FEDERAL MARITIME BOARD

No. S-27 (Sub. 2)

INVESTIGATION OF AGREEMENT NO. 7616
(LYKES-HARRISON POOLING AGREEMENT)

Submitted October 29, 1954. Decided November 17, 1954

Pooling Agreement No. 7616 between Lykes Bros. Steamship Co., Inc., and Thos. and Jas. Harrison, Ltd., found to create relationships which slightly diminish but which do not eliminate competition between its signatories.

The Board is required as a matter of law to consider, under sections 603 (b) and 606 of the Merchant Marine Act, 1936, diminution of competition in computing the amount of operating-differential subsidy to be granted to American-flag operators signatory to pooling agreements.

Odell Kominers for Lykes Bros. Steamship Co., Inc.
John Mason and *Allen C. Dawson* as Public Counsel.

REPORT OF THE BOARD

BY THE BOARD:

This proceeding arises out of our order of investigation and hearing dated August 8, 1951, recast April 7, 1952, in which we proposed to determine the effect of pooling and/or sailing agreements Nos. 7549, 7616, 7792, and 7796 [1] on foreign-flag competition as a factor in determining the operating-differential subsidies payable under title VI, Merchant Marine Act, 1936, as amended, 46 U. S. C. 1171 et seq. (hereinafter called "the Act"), to the subsidized operators which are parties thereto. The purpose of the investigation, as recast, was to develop and receive evidence with respect to the following issues:

1. Whether these agreements by (a) pooling or apportioning earnings, losses or traffic; (b) allotting or distributing sailings, traffic or areas; (c) restricting the volume, scope, frequency or coverage of services; or (d) any other means, create relationships such as eliminate or tend to eliminate or diminish the extent of competition among their signatories.

[1] The pooling and/or sailing agreements are:
Pooling Agreement No. 7796 between Grace Line Inc. and Chilean Line (C. S. A. V.); Sailing Agreement No. 7549 between Moore-McCormack Lines, Inc., and Swedish lines; Agreement No. 7792 (supporting Agreement No. 7795), referred to as the Colombian Coffee Pooling Agreement, an eight-party agreement; and Pooling Agreement No. 7616 between Lykes Bros. Steamship Co., Inc., and Thos. and Jas. Harrison, Ltd.

2. If so, whether the Board is required, as a matter of law, to consider under sections 603 (b) and 606 of the Merchant Marine Act, 1936, as amended, such elimination or diminution of competition in computing the amount of operating-differential subsidy to be granted to American-flag operators, signatory to such agreements.

3. Whether, if the Board is required, as a matter of law, to consider such elimination or diminution of competition, if any, in such computation, it is precluded from so doing in the case of any approved agreement which was in effect at the time the operating-differential subsidy contract was first awarded.

4. Whether, if the Board is not required as a matter of law, to consider such elimination or diminution of competition, if any, in such computation under sections 603 (b) and 606 of the Act, it should nevertheless so consider the same in the exercise of sound administrative discretion.

The issues, as recast, narrowed the scope of investigation and hearing to the confined issues presented under sections 603 (b) and 606 of the Act, which provide as follows:

SEC. 603. * * * (b) Such contract shall provide that the amount of the operating-differential subsidy shall not exceed the excess of the fair and reasonable cost of insurance, maintenance, repairs not compensated by insurance, wages and subsistence of officers and crews, and any other items of expense in which the Commission shall find and determine that the applicant is at a substantial disadvantage in competition with vessels of the foreign country hereinafter referred to, in the operation under United States registry of the vessel or vessels covered by the contract, over the estimated fair and reasonable cost of the same items of expense (after deducting therefrom any estimated increase in such items necessitated by features incorporated pursuant to the provisions of section 501 (b)) if such vessel or vessels were operated under the registry of a foreign country whose vessels are substantial competitors of the vessel or vessels covered by the contract.

SEC. 606. Every contract for an operating differential subsidy under this title shall provide (1) that the amount of the future payments to the contractor shall be subject to review and readjustment from time to time, but not more frequently than once a year, at the instance of the Commission or of the contractor. If any such readjustment cannot be reached by mutual agreement, the Commission, on its own motion or on the application of the contractor, shall, after a proper hearing, determine the facts and make such readjustment in the amount of such future payments as it may determine to be fair and reasonable and in the public interest. The testimony in every such proceeding shall be reduced to writing and filed in the office of the Commission. Its decision shall be based upon and governed by the changes which may have occurred since the date of the said contract, with respect to the items theretofore considered and on which such contract was based, and other conditions affecting shipping, and shall be promulgated in a formal order, which shall be accompanied by a report in writing in which the Commission shall state its findings of fact; * * *.

At a prehearing conference on January 18, 1954, a motion to sever and to proceed separately with hearings on Agreements Nos. 7549, 7616, 7792, and 7796 was granted by the presiding examiner.

Separate hearings on Pooling Agreement No. 7616 were conducted from March 2, 1954, through March 4, 1954. Although the exam-

iner's recommended decision, served on August 6, 1954, deals with all of the matters in which hearings was held, this present report is directed only to the specific recommended decision of the examiner in the matter of the pooling agreement between Lykes Bros. Steamship Co., Inc. (hereinafter called "Lykes") and Thos. and Jas. Harrison, Ltd. (hereinafter called "Harrison").

The examiner recommended that the Board find, under issue No. 1, that (a) the subject agreement creates relationships which do not eliminate competition between its signatories, but (b) which do tend to diminish such competition, that (c) notwithstanding, the competition met by Lykes remains substantial. The decision recommended as to issue No. 2 that the Board is required, as a matter of law, to consider under sections 603 (b) and 606 of the Act, diminution of competition in computing the amount of operating-differential subsidy. It was further recommended that no determination be made under issue No. 3, since the Lykes/Harrison agreement was not in effect when Lykes' subsidy contract was first awarded. Likewise no determination was recommended under issue No. 4 in view of the recommended findings in issue No. 2.

Exceptions to the recommended decision hereinabove described were filed by Public Counsel and by counsel for Lykes. Oral argument on the exceptions was heard by the Board on October 13, 1954. Thereafter the matter was remanded to the examiner for clarification of his finding of diminution of compensation between the pool members. By supplemental recommended decision served on October 29, 1954, the examiner found the degree of diminution to be slight.

