plans and engineering for a 20-knot Mariner was $13,560, as set forth on page 426. A proportionate reduction in plan costs for an 18-knot commercial equivalent gives an estimated British cost of plans and engineering of $11,450.

With the British material cost of the commercial equivalent estimated at $2,635,297 and plans estimated at $11,450, and labor estimated at 859,435 man-hours, a reasonable British estimate of the entire commercial equivalent was computed in substantially the same manner used for the British estimate on the 20-knot Mariner set forth on page 426, giving a result of $4,120,000 on February 7, 1951, as follows:

TABLE XIV

Material—68.07 percent of $3,871,451 equals	$2,635,297	
Insurance	37,997	
		$2,673,294
Labor—859,435 hours × 1.18 × $0.461 equals	467,516	
Plans and engineering	11,450	
Direct labor	478,966	
Indirect labor, including general administrative charges and social charges—30 percent of direct labor	143,690	
		622,656
		$3,295,950
Establishment charges, including use of plant and equipment, property taxes, and firm's profit—25 percent of above		823,987
Total British estimated cost of 18-knot commercial equivalent, Feb. 7, 1951		$4,119,937
This is rounded off at		$4,120,000

Fifth Step: British Cost of 18-Knot Commercial Equivalent for Later Dates

When once the British estimated cost as of February 7, 1951, was established for the commercial equivalent, the British index of materials and labor already referred to was applied to the February 7, 1951, material and labor costs above set forth and the following British estimated costs were computed for the three contract dates as follows:

TABLE XV

February 7, 1951	$4,120,000
June 25, 1951	4,261,000
August 1, 1951	4,424,000

TABLE XVI.—*Summary of basic cost ratios—British estimated cost to United States actual or estimated cost—and maximum subsidy rates computed as of dates of United States Mariner construction contracts*

Yard	20-knot vessel for passenger-freight combination use—ratio, British : American	Maximum subsidy rate (percent)	18-knot vessel for freighter use—ratio, British : American	Maximum subsidy rate (percent)
Newport News	[1] 4,723,500 / 7,803,700 = 0.6053	39.47	4,120,000 / 6,797,990 = 0.6061	39.39
Ingalls	[1] 4,723,500 / 7,903,780 = .5976	40.24	4,120,000 / 6,885,180 = .5984	40.16
Bethlehem, Sparrows Point	[1] 4,723,500 / 7,932,680 = .5954	40.46	4,120,000 / 6,910,360 = .5962	40.38
Bethlehem, Quincy	[1] 4,723,500 / 8,316,300 = .5680	43.20	4,120,000 / 7,244,590 = .5687	43.13
Sun	[1] 4,723,500 / 8,428,636 = .5604	43.96	4,120,000 / 7,342,460 = .5611	43.89
New York	[1] 4,886,000 / 9,031,700 = .5410	45.90	4,261,000 / 7,867,860 = .5416	45.84
Bethlehem, San Francisco	[1] 5,072,000 / 9,193,950 = .5517	44.83	4,424,000 / 8,009,190 = .5524	44.76

[1] Since the United States contract price figures, as explained in Note 1, are based on bidders' estimates of December 1950 and April 1951, for contracts executed on Feb. 7, 1951, and on June 25, 1951, and Aug. 1, 1951, respectively, the figures for U. S. costs less NDF, set forth in table II, have been re-estimated for use in this table to reflect escalation to the contract dates so as to make them comparable with the British estimates, all of which are based on British prices as of the several contract dates.

TABLE XVII.—*Summary of minimum basic prices for Mariner vessels for use in foreign commerce*

Yard	20-knot vessel for passenger-freight combination use	18-knot vessel for freighter use
Newport News Ingalls SB Co Bethlehem, Sparrows Point Bethlehem, Quincy Sun SB & DD Co	$4,723,500	$4,120,000
New York SB Co	4,886,000	4,261,000
Bethlehem, San Francisco	5,072,000	4,424,000

CHANGES, ESCALATION, ETC.

The foregoing basic minimum prices are subject to adjustment for changes and escalation and the owner's "allowance list", being the cost

of certain Government-furnished ship's outfit such as navigating instruments, flags, steward's outfit, including silver and linen, as well as deck and engine room portable tools and outfit. In the case of sale of a vessel under section 502 of the Act, adjustments will also have to be made for interest; and in case of a sale under section 705 of the Act, adjustment will be required for depreciation. The computation of these items may be made for each vessel when a sale becomes imminent, but certain general principles with regard to the computation of these items may be here set forth. We believe that the items of interest and depreciation raise no serious problem when the sales price has once been established. The various items supplied by the Government have, according to a preliminary estimate furnished us, a value of approximately $35,000 per vessel. No evidence has been presented to us that the cost of these items in Britain is less than the cost at which they will be supplied by this Government to the vessels, and, accordingly, no subsidy allowance will be made with respect to these items.

Any changes in the original contract, plans, and specifications made since the signing of the respective contracts will carry the subsidy rate above set forth in table XVI for the vessel involved, excepting that any increase or decrease in cost of items which have been designated in this report as national-defense features will be entirely for Government account.

The determination of escalation is somewhat more complicated. All the contracts with the American yards provide for a base price to be adjusted upward or downward for changes in costs of materials or labor in accordance with well-recognized United States Government indices, with allowance for certain machinery items in some cases. The estimated British construction costs of the 20-knot Mariner and the commercial equivalent have been computed herein as basic costs as of the American contract dates. We are advised that the British contracting practice is somewhat different from the American practice in that whereas a basic price may be agreed to, escalation is not computed from any established indices. On the contrary, where contracts are not made on a cost-plus basis, British practice appears to be to set forth in the contract the expected disbursement for material items and for labor items and agree that if the cost of material or the cost of labor is increased or decreased from the specified amount during the construction period, an adjustment will be made accordingly. Such an arrangement thus makes British escalation dependent on a post-construction audit of the builder's actual figures, a procedure which does not help us to make the foreign cost estimates required of us under the Act. Where, as here, both the American construction contract and the foreign practice provide for modification of the build-

er's contract price for changes in material and labor costs during construction, and where, as here, we have selected British estimated construction costs as of the dates of the respective United States contracts, some adjustment must be made in British basic costs for escalation if our estimates are to fairly and reasonably represent the total British estimated cost of construction. This conclusion is consistent with the conclusion set forth in our first report in *Sales Prices of "Independence" and "Constitution," supra*, where we said in this connection:

> Section 502 of the Act, particularly when coupled with the authority given under section 207 to "enter into such contracts * * * as may, in its discretion, be necessary," contains sufficient flexibility to permit subsidy determinations to conform to accepted commercial practice in this regard.

In the same report we posed the question as to whether escalation adjustment for the hypothetical ship should be based on changes in foreign shipbuilding costs, or whether the adjustment for administrative convenience might be geared to United States wage and material indices, and we said:

> From a strictly theoretical point of view the escalation clause in a foreign vessel sales contract should be geared to appropriate foreign wage and material indices since the vessel sales price is to be "a price corresponding to the estimated cost * * * of building such vessel in a foreign shipyard."

Our attention has been directed to the "Mechanical Engineering Materials Price Index," giving a weight value to approximately thirty engineering commodities, maintained on a monthly basis by the British Board of Trade, an official British agency. This materials index is regularly published in the British Board of Trade Journal, and, in our judgment, is the best available measure of changes in materials costs which British shipbuilders and their clients would take account of in the post-construction audits which have been described to us.

Our attention has also been directed to the "Index of Average Hourly Earnings of All Workers in the Shipbuilding and Ship Repair Industry," published every 6 months, and the "Index of Weekly Wage Rates of All Workers in the Principal Industries and Services," published every month by the British Ministry of Labour in its monthly Gazette. While the labor rates for the shipbuilding industry are not published monthly, we believe that by interpolation of data from the index of all workers for intermediate periods a satisfactory British wage index for the shipbuilding industry is available for any given month. We agree with the recommendation of our staff that, at least under the circumstances disclosed in this case, the British indices above mentioned reflect more accurately increases or decreases in British costs of material and labor, including indirect labor, social and administrative charges during construction, than could be obtained

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from the application of American indices or from any other reasonably available source. We think the use of the available British indices is more practical than an attempt to discover contemporaneous contracts and audits which might disclose adjustments for British escalation based on actual experience.

The question remains as to the method of application of the British indices, and particularly as to the amounts of labor and material entering into our basic estimated foreign construction cost to which the indices should be applied for each escalation period during the time of construction. Each Mariner constructed in a United States yard may have a different period of construction from every other Mariner, and on any selected date may have progressed toward completion to a different extent. The escalation factors of any particular Mariner accordingly cannot well be used in our estimate of the escalation element entering into the total estimated construction cost of the hypothetical foreign vessel. Accordingly, we believe it fair and reasonable to estimate a single foreign escalation figure to be added to the estimated basic foreign prices above set forth, based on all appropriate escalation factors entering into the computation of United States escalation for each of the three groups of Mariners respectively. This would be accomplished with respect to Mariners contracted for on February 7, 1951, by (1) determining the extent of completion of each such Mariner in each escalation period (except those whose completion as commercial vessels is abandoned), thereby establishing the average percentage of material received for and labor performed on such vessels for each escalation period, and (2) then applying to the British basic costs of such percentage of material and labor for each such escalation period the increase or decrease shown by the British material and labor indices, with due regard for any change in the official rate of currency exchange applicable to each escalation period.

Similar computations would be made for the escalation with respect to Mariners contracted for on June 25, 1951, and on August 1, 1951, respectively. The computation of escalation upon any estimated basic construction cost, as hereinabove set forth, whether involving British or American costs, may be made in the manner above set forth, using the appropriate indices, or, in the alternative, by the use of ratios wherever appropriate.

Since the ratio of British to American escalation does not necessarily follow the ratio above set forth for the basic ship costs, there is a possibility that the total British estimated cost of construction, including extras, escalation, etc., may be less than 50 percent of the actual cost of the 20-knot Mariner or estimated United States cost of construction of the 18-knot commercial equivalent, plus escalation,

extras, etc. In such event, the statutory subsidy limit of 50 percent of total United States cost must prevail and the subsidy award must necessarily be limited to that amount.

(Sgd) A. J. WILLIAMS,
Secretary.

FEDERAL MARITIME BOARD
MARITIME ADMINISTRATION

Docket No. S–36

AMERICAN PRESIDENT LINES, LTD.—APPLICATION FOR PERMISSIONS UNDER SECTION 805 (a), MERCHANT MARINE ACT, 1936, AS AMENDED

Application for permission authorizing certain persons to serve on the board of directors of American President Lines, Ltd., and for a holding company or affiliate of American President Lines, Ltd., to maintain certain relationships with a concern that owns or charters vessels in the domestic intercoastal or coastwise service, granted.

No showing made that grant of such permission will result in unfair competition to any person, firm, or corporation operating exclusively in coastwise or intercoastal service, or that it would be prejudicial to the objects and policy of the Merchant Marine Act, 1936, as amended.

Warner W. Gardner for applicant.

Odell Kominers for Luckenbach Steamship Company, Inc., and *Alan F. Wohlstetter* and *William I. Denning* for Pacific-Atlantic Steamship Co., interveners.

John Mason for the Board and the Maritime Administrator.

REPORT OF THE BOARD AND THE MARITIME ADMINISTRATOR

BY THE BOARD AND THE MARITIME ADMINISTRATOR:

American President Lines, Ltd. (hereinafter referred to as "APL"), has applied to the Board and the Maritime Administrator for written permissions under section 805 (a) of the Merchant Marine Act, 1936, as amended (hereinafter called "the Act"), for certain persons to serve on its board of directors and for a holding company or affiliate to maintain certain relationships with a concern that owns or charters vessels in the domestic intercoastal or coastwise service.

Luckenbach Steamship Company, Inc., Luckenbach Gulf Steamship Company, Inc.,[1] and Pacific-Atlantic Steamship Co. have intervened, and applicant and interveners have been heard on the issues raised.

[1] States Marine Company of Delaware purchased Luckenbach Gulf in its entirety, after Luckenbach had filed its petition to intervene, but States has not appeared or participated actively in this case.

Section 805 (a) of the Act provides that:

> It shall be unlawful to award or pay any subsidy to any contractor under authority of title VI of this Act * * * 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. * * * 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 * * *.

APL is a contractor under authority of title VI of the Act [2] and has applied for permission authorizing the following relationships:

Ralph K. Davies is an officer and director of APL. He is a substantial shareholder of American Independent Oil Co. (hereinafter called "Aminoil"). Aminoil is the sole owner of all the capital stock of Independent Tankships, Inc. (hereinafter called "Tankships"). Tankships owns six T2 tankers, some of which at one time or another have engaged in the intercoastal or coastwise carriage of petroleum products.

O. W. March is a director of APL and owns 0.65 percent of the common stock of Signal Oil and Gas Co., which owns 15.08 percent of the common stock of Aminoil, the owner of Tankships.

Russell H. Green is a director of APL and owns some of the stock of Signal Oil and Gas Co., a stockholder of Aminoil, the owner of Tankships.

Samuel B. Mosher is not now a director of APL, but he was on its board of directors from March 19, 1951, to June 10, 1953, and it is anticipated that he will return to the board at some future time. Mr. Mosher owns 18.4 percent of the common stock of Signal Oil and Gas Co., which, as pointed out above, is a shareholder in Aminoil, the owner of Tankships.

Signal Oil and Gas Co. owns 46.1 percent of the voting stock and about 33.6 percent of the total stock equity of APL. Signal Oil and Gas Co. owns 15.08 percent of the common stock of Aminoil, the owner of Tankships.

The above described relationships have existed for a number of years, and it is for these relationships as they have existed in the past and as they may exist in the future that APL has requested permission under section 805 (a).

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[2] APL holds operating-differential subsidy contract No. FMB-12.

In addition to the facts as set forth above, the following facts bear on the determination of this case:

(1) APL is the successor in interest to the former Dollar Steamship Line, Inc., Ltd.,[3] a steamship company which, between August 15, 1938, and October 28, 1952, was owned principally by the United States. In March of 1948, the United States voted its stock to put Mr. Davies on the board of directors. Mr. Davies was then, as he is now, a shareholder in Aminoil, which at that time, as now, owned Tankships.

(2) Mr. Mosher was put on the board by the United States in March of 1951. He was then, as now, a shareholder of Signal Oil and Gas Co., which owns stock in Aminoil, the owner of Tankships.

(3) When the United States sold its APL stock on October 28, 1952, it knew that the purchaser intended to sell "about 50 percent" of such stock to Signal Oil and Gas Co.

(4) Tankships received its corporate charter in October 1947. It secured and has owned since 1948 six ocean-going tankers: *Birch Coulie*, *Fort Fetterman*, *Pine Ridge*, *Powder River*, *Quemado Lake*, and *Spirit of Liberty*.

The first five of the foregoing tankers were let under 5-year bareboat charters to Esso Shipping Company at dates between January 30, 1948, and February 17, 1948. While Tankships had no interest in or control over the use to which the vessels were put under bareboat charter, it appears, in fact, that all five vessels were in the Gulf/Atlantic trade or in the foreign trade.

Since termination of the Esso charters in 1953, these five vessels have all been under voyage charters in the foreign, coastwise, and intercoastal trades. There have been only two intercoastal voyages by these ships, each carrying casing-head gasoline, Gulf to California.

The *Spirit of Liberty*, since its acquisition by Tankships in June 1948, has been on consecutive or single voyage charters. From June 1948 to October 1950, the charter voyages were in the coastwise or intercoastal trade; in October 1950, the ship was let on a 2-year voyage charter in the foreign trade. In November and December 1952, the ship was let on single voyage charters for Gulf to North of Hatteras liftings. Since January 1953, the ship has been under a 19-month consecutive charter which permits world-wide trading but the ship is expected to operate mostly coastwise. Since its acquisition by Tankships, the ship has made eleven intercoastal voyages, carrying fuel oil eastbound or casing-head gasoline westbound.

[3] The name of the company was changed to American President Lines, Ltd., in August 1938.

(5) Interveners operate dry cargo ships in the intercoastal trade; such ships have deep tanks in which are carried from time to time lubricating oil, vegetable oils, fatty oils, and detergents.

POSITIONS OF THE PARTIES

All parties agree that the vessels of Tankships have never carried any cargo in competition with interveners. APL is willing to commit Tankships never to carry any lubricating oils, vegetable oils (including coconut), fatty oils (including tallow), or detergents. Pacific-Atlantic would not object to our granting section 805 (a) permission, limiting Tankships' vessels, however, from carrying any of the above-named cargoes. Luckenbach agrees that it does not object to such limited permission directed toward the future, but it does object to any permission covering past activities, whether limited or not.

APL argues, despite the fact it has filed the application herein, that section 805 (a) does not apply to the relationships above described because Tankships' vessels have never engaged in a regular service. Additionally, APL urges that the relationships are too remote to be reached by section 805 (a). APL urges in the alternative that written permission has already been granted for the relationships because of the written proxies given by the Maritime Commission to put Messrs. Davies and Mosher on APL's board of directors. The defect of lack of opportunity for hearing under section 805 (a), says APL, has been cured by these proceedings, and the former permission can now be ratified. As a final alternative, APL submits that full permission can now be granted because no showing has been made that Tankships' vessels have offered any competition—much less unfair competition—to any intercoastal or coastwise operator.

APL, accordingly, moves (1) for a declaratory order that section 805 (a) is inapplicable here, or, in the alternative, (2) for a declaratory order that the written permission required by section 805 (a) has already been granted in the Maritime Commission proxies putting Messrs. Davies and Mosher on APL's directorate, or, in the alternative, (3) that full permission be granted now, both retrospectively and prospectively.

Luckenbach takes the position that section 805 (a) is applicable to any intercoastal or coastwise voyage and therefore reaches the operations of Tankships, and that the relationships between APL and Tankships, however remote, are nevertheless within the terms of the statute. Luckenbach concedes that Tankships' vessels have never competed with its vessels for any cargo, and concedes further that we have power to grant the requested permission for the past, up to the

time the application was filed herein. Luckenbach asserts, however, that APL has been in willful violation of section 805 ever since the application was filed.

Pacific-Atlantic generally joins in Luckenbach's position, except that it has no objection to the grant of permission if limited, as stated above, against Tankships' carrying lubricating oils, vegetable oils, fatty oils, or detergents.

Counsel for the Board argue that while the relationships described above are remote, they are, nevertheless, within the scope of the statute. He says, however, that section 805 (a) is not self-executing, does not relate to the past, and that any past activity which may come within section 805 can only be reached under section 805 (f). Under that section, violations of section 805 must be shown to have been willful.

DISCUSSION

In the administration of section 805 (a), we are alert to insure that the concern expressed by Congress for the protection of coastwise and intercoastal operators is given full effect. In *Am. Pres. Lines, Ltd.—Unsubsidized Operation, Route 17*, 3 F. M. B.-M. A. 457, we said at page 470 that

> The great importance to our merchant marine of its domestic fleet * * * should prompt us to resolve all doubts against activities of subsidized companies whose operations might tend to impede the development of domestic transportation by sea.

We are ready to resolve all doubts in favor of the intercoastal operators in this case, but we have not been presented with evidence indicating that vessels of Tankships have engaged in unfair competition with intercoastal operators or that such operations have been or would be prejudicial to the objects and policy of the Act (if such operations in the future are limited as described above).

The vessels of Tankships have made only thirteen intercoastal voyages, on none of which has any cargo been carried that was competitive with the operations of any intervener herein. There has been no suggestion that any Tankships operation has deprived any intercoastal or coastwise operator of cargo which they need, or have the capacity to carry, or to which they are fundamentally entitled.

Turning next to the particular contentions of the parties and especially to the motions of APL, we deny the motion for a declaratory order that section 805 (a) is not applicable here. Our predecessors have applied the section even where only two episodic intercoastal

voyages were involved,[4] and we believe that *a fortiori* the section is applicable to the operations of Tankships. Nor are the APL-Tankships relationships too remote for the statute. They are within the clear meaning of the statute, which speaks in terms of ownership of vessels or pecuniary interests, "directly or indirectly".

APL's second motion, for a declaratory order that the requisite statutory permission has already been granted, is also denied. Section 805 (a) calls for "the written permission of the Commission", and in view of Congress' concern for intercoastal and coastwise operators and in view of the mandatory requirement for hearing on section 805 (a) issues, we take it that we cannot impute the force of statutory permission to proxies, given by the Maritime Commission without the benefit of the hearing we have had herein.

We will, however, grant APL's third motion that the applied-for permission be granted now, retrospectively and prospectively, upon condition that Tankships' vessels shall not carry any lubricating oils, fatty oils, vegetable oils, or detergents.

As stated above, all parties have agreed that such limited permission may be granted for the future. Further, we have not been presented with either facts or argument against the granting of permission for the past up to the date of the filing of the application herein, or to the effect that such permission would be prejudicial to the objects and policy of the Act.

With respect to the period since the filing of the application, during which the application has been before us, Luckenbach urges that APL has willfully continued the relationships without permission, and has therefore violated section 805 (f). If this contention had any validity it would mean that a subsidized operator could never file application under section 805 (a) without entering upon a violation of section 805 (f), unless section 805 (a) permissions were forthcoming instantly upon filing the application. As a matter of practical administration, of course, that is not possible. Nor do we suppose Congress intended such a result, for the statute contains provision for interventions against applications and for a mandatory hearing on such interventions. Accordingly, our retrospective permission will apply not only up to the filing of the application herein, but also to the period between such filing and the date of our order herein.