No exceptions to the supplemental recommended decision have been filed by the parties.

On November 5, 1954, the parties were notified of our intention of taking official notice, under Rule 13 (g) of the Rules of Practice and Procedure, of reports dated October 22, 1954, and November 1, 1954, from Director, Office of National Shipping Authority and Government Aid, to the Secretary, Federal Maritime Board, relating to competitive conditions in the trade here under consideration during the first nine months of 1954. The parties have not advised us of any intentions of disputing the facts shown in these reports.

We agree generally with the examiner's recommended decision and specifically find the following:

1. Lykes holds operating-differential subsidy agreement contract No. MCc-62431 with the Board. That agreement, executed in 1937 and inoperative during World War II, was resumed on December 29, 1949, effective as of January 1, 1947, and includes Lykes' service Line B-1 (Trade Route No. 21), described in the contract as follows:

Between a United States Gulf port or ports (west of but not including Gulfport, Mississippi) and a port or ports on the West Coast of the United Kingdom, with the privilege of calling at Irish ports and with the further privilege of calling at Tampa, Port Tampa, Boca Grande, and at ports in the West Indies and Mexico.

2. Lykes, along with Harrison, a British shipping company, is party to a pooling agreement providing for equal participation in revenue and traffic from designated United States Gulf ports to Mersey ports in the United Kingdom.[2] The other pool member, Harrison, has served the trade from the Gulf to Mersey ports since shortly after the United States Civil War and owns 41 vessels which are comparable to those of Lykes.

3. The other lines in the trade besides Lykes and Harrison are Brocklebank (Cunard) Line (hereinafter called "Brocklebank"), Ropner Line (hereinafter called "Ropner"), both British, and States Marine Corporation of Delaware (hereinafter called "States Marine"), an American line operating foreign-flag vessels in this trade. Prior to 1954, the combined annual sailings of these lines did not exceed 16 as compared with the pool sailings ranging from 39 to 59 per year. Two United States-owned lines, Waterman Steamship Corporation (hereinafter called "Waterman") and States Marine, have tried unsuccessfully to penetrate the trade, although neither line has applied for admission to the pool. During the first nine months of 1954, carryings of non-pool, foreign-flag vessels have substantially increased. Reports from the Director, Office of National Shipping Authority and Government Aid, of which we may take official notice, reveal, inter alia, the following increase in sailings as compared with preceding years:

[000 omitted]

Year	Lykes Harrison Pool						Foreign Flag Competing Lines[3]	
	Total		Lykes		Harrison			
	Sailings	Tons	Sailings	Tons	Sailings	Tons	Sailings	Tons
1950	46	268.9	23	128.7	23	140.2	9	12.7
1951	59	363.7	31	192.5	28	171.2	4	11.2
1952	46	299.0	22	138.3	24	160.7	11	11.9
1953	39	205.1	19	110.7	20	94.4	16	45.0
1954 (9 mo.)	41	(4)	21	(4)	20	(4)	23	114.5

[2] The agreement provides for cooperation in the transatlantic trade to the United Kingdom ports of Liverpool, Garston, Birkenhead, Manchester and Runcorn from the U. S. A. Gulf ports of Tampa, Port Tampa, Boca Grande, Florida, New Orleans, Louisiana, Lake Charles, Louisiana, Orange, Texas, Beaumont, Texas, Port Arthur, Texas, Port Neches, Texas, Houston, Texas, Galveston, Texas, Texas City, Texas, Freeport, Texas, Corpus Christi, Texas, and Brownsville, Texas. It will be noted that ports embraced in the pooling agreement are not identical with the ports described in Lykes' Line B-1 (Trade Route No. 21).

[3] Ropner in all years 1950–54; Cunard Brocklebank since November 1953; Gulf Shipping Lines and U. S.-Europe Merchant Line in 1951 only.

[4] Not yet available.

4. The trade encompassed by the pooling agreement is governed by the Gulf/United Kingdom Conference Agreement No. 161, of which Lykes, Harrison, States Marine, Ropner, and Brocklebank are members.[5]

5. The present pooling agreement was preceded by similar agreements. After World War I, the predominant lines in the Gulf/Mersey trade were Harrison and Leyland, largely through the nationalistic tendency of British consignees to instruct routing on British vessels. The United States Shipping Board line was unable to attract more than 25 to 30 percent of the total traffic. The keen competition led to blanketing of sailings, uneconomical calls at numerous ports, and overtonnaging of the berth. In 1932, agreement was reached between the Shipping Board and the British lines to alternate monthly sailings at Sabine River ports to prevent wasteful competition. In the meantime, Lykes, as agent for the Shipping Board, attempted but failed to reach an agreement with European lines serving the Gulf because the latter offered a percentage participation to the United States flag line substantially below 50 percent. Finally, in 1933, Lykes, as agent, was able to obtain a pooling agreement with Harrison and Leyland whereby Lykes would receive 50 percent of the traffic and revenue and the two British lines the remainder. The result was that Lykes obtained a greater share of the traffic, and all three lines achieved greater operating economies. The latter agreement (No. 2218) was approved by the Shipping Board under section 15 of the Shipping Act, 1916, on February 8, 1933. A subsequent and similar agreement (No. 2401), approved on July 18, 1933, continued in force without change (except for the purchase by Lykes of the service run by the United States Shipping Board line and the purchase of Leyland by Harrison) until terminated in 1939 after the outbreak of World War II.

6. The pooling agreement here under consideration (No. 7616) was executed on June 24, 1947, filed with the Maritime Commission on July 28, 1947, and approved under section 15 of the Shipping Act, 1916, on July 1, 1948. Agreement No. 7616 differs from the prior agreement (2401) primarily in its provisions covering carriage of parcel lots of bulk cargo. It is self-renewing from year to year, subject to cancellation on six months notice, and covers the eastbound traffic of Lykes and Harrison, with enumerated exceptions, from

[5] Complete membership of Conference Agreement No. 161 is as follows: The Cunard Steam-Ship Company Limited; Thos. & Jas. Harrison Limited (Harrison Line); Larrinaga Steamship Co., Ltd. (Larrinaga Line); Lykes Bros. Steamship Co., Inc. (Dixie-U. K. Line); (Ropner Line)—Joint Service of Sir R. Ropner & Co. (Management) Ltd.; The Pool Shipping Company Limited; The Ropner Shipping Company Limited (States Marine Lines)—Joint Service of States Marine Corporation, States Marine Corporation of Delaware. Waterman is not presently a member.

designated United States Gulf ports to United Kingdom Mersey ports.

7. Under the pooling agreement freight revenues less carrying charges are to be placed in a money pool and are to be distributed 50 percent to Lykes and 50 percent to Harrison.[6] Although there is a provision for quarterly distribution of the money pool, no money actually changes hands. Joint allocation is made each month by a Pool Committee composed of representatives of the carriers to the end that the carryings and revenue of each will be approximately on the agreed fifty-fifty basis. The parties, in addition, exchange information as to expected traffic movements and schedule sailings in order to avoid conflict and duplication of loading and discharge ports, and cargo manifests of each line are submitted to an independent agency for purposes of recording and computing the carryings of each line. When one member has carried a greater proportion of cargo than another, the pool gives a larger vessel allocation to the undercarrying member.

8. The lines solicit for this trade as independently and as intensely as for trades outside of the pool. The solicitation staff of Lykes outnumbers Harrison's in the United States by five to one. Harrison's staff in England, however, outnumbers Lykes by about twenty to one. Although cargo is not booked by either party for the other, in the event that one party has booked cargo for which a ship cannot be provided, that party will suggest to the shipper that its cargo be carried on a vessel of the other. Cargo-booking contracts of either line apply on ships of the other.

9. The pool results in increased frequency of service at principal ports, adequate coverage at lesser ports, greater share for Lykes of the available traffic, including high-rated cargo, and increased earnings by the carriers from maximum utilization of vessel space, better balanced cargoes, elimination of wasteful calls at smaller ports, and reduced voyage turnaround. Additionally, the pool has tended to break down the traditional preference of British shippers for British-flag lines. Lykes, under the pooling agreement, has carried 50 percent of cotton moving from the Gulf to the United Kingdom under the control of British Government procurement agencies, whereas in the absence of the pool, Lykes would probably have been excluded from participation in such shipments. Although control over these shipments has recently been released by the British Government to private British purchasers, Lykes continues to participate in the trade to an extent not possible without the pooling agreement.

[6] Carryings and revenue derived from non-pool ports are not subject to the agreement.

10. Since the freight rates in the Mersey trade are comparable to the rates in Lykes' service B-2 from the Gulf to London and continental ports,[7] in which there is no pool, it is clear that the pooling agreement has neither an adverse nor a beneficial effect on rates. All members of the Gulf/United Kingdom Conference who qualify as cotton carriers may vote on freight rates.

11. The pooling agreement, in the following manner, has the effect of diminishing foreign-flag competition within the meaning of section 603 (b) of the Act:

(a) Operational economies resulting from the pooling agreement present formidable competition for non-member carriers;

(b) During the life of the present agreement, Harrison cannot receive more than 50 percent of the revenue derived from the combined carryings of both lines;

(c) Lykes and Harrison, during periods in which no other line or an insufficient number of other lines qualify as cotton carriers,[8] have the *power*, in the Gulf/United Kingdom Conference, to control tariff rates on cotton, the most important commodity in the trade;

(d) In the absence of a pooling agreement, the participation of Lykes in movements in the trade would be substantially reduced. We find that Harrison has refrained, because of the pooling agreement, from obtaining the amount of cargo which it could otherwise have obtained. In the past this restraint has been manifested by Harrison's cooperation in refraining from taking steps to preclude Lykes from obtaining cargo controlled by British procurement agencies.

12. Competition with foreign lines has not been eliminated in the Gulf/Mersey trade by virtue of the agreement for the following reasons:

(a) Either line, if dissatisfied with the other's carryings and efforts to solicit cargo, may free itself of the unsatisfactory member by withdrawal from Agreement No. 7616 on six months' notice;

(b) Each party solicits cargo as vigorously and as independently for this trade as for its other trades;

[7] Line B-2 covers the route between Mobile (other east Gulf ports as traffic offers) to Havre, London, Antwerp, and Rotterdam, returning east Gulf, with privilege of calling at Baltic ports.

[8] Conference Agreement No. 161, clause 4, provides that only those lines providing regular services to the ports of Liverpool and Manchester shall be entitled to vote on freight rates on cotton and cotton linters.

(c) While the pool remains formidable competition to other foreign-flag lines, the recent release of control of cargo movements by British Government procurement agencies to private British buyers created new opportunities for British-flag lines other than Harrison to obtain a larger participation in such movements. While participation of lines by vessels, other than British lines, in movements of British-controlled cargo has been hampered by traditional British nationalism, no such obstacle is presented to British-flag non-pool vessels;

(d) As hereinabove stated, carryings of non-pool, foreign-flag vessels have substantially increased during the first nine months of 1954 to a combined total of 23 sailings as contrasted with the previous annual high of 16 sailings. The data, while incomplete as to tonnage lifted, indicate increased competition in the trade.

13. The existence of the pooling agreement does not affect Lykes' need for cost-parity with foreign-flag competitors. It further appears, from the evidence adduced at the hearing, that Lykes could not long operate in this trade on a long-range basis without subsidy and that the termination of subsidy might well result in cancellation of the pooling agreement. Lykes' president testified that Harrison might well seek to drive Lykes out of the trade if Lykes should be put to the disadvantage of unsubsidized operation. We infer from this testimony that the pool only exists while substantial competition between Lykes and Harrison remains; that the pool serves only to partially restrain, for economic advantage in operation, the continuing, substantial competition between the parties.

14. The Maritime Commission was aware of the pre-war pool (Agreement No. 2401) when, in 1937, it first awarded a subsidy contract to Lykes. The present pooling agreement (No. 7616) was not then in existence. It was in existence, however, when the resumption subsidy contract was executed.