An appropriate order will be entered.

[4] *Lykes Bros. Steamship Company, Inc.—Application Under Section 805 (a), etc.*, 2 U. S. M. C. 349.

ORDER

At a Session of the FEDERAL MARITIME BOARD, held at its office in Washington, D. C., on the 14th day of April A. D. 1954

No. S-36

AMERICAN PRESIDENT LINES, LTD.—APPLICATION FOR PERMISSIONS UNDER SECTION 805 (a), MERCHANT MARINE ACT, 1936, AS AMENDED

It appearing, That American President Lines, Ltd., has applied to the Board and the Maritime Administrator for written permission authorizing the following relationships:

(1) For Ralph K. Davies to act as an officer and director of American President Lines, Ltd.;

(2) For O. W. March, Russell H. Green, and Samuel B. Mosher to act as directors of American President Lines, Ltd.; and

(3) For Signal Oil and Gas Co. to be a holding company, subsidiary, affiliate, or associate of American President Lines, Ltd.; and

It further appearing, That Luckenbach Steamship Company, Inc., Luckenbach Gulf Steamship Company, Inc., and Pacific-Atlantic Steamship Co., have intervened against such application, and

The Board and the Maritime Administrator having heard the applicant and the interveners on said application:

It is ordered, That written permission as required by section 805 (a) of the Merchant Marine Act, 1936, as amended, be, and it is hereby, granted, authorizing the existence of the relationships above described, retrospectively and prospectively, subject to the condition that none of the vessels owned, operated, or chartered by Independent Tankships, Inc., shall, after the date of this order, carry any lubricating oils, or vegetable oils (including coconut), or fatty oils (including tallow), or detergents, in the domestic intercoastal service.

By order of the Board.

This order is concurred in and adopted by the Maritime Administrator.

[SEAL] (Sgd.) GEO. A. VIEHMANN,
Assistant Secretary.

FEDERAL MARITIME BOARD
MARITIME ADMINISTRATION

No. S–38

ISBRANDTSEN CO., INC.

v.

AMERICAN EXPORT LINES, INC.

Submitted May 3, 1954. Decided May 13, 1954

Isbrandtsen Co., Inc., not found to operate as a common carrier by water exclusively employing vessels registered under the laws of the United States on Trade Route 18 from and to a United States port or ports.

Participation by American Export Lines, Inc., with other common carriers by water, in cotton freight agreements for exclusive carriage of Egyptian cotton from Egypt to India and Pakistan, not found to be unjustly discriminatory or unfair within the meaning of section 810 of Merchant Marine Act, 1936, as amended, or of section II–18 (b) of the operating-differential subsidy agreement between American Export Lines, Inc., and the United States.

American Export Lines, Inc., not shown to have failed to cooperate with other American-flag companies in the development of the American-flag merchant marine as a whole in violation of section II–3 of the operating-differential subsidy agreement between American Export Lines, Inc., and the United States.

Participation by American Export Lines, Inc., without approval of the United States, in cotton freight agreements for exclusive carriage of Egyptian cotton from Egypt to India and Pakistan found not in violation of section II–18 (c) of the operating-differential subsidy agreement between American Export Lines, Inc., and the United States.

John J. O'Connor and *John J. O'Connor, Jr.*, for Isbrandtsen Co., Inc.

Gerald B. Brophy, *Carl S. Rowe*, and *Francis E. Koch* for American Export Lines, Inc.

Richard W. Kurrus as Public Counsel.

REPORT OF THE BOARD AND THE MARITIME ADMINISTRATOR

BY THE BOARD AND THE MARITIME ADMINISTRATOR:

Exceptions to the examiner's recommended decision have been filed by all parties and the matter has been argued orally before the Board

and the Administrator.[1] We agree with the result recommended by the examiner. Exceptions and recommended findings not discussed in this report nor reflected in our findings or conclusions have been given consideration and found not related to material issues or not supported by evidence.

Complainant (hereinafter called "Isbrandtsen") maintains a United States-flag round-the-world common-carrier service running eastbound from United States North Atlantic ports through the Mediterranean Sea and the Indian Ocean and thence across the Pacific and back to United States North Atlantic ports, and offers to transport freight from Alexandria, Egypt, to ports in India and Pakistan. Respondent (hereinafter called "Export") operates a United States-flag common-carrier service, and receives an operating-differential subsidy under a contract with the United States for service between United States Atlantic ports and ports in the Mediterranean Sea, India, Pakistan, Ceylon, and Burma, on essential trade route No. 18, and likewise offers to transport freight from Alexandria to ports in India and Pakistan.

Isbrandtsen alleges that Export and 29 American and foreign steamship lines made two annual agreements with members of the Alexandria Cotton Exporters Association (who are the shippers of substantially all the cotton moving from Alexandria to India and Pakistan) for the transportation of all their cotton destined to India and Pakistan, and that Export's action pursuant to such agreements has effectively excluded Isbrandtsen from participating in the transportation of such cotton, and is unjustly discriminatory and unfair to Isbrandtsen because in violation of section 810 of the Merchant Marine Act, 1936 (hereinafter called the "1936 Act"), and in violation of certain provisions of respondent's operating-differential subsidy agreement. Isbrandtsen demands the discontinuance of subsidy payments by the United States to Export and the termination of Export's subsidy agreement.

Section 810 of the 1936 Act reads as follows:

> It shall be unlawful for any contractor receiving an operating-differential subsidy under title VI or for any charterer of vessels under title VII of this Act, to continue as a party to or to conform to any agreement with another carrier or carriers by water, or to engage in any practice in concert with another carrier or carriers by water, which is unjustly discriminatory or unfair to any other citizen of the United States who operates a common carrier by water exclusively employing vessels registered under the laws of the United States on any established trade route from and to a United States port or ports.

[1] Board members Williams and Upton heard oral argument. Maritime Administrator Rothschild has reviewed the record of the argument, and he participates in this decision as Administrator.

No payment or subsidy of any kind shall be paid directly or indirectly out of funds of the United States or any agency of the United States to any contractor or charterer who shall violate this section. Any person who shall be injured in his business or property by reason of anything forbidden by this section may sue therefor in any district court of the United States in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

Sections II–3, II–18 (b), and II–18 (c) of Export's subsidy agreement, relied on by Isbrandtsen, read as follows:

II–3. *Development of American-flag Merchant Marine.* The Operator shall cooperate with the Commission and with other American-flag companies in the development of the American-flag merchant marine as a whole and, wherever practicable, the Operator shall favor American-flag companies in transshipping cargo, in selecting foreign and domestic agents or other representatives, in the rental of terminal and other facilities, and in related matters.

II–18 (b) The Operator agrees not to continue as a party to or to conform to any agreement with another carrier or carriers by water, or to engage in any practice in concert with another carrier or carriers by water, which is unjustly discriminatory or unfair to any other citizen of the United States who operates a common carrier by water exclusively employing vessels registered under the laws of the United States on any established trade route from and to a United States port or ports.

II–18 (c) Before obligating itself otherwise than conditionally upon approval of the Commission, after the date of execution of this agreement, under any agreement applicable to the subsidized service(s), route(s) or line(s) which provides for any pooling or apportioning of earnings, losses or traffic, or any allotting or distribution of sailings, traffic or area, or which restricts or attempts to restrict the volume, scope, frequency, or coverage of any such subsidized service(s), route(s) or line(s), the Operator shall obtain the Commission's approval thereof under this agreement, in addition to any approval required under any other provision of law. In granting or withholding such approval, the Commission shall consider whether such agreement contravenes, or may reasonably be expected to operate at any time so as to contravene the purposes, policy, or provisions of the Act.

In the event the Operator is at the date of execution hereof a party to any agreement of the type described above, it shall promptly so advise the Commission. If the Commission at any time finds, after notice and opportunity to the Operator to be heard, that any such existing agreement, or any such agreement executed after execution of this agreement, whether or not previously approved under Section 15, Shipping Act, 1916, or hereunder, contravenes or may reasonably be expected to operate at any time so as to contravene the purposes, policy, or provisions of the Act, the Operator shall take such lawful action as the Commission may require to amend, modify, terminate or withdraw from such agreement.

If upon review of such existing agreements, the rights of withdrawal therein provided are found by the Commission to be unreasonably restrictive as to time, cause therefor, or otherwise, the Operator shall cooperate with the Commission in securing such revision thereof as the Commission shall require.

Sections II–21 (f), II–30 (b), (e), and (f), and II–31 of the subsidy agreement, also relied on by Isbrandtsen, provide for discontinuance of subsidy payments for violations of section II–18 (b) and define events of default, and provide for the termination of the subsidy agreement in case of the happening of events of default so defined.

Export filed a motion to dismiss the complaint on the following grounds:

1. No provision of law or of Export's operating-differential subsidy agreement confers upon Isbrandtsen any right to initiate a proceeding for any violation of section 810 of the 1936 Act;

2. Isbrandtsen fails to allege that it is one of the class for whose protection section 810 of the 1936 Act is designed and without whom there can be no violation of that section;

3. Section 810 of the 1936 Act confers no jurisdiction on the Board with respect to commerce between points in foreign countries as set forth in the complaint; and

4. Export's action under the cotton agreements violated no statute but was actually in accordance with the policy of Congress expressed in section 14a of the Shipping Act, 1916 (hereinafter called the "1916 Act").

We denied the motion to dismiss, without at that time deciding the issues raised by the motion, and ordered the case to proceed "to afford complainant an opportunity to prove such alleged violations and to afford respondent an opportunity to rebut the charges made." Export accordingly answered, denying any violation of the 1936 Act or of its operating-differential subsidy agreement, and the case was heard by the examiner, who recommended that Export's participation in the cotton transportation agreements should be held not unjustly discriminatory or unfair to Isbrandtsen in violation of section 810 of the 1936 Act, and that such participation should be held not a violation of the sections of Export's subsidy agreement relied upon. Accordingly, the examiner recommended that the complaint be dismissed.

We make the following findings of fact:

1. Isbrandtsen is a corporation organized under the laws of the State of New York, all of the officers, directors, and stockholders being citizens of the United States, and is a citizen of the United States within the meaning of section 2 of the 1916 Act. Isbrandtsen has, since 1949, operated a common carrier liner service with United States-flag vessels providing fortnightly sailings eastbound on a round-the-world route, including calls at Alexandria, Bombay, India, and Karachi, Pakistan. The carriage of cotton from Alexandria to

India and Pakistan can make an important contribution to the over-all success of this service. Isbrandtsen also operates other services in the foreign commerce of the United States with foreign-flag vessels, notably from Gulf and South Atlantic ports to continental European ports, from the Gulf to Central American ports, and from North Atlantic ports to Colombia and Peru. Isbrandtsen's first carriage of cotton in the trade here involved was in October 1952, and up to November 24, 1952, on three voyages of its regularly scheduled vessels carried slightly over 3,700 bales from Alexandria to India and Pakistan. Isbrandtsen has never become a member of any steamship conference in any trade or been a party to any agreement in this trade. It is the only nonconference carrier in the trade. It publishes no tariff of rates on cotton moving from Alexandria to India and Pakistan, preferring to negotiate rates directly with the shippers.

2. Cotton is substantially the only commodity exported from Egypt to India and Pakistan, and in recent years about 150,000 bales or 37,500 tons have moved each year. The shipping season extends from the first of each September through August of the following year.

3. Apart from Isbrandtsen's limited participation, there have been since 1952 thirty steamship lines handling this eastbound cotton movement from Egypt, including two United States-flag lines, Egyptian-flag, and other foreign-flag lines. Steamship lines participating in this cotton movement, other than Isbrandtsen, have since World War II made it a practice before the beginning of each cotton season to present a single cotton freight rate from Egypt to India and Pakistan to the Alexandria Cotton Exporters Association (hereinafter called "the Association"), the rate to be effective for the season. The Association comprises substantially all the shippers of Egyptian cotton in the trade. When the rate for a given shipping season is arrived at, a written agreement is drawn up and signed by all of the individual participating carriers and all of the shippers of cotton. These agreements, known as cotton freight agreements, vary from year to year. The carriers, parties to the agreements, are generally referred to as conference carriers, although, unlike many steamship conferences known in the United States, they do not maintain a separate office with a salaried staff. A chairman and a secretary are appointed, and meetings are held in Egypt in the office of one of the carriers. Memoranda issued by the carriers show the heading "Egypt-India/Pakistan Cotton Conference". The carriers, parties to the agreements in issue, will hereinafter be called "conference carriers", or, as a unit, the "conference".

4. Export has been a member of the conference since the season beginning September 1946, excepting that, because certain features

of the agreement proposed for the 1948–1949 season were unacceptable to it, Export did not sign the cotton freight agreement that year, and during that year did not participate in the carriage of Egyptian cotton to India and Pakistan. From September 1949 through August 1953, Export transported 66,974 bales of cotton in the trade, from which it realized a total freight revenue of about $350,000. Export has had no objection to Isbrandtsen sharing in the carriage of cotton from Alexandria to India and Pakistan on equal terms with the other carriers in that trade.

5. The cotton freight agreement to cover the year beginning September 1, 1952, was signed November 24, 1952, and the cotton freight agreement for the year beginning September 1, 1953, was signed on September 7, 1953. These two cotton freight agreements constitute the basis of the complaint in this case. Both provide:

(a) That the conference members would provide sufficient tonnage to insure regular and quick transportation of all Egyptian cotton to named ports in India and Pakistan;

(b) That the freight rates of 170 shillings per 1,000 kilos in the 1952 agreement, and 155 shillings per 1,000 kilos in the 1953 agreement, were each subject to a rebate of 30 shillings per 1,000 kilos, and that payment of such rebate to a shipper was conditioned upon such shipper having shipped all his cotton during the respective seasons on vessels of conference members, and that payment of the rebate was to be made after the expiration of the agreement and within 30 days from presentation by the claimants of a statement proving their rights thereto (except that 90 percent of any rebate accumulated during any month was to be payable within 30 days of each elapsed month).

(c) That the conference members would not quote or charge a rate lower than the agreed rate on cotton in the trade to any person not a party to the agreement, and that conference members would have the privilege of admitting other shipowners to the benefits and obligations of the agreement; and

(d) That the Association members would, during the effective period of the agreement, agree to ship their cotton exclusively on vessels owned, controlled, or nominated by conference members and on no other vessels except with the consent of the conference members.

6. The 1952 agreement, although by its terms declared to commence to operate from September 1, 1952, was not signed until November 24, 1952, and was not fully effective until the date of signature. Isbrandtsen was not a party to either the 1952 or 1953 cotton freight agreement, did not apply to be a party to either, and has carried no cotton in the trade since November 24, 1952.

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7. In the summer of 1953, during the course of negotiations for the 1953 cotton freight agreement, the conference originally proposed a freight rate of 170 shillings per 1,000 kilos, less a rebate of 30 shillings. Isbrandtsen offered to the Association a freight rate of 120 shillings per 1,000 kilos. On July 13, 1953, after the conference members had learned of Isbrandtsen's offer, they prepared a memorandum pointing out that the conference lines provided a large number of sailings to seven ports in India and Pakistan, whereas Isbrandtsen offered only two sailings per month and only to three Indian and Pakistani ports.[2] The memorandum also stated that the conference lines would not be willing to help Isbrandtsen meet his carrying obligations should he secure the cotton trade to India and Pakistan. In the course of negotiations the Egyptian Government became interested in the situation, with the result that when a rate of 155 shillings less a 30 shilling rebate was finally offered by the conference lines, the Egyptian Government suggested that Isbrandtsen either be admitted to participation in the cotton freight agreement or that he be allocated 5 or 10 percent of the trade as an independent operator. When the conference invited Isbrandtsen to apply for membership, Isbrandtsen replied that it was "out of the question" for Isbrandtsen to become a member of any conference. Isbrandtsen also rejected the suggested participation on a fixed percentage basis. Before Export was aware of Isbrandtsen's formal refusal to apply for conference membership, Export advised the conference secretary that it "would welcome the admission of this line [Isbrandtsen] in the conference."

POSITION OF THE BOARD AND ADMINISTRATOR

This is an unusual proceeding in that Isbrandtsen makes no charge of any violation of the 1916 Act and has therefore no statutory right to file a complaint for relief under that Act. Isbrandtsen has no statutory right as a taxpayer or competitor to intervene in statutory or contractual relations between the United States and a United States-flag subsidized operator. Under the 1936 Act and under Reorganization Plan No. 21 of 1950, 46 U. S. C. A. § 1111 note, the Board has authority to make, amend, and terminate operating-subsidy agreements, and the Maritime Administrator, acting for the Secretary of Commerce, has authority to take all actions to administer such agreements when once made. The Board, prior to executing the operating-differential subsidy agreement with Export, made all necessary findings under title VI of the 1936 Act with respect to Export's

[2] Most Egyptian cotton in the trade moves to the three ports at which Isbrandtsen calls.

operation on Trade Route No. 18, including the determinations (1) that the operation of Export's vessls in such service was required to meet foreign-flag competition and to promote the foreign commerce of the United States; (2) that Export owned or could and would build or purchase vessels of the size, type, speed, and number required to enable it to operate and maintain the service in such manner as might be necessary to meet competitive conditions and promote foreign commerce; (3) that Export possessed the ability, experience, financial resources, and other qualifications necessary to enable it to conduct the proposed operations of the vessels to meet competitive conditions and promote foreign commerce; and (4) that the granting of the subsidy aid was reasonably calculated to carry out effectively the purposes and policy of the 1936 Act.

Isbrandtsen demands discontinuance of subsidy payments to Export and termination of Export's subsidy agreement because of alleged damage and injury to complainant. We do not approach the case from the point of view of Isbrandtsen's claim of alleged injury but review the evidence and arguments presented by the respective parties to determine whether reason exists to modify or terminate the present operating-differential subsidy agreement with Export.

EXPORT'S MOTION TO DISMISS

Export renewed its motion to dismiss at the close of the hearing, and while we agree that this proceeding should be discontinued on the merits, we may comment on the grounds for dismissal above set forth, as follows:

With regard to the first, third, and fourth grounds for dismissal, it may be said that under section 214 of the 1936 Act the Maritime Commission had full power to conduct any investigations necessary or proper in carrying out the provisions of the 1936 Act. The Board and the Administrator, who have jointly considered this matter, have between them all the statutory powers of the Maritime Commission, and their determination to proceed with the matter is fully authorized by section 214 and Rule 10 (a) (formerly section 201.111) of their Rules of Practice and Procedure. The defect in the complaint charged in the second ground for dismissal was cured by amendment.

POSITIONS OF THE PARTIES

Isbrandtsen asserts and Export denies (1) that complainant is a "citizen of the United States," and (2) that Isbrandtsen "operates as a common carrier by water exclusively employing vessels registered

under the laws of the United States on any established trade route" so as to bring Isbrandtsen within the language of section 810 of the 1936 Act and of section II–18 (b) of the subsidy agreement. Isbrandtsen asserts and Export denies (3) that Export's action with respect to the 1952 and 1953 cotton freight agreements involved practices which are "unjustly discriminatory or unfair", within the langauge of the same sections. Isbrandtsen charges and Export denies (4) that Export's joining with 29 other carriers to move the Egyptian cotton on conference terms and thereby excluding Isbrandtsen unless it agreed to such terms, was failure to "cooperate with other American-flag companies in the development of the American-flag merchant marine as a whole", within the language of section II–3 of the subsidy agreement. Isbrandtsen and public counsel charge and Export denies (5) that the cotton freight agreements do or may "restrict or attempt to restrict the volume, scope, frequency, or coverage of the subsidized service" of Export within the language of section II–18 (c) of the subsidy agreement, and Export's participation in the agreements without approval violates its subsidy agreement. Export urges as separate defenses (6) that its action in participating in the cotton freight agreements is consistent with public policy as expressed in section 14a of the 1916 Act, and (7) that in any event no domestic or foreign commerce of the United States is involved in the carriage of cotton between Egypt and India and Pakistan, and that, therefore, neither the Board nor the Administrator is authorized to inquire into Export's actions with regard thereto.

DISCUSSION OF ISSUES

The examiner found that Isbrandtsen is a citizen of the United States. There is undisputed testimony that all officers, directors, and stockholders of Isbrandtsen, a New York corporation, are citizens of the United States, and this brings Isbrandtsen within the definition of the term under section 905 (c) of the 1936 Act and section 2 of the 1916 Act.

The examiner found that Isbrandtsen is a common carrier by water exclusively employing United States-flag vessels on Trade Route No. 18 between United States ports and India and Pakistan. The examiner recommended that operation by Isbrandtsen of foreign-flag vessels on other trade routes should not be held to be inconsistent with a finding that it operates exclusively with United States-flag vessels "on any established trade route" within the language of section 810. Export, however, urges strongly that if, as here admitted, Isbrandtsen operates with foreign-flag vessels on any established

trade route from or to a United States port, it cannot be operating exclusively with United States-flag vesesls, and can therefore have no standing under the section. The exact meaning of the word "any" in the statute is far from clear, and the legislative history of section 810, which was added to the law by amendment on the floor of the Senate, throws no light on the subject. It may very well be that Congress intended to give the protection of the section only to United States-flag carriers operating no lines or services under foreign flag, but we do not think it is necessary for us to speculate on this point in this proceeding, for, as the examiner pointed out, Isbrandtsen's witnesses testified that Isbrandtsen might have operated one or more foreign-flag ships as tramps over the trade route here involved (Trade Route No. 18) in addition to United States-flag vessels on Isbrandtsen's regular fortnightly service.

Isbrandtsen's witness, speaking of the area covered by Isbrandtsen's regular round-the-world sailings, said:

Q. You haven't chartered a vessel for any special sailing into that area since 1949?

A. It is possible that we have had such sailings in there since 1949. The reason that I put it that way is that it was something that wouldn't come under my particular authority, and I am not as familiar with it, or as close to it, as I am with the line ships.

Q. Is it possible that those special sailings since 1949, under charter by Isbrandtsen, were ships of foreign registry?

A. They might possibly have been.

Q. So actually, every week there might be a vessel chartered by Isbrandtsen, of foreign registry, that have not fitted into your schedule pattern, that may, nevertheless, be operating over some parts of the route which you have described. That's correct, isn't it?

A. It could be."

Furthermore, it appears that the so-called tramp or "special sailings" of Isbrandtsen are not limited to private charters but operate as common carriers.

Q. What are special sailings, the term you are using?

A. Well, we distinguish those apart from our line vessels to the extent that they may actually start off with what we would call a semi-charter parcel of cargo. That would be a vessel that would be offered a parcel of cargo that would exceed ordinary liner vessels' cargoes and not be quite sufficient to complete or fill a charter vessel, but with that part of cargo in there, we would then use that as a base to complete it with additional cargo.

In the light of this record we cannot find that Isbrandtsen is operating as a common carrier even on Trade Route No. 18 *exclusively* with United States-flag vessels. The word "exclusively" clearly denotes every kind of operation whether regular fortnightly sailings or "special sailings." While a decision on this point is sufficient to dis-

pose of charges of violation of section 810 of the 1936 Act and section II–18 (b) of the subsidy agreement, we rely also on other grounds which we think are equally important.

Is Export's action in relation to the cotton freight agreement in any event unjustly discriminatory or unfair to Isbrandtsen even if the latter could come within the terms of the section? Isbrandtsen contends that the words "unjustly discriminatory or unfair", as applied to carriers' practices and as used in section 810 and in the subsidy agreement, are words of art which necessarily include the giving of deferred rebates or engaging in any of the other unfair practices defined in section 14 of the 1916 Act. Isbrandtsen asserts that under the cotton freight agreements, Export granted and agreed to grant deferred rebates. But it must be borne in mind that the unfair practices proscribed by section 14 of the 1916 Act relate to transportation to or from ports of the United States whereas the situation in this case involves transportation solely between foreign ports.

It is not clear that every practice deemed unfair by lines or conferences transporting to or from United States ports is necessarily unfair if practiced by lines or conferences in trades between foreign ports. Section 14 of the 1916 Act makes unlawful the payment of a deferred rebate in connection with transportation to or from a United States port, and no conference agreement of lines in such a trade permitting a deferred rebate in such transportation would be approved under section 15 of that Act. However, section 14a of the Act not only does not make it unlawful for a United States-flag vessel trading between foreign ports to give deferred rebates, but provides that if a United States-flag operator applies for admission to a conference engaged in transportation between foreign ports and is excluded, even though such conference grants deferred rebates or engages in other practices designated as unfair by section 14, then the foreign-flag members of the conference excluding the United States-flag operator from membership are to be penalized by refusal of the right to enter their ships in any port of the United States.

Section 14a, which was added to the 1916 Act by amendment on June 5, 1920, was aimed to put United States-flag vessels operating *between foreign ports*, in competition with foreign-flag ships, on a par with their foreign competitors who were then using the deferred rebate system to hold their shippers. The report of the House Committee on Merchant Marine and Fisheries (H. R. Report No. 1026, 66th Congress, 2d Session) accompanying the bill which was to become section 14a of the 1916 Act, referring to deferred rebates and other practices defined as unfair for common carriers operating to and from United States ports by section 14 of the 1916 Act, declared:

Our vessels being prohibited such practices by section 14 were placed at a disadvantage, so it was thought proper to prepare additional legislation which is contained in section 14a, the provisions of which allow our ships to enter any such combination of interest between foreign ports, and requires foreign lines or owners to allow our ships to enter on equal terms, the penalty of such refusal being the exclusion of the ships of such lines and owners from our ports while such practices are continued.

* * * * * * * *

It was thought advisable by the committee to give our ships an equal chance in these trades upon foreign routes, and for us as far as possible to require for them fair and equal treatment.

Thus it appears that under section 14, as to transportation to and from American ports, fair treatment excludes deferred rebates, while under section 14a, as to transportation between foreign ports, fair treatment does not exclude deferred rebates but requires for the United States-flag shipowner the right to join foreign conferences on equal terms.

We do not think that Congress, when it passed section 810 of the 1936 Act, intended in any way to repeal or modify the effect of section 14a of the 1916 Act. Senator O'Mahoney, who on the floor of the Senate offered the amendment which became section 810 of the 1936 Act, after quoting section 14a of the 1916 Act relating to transportation between foreign ports, said (Congressional Record, Volume 80, p. 10076):

It is represented, on apparently good authority, that American citizens operating such lines have applied for admission to conferences of which foreign lines are members, and have been denied that admission. Without the amendment which is proposed, therefore, we should have the anomalous condition that the United States would be in the position of paying a subsidy to an American line which was in truth and in fact engaged in a conspiracy with foreign lines to discriminate against another American line. This amendment will, I think, obviate that very unwise and improper and unjustifiable condition.

* * * * * * * *

I am told that the Shipping Board in the past has not enforced the law which so clearly provides that American lines, on application, are entitled to admission to any conference. A closed combination of this kind is indefensible, and surely should not be supported by the Treasury of the United States.

It seems clear that the discrimination which Senator O'Mahoney referred to in his amendment and in his discussion, quoted above, means unjust discrimination or unfair treatment in excluding a United States-flag line from a conference operating between foreign ports and does not mean deferred rebates. It follows that Export, by participation in the cotton freight agreements permitting deferred rebates, has not been shown to have been a party to or conformed to an agreement or to have engaged in a practice which is unjustly dis-

criminatory or unfair within the meaning of section 810 of the Act or section II–18 (b) of the subsidy agreement.

With respect to Export's alleged failure to cooperate with Isbrandtsen and consequent violation of section II–3 of the subsidy agreement, it may be said that Export made it clear that it had no objection to the admission of Isbrandtsen to the conference on equal terms with other members, and had no objection to the participation of Isbrandtsen in the carriage of cotton from Alexandria to India and Pakistan on equal terms with the other conference members. In fact, Isbrandtsen was invited by conference members to submit an application for membership in August 1953, and in reply Isbrandtsen pointed out—"The principles on which Isbrandtsen operates are 'independence' and no ties with the conferences or 'dual rate' systems." We do not believe that under the circumstances of this case the cooperation referred to in section II–3 of the subsidy agreement requires more than offering to Isbrandtsen an opportunity to join the conference "upon equal terms with all other parties thereto." We do not find evidence in this case that Export has violated section II–3 of the subsidy agreement.

We have examined the cotton freight agreements of 1952 and 1953, offered in evidence, and are unable to agree that they have the effect of restricting or attempting to restrict the volume, scope, frequency, or coverage of Export's subsidized service on Trade Route No. 18 or that they may reasonably be expected to contravene the purposes or policy of the 1936 Act. We do not find that such agreements need approval under section II–18 (c) of the subsidy agreement or that the evidence shows any violation of that section. Under the circumstances, we find it unnecessary to pass on the two separate defenses relied on by Export, being Nos. 6 and 7 in the list above set forth.

The proceeding will be discontinued.

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 13th day of May A. D. 1954

No. S-38

ISBRANDTSEN CO., INC.

v.

AMERICAN EXPORT LINES, INC.

It appearing, That Isbrandtsen Co., Inc., has complained of alleged violation by American Export Lines, Inc., of section 810 of the Merchant Marine Act, 1936, and of the operating-differential subsidy agreement between American Export Lines, Inc., and the United States; and

It further appearing, That American Export Lines, Inc., has denied the existence of the alleged violations complained of; and

The Board and Maritime Administrator having duly heard the parties and having fully investigated the matters and things involved and having, on the date hereof, made and entered a report stating their conclusions, decision, and findings thereon, which report is hereby referred to and made a part hereof:

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

By order of the Board.

This order is concurred in and adopted by the Maritime Administrator.

[SEAL] (Sgd.) GEO. A. VIEHMANN,
Assistant Secretary.

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 May 10, 1954. Decided May 13, 1954

Unsubsidized operation of Lykes Bros. Steamship Co., Inc., in its Line D Service on Trade Route No. 22 found to be, apart from calls to Indonesia-Malaya, an existing service to the extent of 24 sailings per annum.

Effect of granting application of Lykes Bros. Steamship Co., Inc., for increase from 24 to 48 subsidized sailings per annum in its Line D Service on Trade Route No. 22 (apart from calls to Indonesia-Malaya) would not be to give undue advantage or be unduly prejudicial as between citizens of the United States.

Section 605 (c), Merchant Marine Act, 1936, does not interpose a bar to the grant of application of Lykes Bros. Steamship Co., Inc., for increase of number of subsidized sailings in its Line D Service on Trade Route 22, except insofar as such application seeks an increase in the maximum number of calls at Indonesia-Malaya.

Present service to Indonesia-Malaya from United States Gulf ports by vessels of United States registry not found inadequate, and it is not necessary to award subsidy for increased number of calls at Indonesia-Malaya to provide adequate service by vessels of United States registry.

Section 605 (c) of the Merchant Marine Act, 1936, does interpose a bar to the grant of application of Lykes Bros. Steamship Co., Inc., for increase in maximum number of calls at Indonesia-Malaya ports.

Frank J. Zito, *Odell Kominers*, and *Joseph M. Rault* for Lykes Bros. Steamship Co., Inc.

Francis H. Inge and *Sterling F. Stoudenmire, Jr.*, for Waterman Steamship Corporation, intervener, and *John T. Carpenter*, *William G. Dorsch*, *Dale Miller*, *Mitchell C. Cunningham*, *John Lee Gainey*, *John C. White*, *Robert A. Nesbitt*, *F. H. Fredericks*, *George C. Whitney*, and *Lachlen Macleay* for various other interveners.[1]

[1] None of the interveners except Waterman Steamship Corporation participated herein on further hearing.

Harold J. Carroll, representing Rubber Manufacturers Association, Inc., as *amicus curiae*.

Allen C. Dawson and *Alan F. Wohlstetter* as Public Counsel.

SUPPLEMENTAL REPORT OF THE BOARD

BY THE BOARD:

This is a proceeding under section 605 (c) of the Merchant Marine Act, 1936 (hereinafter called "the Act"), instituted to determine whether that section interposes a bar to the application of Lykes Bros. Steamship Co., Inc. (hereinafter called "Lykes"), for an increase from 24 to 48 per annum in the maximum number of subsidized sailings in its Line D Service on Trade Route 22, with an increase from 12 to 24 per annum in the number of such sailings that may include calls at ports in Indonesia-Malaya.[2]

In our first report in this proceeding, 4 F. M. B. 153 (1953), we found that the unsubsidized operation of Lykes in its Line D Service was to some extent an "existing service" within the meaning of section 605 (c) of the Act. We remanded the case to the examiner to take further evidence and to make a further recommended decision in the light thereof, as to the extent to which Lykes has maintained an existing service as well as on the full question whether section 605 (c) of the Act interposes a bar to our amending our subsidy contract with Lykes.

The examiner has recommended, and we agree, (1) that section 605 (c) of the Act does not interpose a bar to the grant of the

[2] 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 a modification of the above route description): Caroline Islands, Marianas Islands, Palau Island, Marshall Islands, Okinawa Islands, 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).

application herein for an increase in the maximum number of Lykes' subsidized sailings in its Line D Service, except insofar as Lykes seeks subsidy for an increased number of calls at Indonesia-Malaya, and (2) that section 605 (c) of the Act does interpose a bar to the grant of the application herein insofar as it seeks an increase in the number of authorized calls at Indonesia-Malaya.

Lykes, Public Counsel, and intervener Waterman Steamship Corporation (hereinafter called "Waterman") have filed exceptions to the recommended decision, and the matter has been argued orally. Contentions of the parties or requested findings not dealt with in this supplemental report have been given consideration and found not related to material issues or not supported by the evidence.

Section 605 (c) of the Act presents us with the following issues: First, whether the operations for which Lykes seeks subsidy would be in addition to the existing service or services; second, if so, whether the service already provided by United States-flag vessels is inadequate and additional vessels should be operated in the service involved to accomplish the purposes and policy of the Act; third, if the service sought to be subsidized would not be in addition to the existing service or services, whether the effect of awarding the subsidy sought by Lykes would be to give undue advantage or be unduly prejudicial as between citizens of the United States; and fourth, if so, whether the award of subsidy is necessary in order to provide adequate service by vessels of United States registry.

We make the following findings of fact:

1. Lykes operates exclusively from Gulf ports outbound and principally to Gulf ports inbound, and provides four outbound sailings per month. These are spaced through the month to accommodate shippers who make their sales on the basis of first-half-of-month and second-half-of-month sailings. Japan is the first country at which each of the four monthly sailings call. One vessel in each half of the month then calls at Korea, Formosa, and the Philippines to discharge and to load for the Gulf or North Atlantic or both. These two vessels or either of them may call at other nearby areas as conditions warrant. The other first-half-of-month vessel normally proceeds from Japan to Indonesia-Malaya (via the Philippines if necessary) to discharge and load. The other second-half-of-month vessel has recently returned home directly from Japan in ballast. This vessel at one time proceeded from Japan to Indonesia for bauxite or to the Philippines for sugar, but neither of these commodities has been carried by Lykes in the recent past.

2. The number of outbound sailings made by Lykes in its Line D Service in each of the 8 years from 1946 to 1953, inclusive, is shown in the following table:

TABLE I

Year:	*Number of sailings*
1946	63
1947	67
1948	73
1949	55
1950	42
	Average 1946–1950: 60 sailings per annum
1951	48
1952	50
1953 (first 9 months)	37

Twenty-four of the sailings for each of the above years were subsidized; the remainder were unsubsidized. All of the sailings after 1949 were made in liner service. Beginning in 1948, twelve sailings each year included calls at Indonesia-Malaya.

3. Lykes' sailings in excess of 24 per annum were made without subsidy under temporary permission given from time to time by the U. S. Maritime Commission or the Maritime Administration pursuant to Article I-2(d) of Lykes' operating-differential subsidy contract.

4. The unusually low number of sailings (42) made by Lykes in 1950 was due in part to Lykes having chartered out some of its vessels to the United States for use to Korea, and in part to delay in obtaining permission from the Maritime Administration to make two unsubsidized sailings in additon to two subsidized sailings during each of the last three months of 1950.

5. In 1951 and 1952 the vessels employed by Lykes in its Line D Service sailed over 99 percent full and over 85 percent down. Lykes' service has been profitable.

6. Waterman owns 40 C–2 vessels operating in various trades. During the period 1946–48, Waterman maintained separate services from Gulf ports to the Far East and from North Atlantic ports to the Far East. At the present time Waterman operates from North Atlantic, Gulf, and, occasionally, Pacific ports to Japan and Korea, returning to Atlantic ports via Hawaii. The calls at Atlantic ports were made to discharge inbound cargo and to obtain military cargo, although commercial cargo is accepted if tendered. Waterman's carryings from United States to Japan and Korea consist largely of military cargo. Waterman also has served the Philippines in addition to Japan and Korea, but it does not do so now.

7. The sailing frequency of Waterman vessels from the Gulf to Far East is about two per month. Waterman has been operating profit-

ably on Trade Route 22. In 1951 and 1952, the cargo on Waterman vessels on the route, including cargo lifted at North Atlantic, Gulf, and Pacific ports, averaged per sailing over 80 percent of the deadweight capacity and slightly under 95 percent of the cubic capacity of the vessels.

8. States Marine Corporation in 1951 made 40 outbound sailings on Trade Route 22, 19 of which were made with owned vessels (5 C–2's, 7 Victorys, 7 Libertys) and 21 of which were made with chartered vessels. In 1952 it made 60 outbound sailings on the route, 28 with owned vessels (8 C–2's, 10 Victorys, 10 Libertys) and 32 with chartered vessels. Its average lift per vessel from the Gulf in 1951 and 1952 was about 7,650 tons.

9. Isthmian Steamship Company employs mainly owned vessels (C-type) on Trade Route 22. In 1951 it made six outbound sailings on the route, and in 1952, fourteen outbound sailings. Isthmian carried 15,006 tons of liner cargo outbound on Trade Route 22 in 1951 (including 13,445 tons to Indonesia-Malaya). In 1952 it carried 13,665 tons of liner cargo outbound (including 7,239 tons to Indonesia-Malaya).

10. Foreign-flag lines operating on Trade Route 22 made 112 outbound sailings in 1952 and about 122 such sailings in the first eight months of 1953.

11. In 1950 the total movement of commercial cargo from Gulf ports to Indonesia-Malaya amounted to 134,795 tons (109,894 tons liner and 24,901 tons nonliner). In 1951 the movement declined to 131,649 tons (121,538 tons liner and 10,111 tons nonliner). In 1952 it declined still further to 113,927 tons (all liner). The movement of this cargo in the first six months of 1953 was 63,000 tons (46,000 tons liner and 17,000 tons nonliner). United States-flag lines carried about 31 percent of such cargo, Lykes carrying about 29,000 tons, or 25 percent, and Isthmian Steamship Company carrying about 6 percent.

12. The inbound movement from Indonesia-Malaya to the Gulf averaged in 1949 and 1950 more than 600,000 tons, nearly 500,000 tons of which was bauxite shipped to the Gulf for stockpiling. In 1951 the volume of inbound cargo declined to 408,969 tons (291,249 liner tons and 117,720 nonliner tons). In 1952, when the bauxite movement had ceased, the inbound movement declined to 70,424 tons (all liner). In the first six months of 1953, inbound traffic amounted to 41,000 tons (all liner).

13. The inbound movement from Indonesia-Malaya to the Gulf is mainly rubber. Shipments of this commodity constituted 68,515 tons of the 81,813 tons of cargo other than bauxite that moved in 1950. Lykes in 1952 carried about 53 percent of the rubber moving, and is

the only carrier providing direct service from Indonesia-Malaya to the Gulf at the present time.

14. Approximately 100 percent of the military-controlled cargo moving outward from the Gulf is shipped via United States-flag lines. The Military Sea Transportation Service allocates this cargo among United States-flag operators according to the number of sailings each offers. Thus, Lykes, making twice as many sailings as Waterman, is allocated twice as much military-controlled cargo as Waterman.

We will discuss first the facts and issues as they relate to Lykes' Line D Service, except for the proposed additional calls at Indonesia-Malaya.

EXISTING SERVICE ISSUE (FAR EAST)

Positions of the Parties

Lykes urges that it maintains an existing service to the Far East (except with respect to calls at Indonesia-Malaya), at least to the extent for which it seeks additional subsidy. In this connection, Lykes points to the fact that for five years immediately preceding filing its application herein, it averaged 60 sailings per annum. Waterman contends here, as it contended at the time of our first report, that Lykes has an existing service to the Far East only to the extent of its 24 subsidized sailings per annum, and that any additional sailings cannot be deemed part of an "existing" service since such sailings were made under temporary permissions granted because of abnormal circumstances. We have already rejected Waterman's contention on this point, both in our first report and by denying Waterman's petition for reconsideration of our first report. But Waterman urges that in any case Lykes cannot be said to maintain an existing service to the extent of any more than 36 sailings per annum. In this connection, Waterman points out that the fourth vessel dispatched by Lykes from the Gulf each month returns home in ballast, and that a ship in ballast cannot be said to be providing service. Lykes maintains that this fourth vessel provides existing service in that it (1) sails full from the Gulf and (2) offers space in the Far East for inbound cargo, and that the existence or non-existence of service may not be determined by whether or not the service is availed of.

Waterman urges further that in any case Lykes' existing service to the Far East cannot amount to any more than 42 sailings per annum, because that is the number of sailings made by Lykes in the year immediately preceding the filing of the application herein. But Lykes points out that 1950 was an abnormal year in that extraordinary de-

mands were made upon it by the Government for vessels to Korea and that for the 5 years preceding the filing of the application Lykes has averaged 60 sailings per annum.

Discussion

As pointed out above, we have already ruled that the temporary nature of the permissions under which Lykes operated more than 24 vessels in its Line D Service does not affect the question whether such sailings constitute an existing service within the meaning of section 605 (c) of the Act. This question is discussed fully in our first report herein, and we do not feel it necessary to elaborate further now.