15. When the present pooling agreement was before the Maritime Commission for approval under section 15 of the Shipping Act, 1916, the Commission dealt not only with the questions involved under that section, but also considered the implications and effect, under the Act, of approving a pooling agreement to which a subsidized operator was a party. In fact, the Commission approved the agreement only after it had sought and received advice from its General Counsel that the agreement was not unlawful *per se* under the Act.[9] Actually, the consideration of this agreement led to the formulation and incorpora-

[9] Minutes of United States Maritime Commission, July 1, 1948. One Commissioner dissented on the ground that the agreement was contrary to the purposes and policy of that act.

tion of Article II–18 (c) in all operating-differential subsidy agreements.

16. On at least four occasions, the subject agreement was brought to the attention of congressional committees in the House and Senate concerned with the merchant marine, and no adverse comment was made.

From the foregoing statement of facts we reach the identical conclusions arrived at by the examiner, restated as follows:

Issue No. 1. Relationships have been created which do not eliminate competition between the signatories to Agreement No. 7616, but which do tend slightly to diminish competition between the signatories thereto. Notwithstanding the diminution, the competition met by Lykes remains substantial.

Issue No. 2. The Board is required as a matter of law to consider, under sections 603 (b) and 606 of the Act, diminution of competition in computing the amount of operating-differential subsidy.

In view of our conclusions on issue No. 2, it is unnecessary to consider issue No. 4. Since the agreement was not in effect when Lykes' subsidy was first awarded, it is unnecessary to consider issue No. 3.

LYKES' EXCEPTIONS

On September 13, 1954, Lykes filed a memorandum primarily supporting, but partially excepting to the recommended decision. Lykes excepted to the conclusion of the examiner on issue No. 2 on the grounds that:

(1) The examiner's recommendation that consideration must be given to diminution of competition in computing the subsidy rate penalizes Lykes for following a policy previously laid down by the Shipping Board;

(2) Recomputation of subsidy rates must be based on cost-parity alone;

(3) The recalculation proposed is unauthorized by the act;

(4) The Government is precluded under section 606 from recomputing the subsidy under the circumstances, since the pooling agreement was in effect when the subsidy contract was awarded;

(5) The examiner's recommended decision runs contrary to the policy of encouraging subsidized operators to increase efficiency and improve service.

Lykes excepts to the conclusion on issue No. 1 on the ground that the examiner erroneously found diminution of competition.

Lykes also excepted generally to the examiner's recommended findings insofar as those findings differed from Lykes' proposed findings, and additionally that having approved of the pooling agreement, the Government should be estopped from now "questioning its own actions."

We reject with little discussion Lykes' first and fourth bases for exception to the examiner's conclusions on the second issue. First, actions and policies of the Shipping Board prior to passage of the Act do not enter into consideration of matters arising under that statute. Considering the fourth basis for exception, we think that the examiner correctly found the 1937 subsidy contract and the resumption agreement executed in 1949 to be one agreement. The intent of the parties in this respect is abundantly evident from an examination of the instrument executed in 1949, which provides, in pertinent part, as follows:

> NOW, THEREFORE, in consideration of the premises, the parties hereto agree that effective January 1, 1947 * * * the Subsidy Agreement, as amended, is hereby *amended* as follows: * * *. (Emphasis added.)

Contrariwise, the pooling agreements are distinct and separate documents, in spite of their similar content. The pre-war agreement, No. 2401, was *terminated* by the parties and *cancelled* by the Maritime Commission on October 17, 1939, at their request. The present agreement, No. 7616, does not refer to earlier agreements or purport to be other than an independent and original agreement between the parties.

The second and third bases for exception to the conclusions in the second issue are in substance the same; that is, that section 606 of the Act does not contemplate or authorize a recalculation of operating-differential subsidy rates where foreign-flag competition is diminished below the level upon which the subsidy contract was based.

We agree with the examiner that diminution in competition must be considered in computing the amount of subsidy to be granted. Section 606 of the Act provides for periodic review of future payments under the contract and readjustment thereof, where required, in the event of changes "with respect to the items theretofore considered and *on which such contract was based* (as described in section 603 (b)) *and other conditions affecting shipping* * * *." (Emphasis supplied.) The purpose of providing cost-parity is to enable the United States flag lines to meet foreign competition, and the existence and degree of such competition are considerations basic to the subsidy contract. Certainly where foreign-flag competition is eliminated, the basis for the award disappears. So, too, where competition has diminished from the level existing upon computation of the award, the basis for the award may be affected to the extent of the

change in competition. The factors set out in section 603 (b) which affect and measure the subsidy award are not confined to necessary visible differences in operational cost between the United States-flag operator and those of a foreign competitor but are broader and more flexible in conformity with the purposes and policies of the Act. Efficiency in vessel utilization, foreign governmental aid, cargo preferences, and other factors which depend in varying degree on the kind and/or amount of foreign-flag competition are considered prior to grant of the award; changes in these factors, as a result of diminished competition, may alter the basis for the award and must, under section 606, be considered in review. Additionally, section 606, by requiring review of future payments in respect to "* * * other conditions affecting shipping * * *," implicitly contemplates consideration of conditions not existing at the time of execution of the subsidy contract or necessarily basic to the contract, at the time of execution. Whether the diminution of competition here must be reflected in the amount of subsidy award payable, we do not here determine, nor would such a determination be possible from the record before us.

We now come to Lykes' fifth basis for exception to the conclusions of the examiner on the second issue. Lykes there argues that recalculation of subsidy awards on the basis of diminished competition violates the policy of encouraging increased efficiency in subsidized operations. The Act itself furnishes a complete answer to that contention. Section 606 *requires* operational efficiency in order to minimize the public expenditure necessary to enable a United States-flag line to compete with foreign lines. Increased efficiency is encouraged, as a matter of policy, for the same reasons. Further, we interpret sections 606 and 603 (b) as *requiring* us to consider diminution of competition and the effects thereof in review of subsidy payments, for the same public considerations, among others. Accordingly, we find no inconsistency between our policy and the examiner's recommended decision.

Finally, Lykes argues that the express Maritime Commission approval of Agreement No. 7616 under section 15 of the Shipping Act, 1916, precludes us from now finding a diminution of competition resulting from that agreement.