With respect to Waterman's contention that the fourth monthly sailing of Lykes is not an existing service because it returns home in ballast, we agree with Lykes that whether or not a service offered is availed of by shippers is not determinative of the existence of such service. Accordingly, we find that the fourth sailing constitutes part of the existing service provided by Lykes in its Line D Service.

Nor are we willing to limit ourselves in determining the extent of Lykes' existing service to the service provided in the year immediately preceding the filing of the application, or in any other particular year. Rather, we take account of the service provided by Lykes over a period of years, and in this case where the average number of sailings made by Lykes for the five years preceding the filing of its application is well above 48, we have no hesitation in finding that Lykes has provided an existing service to the Far East at least to the extent of 48 sailings per annum.

ADEQUACY OF UNITED STATES FLAG SERVICE (FAR EAST)

In view of our finding that Lykes provides existing service, at least to the extent of the service which it seeks to have subsidized, we are not at this point required to examine into the issue of adequacy of service provided by vessels of United States registry.

UNDUE ADVANTAGE AND UNDUE PREJUDICE (FAR EAST)

Positions of the Parties

Waterman urges that any grant of subsidy constitutes undue advantage to the grantee and undue prejudice to competing citizens of the United States, and further, that undue advantage and prejudice would exist in this case because an award of subsidy would entitle Lykes to twice as much military-controlled cargo as Waterman under the Military Sea Transportation Service system of allocating such cargo.

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Lykes and Public Counsel contend that while it is true that the grant of a subsidy always gives rise to prejudices and advantages, nevertheless, it is only those prejudices and advantages which are undue that will bar grant of a subsidy. Lykes and Public Counsel contend that Waterman has not shown any special advantage to Lykes or prejudice to itself which could be characterized undue or which was beyond the contemplation of Congress when it provided for the award of subsidies in title VI of the Act. They point out that Lykes obtains twice as much military-controlled cargo as Waterman, not because Lykes is subsidized, but rather, because Lykes provides approximately twice as many sailings as Waterman. Lykes puts forward the caveat that if Waterman in this case is held to have shown undue advantage and prejudice, then any unsubsidized operator, competitive with an applicant for subsidy, could make such a showing, and the Board would be unable to award subsidy to any applicant.

Discussion

We have said that any evidence on whether an award of subsidy would give undue advantage or be unduly prejudicial as between citizens of the United States should come from parties claiming undue prejudice under section 605 (c) of the Act (*Grace Line Inc.—Subsidy, Route 4*, 3 F. M. B. 731, 737 (1952)). Waterman has not argued here that it will be prejudiced in any respect other than in respect of (1) its position as an unsubsidized operator in competition with a subsidized operator and (2) its position as compared with Lykes' position in securing allocations of Military Sea Transportation Service controlled cargo.

The first type of prejudice is not undue as it was contemplated by the Act, and the second is not a consequence of Waterman being unsubsidized, but, rather, is a consequence of the number of sailings Waterman and Lykes make on the trade route. Waterman is free to make as many or as few sailings as it chooses. The sailings that have been made by Lykes in excess of the number of sailings made by Waterman have, in the past, been unsubsidized.

Apart from calls to Indonesia-Malaya, we are unable to find that grant of the application herein would give undue advantage or be unduly prejudicial as between citizens of the United States. Consideration of adequacy of service therefore is not required by the Act.

PROPOSED ADDITIONAL CALLS AT INDONESIA-MALAYA

Waterman, Public Counsel, and the examiner have all taken the position that Lykes does not maintain an existing service to Indonesia-Malaya to any greater extent than the service it provides under its

operating-differential subsidy contract. Lykes does not except to this, but maintains that the service to Indonesia-Malaya is inadequate, and in the accomplishment of the purposes and policy of the Act additional vessels should be operated to and from Indonesia-Malaya.

Positions of the Parties (Indonesia-Malaya)

Lykes takes the position generally that Waterman has no standing to raise any issues under section 605 (c) of the Act with respect to Lykes' calls at Indonesia-Malaya because Waterman does not serve that area. Waterman asserts that it does have standing to raise such issues because a subsidy to Lykes for Indonesia-Malaya calls would be a "springboard to subsidized additional sailings to Japan and the Far East destinations."

Lykes asserts that, in any event, the 31 percent United States-flag participation in the movement of outbound cargo from the Gulf to Indonesia-Malaya is inadequate, being substantially less than 50 percent. Lykes asserts that this low level of United States-flag participation is due primarily to the fact that Lykes, offering only one sailing per month, is competitive for only half the cargo, i. e., that part moving in the first half of each month. If Lykes were able to compete for all the cargo by offering two sailings per month, it could, presumably, double its present participation of 25 percent of the total movement. Thus, with Isthmian's carryings, the minimum adequacy standard of 50 percent United States-flag participation would be met.

With respect to the inbound service, Lykes asserts that even though it carries about half the cargo moving from Indonesia-Malaya to the Gulf, the service it provides is inadequate because not frequent enough to fill the needs of rubber importers in the area served by Lykes. Lykes also fears that a foreign-flag operator may institute a direct Indonesia-Malaya Gulf service and wishes to anticipate and forestall that possibility in the interest of prudent business judgment and benefit to the commerce of the United States.

Waterman takes the position that the inbound service provided by vessels of United States registry from Indonesia-Malaya to the Gulf is adequate, amounting as it does to participation in approximately half the cargo moving.

Rubber Manufacturers Association, Inc., appearing as *amicus curiae*, urges that Lykes be authorized to make 12 additional calls per annum at Indonesia-Malaya, pointing out that Lykes maintains the only direct service from that area to the Gulf and that, because of the importance of speedy transit time to importers of crude rubber, two calls per month rather than the one call now provided would better serve the interests of the rubber manufacturers.

Discussion (*Indonesia-Malaya*)

While it is true that we have interpreted the will of Congress as expressed in section 101 of the Act that 50 percent participation by United States-flag operators in cargo moving in the foreign commerce of the United States is the goal to be sought in achieving the purposes and policy of the Act, we have never said that United States-flag service on every trade route must provide capacity to carry 50 percent of the cargo moving on that route. Much less are we willing to say that 50 percent participation is the standard of adequacy for United States-flag vessel participation in cargo moving over a particular part of an essential foreign trade route. In this case, where an additional 25 percent participation by Lykes would amount to increased carryings of only about 29,000 tons a year, or an average of about 2,400 tons of Indonesia-Malaya cargo for each of the twelve additional sailings sought, we are not justified in finding that United States-flag service from the Gulf to Indonesia-Malaya is inadequate, and, in any case, we cannot find that additional vessels should be operated from the Gulf to Indonesia-Malaya in accomplishment of the purposes and policy of the Act.

With respect to Lykes' contention that the inbound service from Indonesia-Malaya is inadequate because not frequent enough, despite the fact that Lykes is carrying about half the traffic in rubber, which is the main commodity, we are not convinced that the infrequency of direct sailings is alone enough to render the service provided by vessels of United States registry inadequate. In this connection and in connection with the apprehension expressed by Lykes that foreign-flag operators may invade the route, and while our decision does not turn on this point, we are impressed to some extent with the fact that Lykes has not applied to the Maritime Administrator for permission to make additional unsubsidized sailings from Indonesia-Malaya to the Gulf.

Our conclusions herein are not tantamount to a finding that Lykes is entitled to a subsidy for an increased number of sailings on Trade Route 22, for such a conclusion can be reached only after the necessary administrative study and action required under section 601 and various other provisions of the Act.

CONCLUSIONS

We therefore conclude that:

(1) Section 605 (c) of the Act does not interpose a bar to the grant of Lykes' application for an increase in the number of its subsidized sailings in its Line D Service on Trade Route 22, except insofar as it

seeks an increase in the maximum number of calls at Indonesia-Malaya; and

(2) Section 605 (c) of the Act does interpose a bar to the grant of Lykes' application insofar as it seeks an increase in the maximum number of subsidized calls at Indonesia-Malaya ports.

By the Board.

(Sgd.) GEO. A. VIEHMANN,
Assistant Secretary.

MARITIME ADMINISTRATION

No. S–45

GRACE LINE INC.—APPLICATION FOR RENEWAL OF WAIVERS UNDER SECTION 804 OF THE MERCHANT MARINE ACT, 1936, AS AMENDED

Submitted July 22, 1954. Decided August 12, 1954

Special circumstances and good cause shown justifying continuance of waivers under section 804, Merchant Marine Act, 1936, as amended, to permit affiliates of Grace Line Inc. to solicit cargo and passengers in this hemisphere for vessels of Rederiaktiebolaget Nordstjernan (Johnson Line).

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John Mason as Public Counsel.

REPORT OF THE MARITIME ADMINISTRATOR

BY THE ADMINISTRATOR:

This proceeding was instituted by order of the Maritime Administrator dated November 19, 1953, setting for hearing before an examiner of the Federal Maritime Board the question whether the provisions of section 804 of the Merchant Marine Act, 1936, as amended (hereinafter "the Act"), ought to be waived to permit affiliates of Grace Line Inc. (hereinafter "Grace Line") in this hemisphere to solicit cargo and passengers for vessels of Rederiaktiebolaget Nordstjernan (hereinafter "Johnson Line"). Section 804 of the Act provides in part:

> It shall be unlawful for any contractor receiving an operating-differential subsidy under title VI * * * of this Act * * * directly or indirectly to own, charter, act as agent or broker for, or operate any foreign-flag vessel which competes with any American-flag service determined by the Commission to be essential as provided in section 211 of this Act: *Provided, however*, That under special circumstances and for good cause shown the Commission may, in its discretion, waive the provisions of this section as to any contractor, for a specific period of time * * *.[1]

[1] By virtue of Reorganization Plan No. 21 of 1950 and of Department of Commerce Department Order No. 117 (Amended), the Maritime Administrator has succeeded to the functions of the United States Maritime Commission under this section of the Act.

Public hearings were had before the examiner, participated in by Grace Line and by Public Counsel. The examiner has recommended the conclusion that special circumstances and good cause justifying continuance of the waivers have not been shown. Counsel have filed briefs, oral argument has been presented, and the matter has been duly considered.[2] I have concluded that section 804 ought to be waived to permit Grace Line's affiliates in this hemisphere to solicit cargo and passengers for vessels of Johnson Line.

The facts upon which I have based my decision are:

1. Grace Line is a wholly owned subsidiary of W. R. Grace & Co., a Connecticut corporation. Grace Line operates a number of subsidized services between the United States and Central America, the Caribbean, and South America. It is also part owner of Gulf & South American Steamship Co., Inc., which operates between United States Gulf ports and the west coast of South America.

Grace Line's services are principally four:

(a) U. S. Atlantic via the Panama Canal to the west coast of South America on Trade Route No. 2, with weekly sailings of passenger-freight ships and fortnightly sailings of C–2 freighters;

(b) U. S. Atlantic to Netherlands West Indies and north coasts of Venezuela and Colombia on Trade Route No. 4, with weekly sailings of the passenger-freight ships *Santa Rosa* and *Santa Paula*, C–2 passenger-freight ships, and C–2 freighters;

(c) U. S. Pacific to ports on the west coasts of Central and South America on Trade Route No. 25, with fortnightly sailings of C–2 freighters;

(d) West coast of North America via the west coast of Central America and the Panama Canal Zone to the north coasts of Colombia and Venezeula, with monthly sailings of chartered freighters.

In addition, Grace Line employs one ship in feeder service between the west coast of Central America and the Panama Canal Zone.

2. Johnson Line is a Swedish corporation and operates vessels between Baltic Ports-Antwerp and the Americas. The North Pacific service of Johnson Line operates via Curacao, La Guaira, Cartagena, and the Panama Canal Zone to the west coasts of Central and North America and return. Johnson Line's South Pacific service operates via La Guaira-Puerto Cabello, Curacao, and the Panama Canal Zone to ports on the west coast of South America and return. The North Pacific service is operated on a fortnightly sailing schedule with eight modern ships especially designed for the trade, with large reefer

[2] The Vice Chairman of the Federal Maritime Board, as a Special Assistant to the Maritime Administrator, has considered this case with the Administrator and concurs in the result.

capacity and speed of 19½ knots. The South Pacific service also provides fortnightly sailings with six modern ships having a speed of from 16 to 17 knots.

3. On the Pacific coast of the United States, on the west coast of Central America, in the Panama Canal Zone, in Colombia, and on the west coast of South America are various companies which are entirely or largely owned by W. R. Grace & Co. These affiliates of Grace Line act as husbanding and soliciting agents for vessels of Grace Line and for vessels of Johnson Line. These Grace Line affiliates have acted as agents for Johnson Line's North Pacific service vessels since 1914. They also represented vessels of the South Pacific service from 1914 to 1921, at which time that service was discontinued. The South Pacific service was resumed in 1936. A Chilean line, Compania Chilean Navigacion Interoceania (hereafter "C. C. N. I."), was given the agency. Immediately after the war, in 1946, Grace Line and Johnson Line commenced negotiations looking to resumption of Grace Line's affiliates' representation of Johnson Line's South Pacific service. The agency was placed in the hands of Grace Line's affiliates in 1952.

4. Both Grace Line and Johnson Line have at one time or another been members or affiliates of the European-South Pacific Magellan Conference which establishes rates for traffic moving between Europe and the west coast of South America (except for Buenaventura and Ecuadorian ports). Before World War II (except, apparently, for a 1- or 2-year period in 1936 and/or 1937, when Johnson Line was not affiliated in any way with the Conference), both lines were in the Conference. Since the War, Grace Line has not been in the Conference although Johnson Line has been.

5. Waivers of section 804 of the Act have been given from time to time by the U. S. Maritime Commission and by the Maritime Administration to permit Grace Line's affiliates to act as agents for Johnson Line's vessels.

6. On August 21, 1953, the Maritime Administrator continued section 804 waivers previously granted to permit the agency relationships to continue subject to the following:

> * * * *provided* that such services shall not include solicitation of cargo or passengers for said Johnson Line vessels, with the understanding, however, that Grace Line Inc. may request a public hearing on said matter of solicitation * * *.

The waiver was subject also to a number of other provisos relating to the exact nature of the agency services to be rendered, termination date of the waiver, submission of reports to the Maritime Administrator, right of the Administrator to modify the waivers, and accounting for compensation received by Grace Line or its affiliates for performance of agency services.

7. In deciding to waive section 804 of the Act as to all general agency services (berthing, husbanding, fueling) except solicitation of passengers and cargo, the Maritime Administrator considered that special circumstances and good cause for continuance of the waiver had been shown in that the agency:

(1) protected Grace Line vessels from unlimited foreign-flag competition;

(2) permitted Grace Line, through its affiliates, to exercise a certain amount of control over the cargo moved on the routes and the schedule of ports of call of Johnson Line; and

(3) enabled Grace Line, in any case, to obtain preference for cargo which otherwise might go to foreign-flag vessels.

8. The Administrator, in his action of August 21, 1953, indicated that it was not clear at that time whether other United States-flag operators were aware of Grace Line's affiliates' solicitation for Johnson Line vessels and that it was not evident to what extent Grace Line's affiliates engaged in such solicitation or the effect thereof on Grace Line's subsidized operations.

9. The record indicates that Johnson Line will not continue Grace Line's affiliates as its agents in this hemisphere unless those affiliates can solicit cargo and passengers as well as perform husbanding, berthing, and fueling services. Nor is Johnson Line interested in having different agencies split between North and South America. Johnson Line desires one agency organization in this hemisphere.

10. Moore-McCormack Lines, Inc., and Pacific Argentine Brazil Line, Inc., both United States-flag lines, operate from United States Pacific ports to the Caribbean. States Marine Corporation, another United States-flag line, operates from United States Pacific ports to the United Kingdom and Ireland and from United States Pacific ports to the LeHavre-Hamburg range. All three of these lines have stated that they do not oppose continuance of section 804 waivers to permit Grace Line's affiliates to solicit cargo and passengers for vessels of Johnson Line.

11. Grace Line and Johnson Line have entered into an agreement which provides in part that:

* * * whenever and wherever our [i. e., Johnson Line] vessels are in a direct competitive position, then our said agents [i. e., Grace Line's affiliates] shall be at liberty to give preference in every respect to Grace vessels.

12. Vessels of Grace Line and Johnson Line are potentially competitive for the following traffic:

(a) Traffic moving northward from the north coast of Colombia (Cartagena) and the Panama Canal Zone to the west coasts of Central and North America, and way traffic;

(b) Traffic moving southward from the west coast of North America to the west coast of Central America, Panama Canal Zone, and the north coast of South America, and way traffic;

(c) Traffic moving southward from the Panama Canal Zone to the west coast of South America, and way traffic;

(d) Traffic moving between North Europe and the west coast of South America; and

(e) Traffic moving between the United States Atlantic and Gulf coasts and the west coast of South America.

13. Passengers carried by Johnson Line are usually travelers with whom Grace Line does business, and they are never carried by Johnson Line unless Grace Line vessels do not have accommodations available. In 1952, the passengers carried by Johnson Line between United States Pacific, Central American, and Canal Zone ports numbered 33, and in the first 9 months of 1953, 19. The corresponding figures for Grace Line were 34 and 39.

As to passenger traffic between the United States Atlantic coast and the west coast of South America, Grace Line endeavors to sell tickets for the through transportation. As a consequence, its vessels usually do not have accommodations available at Cristobal, but at ports on the west coast of South America accommodations become available as passengers are discharged. It was testified by Grace Line's witness that most of the passenger movement between these ports is "commercial traffic"; that passengers are carried by Johnson Line only when Grace Line's vessels have no accommodations available; and that "when we are unable to give space to a client on one of our ships and are able to obtain space on one of the Johnson Line ships, it helps us in our contacts". In 1952, Grace Line carried 51 passengers from Cristobal-Balboa to ports on the west coast of South America, and Johnson Line carried 18; in the first 9 months of 1953, Grace Line carried 35 passengers from Cristobal-Balboa to these ports, and Johnson Line carried 19. In 1952, Grace Line carried 438 passengers from Callao to other ports on the west coast of South America and to Cristobal, and Johnson Line carried 40; in the first 9 months of 1953, Grace Line carried 274 passengers from Callao to such other ports, and Johnson Line carried 19. In 1952, Grace Line carried 529 passengers from Valparaiso to other ports on the west coast of South America and to Cristobal, and Johnson Line carried 32; in the first 9 months of 1953, Grace Line carried 340 passengers from Valparaiso to such other ports, and Johnson Line carried 35.

14. Percentages of sailings and cargo carried northward from the Panama Canal Zone to the west coasts of Central and North America by Grace Line and Johnson Line and their competitors in 1952 and the first 9 months of 1953 are as follows:

TABLE I

Line	Percentage of sailings	Percentage of cargo carried
1952		
Grace	14.4	45.3
Johnson	17.4	3.4
Others [1]	68.2	51.3
1953 (first 9 months)		
Grace	14.6	53.2
Johnson	16.4	6.0
Others [1]	69.0	40.8

[1] "Others" are all foreign-flag carriers except United Fruit Co., which in 1952 carried 46.8 percent of the cargo with 21.2 percent of the sailings and in the first 9 months of 1953 carried 31.5 percent of the cargo with 20.0 percent of the sailings.

Percentages of sailings and coffee [3] carried northward from the north coast of Colombia (Cartagena) to the west coast of North America by Grace Line and Johnson Line and their competitors in 1952 and the first 9 months of 1953 are as follows:

TABLE II

Line	Percentage of sailings	Percentage of coffee carried
1952		
Grace	7.1	
Johnson	89.3	73.7
Others [1]	3.6	26.3
1953 (first 9 months)		
Grace	4.3	5.2
Johnson	78.3	29.7
Others [1]	17.4	65.1

[1] "Others" are foreign-flag carriers.

15. Numbers and percentages of sailings and amounts and percentages of cargo carried from the west coast of Central America to the west coast of North America by Grace Line and Johnson Line and

[3] Coffee is the only export cargo moving in any substantial amount out of Cartagena to the west coast of North America.

their competitors in 1952 and the first 9 months of 1953 are as follows:

TABLE III

Line	Number of sailings	Percentage of sailings	Long tons of cargo carried	Percentage of cargo carried
1952				
Grace	31	30.4	41,552	58.8
Johnson	23	22.5	14,580	20.6
Others [1]	48	47.1	14,630	20.6
1953 (first 9 months)				
Grace	23	25.3	29,584	47.5
Johnson	21	23.1	8,116	13.0
Others [1]	47	51.6	24,618	39.5

[1] "Others" are all foreign-flag carriers except for tramps, whose flags are not shown by the record and who carried less than 10 percent of the cargo.

16. Johnson Line does not compete with Grace Line for cargo moving southward from the west coast of North America to the west coast of Central America, Panama Canal Zone, and north coast of South America even though Johnson Line vessels have the capacity and the time to do so and even though they call at ports on the west coast of Central America to load cargo for Europe. In 1952, on leaving the last west coast of North America port, the vessels of Johnson Line's North Pacific service had unused space averaging per vessel 2,100 tons cubic and 1,950 tons deadweight. In the first 9 months of 1953, they had unused space averaging 3,300 tons cubic and 1,250 deadweight per vessel.