Lykes further contends that the approval of Pooling Agreement No. 7616 by the Maritime Commission in 1948 under section 15 of the Shipping Act, 1916, and an implicit approval of the agreement under the subsidy provisions now estop the Government from reviewing the amount of subsidy payments. We consider as a complete answer to Lykes' contentions the facts that (a) the Maritime Commission's ex-

688-650 O - 63 - 37

press order of approval was issued only under section 15 of the Shipping Act, 1916, and (b) the Commission's implicit approval of the pooling agreement, if any, was limited to the lawfulness *per se* of the agreement and did not extend to the practices thereunder.

EXCEPTIONS OF PUBLIC COUNSEL

Public Counsel filed exceptions to the examiner's recommended decision on the ground that:

(1) The examiner erred in finding that the pooling agreement did not eliminate competition between its signatories; and

(2) The examiner erred in holding that the question of whether or not the subject agreements comport generally with the purposes and policy of the Act, is foreclosed in the investigation.

Public Counsel's first exception reaches the fundamental issue in this proceeding, the question of the effect of the pooling agreement on competition between Lykes and Harrison. Public Counsel contends that the agreement between the parties is a substitute for competition, necessarily destroys or diminishes competition below a substantial level, and does not meet the standards for competition prescribed in *Review of Grace Line Subsidy, Route 2*, 4 F. M. B. 40 (1952).

Public Counsel does not contend that shipping pools, in essence, are unlawful under the Act or that any such pool necessarily eliminates competition between its signatories and in the trade concerned, nor do we take his assertion that "pooling agreements are bald efforts to substitute monopoly for competition" to be so intended; in oral argument counsel has stated his belief that there are carrier pools which do not reduce or eliminate competition. He confines his objections, rather, to the effect of this particular agreement on competition between its member carriers.

We agree with Public Counsel that pooling agreements are not unlawful *per se* under the Act or under the Shipping Act, 1916, although pooling agreements necessarily tend to reduce "competition" as ordinarily defined. We do not agree that Agreement No. 7616 diminishes competition between the parties below a substantial level. Competition, in the usual sense, has three elements: price, quality, and service.[10] Competition in this sense has been defined as: "The effort of two or more parties, acting independently, to secure the custom of

[10] *Mississippi Valley Hardwood Co. et al.* v. *McClanahan, Dist. Atty., et al.*, 8 F. Supp. 388 (W. D. Tenn., 1934).

a third party *by the offer of the most favorable terms* * * *."[11] (Emphasis supplied.)

It is apparent that the concept of competition as applied in decisions dealing with antitrust law violations and unfair trade practices cannot be made applicable to shipping practices under the Act, which contemplates the continued existence of price regulation by steamship conferences as well as other practices which, absent enabling legislation, would violate Federal antitrust laws. "Competition" under the Act necessarily contemplates a less than full, free, and unrestrained struggle for custom, since price regulation, the antithesis of "competition" as usually defined, is present. We are of the opinion that the word "competition", as applied in the Act, must be given a broader meaning within the structure of the Act and consistent with its purposes. Competition in this sense is an elastic term not readily categorized or restricted in application. As we stated in *Review of Grace Line Subsidy*, *Route 2*, *supra*, pages 44–45:

> Congress has not provided a definition of the term "substantial competition" as it applies to foreign-flag operators. * * * The term "foreign-flag competition" has similarly not been given a restricted or definite meaning, nor did Congress direct that the administrators of the Act should crystallize its meaning in the manner in which they were directed to do with respect to the words "net earnings" and "capital necessarily employed," in section 607 (d) of the Act. * * * For those words, like the words, "interstate commerce" and "navigable waters," used in the Constitution of the United States, should retain that degree of flexibility that will permit the administrators of the Act to carry out the general policies of Congress with consideration for the exigencies of the day.

Accordingly, we believe that the finding of substantial competition, as above discussed, in the Gulf/Mersey trade is fully justified from the facts outlined in paragraph 12, *supra.*

The examiner did not err in holding that the question of whether or not the subject agreements comport generally with the purposes and policy of the Act is foreclosed in this investigation. The scope of inquiry was outlined in the notice of investigation given on August 8, 1951. Further broadening of the issues would do unwarranted violence to the notice requirements of the Administrative Procedure Act.

Contentions of the parties or requested findings not dealt with in this report have been given consideration and found not related to material issues or not supported by the evidence.

Investigation is discontinued.

By order of the Board.

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

[11] *Lipson* v. *Socony Vacuum Corporation*, 87 F. (2d) 265 (CCA 1st, 1937).

FEDERAL MARITIME BOARD

No. S–27 (Sub. 4)

INVESTIGATION OF AGREEMENT No. 7796 (GRACE-C. S. A. V. POOLING AGREEMENT)

Submitted August 31, 1954. Decided December 15, 1954

Pooling Agreement No. 7796 between Grace Line Inc. and Chilean Line (C. S. A. V.) found not to create relationships such as eliminate or diminish competition between its signatories.

W. F. Cogswell and *E. Russell Lutz* for Grace Line Inc.
John Mason and *Edward Aptaker* as Public Counsel.

REPORT OF THE BOARD

By the Board:

This proceeding arises out of our order of investigation and hearing dated August 8, 1951, recast April 7, 1952, in which we proposed to determine the effect of pooling and/or sailing agreements Nos. 7549, 7616, 7792, and 7796 [1] on foreign-flag competition as a factor in determining the operating-differential subsidies payable under title VI, Merchant Marine Act, 1936, as amended, 46 U. S. C. 1171 et seq. (hereinafter called "the Act"), to the subsidized operators which are parties thereto. The purpose of the investigation, as recast, was to develop and receive evidence with respect to the following issues:

1. Whether these agreements by (a) pooling or apportioning earnings, losses or traffic; (b) allotting or distributing sailings, traffic or areas; (c) restricting the volume, scope, frequency or coverage of services; or (d) any other means, create relationships such as eliminate or tend to eliminate or diminish the extent of competition among their signatories.

2. If so, whether the Board is required, as a matter of law, to consider under sections 603 (b) and 606 of the Merchant Marine Act, 1936, as

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amended, such elimination or diminution of competition in computing the amount of operating-differential subsidy to be granted to American-flag operators, signatory to such agreements.

3. Whether, if the Board is required, as a matter of law, to consider such elimination or diminution of competition, if any, in such computation, it is precluded from so doing in the case of any approved agreement which was in effect at the time the operating-differential subsidy contract was first awarded.

4. Whether, if the Board is not required as a matter of law, to consider such elimination or diminution of competition, if any, in such computation under sections 603 (b) and 606 of the Act, it should nevertheless so consider the same in the exercise of sound administrative discretion.

The issues, as recast, narrowed the scope of investigation and hearing to the confined issues presented under sections 603 (b) and 606 of the Act, which provide as follows:

Sec. 603. * * * (b) Such contract shall provide that the amount of the operating-differential subsidy shall not exceed the excess of the fair and reasonable cost of insurance, maintenance, repairs not compensated by insurance, wages and subsistence of officers and crews, and any other items of expense in which the Commission shall find and determine that the applicant is at a substantial disadvantage in competition with vessels of the foreign country hereinafter referred to, in the operation under United States registry of the vessel or vessels covered by the contract, over the estimated fair and reasonable cost of the same items of expense (after deducting therefrom any estimated increase in such items necessitated by features incorporated pursuant to the provisions of section 501 (b)) if such vessel or vessels were operated under the registry of a foreign country whose vessels are substantial competitors of the vessel or vessels covered by the contract.

Sec. 606. Every contract for an operating differential subsidy under this title shall provide (1) that the amount of the future payments to the contractor shall be subject to review and readjustment from time to time, but not more frequently than once a year, at the instance of the Commission or of the contractor. If any such readjustment cannot be reached by mutual agreement, the Commission, on its own motion or on the application of the contractor, shall, after a proper hearing, determine the facts and make such readjustment in the amount of such future payments as it may determine to be fair and reasonable and in the public interest. The testimony in every such proceeding shall be reduced to writing and filed in the office of the Commission. Its decision shall be based upon and governed by the changes which may have occurred since the date of the said contract, with respect to the items theretofore considered and on which such contract was based, and other conditions affecting shipping, and shall be promulgated in a formal order, which shall be accompanied by a report in writing in which the Commission shall state its findings of fact; * * *.

At a prehearing conference on January 18, 1954, a motion to sever and to proceed separately with hearings on Agreements Nos. 7549, 7616, 7792, and 7796 was granted by the presiding examiner.

Separate hearing on Pooling Agreement No. 7796 was held on March 31, 1954. Although the examiner's recommended decision, served on August 6, 1954, deals with all of the pooling/sailing agreements on which hearing was held, this present report is directed only to the specific recommended decision of the examiner in the matter of Pooling Agreement No. 7796.

The examiner recommended that we find, under issue No. 1, that relationships have been created which do not eliminate or diminish competition between the signatories to Agreement No. 7796 and that the Board specifically find the following, in addition to the ultimate fact:

1. *The parties to the pool* are Grace Line Inc. (hereinafter "Grace") and Compania Sud Americana de Vapores (hereinafter "Chilean Line"). Grace operates a subsidized service on Line A, Trade Route 2 (U. S. Atlantic ports/west coast of South America). Its operating-differential subsidy contract was awarded in 1937; operations were suspended during World War II, and were resumed on January 1, 1947. Its contract provides for 50–52 sailings with combination passenger and freight vessels, and 13–26 sailings with cargo vessels.

2. Its combination service is weekly between New York and Arica, Antofagasta, Charnal, Valparaiso, and San Antonio, Chile, and at several ports in the Canal Zone, Colombia, Ecuador, and Peru, with occasional calls at other ports. Its freighters make two sailings per month between Boston, New York, Baltimore, and Norfolk, and Tocopilla, Antofagasta, Coquimbo, and Valparaiso, Chile, and several ports in the Canal Zone, Colombia, and Peru, with occasional calls at other ports.

3. Chilean Line has operated in the trade since before 1920. It averages two sailings per month between New York, Philadelphia, and Baltimore, and Arica, Tocopilla, Antofagasta, Coquimbo, Valparaiso, San Antonio, Talcahuano, San Vincente, and Iquique, Chile, and several ports in Colombia, Ecuador, and Peru, with occasional calls at other ports. Four of its C–2 ships also serve European ports regularly. It has ample capacity to carry more than 50 percent of the total kilo tonnage from United States Atlantic ports to Chile and still have sufficient space for its European carryings.

4. *The other lines in the trade*, providing berth services, operate foreign flag vessels—the Coldemar Line, Grancolombiana, West Coast Line, and Isbrandtsen Company, Inc. (foreign-flag time charters). Of these, only the West Coast Line provides berth service to Chilean ports, with a sailing every two weeks covering the same general area as Grace and Chilean Line. Northbound from Chile, an industrial

carrier and Isbrandtsen, occasionally, carry full cargoes of ore in foreign-flag vessels.

5. *Participation of lines in the trade.* The pool covers the trade between United States North Atlantic ports and Chile. During the period 1948–1953, the percentage of southbound liner cargo moving to Chile ranged from 28 to 48 percent of the total southbound movement on Trade Route No. 2. Northbound from Chile, the percentages ranged from 47 to 55. During the same period the relative participation of berth services in cargo to and from Chile was as follows:

TABLE I

	Sailings (1948–1953)	*Percent of Cargo carried*
Grace		
Southbound	64–70	45–56
Northbound	65–72	53–78
Chilean Line		
Southbound	24–28	30–43
Northbound	24–27	10–19
West Coast Line*		
Southbound	25–30	12–22
Northbound	24–26	10–23

*Since the inception of the pool, West Coast Line has improved its service somewhat, and has increased its over-all participation in the trade.

Grace's carryings of copper northbound during the same period were between 75 and 83 percent of the total, compared with 13 to 22 percent carried by Chilean Line.

6. *Prior pooling agreements* were formerly had by Grace with West Coast Line (1937) and Chilean Line (1941), apportioning revenue on southbound cargo. They were terminated due to World War II. Grace listed the former pool in its application for an operating-differential subsidy filed in 1937. Grace's share in the pool with Chilean Line was 75 percent.