17. Revenue tons of cargo transshipped at Cristobal, Canal Zone, to ports on the west coast of South America by Grace Line and Johnson Line and their competitors in 1952 and the first 8 months of 1953 are as follows:

TABLE IV

Line	Revenue tons carried
1952	
Johnson (service from Europe)	5,415
Others (service from Europe) [1]	18,395
Grace (service from U. S. Atlantic)	3,834
Gulf and South American (service from U. S. Gulf)	439
Others (service from U. S. Atlantic and Gulf) [1]	16,618
1953 (first 8 months)	
Johnson (service from Europe)	7,504
Others (service from Europe) [1]	7,457
Grace (service from U. S. Atlantic)	1,046
Others (service from U. S. Atlantic and Gulf) [1]	7,867

[1] "Others" are all foreign-flag carriers.

It is estimated that 15 to 20 percent of the cargo that moved from Cristobal to the west coast of South America during 1952 and the

first 8 months of 1953 originated at U. S. Atlantic and Gulf ports. Such cargo is not solicited for a specific on-carrier. The record does not show the extent to which Grace Line or Johnson Line participates in carrying such cargo. Grace Line is not interested in carrying transshipment cargo from Cristobal, preferring to carry through-haul cargo from the United States to South America.

18. Percentages of sailings and cargo carried by Grace Line and Johnson Line and their competitors from named ports on the west coast of South America to Europe either direct (D) or by transshipment (T) at New York in 1950, 1952, and the first 9 months of 1953 are as follows:

TABLE V.—*Guayaquil (general cargo)*

Line	Percentage of sailings	Percentage of cargo carried
1950		
Johnson (D)	5.5	1.9
Others (D) [1]	38.3	80.5
Grace (T)	35.9	17.3
Others (T) [1]	20.3	.3
1952		
Johnson (D)	9.0	6.0
Others (D) [1]	32.3	68.2
Grace (T)	25.9	25.8
Others (T) [1]	32.8	
1953 (first 9 months)		
Johnson (D)	7.8	13.7
Others (D) [1]	39.1	78.0
Grace (T)	26.3	8.3
Others (T) [1]	26.8	

[1] "Others" are all foreign-flag carriers.

TABLE VI.—*Buenaventura (coffee)*[1]

Line	Percentage of sailings	Percentage o cargo carried
1950		
Johnson (D)	2.2	10.9
Others (D)[2]	22.8	81.9
Grace (T)	38.6	6.5
Others (T)[2]	36.4	.7
1952		
Johnson (D)	7.2	18.2
Others (D)[2]	14.5	39.3
Grace (T)	27.5	42.5
Others (T)[2]	50.8	
1953 (first 9 months)		
Johnson (D)	6.4	24.5
Others (D)[2]	14.8	44.0
Grace (T)	20.9	31.5
Others (T)[2]	57.9	

[1] Coffee constitutes approximately 97 percent of all cargoes exported from Buenaventura to all destinations.
[2] "Others" are all foreign-flag carriers.

In 1953, Colombia, Finland, and Sweden concluded reciprocal trade agreements, one of the terms of which provided that coffee moving from Colombia to Sweden should move by direct carrier. The greater portion of cargo moving from Colombia to Europe goes to Sweden.

TABLE VII.—*Callao (general cargo)*

Line	Percentage of sailings	Percentage of cargo carried
1950		
Johnson (D)	6.2	3.8
Others (D) [1]	50.0	95.8
Grace (T)	35.6	.4
Others (T) [1]	8.2	
1952		
Johnson (D)	7.8	4.3
Others (D) [1]	52.6	94.9
Grace (T)	29.6	.8
Others (T) [1]	10.0	
1953 (first 9 months)		
Johnson (D)	7.9	2.4
Others (D) [1]	48.3	94.4
Grace (T)	32.6	3.0
Others (T) [1]	11.2	.2

[1] "Others" are all foreign-flag carriers.

Most of the cargo moving from Callao to Europe is bulk ores and metals which are rated so low it is not usually possible to transship them profitably.

TABLE VIII.—*Valparaiso (general cargo)*

Line	Percentage of sailings	Percentage of cargo carried
1950		
Johnson (D)	7.1	5.3
Others (D)[1]	51.0	74.2
Grace (T)	31.4	19.4
Others (T)[1]	10.5	1.1
1952		
Johnson (D)	6.9	21.5
Others (D)[1]	51.4	78.5
Grace (T)	27.3	
Others (T)[1]	14.4	
First 9 months of 1953		
Johnson (D)	10.0	[2] 20.3
Others (D)[1]	52.9	[2] 78.2
Grace (T)	29.3	[2] .3
Others (T)[1]	7.8	

[1] "Others" are all foreign-flag carriers.
[2] These figures account for only 98.8 percent of the cargo. The record contains no explanation for the missing 1.2 percent.

Nearly all of the Valparaiso cargo handled by Grace in 1950 consisted of onions for London and Liverpool. Because of excessive rot, carriage of this cargo by transshipment was abandoned after 1950.

19. Grace Line's European transshipment business reflected in tables V through VIII was developed by Grace Line commencing in the early 1930's. It has now reached the point where the traffic both ways (westbound traffic is not reflected in the tables above) accounts for something over $1,000,000 revenue per year. The record shows that in the development and maintenance of this business Johnson Line has been of assistance from time to time by way of supplying Grace Line with information on rates and conditions of the European-South Pacific Magellan Conference.

20. Johnson Line pays 40 percent of the expense of pier rent, watchmen, and electricity at Grace Line's San Francisco pier. This arrangement would not be continued if Grace Line's affiliates should lose the agency, and Grace Line's witness testified that it is his opinion Grace Line would not be able to sublet the space to another carrier.

21. Johnson Line is one of the foremost proponents of diesel propulsion and has made extensive experiments with cargo gear. It has been cooperative in turning over information on new developments in these matters to Grace Line.

22. If the waiver should be extended, Grace Line's affiliates would pay over to Grace Line, which consistently has been in a recapture position, their profits from the agency fees and commissions. It is estimated that, if such profits had been added to Grace Line's in 1953, there would have resulted additional earnings for reserve and recapture in the sum of $126,897.

23. C. C. N. I. has instituted a service competitive with Grace Line's on Trade Route No. 25. Grace Line claims that it is fair to assume that if Grace Line's affiliates should lose the Johnson Line agency it would fall into the hands of the C. C. N. I.

24. Whenever a vessel of Johnson Line and one of Grace Line are both in position to use port facilities that are not adequate to serve both vessels, the Grace Line vessel gets to use the facilities first.

DISCUSSION

Section 804 of the Act vests the Maritime Administrator with discretionary authority to waive the prohibition of the section so as to permit a subsidized American operator to act as agent for foreign-flag vessels competitive with an essential American-flag service when special circumstances exist and when good cause has been shown. The fundamental approach of the Administrator to the section 804 waiver problem, as exemplified in *American Export Lines, Inc.—Section 804 Waiver*, 4 M. A. 379, is that subsidized operators in the American merchant marine ought to be encouraged to use every means at their

command, as prudent business men, to increase carryings, increase efficiency, or reduce overhead or other costs whenever they can do so without incurring obligations that are unduly disadvantageous. The means of accomplishing these objects or any of them may well include acting as agent for foreign-flag vessels. However, any such arrangement must necessarily result in greater benefit than detriment to the American subsidized operator.

In *American Export*, *supra*, the Administrator pointed out that the American operator and the foreign operator were principal competitors in substantially parallel services; that alleged passenger preference and alleged competitive effectiveness claimed as benefits by the American operator did not appear to flow from the agency for which waiver was sought but from other facts and circumstances; and that with respect to reciprocal traffic promotion obligations of the two lines, the American line appeared at a marked disadvantage.

In this case, on the other hand, the principal services of Grace Line and Johnson Line are not competitive; it appears that Grace Line, with respect to the traffic in which it is mainly interested, has obtained from Johnson Line the right to prefer itself with no countervailing disadvantages comparable to the foreign line's control of westbound traffic mentioned in the *American Export* case; and that, if Grace Line's affiliates are not permitted to solicit for Johnson Line, Grace Line will lose the benefits already recognized in the Maritime Administrator's action of August 21, 1953, waiving section 804 to permit Grace Line's affiliates to act as agents for Johnson Line vessels in all respects except solicitation.

In his action of August 21, 1953, the Administrator recognized that a nonsoliciting agency protects Grace Line from unlimited foreign-flag competition, permits Grace Line to exercise some control over cargo and Johnson Line vessel schedules, and enables Grace Line to obtain preferences as to cargo that might otherwise move on foreign carriers. The record shows that Johnson Line is not interested in a split agency in this hemisphere and that, if Grace Line is not permitted to solicit for Johnson Line vessels, the agency will be transferred to another organization with consequent loss to Grace Line of the special, recognized benefits flowing from the general aspects of the agency.

Moreover, one of the purposes of the instant hearing, on the solicitation aspects of the agency, is to clarify the extent of solicitation and to give other American-flag operators opportunity to make representations in accordance with their own interests. No American-flag operator has objected to Grace Line's affiliates soliciting for vessels of Johnson Line.

Grace Line has urged affirmatively that the agency enables it to obtain preference as to passengers and cargo that would otherwise move in foreign vessels. By the terms of the agency preference agreement referred to in finding 11 above, Grace Line's affiliates are enabled to prefer Grace Line vessels over the vessels of their Johnson Line principal. In my judgment, this in itself is a special circumstance of substantial weight, abrogating as it does the normal agent's obligation to promote the interests of his principal. And the record shows that with respect to cargoes in which Grace Line is interested, vessels of Grace Line have secured, in general, disproportionately larger loadings than their sailings might ordinarily entitle them to.

Public Counsel argues, on this point, that there is no evidence to show how much of the cargo that Grace Line vessels now carry would move on foreign-flag ships if the agency did not exist. Public Counsel also points out that Grace Line is already obliged, under its subsidy contract, to prefer its own vessels over foreign ships. He suggests therefore that the preference agreement is not a special circumstance. The mere fact that there is not of record an exact measure of the extent to which Grace Line obtains preference over Johnson Line does not mean that Grace Line is not in fact securing such preference. In my opinion, indications are that Grace Line does secure some preference in passengers and cargo that would otherwise move over the Johnson Line, and this preference is a proximate result of the fact that the agency agreement is qualified by the preference agreement. Nor does the preference agreement lose its special character merely because it is consistent with Grace Line's obligations under the subsidy contract.

Grace Line further claims that because its affiliates offer a more rounded service, i. e., a service including Johnson Line sailings as well as sailings of Grace Line, Grace Line is able to compete more effectively with foreign-flag lines operating from ports on the west coast of Central America and Mexico to U. S. Pacific ports, without detriment to any U. S.-flag service. The record shows that Grace Line vessels do carry a larger share of this cargo than might normally be justified by their sailings, while other carriers (including Johnson Line) carry a lesser share than their sailings would indicate. In this connection, the record shows that Grace Line's affiliates do not offer Johnson Line space unless no Grace Line space is available, and it is my judgment that shippers tend to patronize the agent who can offer them a wider range of sailing dates. This aspect of the agency thus appears to benefit Grace Line without in any way imposing a disadvantage upon Grace Line or upon the American merchant marine.

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Public Counsel, however, contends that it is anomalous for an American operator to say he is using foreign tonnage to compete more effectively with foreign tonnage. Public Counsel suggests that Grace Line might charter additional tonnage to take care of the cargo it shunts to Johnson Line vessels, or that Grace Line might invite some other American-flag operator into the trade. But the record shows that in the first 9 months of 1953, for example, the traffic shunted to Johnson Line amounted to only 8,116 long tons which, distributed among the 21 sailings that Johnson Line made, would amount to an average of less than 400 long tons per sailing. To suggest either that Grace Line charter additional vessels or that another American operator institute a new service to carry such minor traffic would, in my judgment, be an improper governmental invasion of private managerial discretion.

Grace Line also asserts that special circumstances and good cause speak for continuance of the section 804 waiver in that the agency agreement and the friendly relationship with Johnson Line it has engendered enable Grace Line to compete more effectively for transshipment business to and from the west coast of South America and Europe via the port of New York. This is ascribed to the fact that Johnson Line acted as a "friend in court" at meetings of the European-South Pacific Magellan Conference which controls the trade, to prevent institution of the deferred rebate by that conference and to keep Grace Line informed of conference rates and conditions.

It appears from the record that the heaviest movement of cargo from the west coast of South America to Europe is by direct carriers, of which Johnson Line is one, but that Grace Line, offering only a transshipment service via New York, has been able to carry substantial amounts of European cargo. During all years of record in this proceeding, from all west coast of South America ports served by Grace Line, Grace Line has carried more Europe-bound cargo than all other transshipment carriers together.[4]

Public Counsel contends, however, that this transshipment business was developed by Grace Line during a period when Grace Line's affiliates did not represent Johnson Line's South Pacific service. Despite the fact that Grace Line's affiliates were not representing Johnson Line during part of the time the European transshipment business was developing, Johnson Line probably was some help to Grace Line in the latter's competition with the conference, and in my opinion Grace Line is now and probably will in the future benefit from

[4] An exception was 1950, when neither Grace Line nor any other transshipment carrier lifted any European cargo from Valparaiso.

Johnson Line's affiliation in the conference by way of keeping informed of conference rates and conditions.

Grace Line urges as another special circumstance that Johnson Line vessels forego carriage of cargoes from U. S. Pacific ports to the west coasts of Mexico and Central America, the Canal Zone, and the north coasts of Columbia and Venezuela. The examiner found, and Public Counsel supports the finding, that this forebearance by Johnson Line cannot be said—on the basis of the record—to depend upon the arrangement with Grace Line in the sense that Johnson Line would inaugurate such a service should the agency arrangement come to an end. I have not accorded any weight to this contention of Grace Line.

Grace Line also asserts as special circumstances and good cause the following: (a) That Grace Line vessels receive priority over Johnson Line vessels in use of limited port facilities, thereby avoiding delays and overtime; (b) that Grace Line receives financial benefits from the agency and that such benefits are subject to recapture; (c) that Grace Line has received information on new developments in diesel propulsion and cargo gear from Johnson Line; (d) that if Grace Line should lose the agency it would fall into the hands of C. C. N. I., Grace Line's Chilean competitor on Trade Route No. 25; and (e) that an agency relationship between the two lines has existed for many years without complaint from any source.

Public Counsel argues (a) that avoidance of port delay cannot help justify a section 804 waiver because there is no evidence that delays have ever been avoided in consequence of the agreement; (b) that financial benefits resulting from the agency are normal rather than special circumstances of the agency agreement; (c) that no information on diesel equipment or cargo gear has been used by Grace Line; (d) that even if C. C. N. I. should obtain the Johnson Line agency, Johnson Line vessels would no more compete with Grace Line than they do now; and (e) that the Administrator should not be affected in his decision by the long-time existence of the agency but rather should decide this case on the basis of the facts as they are now.

Even though I have based my decision herein solely upon the facts as they are now, and even though my decision does not turn on the point, I am impressed to some extent with the fact that Grace Line has developed its business over many years to the point where it is carrying apparently more than its share of the traffic in its principal trades while during this period its affiliates in the Americas have represented the vessels of Johnson Line. The relationship has not appeared to hamper Grace Line's development in the past. During the years of record in this proceeding, I am convinced that the rela-

tionship has benefited Grace Line and, in my judgment, the facts indicate that it will continue to do so in the future.

So far as avoidance of port delay is concerned, while I do not give the point much weight, I do find in the record some evidence that there may be benefits to Grace Line from time to time resulting from the priority to which it is entitled in the use of limited port facilities.

The remaining points put forward by Grace Line appear, on the basis of the record before me, to be either of minor weight as special circumstances or so speculative that I cannot in any event accord weight to them as good cause within the meaning of the proviso clause of section 804.

CONCLUSION

The Maritime Administrator has already determined that special circumstances and good cause have been shown to justify waiver of the provisions of section 804, Merchant Marine Act, 1936, to permit affiliates of Grace Line to serve as agents for vessels of Johnson Line in certain respects, not including solicitation. The record herein, in the judgment of the Administrator, shows that special circumstances and good cause also exist which make waiver of section 804 to permit Grace Line's affiliates to book solicited cargo and passengers on Johnson Line vessels beneficial, on balance, to Grace Line and to the American merchant marine.

The waiver sought by Grace Line will therefore be extended for a period of two years from the date hereof, to expire at the close of business on August 12, 1956. The section 804 waivers granted by Administrator's action of August 21, 1953, are also extended to August 12, 1956, so that all the waivers will expire simultaneously.

By the Maritime Administrator.

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

FEDERAL MARITIME BOARD

No. M–61

ANNUAL REVIEW OF BAREBOAT CHARTERS OF GOVERNMENT-OWNED, WAR-BUILT, DRY-CARGO VESSELS, 1954, UNDER PUBLIC LAW 591, EIGHTY-FIRST CONGRESS

REPORT OF THE BOARD

In accordance with section 5 (e) (1) of the Merchant Ship Sales Act of 1946, as amended, an annual review has been made of the bareboat charters of Government-owned, war-built, dry-cargo vessels recommended for use by United States-flag operators during the period from June 30, 1953, to June 30, 1954, inclusive.

On the basis of the foregoing review, the Board tentatively has found that conditions exist justifying the continuance of each of the following charters under the conditions previously certified by the Board:

Charterer	Vessel	Original docket No.	Date vessel delivered
Alaska Steamship Company	Coastal Monarch	M–11	Aug. 9, 1948
	Coastal Rambler	M–11	Aug. 18, 1948
	Lucidor	M–11	Dec. 16, 1948
	Palisana	M–11	Dec. 16, 1948
	Square Knot	M–11	July 6, 1948
	Square Sinnet	M–11	Aug. 1, 1948
American President Lines, Ltd	Lightning	M–27	Apr. 16, 1951
	Shooting Star	M–32	May 23, 1951
Pacific Far East Line, Inc	Contest	M–10	Apr. 27, 1947
	Flying Dragon	M–10	May 8, 1947
	Surprise	M–10	Dec. 20, 1948
	Trade Wind	M–10	Jan. 20, 1949
	Fleetwood	M–10	Dec. 27, 1948
	Flying Scud	M–10	Dec. 10, 1948
	Sea Serpent	M–27	Mar. 28, 1951

Notice of the foregoing tentative findings was served on all interested parties and was published in the Federal Register on July 17, 1954, and interested parties were granted fifteen (15) days from the date of such publication to request a hearing concerning such tentative findings made with respect to any of the above charters by filing written objections thereto, or for other good cause shown. No objections or requests for hearing were filed.

The nine ships chartered to American President Lines, Ltd., and Pacific Far East Line, Inc., are fully refrigerated. They are operated, on a 10-day sailing frequency, in transpacific service primarily to furnish perishable supplies to the military. The Commander, Military Sea Transportation Service, Department of the Navy, has advised that the shipper agencies of the Department of Defense are going to review their requirements beyond October 1954 and that adjustments in the service will be made if the average monthly requirements of the military are so reduced as to make maintenance of the present 10-day schedule uneconomical.

FINDINGS, CERTIFICATION, AND RECOMMENDATION

On the basis of evidence considered by the Board, it is hereby certified to the Secretary of Commerce that, subject to further review at a later date of the charters with American President Lines, Ltd., and Pacific Far East Line, Inc., conditions exist justifying the continuance of the charters listed above, upon the conditions originally certified by the Board.

By the Board.

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

AUGUST 12, 1954.

FEDERAL MARITIME BOARD

No. 741

MISCLASSIFICATION OF TISSUE PAPER AS NEWSPRINT PAPER

Submitted August 11, 1954. Decided September 16, 1954

Respondent R. Stone & Co., Inc., a shipper, found to have falsely classified knowingly and willfully, a shipment of paper to obtain transportation by water therefor at less than the rate or charge which would otherwise be applicable, in violation of section 16 of the Shipping Act, 1916, as amended.

Respondent Tidewater Forwarding Company, Inc., a forwarder, found not to have falsely classified, knowingly and willfully, a shipment of paper to obtain transportation by water therefor at less than the rate or charge which would otherwise be applicable.

Abraham Grenthal for R. Stone & Co., Inc., respondent.

Milton E. Polakoff for Tidewater Forwarding Company, Inc., respondent.

Allen C. Dawson as Public Counsel.

REPORT OF THE BOARD

BY THE BOARD:

This proceeding was instituted by order of the Board dated September 3, 1953, and is a proceeding of investigation into and concerning alleged violations of the Shipping Act, 1916, as amended (hereinafter called "the Act"). As recited in the Board's order, it appeared that R. Stone & Co., Inc. (hereinafter called "Stone"), a shipper, and Tidewater Forwarding Company, Inc. (hereinafter called "Tidewater"), a forwarder, had violated section 16 of the Act. That section provides in part as follows:

> That it shall be unlawful for any shipper consignor, consignee, forwarder, broker, or other person, or any officer, agent, or employee thereof, knowingly and willfully, directly or indirectly, by means of false billing, false classification, false weighing, false report of weight, or by any other unjust or unfair device or means to obtain or attempt to obtain transportation by water for property at less than the rates or charges which would otherwise be applicable.

The examiner has inquired into the facts and has issued a decision recommending that we find Stone in violation of the Act and Tidewater not in violation of the Act. The case has been submitted, without oral argument, on exception to the recommended decision and reply to the exception. We agree in principle with the result recommended by the examiner.