7. *The reason Grace entered the present pool* was to mitigate the effect of controls over import cargo established by the Chilean Government beginning in 1949. These controls were designed to promote the growth of Chilean shipping lines and to alleviate the dollar shortage in Chile by encouraging the use of Chilean-flag carriers rather than United States-flag lines. Control was exercised by: (a) governmental scrutiny of import licenses, in which importers were required to identify the carrier which they intended to patronize and to specify whether payment was to be made in Chilean or foreign currency; and (b) the requirement by the principal Chilean bank, which is controlled by the Government, that letters of credit covering imports contain the condition that the cargo involved must be transported on Chilean Line

vessels. These practices made it possible for the Government effectively to direct cargoes to Chilean Line. Whereas in 1950 a substantial number of commodities were on the "free list", i. e., free from control, now all commercial imports are subject to licensing. The same is true as to exports of copper. Negotiations between representatives of the Governments of the United States and of Chile failed to bring about a change in the above-mentioned policies and practices, whereupon Grace concluded it was to its best interests to enter into the pooling agreement.

8. *The present pooling agreement* (No. 7796) was entered into in October 1950, and on July 6, 1951, was approved by the Board under section 15 of the Shipping Act, 1916, and by the Maritime Administrator under Article II–18 (c) of Grace's subsidy agreement. It provides for a pooling of revenues (less handling charges) derived from cargo carried between North Atlantic ports and Chilean ports. It requires maintenance of at least 25 southbound sailings per annum, spaced not more than 25 days apart; and at least 15 northbound sailings, spaced not more than 30 days apart. No cooperative scheduling of sailings is required.

9. The southbound cargo subject to the pool includes all cargo, with certain exceptions,[2] shipped under local bills of lading from Atlantic ports to Chile (not including cargo destined to Bolivia), whether handled direct or for transshipment. Northbound, the pool covers copper only.

10. Southbound pool revenues are to be divided equally; northbound, to be divided generally in the same proportion as actual copper carryings by the lines. If either party fails to provide the agreed minimum service, its share of the pool shall be reduced by stipulated amounts.

11. The agreement is to continue in force until 1960 and thereafter from year to year, cancelable on 3-months' notice. Cancellation is also provided for upon failure to maintain service and so forth.

12. *Operation of the pool.* The agreement has resulted in the payment of moneys by Grace to Chilean Line in every quarterly period since it was executed in 1950. To the end of 1953, the payment has averaged approximately 14 percent of Grace's gross revenues from southbound cargo subject to the pool, and about seven percent on the northbound pool. For the entire period of the pool, the payments with respect to both southbound and northbound operations under the pool have amounted to 11 percent of Grace's gross revenue.[3]

[2] Excluded are explosives; specie, gold and silver bullion or coins, bulk oil, mail, and passengers' baggage and automobiles.

[3] In 1953 the total payments by Grace amounted to $423,791.

13. There is no provision in the agreement which interferes with Grace's operations based on its free business judgment as a private steamship operator under the United States flag. There have never been any consultations, arrangements, or understandings regarding spacing or scheduling of sailings, either northbound or southbound, between Grace and Chilean Line. There is no joint solicitation or advertising or any joint agency arrangement.

14. *Effect of the pool on solicitation.* Grace actively solicits and seeks all types of cargo in the trade. The establishment of the pool has not resulted in a lessening of its solicitation activity. It does not solicit cargo for the Chilean Line, nor has it ever diverted shut-out cargo to that line. Chilean Line has a large staff in Chile, and their representatives are in active touch with the trade there as well as in New York. The management is in constant touch on a personal basis with Chilean Government authorities.

15. *Benefits of the pool.* The agreement has resulted in the ability of Chilean importers to obtain import licenses designating Grace as the carrier as freely as those designating Chilean Line. Immediately prior to the pool, the import control authority in Chile selectively processed import licenses so as to secure for Chilean Line a greater proportion of higher-rated cargoes. Under the pooling agreement Grace has succeeded in recouping more of this traffic. Free selection of carriers is permitted to large private firms with a general import license, and to certain large governmental enterprises in Chile which are substantial importers. It is Grace's judgment that in the absence of the pooling agreement, this freedom of choice would be withdrawn and the patronage of these importers would go to Chilean Line exclusively.

16. *The effect of the pool on Grace's subsidy.* Counsel for Grace state that without subsidy Grace would not be able to operate at all. Comparison of annual costs of operating C–2 freighters under United States and Chilean flags for the year 1951 indicates an excess in United States costs over Chilean in the amount of $187,583. Grace estimates that its subsidy would have been greater, at least through 1951 (the last year on which rates have been agreed to) had the Chilean Line been eliminated as a competitor. The pooling agreement imposes no requirement of service upon Grace which is inconsistent with its obligation under its operating-differential subsidy contract. The minimum requirements set up by the agreement do not affect the frequency or volume of Grace's service as specified in its subsidy contract.

17. *The basic facts* derived from the foregoing findings 1 to 16, inclusive, under issue 1, are: (a) The concessions made to Chilean

Line in the subject agreement were due to restrictions imposed by the Chilean Government; (b) Grace had no alternative means, other than by this agreement, of preserving its position in the trade; (c) the agreement has not caused any relaxation in Grace's solicitation, Chilean Line has not relaxed its competition vis-a-vis Grace, and competition by Chilean Line continues to be substantial; (d) the agreement has had no effect with respect to the operational aspects of Grace's service, and therefore has not affected the volume or frequency of service as specified in its subsidy contract; (e) the agreement affects only the earnings of Grace; and (f) the agreement has resulted in no diminution of competition.

No exceptions have been filed to the recommended decision.