Although a hearing was convened by the examiner no witnesses appeared before him. No counsel appeared before the examiner except Public Counsel. The case was presented to the examiner on two stipulations, both signed by attorneys for Stone and Tidewater and by Public Counsel.

The facts of record in this proceeding are as follows:

1. Stone is a New York corporation engaged in the business of importing and exporting general merchandise to and from the United States.

2. Tidewater is a New York corporation, with its principal place of business in New York City, and is a freight forwarder registered as No. 455 with the Board in accordance with its General Order No. 72.

3. In May 1953, Stone, as shipper, caused certain paper to be prepared for export to the Philippine Islands and engaged Tidewater as its freight forwarder. Tidewater has acted as freight forwarder for Stone on numerous occasions for shipments of various types of merchandise.

4. Tidewater was advised of the Stone paper shipment by means of a telephone call to one of the officers of Tidewater from a clerk in the office of Arthur Doniger Paper Co., Inc. (the record does not show anything more about Arthur Doniger Paper Co., Inc., than that one of the company's clerks called Tidewater to advise that the Stone paper shipment was ready to be sent to the Philippines).

5. In his conversation with the Doniger clerk Tidewater's officer understood the paper being shipped was brown kraft wrapping paper.

6. Tidewater next prepared all the preliminary documents, referring to the paper in question as brown kraft wrapping paper, and delivered the documents to the New York office of Barber Steamship Lines, Inc., for shipment to the Philippines.

7. The day after the documents were delivered to the Barber office, Tidewater received written shipping instructions from Stone in which the paper was described as newsprint. On the same day Tidewater received a telephone call from the Barber office to the effect that the cartons in which the paper was being shipped were marked "bleached semicrepe napkin tissue 24×36—14". At the same time, because of expiration of Stone's letter of credit from its Philippine consignee, the shipment was ordered to be held up.

8. Subsequent to receiving the advice from Barber that the cartons were marked napkin tissue, Tidewater called Stone and advised of the information received. An officer of Stone stated to Tidewater that "it was impossible, because of the size of the sheets, to use the merchandise for any other purpose than for printing. He also said that this was a newspaper residue and therefore should be shipped as news print."

9. Later, after Stone had obtained an extension of its letter of credit, Stone directed Tidewater to proceed to ship the paper and, by written instruction, to ship it as newsprint.

10. On the basis of the foregoing, Tidewater arranged to have the paper shipped as newsprint via a ship of American President Lines, Ltd.

We take official notice of the fact that during the time here involved Far East Conference Freight Tariff No. 20, on file with us, the tariff under which Stone proposed to ship the paper, contained the following rates on paper and paper articles:

Item 1518	Napkins, Paper Napkins Stock, and Paper Diapers.	Contract	$34.75 W/M
		Noncontract	38.75 W/M
Item 1520	Newsprint	Contract	$22.75 Ton
		Noncontract	26.75 Ton
Item 1550	Tissue and Crepe, including Wrapping Tissue.	Contract	$34.75 W/M
		Noncontract	38.75 W/M
Item 1580	Wrapping, Kraft	Contract	$30.25 Ton
		Noncontract	34.25 Ton
Item 1585	Paper, N. O. S.	Contract	$61.00 W/M
		Noncontract	65.00 W/M

POSITIONS OF THE PARTIES

Stone "concedes that it knowingly and willfully misclassified the paper" with respect to which this proceeding was instituted.

Public Counsel urges that we find Tidewater in violation of the Act, saying that the facts do not reveal that Tidewater, in the situation before us, has measured up to the standards imposed on forwarders by section 16 of the Act. Quoting from *United States* v. *Illinois Central Railroad*, 303 U. S. 239 (1938), Public Counsel asserts that "willfully" means "purposely or obstinately and is designed to describe the attitude of a carrier, who, having a free will or choice, either intentionally disregards the statute or is plainly indifferent to its requirements." Public Counsel also urges upon us certain language from the decision of the United States Maritime Commission in *Rates from Japan to United States*, 2 U. S. M. C. 426 (1940), where, on page 434, referring to the carrier respondents, the Commission said:

> Their persistent failure to inform or even attempt to inform themselves through the media of * * * means which normal business resources and acumen should dictate, is proof that they *knowingly and willfully* keep themselves in ignorance of the false billings concerned. [Emphasis added.]

Tidewater points out that when it was informed that the markings on the cartons were not consistent with the description of merchandise which Stone had given Tidewater, Tidewater made inquiry of Stone and was reassured twice, once orally and once in writing, that regardless of the markings of the cartons, the paper inside the cartons was not napkin tissue but was newsprint. Tidewater further states that even if it had opened the cartons and examined the paper inside them, it would not have been able to decide whether the paper was newsprint or napkin tissue. Tidewater therefore claims that it did all it was required by the Act to do.

DISCUSSION

In view of Stone's concession that it knowingly and willfully misclassified the paper, and in view of the fact that the paper was classified as newsprint—the lowest rate for paper of the rates available to Stone—we conclude that Stone has violated section 16 of the Act.

The disposition of the case as to Tidewater turns upon the construction to be placed on section 16 of the Act and especially upon the meaning of the phrase "knowingly and willfully".

We believe, following the authority cited by Public Counsel, that the phrase "knowingly and willfully" means purposely or obstinately, or is designed to describe a carrier who intentionally disregards the statute or is plainly indifferent to its requirements. We agree that a persistent failure to inform or even to attempt to inform himself by means of normal business resources might mean that a shipper or forwarder was acting knowingly and willfully in violation of the Act. Diligent inquiry must be exercised by shippers and by forwarders in order to measure up to the standards set by the Act. Indifference on the part of such persons is tantamount to outright and active violation.

We are unable to find in this case, however, that Tidewater's action was purposeful, obstinate, indifferent, or lacking in diligence. A freight forwarder, in our judgment, is not required to be an expert on the uses to which the cargo he is handling may be put. Tidewater appears, on the basis of the record in this case, to have used reasonable means in the exercise of ordinary diligence to determine the proper classification for the paper involved in this case. Tidewater asked Stone about the classification of the paper upon learning that there

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might be some question about it and was reassured at that time that although the paper was marked tissue, it was, nevertheless, newsprint. The explanation made by Stone at that time for the apparent inconsistency is not an unreasonable explanation, and, in our judgment, might well be considered sufficient to lay at rest the concerns of a freight forwarder. And subsequent to receipt of this oral advice, Tidewater was further advised in writing by Stone that the merchandise should be shipped as newsprint.

CONCLUSION

We therefore conclude that Stone has violated section 16 of the Act; as to Tidewater, we conclude that the record does not show that it has violated section 16 of the Act. The proceeding as to Tidewater will be discontinued.

The entire record of this proceeding will be forwarded to the Department of Justice for appropriate action.

By the Board.

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

FEDERAL MARITIME BOARD

MARITIME ADMINISTRATION

No. S–33

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

No. S–17 (Sub. 1)

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

Submitted July 7, 1954. Decided September 16, 1954 *

Vessels to be operated on Trade Route No. 17 in Freight Service "C–2", proposed by American President Lines, Ltd., would not, with certain modifications, be in addition to the existing service, or services.

The effect of a subsidy contract between the United States and American President Lines, Ltd., with respect to vessels to be operated on Trade Route No. 17 in Freight Service "C–2", as proposed by American President Lines, Ltd., would not, with certain modifications, 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.

Section 605 (c) of the Merchant Marine Act, 1936, as amended, does not interpose a bar to an award of subsidy to American President Lines, Ltd., with respect to vessels to be operated on Trade Route No. 17 in Freight Service "C–2".

American President Lines, Ltd., or a predecessor in interest, was not in bona fide operation as a common carrier by water in the domestic, intercoastal, or coastwise trade in 1935 over the route or routes or in the trade or trades for which American President Lines, Ltd., has applied for permission to operate in the westbound intercoastal leg of its Trade Route No. 17, Freight Service "C–2".

The operation by American President Lines, Ltd., of its Freight Service "C–2" vessels in the westbound intercoastal service would, except for carriage of reefer cargoes, result in unfair competition to persons, firms, or corporations operating exclusively in the coastwise or intercoastal service.

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*As modified by order dated October 28, 1954.

The operation by American President Lines, Ltd., of its Freight Service "C–2" vessels in the eastbound intercoastal service would result in unfair competition to persons, firms, or corporations operating exclusively in the coastwise or intercoastal service except to the extent that such vessels may carry cargoes eastbound from Los Angeles.

Vessels operated by American President Lines, Ltd., in Freight Service "C–2", Trade Route No. 17, permitted to call at Guam westbound.

The Freight Service "C–2" vessels of American President Lines, Ltd., permitted to serve Manila and two Philippine outports eastbound.

The Fright Service "C–2" vessels of American President Lines, Ltd., permitted to call eastbound at San Francisco Bay ports, but not to lift eastbound intercoastal cargo at such ports.

The Freight Service "C–2" vessels of American President Lines, Ltd., authorized to continue to perform eastbound intercoastal service from the port of Los Angeles only.

Warner W. Gardner, *Reginald S. Laughlin*, *Willis R. Deming*, *David H. Batchelder*, *William G. Symmers*, and *John I. Heise*, *Jr.*, for applicant.

Odell Kominers for Pacific Far East Line, Inc., and Luckenbach Steamship Co., Inc., *James L. Adams* and *Tom Killefer* for Pacific Transport Lines, Inc., *Wm. I. Denning* for States Steamship Company and Pacific-Atlantic Steamship Co., and *Sterling F. Stoudenmire*, *Jr.*, for Waterman Steamship Corporation, interveners.[1]

Allen C. Dawson and *William D. Mitchell* as Public Counsel.

REPORT OF THE BOARD AND MARITIME ADMINISTRATOR

BY THE BOARD AND MARITIME ADMINISTRATOR:

These proceedings were instituted by order of the Board and Administrator dated April 3, 1952, and order of the Board dated June 2, 1952, setting for prehearing conference certain issues raised by applications of American President Lines, Ltd. (hereinafter called "APL"). All the issues in both proceedings relate to a common carrier freight service operated by APL between U. S. Atlantic ports on the one hand and ports in southeast Asia on the other hand, via the Panama Canal, in both directions. This service conforms to Freight Service "C–2" of Trade Route No. 17,[2] recommended as an essential foreign trade route of the American merchant marine by the United States Maritime Commission (hereinafter "Maritime Commission")

[1] American-Hawaiian Steamship Company, appearing by Odell Kominers, and Department of the Interior, appearing by Irwin W. Silverman and A. M. Edwards, both intervened but withdrew before the proceedings were completed. The New England Traffic League, appearing by Harold D. Arnold, also intervened but did not participate actively in the proceedings.

[2] APL's service will in this report be called the C–2 service, and vessels operating thereon will be called the C–2 vessels, it being understood that "C–2" in this report refers to the service and not to type of vessels.

recommendation of May 20, 1946, as amended by Maritime Commission Report of May 1, 1949.[3]

APL, a subsidized operator in three services,[4] has been operating its C–2 service since mid-1948, without subsidy, under approvals given by the Maritime Commission and the Board/Administrator.[5] In January 1952, in accordance with the provisions of title VI of the Merchant Marine Act, 1936, as amended (hereinafter called the "Act"), APL applied for subsidy on its C–2 service, and further applied for (1) authority to continue to perform eastbound intercoastal service in connection with the C–2 service; (2) modification of the C–2 service itinerary to authorize calls at Guam on outbound voyages; (3) the privilege of serving one additional Philippine port (to make a total of two Philippine outports plus Manila); and (4) the privilege of calling eastbound at San Francisco Bay ports and/or Los Angeles, California.

By its order of June 2, 1952, above, the Board set for hearing all the issues raised by both of APL's applications. Issues designated to be heard under Docket No. S–33 embrace all those issues which by sections 605 (c) and 805 (a) of the Act are required to be heard publicly. Issues arising out of the four requests in the paragraph next above were set for hearing under Docket No. S–17 (Sub. 1).

Hearings have been held, the examiner has issued a recommended decision, exceptions have been filed, and we have heard oral argument thereon. The examiner recommended finding in effect that section 605 (c) of the Act does not interpose a bar to an award of subsidy to APL for operation of its C–2 service; that APL should not be permitted to transport any except refrigerated cargo on the westbound intercoastal leg of its C–2 service; that APL should be permitted to continue to transport general cargo eastbound on vessels operated in its C–2 service, subject to revocation of such permission for cause shown; that vessels operated by APL in its C–2 service should be permitted to call at two Philippine outports in addition to Manila homebound, but not at two California ports homebound except upon

[3] The Maritime Commission's 1949 Report describes the service as follows:

> Itinerary: New York (other Atlantic ports as traffic offers) via Panama Canal; Los Angeles, San Francisco to Manila, Hong Kong, Singapore, Belawan, Batavia (now called Djakarta), 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 (now called Thailand) as traffic offers.

[4] Trans-Pacific Passenger-Freight Service (Trade Route No. 29, Passenger-Freight Service 1, from California ports to named ports in Japan, China, and the Philippines and return); Trans-Pacific Freight Service (Trade Route No. 29, Freight Service 2 (modified), from California ports to ports in China, Japan, the Philippines and surrounding area and return); and Round-the-World Service (from New York westbound through the Panama Canal to California, thence to the Far East and India, through the Suez Canal, through the Mediterranean and return to New York).

[5] Approval is required by Article II–16 of APL's operating-differential subsidy agreement.

prior approval; and that vessels operated by APL in the C–2 service should be permitted to transport cargo from Atlantic and California ports to Guam.

In general we agree with the conclusions recommended by the examiner. Exceptions and recommended findings not discussed in this report nor reflected in our findings or conclusions have been given consideration and found not related to material issues or not supported by evidence.

We will direct ourselves first to the issues in Docket No. S–33.

Section 605 (c)

EXISTING SERVICE

The first issue raised by section 605 (c) of the Act is whether APL has been furnishing an existing service on Service "C–2". The section provides in part as follows:

(c) 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 * * *.

We find that:

1. The C–2 service provides ocean transportation primarily between the United States Atlantic coast and the area in Southeast Asia known, before World War II, as the Netherlands East Indies-Straits Settlements area.[6] The service also serves areas along the way. A principal way area is the Philippine Islands. Other way areas are Hong Kong, Indo China, and Thailand.

2. Trade Route No. 17 was characterized "essential" by the Maritime Commission largely because of the strategic and economic importance to the United States of the natural resources—tin, rubber, oils, fibers, etc.—in which the Indonesia-Malaya area is so rich. Freight Service "C–2" on Trade Route No. 17 was established by the Maritime Commission to provide an alternative to the Atlantic/Indonesia-Malaya Suez route, which is the traditional route traveled by steamship lines plying the trade.

3. The route between the United States Atlantic coast and the Indonesia-Malaya area via Suez is not only the traditional route; it is shorter by 2,400 to 3,100 miles than the Panama route. The principal steamship lines that use the Suez route, flying the British and Netherlands flags, are well established with merchants in the Indonesia-

[6] The archipelago that used to be called Netherlands East Indies is now largely included in the Republic of Indonesia. The ports of Soerabaja, Djakarta, and Belawan are all in Indonesia, as the area will be referred to in this report.

The ports of Penang and Port Swettenham lie along the southwest coast of the Malay peninsula on the Strait of Malacca. The term "Straits Settlements" no longer has political significance and Singapore is a British Crown Colony. These three ports will therefore be referred to collectively in this report as "Malaya."

Malaya area both by long years of close commercial relationships and by nationalistic ties.

4. Since May 1941 APL has filed four applications for subsidy for a C–2 service. Two filed during World War II were not acted upon, and the third, filed in July 1946, was denied because the Maritime Commission determined under section 605 (c) of the Act that existing United States-flag services substantially paralleling Services C–1, C–2, and C–4 of Trade Route No. 17 were not shown to be inadequate.[7] The fourth application for subsidy is the one now before us.

5. In June 1947 APL applied for permission to operate a C–2 service without subsidy. In May 1948 the Maritime Commission granted such permission, to be effective until June 30, 1949. In May 1949 the Maritime Commission ordered a hearing on the question whether permission to operate the service ought to be extended.

In January 1951 the Board and Administrator issued a report granting permission to APL to continue to operate the C–2 service without subsidy, subject to the following conditions:[8]

(*a*) The permission was subject to review not later than April 30, 1952;

(*b*) APL was to call on each voyage at no fewer than six ports (including Singapore) in the Indonesia-Malaya area;

(*c*) Elapsed time homeward of each voyage from Singapore to New York was not to exceed 38 days, not more than one Philippine port and one California port to be called;

(*d*) The C–2 vessels were permitted to carry eastbound intercoastal cargo but none other than refrigerated cargo westbound;

(*e*) APL was to schedule its C–2 sailings so as to avoid blanketing the sailings of its own subsidized vessels and the sailings of its United States-competitors;

(*f*) APL was not to refuse inbound cargo from Indonesia-Malaya to United States Atlantic ports in the interest of reserving space for inbound cargo to the Atlantic from intermediate ports;

(*g*) APL was not to operate owned freighters in its C–2 service while chartered freighters were employed in its subsidized services;

(*h*) APL was to receive advance approval of the Maritime Administrator for each schedule of a C–2 service sailing; and

(*i*) APL could at any time (upon good cause shown) apply for permission to depart from any of the foregoing conditions.

[7] *U. S. Lines Co.—Subsidy, Route 12, etc.*, 3 U. S. M. C. 325, 334 (1947).
[8] *Am. Pres. Lines, Ltd.—Unsubsidized Operation, Route 17*, 3 F. M. B.-M. A. 457 (1951).

6. APL has obtained some modification of the conditions set forth above. At present, elapsed homeward time of each voyage from Singapore to New York may not exceed 42–45 days, depending on the type of vessel (instead of 38 days as specified in 1952); C–2 vessels are permitted to call outbound at Guam; C–2 vessels may call homebound at one Philippine outport plus Manila (instead of Manila only as in 1952).

7. An overall limitation on operation of the C–2 service has been that no more than thirteen voyages per annum could be made. Since June 9, 1948, the C–2 service has provided sailings as follows:

TABLE I

Year	Number of sailings
1948 (after June 9)	3 (2 partial).
1949	14 (4 partial).
1950	13.
1951	11 (1 partial).
1952	10 (1 partial).
1953 (first 3 months)	3.
Yearly average, 1949–53	12.

As of December 31, 1952, more than 725,000 tons of cargo had been carried by C–2 vessels since June 1948 to produce over $26,000,000 in revenue.

APL now operates three owned AP3's in the service, plus one or two chartered vessels. APL proposes to operate five owned C3's or other suitable types if the service is subsidized. APL has provided regular service to Guam commencing with the sailing from New York of the *SS President Tyler* on September 17, 1951.

8. No other United States-flag operator serves all the areas touched by APL's C–2 service. Those lines that serve parts of the route also serve other areas off the route. Interveners States Steamship Company (hereinafter "States") and Pacific Transport Lines, Inc. (hereinafter "PTL"), operate between California and principally Japan and the Philippines on Trade Route No. 29.[9] Intervener Pacific Far East Line, Inc. (hereinafter "PFEL"), also operates on Trade Route No. 29 and serves Guam from California. Intervener Waterman Steamship Corporation (hereinafter "Waterman") serves the Far East from United States ports and also operates intercoastal services.[10] Interveners Luckenbach Steamship Company, Inc. (hereinafter "Luckenbach"), and Pacific-Atlantic Steamship Co. (hereinafter

[9] Trade Route No. 29 includes mainly services between Los Angeles-San Francisco and ports in Japan, North China, Hong Kong, the Philippines, and Indo China-Thailand.

[10] Waterman has intervened only to the extent of its interest in the intercoastal aspects of the case.

688-650 O - 63 - 35

called "Quaker", after the trade name of its intercoastal line) operate intercoastal services.

9. In addition to the interveners, a number of other United States-flag services are competitive in some degree with portions of APL's C–2 service. Isthmian Steamship Co. (hereinafter "Isthmian") serves all the area served by the C–2 service except Guam, operating via Panama and Suez. Isbrandtsen Co., Inc. (hereinafter "Isbrandtsen"), operates a service between the Indonesia-Malaya area and both the west and east coasts of the United States via Suez outbound and via Panama inbound. Between United States Atlantic ports and the Philippines, United States Lines Company (hereinafter called "American Pioneer", after the trade name of its transpacific line) and Waterman provide service in both directions. Isthmian provides service Atlantic/Philippines largely outbound and Isbrandtsen largely inbound.

10. American Pioneer is the only United States-flag line other than APL providing service between the United States Atlantic and Hong Kong. Isthmian and APL are the sole United States-flag operators serving Indo China or Thailand from the United States Atlantic. Service between the west coast of the United States and the Indonesia-Malaya area is provided outbound by Isthmian and APL and inbound by APL, American Mail Line, Ltd. (hereinafter "AML"), and Isbrandtsen. Seven United States-flag lines aside from APL serve the trade between the United States west coast and the Philippines: Isthmian (outbound only), PFEL, PTL, States, Waterman (outbound only), AML (outbound only), and Isbrandtsen (inbound only). Of these operators, only PTL and States intervened to oppose APL's operation on the California/Philippines segment of the route. Isthmian, States, American-Hawaiian Steamship Company (hereinafter "American-Hawaiian"), and APL operate between California and Indo China-Thailand.

Our inquiry is whether the C–2 service proposed by APL would be in addition to the C–2 service presently operated by APL. The examiner found that, for the purposes of section 605 (c), the proposed service would not be in addition to the existing service. APL states in its application for subsidy that "Applicant does not at this time propose to establish any new service, route, or line."

APL's proposed service would in fact differ from the existing service in respect of vessel type, number of Philippine and California ports called, the extent of intercoastal service permitted, and the maximum number of sailings permitted per annum. On the other hand, the proposed change of vessel type (from AP3's to C3's) is not so substan-

tial as to cause us under section 605 (c) to discount the present service as not "existing"; only one additional Philippine and one additional California port are sought to be served; the extent of intercoastal service to be permitted APL's C–2 service is the same as that now provided (see discussion of this subject, *infra*); and the maximum-minimum limits on number of sailings are so close to the actual average performed over the past six years that we do not regard the proposed service in that respect as one "in addition to the existing service."

It is our judgment in this case that APL's proposed service does not, as modified by our actions herein, differ so greatly from the existing service as to make it a service "which", in the words of the Act, "would be in addition to the existing service, or services * * *",[11] and we so conclude.

Undue Advantage or Prejudice

The second issue raised by section 605 (c) of the Act can now be disposed of. Section 605 (c) provides, in its second portion, as follows:

> * * * and 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 * * *.

We find that:

11. The four services of APL (Trans-Pacific Passenger-Freight, Trans-Pacific Freight, Round-the-World, and Atlantic-Straits) provide coordinated, integrated services across the Pacific.

12. Between California and the Philippines, carryings of liner commercial cargo have been as follows:

TABLE II

Year	Outbound				Inbound			
	Total tons	Percent via United States flag	Percent APL C–2 to total	Percent APL C–2 to United States	Total tons	Percent via United States flag	Percent APL C–2 to total	Percent APL C–2 to United States
1948	328,208	77	2	2	336,421	45	1	2
1949	351,118	75	3	4	392,680	53	5	9
1950	215,568	65	4	6	409,591	43	2	4
1951	270,037	68	1	2	370,811	53	1	2
1952	182,618	56	2	4	357,392	44	----------	1

[11] PFEL claims that calls at Guam would be in addition to the existing service. Because of the special problems relating to the proposed Guam call, Guam will be separately discussed later.

13. Carryings of liner commercial cargoes between California and Hong Kong have been as follows:

TABLE III

Year	Outbound				Inbound			
	Total tons	Percent via United States flag	Percent APL C–2 to total	Percent APL C–2 to United States	Total tons	Percent via United States flag	Percent APL C–2 to total	Percent APL C–2 to United States
1948	78,430	84	3	3	19,756	81	4	5
1949	113,038	83	5	6	26,712	68	4	6
1950	121,545	71	6	9	33,171	80	9	11
1951	64,834	69	1	1	16,678	77	6	8
1952	47,399	45	2	4	11,128	74	----	----

14. Tons of liner commercial cargo carried and sailings made by APL's C–2 service and PTL in 1951 and 1952 between California and the Philippines-Hong Kong area were as follows:

TABLE IV

Year	APL C–2				PTL			
	Cargo carried		Sailings		Cargo carried		Sailings	
	Out	In	Out	In	Out	In	Out	In
1951	3,742	3,924	9	10	30,328	58,938	25	25
1952	4,774	1,664	10	10	[12] 16,596	[12] 51,786	19	22

15. Percentages of total liner cargoes moving between California and the Philippines-Hong Kong area represented by the PTL carryings set forth in table IV were as follows:

TABLE V

Year	Total tons		PTL tons		Percent, PTL to total	
	Out	In	Out	In	Out	In
1951	334,871	387,489	30,328	58,938	9.06	15.21
1952	230,017	368,520	[12] 16,596	[12] 51,786	7.22	14.05

Of the interveners, States produced no witnesses and offered no evidence. The Board has stated before that any evidence on whether an award of subsidy would create undue advantage or be unduly prejudicial as between citizens of the United States should come from parties claiming undue prejudice under section 605 (c).[13] Therefore,

[12] Estimated, based on first 6 months' carryings.

[13] *Grace Line Inc.—Subsidy, Route 4*, 3 F. M. B. 731 (1952). To substantially the same effect is *Port of New York Authority* v. *Ab Svenska et al.*, 4 F. M. B. 202 (1953), interpreting section 16 First of the Shipping Act, 1916, as amended. That section makes unlawful, inter alia, the giving of undue advantage or the imposition of undue prejudice.

as to nonintervening competitors of APL and as to States, we find that undue advantage or prejudice would not flow from award of a contract.

The only valid claim of undue advantage and prejudice under section 605 (c) of the Act in this case comes from PTL and relates to service between California and the Philippines-Hong Kong area. PTL's main objection to operation of APL's C–2 service is that the service adds to APL's other three transpacific services to provide a superior competitive, coordinated, integrated complex of services with the following results asserted by PTL to constitute undue advantage and prejudice:

(1) The C–2 service permits APL to offer greater frequency of sailings among Trade Route No. 29 ports;

(2) The C–2 service permits APL to operate a southern as well as a northern route in its freight service on Trade Route No. 29;

(3) By offering direct sailings from Malaya to California, APL obtains cargo not only on its C–2 vessels but also on its other transpacific vessels at the expense of PTL;

(4) With its greater frequency of sailings, APL loses fewer bookings because of letter of credit expirations;

(5) By being allowed to carry Trade Route No. 29 cargo on C–2 vessels, APL obtains an advantage over PTL with respect to overland pool-car shipments and stockpiled petroleum products; and

(6) APL obtains certain advantages over PTL by utilizing a combined sales force for all its four services.

All these advantages stem from the fact that APL operates four coordinated, integrated services across the Pacific and accrue whether or not the C–2 service is subsidized. The burden of the PTL argument is that a subsidy to APL will enable that company to increase the effect of the advantages or prejudices on PTL's operations and that this will provide APL with an undue advantage and will unduly prejudice PTL.[14]

It appears that the C–2 service has carried very little liner commercial cargo between California and the Philippines-Hong Kong area. In 1951, the service carried altogether, both directions, slightly over two percent of such traffic, and in 1952, slightly over one percent. If PTL had carried in 1951 its share of C–2 liner commercial cargo between California and the Philippines-Hong Kong area, it would have amounted to approximately 14 additional tons on each outbound sailing and 24 tons on each inbound sailing. The additional cargoes

[14] PTL takes the position that continuance of the C–2 service unsubsidized will also result in undue advantage and prejudice as between APL and PTL. This issue is not related to Docket No. S–33, which is concerned exclusively with sections 605 (c) and 805 (a) of the Act.

in 1952 would have been 18 tons on each outbound sailing and 11 tons on each inbound sailing.[15]

Although, as argued by PTL, it may be that the mere existence of APL's C–2 service operates to help APL draw cargo away from PTL to APL's other transpacific services, there are no data in the record to measure the extent to which this may occur. In view of this lack of any measurable showing of advantage or prejudice, and in view of the small carryings of C–2 vessels in the trade, we must conclude that any advantage to APL or prejudice to PTL flowing from an award of subsidy to APL would not be undue.

Aside from PFEL's claim with respect to calls at Guam, discussed later, no other intervener has raised any claim of undue advantage or prejudice under section 605 (c) with respect to any part or the whole of the service.

We therefore conclude that the effect of making a subsidy contract with APL, to the extent that contract would deal with the foreign areas served by the C–2 service, would not 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. We add, without implying criticism of APL's past operations, that APL must schedule its C–2 sailings so as to avoid blanketing the sailings of its other services and the sailings of its United States-flag competitors.

ADEQUACY OF SERVICE

In view of our conclusions on the initial issues of section 605 (c), viz., (1) that the service proposed by APL would not be in addition to the existing service, or services, and (2) that award of a subsidy contract would not have the effect of giving undue advantage or of being unduly prejudicial as between citizens of the United States, we need not inquire into whether there is, without APL's C–2 service, adequate service by vessels of United States registry in Freight Service "C–2" of Trade Route No. 17, or whether, in accomplishment of the purposes and policy of the Act, additional vessels ought to be operated therein. *American President Lines* v. *Federal Maritime Board*, 112 F. Supp. 346 (1953), appeal dismissed December 8, 1953.

Our conclusions on the issues raised by section 605 (c) of the Act are not tantamount to a finding that APL is entitled to a subsidy for the whole or any part of its C–2 service, for such a conclusion can be reached only after the necessary administrative study and action under section 601 and other provisions of the Act. In any action taken, we

[15] These figures are arrived at by multiplying the number of tons of liner commercial cargo carried by C–2 vessels by the figures representing the percentages of all liner commercial cargoes carried by PTL and dividing the results by the number of sailings made by PTL.

will take steps to insure that APL does not refuse inbound cargo from Indonesia-Malaya to United States Atlantic ports in the interest of reserving space for inbound cargo to the Atlantic from intermediate ports.

GUAM

The question of service from the continental United States to Guam presents special problems in our administration of the provisions of the Act. Guam is not served by any foreign-flag ocean carriers and is in that respect similar to our domestic intercoastal and coastwise trades. Operators in such trades are protected from subsidized competition by section 805 (a) of the Act, but no such protection is available to operators serving Guam.[16] Intervener PFEL, the only ocean carrier, aside from APL, serving Guam from the continental United States, claims the protection of section 605 (c) of the Act.

We cannot, in a technical sense, apply section 605 (c) to the Guam leg of APL's proposed C–2 service because that section as a whole relates to proposed subsidized services in their entirety and not to individual legs of proposed services.[17] As far as the Guam leg of the proposed C–2 service is concerned, we cannot say that section 605 (c) would apply under any circumstances, in view of the fact that the section by its terms relates to a "contract * * * made under this title." Such contracts can be made applicable only to vessels "which," in the words of section 601, "are to be used in an essential service in the *foreign* commerce of the United States" (emphasis added). Commerce between the continental United States and Guam is not foreign commerce of the United States.[18] It is our judgment, however, that operators trading to Guam are entitled to some protection. Accordingly, our present inquiry extends to whether the effect of the contract sought by APL would be to give undue advantage or be unduly prejudicial as between APL and PFEL.

The record shows that the volume of commercial cargo handled by APL's C–2 service vessels from California to Guam has been small, amounting in 1953 to around 9 percent of PFEL's total, or less than 200 tons per sailing since September 1951. PFEL and APL provide the only commercial ocean carrier services between Guam and the

[16] *American President Lines, Ltd.—Application, etc.*, 3 M. A. 450 (1950).

[17] See *Lykes Bros. S. S. Co., Inc.—Increased Sailings, Route 22*, 4 F. M. B. 455, 464, where we said, on the "adequacy" issue of section 605 (c):

> Much less are we willing to say that 50 percent participation is the standard of adequacy for United States—flag vessel participation in cargo moving over a particular part of an essential foreign trade route.

[18] We do not mean to suggest that a subsidized service may not include a call at Guam. Section 605 (a) of the Act authorizes such a call and provides for pro rata abatement of subsidy on account of domestic cargo, mail, or passengers to Guam.

United States. During the years of record, PFEL has increased its sailings. We are therefore unable to find that the effect of awarding a subsidy contract to APL for its C–2 service would be to give undue advantage or be unduly prejudicial as between APL and PFEL.

SECTION 805 (a)

The remaining issues in Docket No. S–33 arise out of the intercoastal operations proposed by APL as part of its C–2 service, and the effect on such operations of section 805 (a) of the Act.[19] Section 805 (a) provides in part as follows:

> It shall be unlawful to award or pay any subsidy to any contractor under authority of title VI of this Act * * * if said contractor * * * shall own, operate, or charter any vessel or vessels engaged 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 interveners. 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 * * *.

APL proposes to institute full westbound intercoastal service (instead of reefer service only as now limited), and to continue carrying eastbound intercoastal cargoes out of Los Angeles and, in addition, to lift some eastbound cargo out of San Francisco.

STANDING OF INTERVENERS

APL at the outset urges upon us that neither Luckenbach nor Waterman has standing, as an exclusively intercoastal or coastwise operator, to object under section 805 (a) of the Act to APL's C–2 intercoastal operation. We find:

16. Luckenbach charters out to offshore operators, for use in the offshore trades, vessels which it owns but for which there is no demand in the domestic trades. Waterman, in addition to its domestic operations, operates vessels for its own account in the offshore trades. Both Luckenbach and Waterman operate a domestic intercoastal service that does not include foreign ports.

Luckenbach's standing is destroyed by its offshore charters and Waterman's by its own offshore operations, according to APL. APL's argument as to Luckenbach was rejected by the Board in its consideration of *American President Lines, Ltd.—Sec. 805 (a) Ap-*

[19] Section 805 (a) is applicable to the intercoastal aspects of the C–2 service whether subsidized or not. Therefore, while our discussion of section 805 (a) issues has been placed under the Docket No. S–33 heading, it should be clearly understood that our determinations are equally applicable to the Docket No. S–17 (Sub. 1) requests of APL.

plication, 4 F. M. B. 436 (1954).[20] In any event, Luckenbach, Waterman, and APL were parties to *Am. Pres. Lines, Ltd.—Unsubsidised Operation, Route 17, supra*, where the Board and Maritime Administrator said, at page 470, that operators engaged "exclusively" in the intercoastal trade are:

> operators furnishing an intercoastal service that does not include foreign ports.

Since both Luckenbach and Waterman do furnish such services, they have standing to intervene under section 805 (a) against APL's proposed intercoastal operations.

GRANDFATHER RIGHTS

As to carriage of intercoastal cargoes westbound, APL claims grandfather rights under the proviso clause of section 805 (a), which, following the portion of the section set forth above, provides in part as follows:

> *Provided*, That if such contractor * * * or a predecessor in interest was in bona-fide operation as a common carrier by water in the domestic, intercoastal, or coastwise trade in 1935 over the route or routes or in the trade or trades for which application is made and has so operated since that time * * * except * * * as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall grant such permission without requiring further proof that public interest and convenience will be served by such operation, and without further proceedings as to the competition in such route or trade.

APL does not claim grandfather rights for its proposed eastbound intercoastal operation; only westbound.

We find that:

17. APL's round-the-world service has, except during World War II, been operated either by APL or by its predecessor in interest,[21] since 1924.

18. The first leg of the round-the-world service has been a westbound intercoastal run.

19. APL operates two combination and seven freight vessels on a fortnightly sailing frequency in its round-the-world service; before World War II, it had operated only combinations.

APL's claim of grandfather rights is based mainly upon the westbound intercoastal leg of its round-the-world service No interested party in this case disagrees with the proposition that in order to claim

[20] Neither the argument nor rejection of it by the Board is mentioned in the written report, because not determinative of the case (the result was favorable to APL). But the record in that case shows the argument was made, and in the report Luckenbach was given full standing as an exclusively intercoastal operator.

[21] The Robert Dollar Company instituted a round-the-world service in 1924. The service was continued under the Dollar name until, in August 1938, the Dollar Steamship Line, Inc., Ltd., changed its name to American President Lines, Ltd.

grandfather rights under section 805 (a), the service for which such rights are claimed (C–2) must be in substantial parity with the service said to have been operated in 1935 (round-the-world).

Intervener Luckenbach takes the position that the westbound intercoastal segment of APL's proposed C–2 service would not be in substantial parity with the 1935 intercoastal segment of the round-the-world service because (1) a greater number of ships is proposed now than were operating then, (2) sailing frequency would be increased by 50 percent, and (3) the different character of the offshore trades involved would result in different cargoes being carried and would involve different amounts of space.

APL urges that it is irrelevant whether cargo or passenger vessels are involved; the combination vessels carry cargo, and it is cargo that the interveners are interested in. APL also points to *APL—Round-the-World Subsidy, Intercoastal Operations*, 3 F. M. B. 553 (1951), where the Board held that APL had westbound intercoastal grandfather rights for its round-the-world freight vessels as well as combination vessels, even though pre-war there had been no freight vessels in the service.

Section 805 (a) was inserted in the Act "to protect those companies already interested in the coastwise or intercoastal service." [22] In disposing of the question of section 805 (a) grandfather rights, we are guided by two considerations: (1) substantial parity must exist as between proposed and past operations, for the protection of domestic operators already interested in the trade, and (2) the grandfather clause cannot be so strictly read as to permit absolutely no flexibility in equipment. Accordingly, we note (1) that the round-the-world service has been permitted equipment flexibility (*APL—Round-the-World Subsidy, Intercoastal Operations, supra*), and (2) that the proposed C–2 service is, after all, a different one from round-the-world: it was not in operation in 1935 as an Atlantic to Indonesia-Malaya service (having been inaugurated in 1948); it would increase APL's westbound intercoastal sailings by 50 percent; and it would add five C3's or similar types to the westbound intercoastal service over and above the round-the-world service. In short, APL proposes to institute a new and different service, and we do not believe Congress intended that services operated prior to 1935 should provide a basis for claim of grandfather rights for a new and different service.

We therefore conclude that APL or a predecessor in interest was not, as to its C–2 service, in bona fide operation as a common carrier by water in the domestic, intercoastal, or coastwise trade in 1935.

[22] S. Rept. No. 1721, 74th Cong., 2d Sess.

OTHER SECTION 805 (a) QUESTIONS

The remaining questions under section 805 (a) of the Act are: Whether operation of the intercoastal legs of APL's C–2 service will result in unfair competition to exclusively intercoastal operators or whether such operation would be prejudicial to the objects and policy of the Act. The facts that bear on these questions are as follows:

20. C–2 vessels departing the Atlantic coast westbound usually have had available between 80,000 and 100,000 cubic feet of space for foreign-area cargoes to be lifted off the California coast. This space would be sufficient, over a year, to carry about 16,000 tons of cargo or approximately four percent of the cargoes moving in the westbound intercoastal trade. Carriage of that amount of cargo by C–2 vessels (which cargo can be lifted by APL on an added cost basis since the ships make the ports involved anyway) would bring in net revenues that would help bring the over-all C–2 service operation to about a break-even point, financially. APL would not solicit more westbound intercoastal cargo than enough to fill the free space for California offshore cargoes.

21. Westbound, Luckenbach provides weekly sailings, APL's round-the-world vessels provide fortnightly sailings, and Isthmian provides fortnightly sailings.

22. Between August 1952 and March 1953, Luckenbach canceled eleven scheduled westbound intercoastal sailings because of lack of cargo. Luckenbach has more than enough vessels to schedule weekly sailings and, when conditions warrant, does schedule sailings more frequently than weekly.

23. Of the interveners, only Waterman and Luckenbach operate in the eastbound intercoastal trade. Waterman has commenced such operations recently (August 1953) under a temporary certificate from the Interstate Commerce Commission. Luckenbach has been operating on a substantial and successful scale in the eastbound intercoastal trade from California. Luckenbach has regularly scheduled bi-weekly sailings but found it possible in 1951 and 1952 to approximately double that regular schedule with "extra" sailings. In 1951 and the first half of 1952, even with the extra sailings put into the trade, Luckenbach vessels averaged less than four percent free space.

24. In addition to Waterman's recent temporary (ICC) certification, Isbrandtsen has been authorized to provide a limited eastbound intercoastal service from ports in northern California.

25. Los Angeles ordinarily accounts for less than 20 percent of eastbound intercoastal cargoes. APL's C–2 vessels, operating from Los Angeles, carried an average of 450 revenue tons of eastbound inter-

coastal cargo on each sailing in 1952. This amounted to less than one percent of Luckenbach's eastbound carryings during the year.

26. Two of APL's C–2 vessels called eastbound at San Francisco in 1951, averaging 5,400 tons of intercoastal cargo each out of that port.

27. None of the intercoastal interveners has been able to secure enough intercoastal cargo to operate profitably in the intercoastal trade with the ships intended for such trade.

COMPETITIVE EFFECT

In *Am. Pres. Lines, Ltd.—Unsubsidized Operation, Route 17*, *supra*, it was established that the Board and Maritime Administrator, in order to carry out the intent of Congress as expressed in section 805 (a), must be alert to protect coastwise and intercoastal operators against competition from subsidized offshore operators for cargoes which the intercoastal carriers need, have the capacity to carry, and to which they are entitled.

The record shows that the intercoastal interveners herein need all the available intercoastal cargo. We also note that they have the capacity to carry more intercoastal cargo than they are now lifting. APL makes much of the fact that Luckenbach is "over-vesseled," and that "extra" Luckenbach ships, i. e., ships that are in excess of the ships required to provide weekly sailings, should not enter into our evaluation of the capacity of the intercoastal operators. We are aware of the fact that a good many operators today are "over-vesseled" because of lack of cargoes, not only in our own intercoastal trades but also in other trades throughout the world. But in the face of Congress' special concern for exclusively intercoastal operators, and in the face of the importance to the national security and to our domestic commerce of a healthy and vigorous intercoastal water transportation system, we cannot penalize the intercoastal operators by limiting our evaluation of intercoastal capacity solely to those ships which are presently being used on regular schedules.

Taking into account the apparent potential capacity of the intercoastal operators, we conclude that these operators presently have the capacity to carry the cargoes available in the intercoastal trades. And in our judgment those operators who provide exclusively intercoastal services are entitled, as against primarily offshore operators such as APL, to whatever intercoastal cargoes they can carry. For APL to carry westbound intercoastal cargoes on an unrestricted basis would result in unfair competition to persons, firms, or corporations operating exclusively in the coastwise or intercoastal service, and further, for APL to carry such cargoes would be prejudicial to the objects and policy of the Act. It has not been shown, however, that for APL to

carry westbound intercoastal refrigerated cargoes would, under presently existing circumstances, result in unfair competition or would be prejudicial to the objects and policy of the Act, and permission will be given for C–2 vessels to carry such cargoes.

APL's request to serve San Francisco to carry eastbound intercoastal cargo apparently does not amount to a request for permission to serve that port regularly. APL claims that the only time its C–2 vessels would call at San Francisco to pick up eastbound intercoastal cargo would be on occasional voyages when Indonesia-Malaya cargoes are scarce and when Philippine cargoes are not available so that on the order of approximately 50 percent free space is available on a vessel arriving eastbound at California. APL does not anticipate that San Francisco calls in the future would be any more frequent or regular than in the past, which is to say one or two calls per year.

It is difficult to determine what would be the competitive impact of permitting C–2 vessels to call at San Francisco because no one, not even APL, is able to predict how much eastbound intercoastal space would be made available. APL claims that the regular intercoastal operators do not have the capacity to carry the available cargo out of San Francisco during the peak canned goods season, which is the only period when APL would be likely to call. Luckenbach claims that it is able to provide capacity to carry all available eastbound intercoastal cargo even during the canned goods season. Admittedly part of this capacity estimate is based upon the availability to Luckenbach of "extra" ships. Three California shippers testified on the necessity for eastbound intercoastal service from San Francisco Bay and, while none suggested there was an over-supply of such service, neither does the record support a finding that without calls by C–2 vessels the Bay is not adequately served.

As stated above, in our estimate of intercoastal capacity we include Luckenbach's "extra" capacity. With this estimate, it is our judgment that eastbound intercoastal operators would have the capacity to carry all the available cargo. Therefore, on the basis of the present record, we conclude that to permit APL to call at San Francisco for eastbound intercoastal cargo would result in unfair competition to exclusively intercoastal operators and would be prejudicial to the objects and policy of the Act. We will leave it open, however, for APL, in individual cases, to apply to the Maritime Administrator for permission to call at San Francisco for eastbound intercoastal cargo, and he will decide at such times, subject to the hearing requirements of section 805 (a) of the Act, whether or not such permission should be granted.

The position of interested interveners if the C–2 service is limited to Los Angeles as a source of eastbound intercoastal cargo is not clear. Luckenbach states that its principal objection to a call by C–2 vessels

at a second California port is "that it will permit APL * * * to raid eastbound canned goods traffic originating in the San Francisco Bay area * * *. Luckenbach also makes more general arguments apparently directed against *any* eastbound intercoastal service by C–2 vessels, and so does Waterman. But we have not been presented with any substantial evidence that interveners claim should lead us to conclude that permission for APL to lift eastbound intercoastal cargo at Los Angeles would result in unfair competition to them or would be prejudicial to the objects and policy of the Act. Liftings of such cargo have been small, amounting on the average to less than 500 tons per sailing. We will grant permission to APL to continue lifting eastbound intercoastal cargo out of Los Angeles with its C–2 vessels.

We turn now to the issues in Docket No. S–17 (Sub. 1).

APL has been operating its C–2 service since June 1948 without subsidy under permissions granted by the Maritime Commission and the Board/Administrator. Such permissions have been granted for limited periods of time, subject to termination, modification, or extension. On March 7 and 11, 1952, the Board and Administrator approved "in principle" continued operation of the C–2 service. On the same dates they approved "in principle" the recommendation of their General Counsel that permission to continue the service be in the nature of a temporary extension pending the conclusion of the hearing on APL's subsidy application.

By notice dated April 3, 1952, the Board and Administrator advised that—

> The Maritime Administrator and Federal Maritime Board have authorized the continuation of existing operation by American President Lines, Ltd., in the Atlantic-Straits Freight Service C–2, Trade Route 17, subject to conditions imposed * * * and the right being reserved to the Administrator and Federal Maritime Board to review and thereafter to terminate or extend the entire operation at any time.

and that a hearing might be held on the following three requests of APL:

(1) for modification of the C–2 service itinerary to authorize calls at Guam on outbound voyages;

(2) for the privilege of serving one additional Philippine port; and

(3) for the privilege of calling eastbound at San Francisco Bay ports and/or Los Angeles, California.

By notice dated June 2, 1952, the Board and Administrator advised that the hearing would embrace the three issues above set forth, plus

(4) A request for authority to continue to perform eastbound intercoastal service in connection with Service C–2, Trade Route No. 17.

GUAM CALLS

So far as request number (1) is directed toward modification of the itinerary of an unsubsidized service, the following facts appear of record:

1. APL's C–2 vessels began calling outbound at Guam in late 1951 pursuant to authority granted on September 5, 1951. That authorization was based largely on requests by shippers for more Guam service. Since September 1951, carryings of C–2 vessels to Guam have increased, but such carryings have never reached very substantial proportions. The last two C–2 vessels sailing in 1952 and the first three in 1953 averaged slightly over 1,500 tons each.

2. Fifteen shippers have testified they desire to have APL serve Guam from the Atlantic coast, and sixteen said they desired APL's service from California. The economy of Guam is gradually improving, and the demand for goods and supplies of all kinds from the mainland is increasing. It appears that the island itself is unable to feed, clothe, or shelter the population.

3. No ocean service other than APL's C–2 service serves Guam from the Atlantic. Only APL and PFEL serve the island from California. PFEL operates to Guam under a series of Maritime Administration authorizations, subject to withdrawal if circumstances change to make such authorizations unjustified. PFEL's sailings to Guam have been increasing, from 19 in 1950 to an estimated 44 in 1953 (based on first six months sailings in 1953). Cargo carryings of PFEL, California to Guam, have also been increasing; commercial cargoes lifted in 1951 amounted to 37,633 tons while first half of 1953 carryings of such cargoes were 20,607 tons—an annual rate for 1953 of 41,214 tons. APL's carryings of commercial cargoes, California to Guam, mounted in the first quarter of 1953 to 910 tons—an annual rate of 3,640 tons. This was about 9 percent of the commercial cargoes carried to Guam by PFEL.

4. The Guam call adds three or four days to the voyage time of a C–2 vessel. In 1952 APL's C–2 vessels averaged 41 days from New York to Manila. No operator was faster. Only American Pioneer, De La Rama Lines, and Ellerman & Bucknall were as fast. From California to Manila, APL's C–2 vessels provided the second fastest service in 1952, averaging 20 days. Isthmian was faster with 18 days; Ellerman & Bucknall and Klaveness equalled APL's time.

It appears that there is a real need for ocean carrier service from the United States mainland to Guam; that APL's C–2 vessels help meet that need; that the C–2 vessels have provided substantial and increasing service to Guam; that without the service of APL's C–2 vessels, Guam would be without service from the United States Atlantic coast; that even with the extra time involved in making the call at Guam, APL's C–2 vessels have been and will be able to maintain a New York to Manila schedule that is competitive with the fastest schedules offered by any competitor, and that C–2 carryings to Guam are minor when compared with the carryings of PFEL, and have not constituted an unduly prejudicial burden on PFEL.

We therefore conclude that authority should be granted to APL to call outbound with its unsubsidized C–2 vessels at Guam, subject to the condition that cargoes destined to foreign areas served by the C–2 service may not be sacrificed for cargoes destined to Guam.

ADDITIONAL PHILIPPINE PORT

5. At the present time APL's C–2 vessels' eastbound Philippine calls are limited to Manila, plus no more than one Philippine outport.

6. On voyages commenced after January 1951, through the voyage terminated March 23, 1953, C–2 vessels made ten homeward voyages which included calls at no Philippine outports; two voyages which included calls at one outport; five voyages which included calls at two outports; and one voyage which called at three outports. Bugo was the most frequently called outport; the next most frequently called was Narativas (Bangnara). While APL has not limited itself to a request for calls at specific outports, it has mentioned Bugo as a likely first call, the second outport (which might be Subic Bay, Singora, or Iloilo) depending on cargo available.

7. From 1948 through 1952, the C–2 service has carried an increasing share of the inbound cargo from Malaya to the Atlantic (1948, 1 percent of total liner commercial cargo; 1952, 5 percent). The C–2 service has similarly increased its participation in cargo moving from Indonesia to the Atlantic (1948, 1 percent; 1952, 4 percent).

8. APL asserts that it needs authority to call on occasion at more than one outport in order to fill excessive free space sometimes left by a dearth of Indonesia-Malaya cargo. Rubber is the principal Indonesia-Malaya cargo but is characterized as "chancy". There are nearly 200 ships a year on berth in Singapore, for example, competing for cargoes. Rubber, which is brought into Belawan and Singapore by small coasting feeder services, is distributed among conference vessels so as to give all conference vessels, over a period of time, approximately equal opportunities to carry it. APL says that there

have been a few C–2 vessels—say two or three each year—that because of a dearth of available cargoes, had to leave the Indonesia-Malaya area with free space of about 50 percent. In order to keep such voyages from being financially disastrous, APL desires to call at more than one Philippine outport to pick up sugar or other cargoes.

9. Philippine outport cargoes have been overwhelmingly for the Atlantic and not California. In 1950, of 33,720 tons of Philippine outport cargo, only 2,042 tons were for California. In 1951, total outport cargo was 7,680 tons, of which 798 tons were for California. In the first half of 1952, APL's C–2 vessels carried 1,975 tons of Philippine outport cargo, all of which was for the Atlantic.

10. In 1952, homeward transit time for C–2 vessels averaged 42 days from Singapore to New York, which is the number of days now allowed. This compares with 41 days for Barber-Fern-Ville Line, a foreign-flag operator using the Suez route, and with transit times of from 45 to 57 days by seven other foreign-flag lines and two United States-flag lines, all using the Suez route. A total of five extra days would be involved in calling at two Philippine outports, which, added to the C–2 schedule of 38 days from Singapore to New York, makes 43, only one more than now allowed and actually averaged in 1952.

PTL and States object to C–2 vessels serving California from the Philippines whether or not the service is subsidized, on the two general grounds that (1) such service is inconsistent with the purposes and policy of the Act, because it permits APL to sacrifice Indonesia-Malaya area cargoes for Philippine cargoes and generally derogates from the effectiveness of the C–2 service as an Indonesia-Malaya/Atlantic service; and (2) because APL's C–2 service, so far as the Philippines homeward leg is concerned, creates undue prejudice to the interveners and undue advantages for APL.

On most voyages APL does not call at any Philippine outport, and the calls that have been made have not appeared to lessen either APL's participation in cargo moving Indonesia-Malaya to the Atlantic, or to have increased the homeward transit time of C–2 vessels beyond a length that is competitive with the best transit times of other operators. Nor do the minor carryings from Philippine outports to California constitute, in our judgment, undue prejudice and advantage as between APL on the one hand and PTL and States on the other.

We therefore conclude that APL's C–2 vessels may call homebound at two Philippine outports in addition to Manila, subject to the *caveat* that Indonesia-Malaya cargoes may not under any circumstances be sacrificed for Philippine cargoes. The Administrator will review the results of this operation after one year, and, if circumstances warrant, a further report will be made to the Board.

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SAN FRANCISCO BAY PORTS

Our determination hereinabove as to C–2 vessels lifting eastbound intercoastal cargo out of San Francisco renders moot to some extent this issue in Docket No. S–17 (Sub. 1). If APL wishes to call at San Francisco for any good reason other than to lift eastbound intercoastal cargo, we can see no objection thereto. APL says that no San Francisco call will be made on any voyage that has served Philippine outports and that San Francisco calls will not increase the transit time from Singapore to New York by any more than four or five days. As pointed out before, the extra four or five days over the 38-day schedule amounts to 42 or 43 days, and APL is now allowed and actually averaged 42 days in 1952. An occasional San Francisco call, when no call has been made at any Philippine outport, will not have the effect of cutting down on APL's participation in Indonesia-Malaya cargoes and will not have the effect of increasing the transit time beyond that which is competitive with the best transit times of other carriers.

EASTBOUND INTERCOASTAL SERVICE

The question of APL's legal right to continue its eastbound intercoastal service has been discussed in Docket No. S–33, so far as service from Los Angeles is concerned. No considerations have been presented to us which, apart from the legal considerations already discussed in connection with section 805 (a) of the Act, would justify our forbidding APL from lifting eastbound intercoastal cargo at Los Angeles. We therefore conclude that APL's C–2 service should be permitted to continue to perform eastbound intercoastal service from Los Angeles.

By the Board and Maritime Administrator.

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

FEDERAL MARITIME BOARD

No. 726

ISBRANDTSEN CO., INC.

v.

STATES MARINE CORPORATION OF DELAWARE ET AL.

Submitted October 16, 1954. Decided October 28, 1954

REPORT OF THE BOARD ON MOTION FOR RELIEF IN THE NATURE OF SUMMARY JUDGMENT

This matter is presented on a motion of complainant Isbrandtsen Co., Inc. (hereinafter called "Isbrandtsen"), in the nature of a motion for summary judgment, to terminate the proceeding under Rule 5 (o) of the Board's Rules of Practice and Procedure and for relief as prayed for in its complaint. That complaint, filed November 5, 1953, alleges for a first cause of complaint that respondent States Marine Corporation of Delaware (hereinafter called "States Marine"), as a member line of respondent Far East Conference (hereinafter called "the Conference"), employs the exclusive-patronage dual rate, contract/non-contract system; that States Marine refused to allow Isbrandtsen to enter into an exclusive-patronage contract; and that States Marine, in violation of the Shipping Act, 1916 (hereinafter called "the Act"), transported cotton from ports in Texas to ports in Japan at a discriminatory freight rate of $2.20 per 100 lbs., rather than at the exclusive-patronage contract rate of $2.00 per 100 lbs. For a second cause of complaint, Isbrandtsen alleges that Waterman Steamship Corporation (hereinafter called "Waterman"), as a member line of the Conference, employs the exclusive-patronage, dual rate, contract/non-contract system; that Isbrandtsen applied to Waterman and was denied an exclusive-patronage contract; and that Isbrandtsen paid freight for the shipment of cotton from Texas to Japan at a rate of $2.20 per 100 lbs., rather than at the $2.00 exclusive-patronage contract rate for the service. For a third cause of complaint, Isbrandtsen alleges that the Conference's exclusive-patronage, dual rate, contract/non-contract system violates sections 14, 15, 16, and 17 of the Act, and has never been approved by this Board.

Isbrandtsen seeks in relief (1) reparation in the amount of $5,455.00

the sum by which freight paid States Marine exceeded the exclusive-patronage contract tariff rate for cotton, (2) reparation in the amount of $1,232.28, the sum by which freight paid Waterman exceeded the exclusive-patronage contract rate for cotton, and (3) an order directing the Conference and its members to cease and desist from using the exclusive-patronage, dual rate, contract/non-contract system.

The answer filed on February 16, 1953, for States Marine, Waterman, and for all members of the Conference with the exception of respondent Isthmian Steamship Company (hereinafter called "Isthmian"), admits the use of the exclusive-patronage, dual rate, contract/non-contract system, that the sums alleged represent the difference between the contract/non-contract rates on the shipments complained of, and that States Marine and Waterman collected freight on the shipments complained of at the non-contract tariff rate. The answer denies that Isbrandtsen was the shipper of the cotton involved and denies that Isbrandtsen was refused the right to enter into an exclusive-patronage contract.

Isthmian filed a separate answer to the complaint but has not filed a reply to complainant's motion.

Following the complaint and answers thereto, hearings in this matter in conjunction with Docket Nos. 732, 733, 734, and 735 were held in Houston, Texas, between May 25 and June 4, 1954. The hearings were not completed and were adjourned to October 19, 1954.

On July 16, 1954, Isbrandtsen filed the motion now before us. Replies thereto were timely filed by Public Counsel and by counsel for respondents other than Isthmian. The motion was set for oral argument on October 6, 1954, and heard on that date. Argument in support of the motion was made by counsel for Isbrandtsen, and in opposition to the motion by counsel for the Conference, counsel for respondents other than Isthmian, and by Public Counsel. All parties were given an opportunity to file and did file briefs subsequent to argument.

We consider that the motion of Isbrandtsen raises issues as to whether:

(a) this Board has power, express or inherent, to issue the summary award requested; and

(b) assuming such power, whether summary procedures are applicable to the matter presently before us.

We conclude that no summary power of disposition has been expressly delegated to this Board by the Congress or is inherent in the Board's functions. Our power to award reparation and to order the discontinuance of unlawful practices in freight rate matters is derived from and defined by the Act. The manner in which that power is to

be exercised is set forth in section 23 of the Act, which provides in part as follows:

> Orders of the board relating to any violation of this Act shall be made only after full hearing, and upon a sworn complaint or in proceedings instituted of its own motion.

The plain and inescapable effect of the quoted language is to require us to give full opportunity to all parties to present evidence in questions of statutory violation, as well as to preclude us from making any adjudications prior to completion of that presentation. Since Isbrandtsen's complaint alleges violations of the Act, the provisions of section 23 thereof preclude us from granting the relief requested.

Counsel for Isbrandtsen argues that the power of summary proceeding is inherent in Rule 5 (o) of the Rules of Practice and Procedure, and quotes in part therefrom as follows:

> * * * motions to dismiss or otherwise terminate the proceeding * * * shall be addressed to the Board.

Counsel implicity contends that the phrase "otherwise terminate the proceeding" contemplates summary proceedings, in the absence of some other provisions in the rules for termination; put otherwise, that given the power to terminate a proceeding in a manner other than by dismissal of a complaint, all methods of terminating proceedings employed by judicial bodies necessarily flow from that power.

We point out that, in full context, Rule 5 (o), from which the phrase relied on by counsel for Isbrandtsen was extracted, does not create a type or types of relief but describes the procedural requirements to which motions must conform. We further point out that methods of terminating proceedings other than by motion to dismiss have been provided by Rules 6 (a) and 6 (c) of the Board's Rules of Practice and Procedure. Both methods require consent of the parties and obviously do not contemplate summary proceedings.

Assuming, however, express or implied power in this Board to grant the relief now requested, we are not persuaded that a summary order should issue in the present circumstances. The object of the motion for summary judgment is to separate what is formal or pretended in denial or averment from what is genuine and substantial, so that only the latter may subject a suit to the burden of a trial. *Richard* v. *Credit Suisse*, 242 N. Y. 346, 152 N. E. 110 (1926).

The moving party has the burden of showing the absence of any genuine issue as to all the material facts. *Walling* v. *Fairmont Creamery Co.*, 139 F. 2d 318 (CCA 8th 1943). Isbandtsen has not met that burden here since the record reveals substantial issues of fact among which are the following:

(a) The parties dispute whether Isbrandtsen was denied an

exclusive-patronage contract by respondents States Marine and Waterman, as well as other facts necessary to establishing prejudice, disadvantage, and discrimination as alleged in the complaint.

(b) Although the parties are in agreement as to the fact of the cotton shipments, the freight rates under which cotton was shipped and the sums by which freight paid to respondents States Marine and Waterman exceeded the exclusive-patronage contract tariff rates for that commodity, it is nevertheless incumbent on Isbrandtsen to show injury prior to an award of reparation under section 22 of the Act. Even if discrimination and unjust preference were undisputed, the question of injury remains. In this regard, our predecessors in *Port of Phila. Ocean Traffic Bureau* v. *Export S. S. Corp.*, 1 U. S. S. B. B. 538 (1936), at page 541, have clearly stated the following:

> It is well settled that the existence of unjust discrimination and undue prejudice and preference is a question of fact which must be clearly demonstrated by substantial proof. As a general rule there must be a definite showing that the difference in rates complained of is undue and unjust in that it actually operates to the real disadvantage of the complainant. In order to do this it is essential to reveal the specific effect of the rates on the flow of the traffic concerned and on the marketing of the commodities involved, and to disclose an existing and effective competitive relation between the prejudiced and preferred shipper, localities, or commodities. Furthermore, a pertinent inquiry is whether the alleged prejudice is the proximate cause * * *

See also *H. Kramer & Co.* v. *Inland Waterways Corp. et al.*, 1 U. S. M. C. 630 (1937), and *Eden Mining Co.* v. *Bluefields Fruit & S. S. Co.*, 1 U. S. S. B. 41 (1922).

Viewing specifically the incompleted hearings and difficult legal question presented, we do not feel that the facts and circumstances surrounding this motion properly lend themselves to determination by summary proceedings. We consider the facts and legal issues sufficiently complex and of sufficient far-reaching import as to fall within that category of controversy described by the Supreme Court in *Kennedy et al.* v. *Silas Mason Co.*, 334 U. S. 249 at pages 256 and 257, as not proper for the exercise of summary procedures:

> We do not hold that in the form the controversy took in the District Court that tribunal lacked power or justification for applying the summary judgment procedure. But summary procedures * * * present a treacherous record for deciding issues of far-flung import, on which this Court should draw inferences with caution from complicated courses of legislation, contracting and practice.

The motion is denied.

By order of the Board.

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