On consideration of all of the facts and circumstances of record, the Board adopts as its own the examiner's findings and conclusions of fact as to issue No. 1. While we consider that the concept of competition inherent in decisions dealing with antitrust law violations and unfair trade practices is violated by the terms of Pooling Agreement No. 7796 and the practices thereunder, we do not consider that the agreement or its effects in any way creates relationships tending to diminish competition as necessarily defined under the Act. As we stated in *Lykes-Harrison Pooling Agreement*, 4 F. M. B. 515, 527:

> It is apparent that the concept of competition as applied in decisions dealing with antitrust law violations and unfair trade practices cannot be made applicable to shipping practices under the Act, which contemplates the continued existence of price regulation by steamship conferences as well as other practices which, absent enabling legislation, would violate Federal antitrust laws. "Competition" under the Act necessarily contemplates a less than full, free, and unrestrained struggle for custom, since price regulation, the antithesis of "competition" as usually defined, is present. We are of the opinion that the word "competition", as applied in the Act, must be given a broader meaning within the structure of the Act and consistent with its purposes. Competition in this sense is an elastic term not readily categorized or restricted in application.

See also *Review of Grace Line Subsidy, Route 2*, 4 F. M. B. 40 (1952).

In view of our finding and conclusion as to issue No. 1, it is unnecessary for us to consider issues Nos. 2, 3, and 4 outlined in our order of investigation and hearing, as recast.

The investigation is discontinued.

By order of the Board.

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

FEDERAL MARITIME BOARD

No. 759

ANGLO CANADIAN SHIPPING CO., LTD., ET AL.

v.

MITSUI STEAMSHIP COMPANY, LTD.

Submitted December 13, 1954. Decided December 15, 1954
Issued January 27, 1955

Motion to dismiss complaint of Anglo Canadian Shipping Co., Ltd., et al., members of Pacific Coast European Conference, under sections 16 and 17 of the Shipping Act, 1916, as amended, granted. The making and quoting, by a carrier, of rates lower by fixed differential than the rates of competing carriers is not a violation *per se* of section 16 or section 17 of the Shipping Act, 1916, as amended, nor is the payment of "excessive" fees to freight forwarders, without more, a violation of those sections.

Motion to dismiss petition of Anglo Canadian Shipping Co., Ltd., et al., members of Pacific Coast European Conference, under section 19 of the Merchant Marine Act, 1920, for investigation of alleged differentially lower rate making by Mitsui Steamship Company, Ltd., and for the issuance of section-19 rules, if warranted, denied.

Jerome A. Strauss and *Alan F. Wohlstetter* for Mitsui Steamship Company, Ltd.

Leonard G. James for Anglo Canadian Shipping Co., Ltd., et al.

John Mason as Public Counsel.

REPORT OF THE BOARD ON MOTION TO DISMISS COMPLAINT AND TO DISMISS PETITION FOR RULES

Complainants-petitioners, members of Pacific Coast European Conference and parties to Agreement FMB No. 5200 (hereinafter "the Conference"), by combined complaint and petition filed on July 12,

1954, allege violation of sections 16 and 17[1] of the Shipping Act, 1916, as amended (hereinafter "the 1916 act"), on the part of respondent Mitsui Steamship Company, Ltd. (hereinafter "Mitsui"), a Japanese-flag line, in quoting rates differentially lower than published conference rates and in paying excessive fees to freight forwarders.

The Conference seeks an order requiring Mitsui to desist from said violations and to pay the Conference reparation for damages caused thereby. The Conference further petitions the Board to investigate the practices of Mitsui and to issue, pursuant to section 19 of the Merchant Marine Act, 1920[2] (hereinafter "the 1920 Act"), such rules and regulations as may be necessary in the premises.

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[1] SEC. 16. 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.

That it shall be unlawful for any common carrier by water, or other person subject to this Act, either alone or in conjunction with any other person, directly or indirectly—

First. 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.

Second. To allow any person to obtain transportation for property at less than the regular rates or charges then established and enforced on the line of such carrier by means of false billing, false classification, false weighing, false report of weight, or by any other unjust or unfair device or means.

Third. To induce, persuade, or otherwise influence any marine insurance company or underwriter, or agent thereof, not to give a competing carrier by water as favorable a rate of insurance on vessel or cargo, having due regard to the class of vessel or cargo, as is granted to such carrier or other person subject to this Act.

Whoever violates any provision of this section shall be guilty of a misdemeanor punishable by a fine of not more than $5,000 for each offense.

SEC. 17. That no common carrier by water in foreign commence shall demand, charge, or collect any rate, fare, or charge which is unjustly discriminatory between shippers or ports, or unjustly prejudicial to exporters of the United States as compared with their foreign competitors. Whenever the board finds that any such rate, fare, or charge is demanded, charged, or collected it may alter the same to the extent necessary to correct such unjust discrimination or prejudice and make an order that the carrier shall discontinue demanding, charging, or collecting any such unjustly discriminatory or prejudicial rate, fare, or charge.

Every such carrier and every other person subject to this act shall establish, observe, and enforce just and reasonable regulations and practices relating to or connected with the receiving, handling, storing, or delivering of property. Whenever the board finds that any such regulation or practice is unjust or unreasonable it may determine, prescribe, and order enforced a just and reasonable regulation or practice.

[2] Insofar as is pertinent to this motion, section 19 of the 1920 Act provides:

> (1) The board is authorized and directed in aid of the accomplishment of the purposes of this Act:
>
> (a) To make all necessary rules and regulations to carry out the provisions of this Act;
>
> (b) To make rules and regulations affecting shipping in the foreign trade not in conflict with law in order to adjust or meet general or special conditions unfavorable to shipping in the foreign trade, whether in any particular trade or upon any particular route or in commerce generally and which arise out of or result from foreign laws, rules, or regulations or from competitive methods or practices employed by owners, operators, agents, or masters of vessels of a foreign country; * * *

On September 14, 1954, Mitsui moved to dismiss the complaint and petition on the grounds that (1) as a matter of law the facts alleged are not sufficient to constitute a cause of action under section 16 or section 17 of the 1916 Act; (2) as a matter of law the facts alleged in the petition are not sufficient to justify an investigation into the alleged practices of Mitsui and the initiation of a rule-making proceeding; (3) the Board has no authority to prohibit the alleged practices of Mitsui by the issuance of rules under section 19 of the 1920 Act; and (4) should the Board find that it does have such power, it should decline, as a matter of discretion, to exercise that power.

Reply to the motion to dismiss the complaint and the petition was filed by the Conference on October 18, 1954, and reply to the motion to dismiss the petition was filed by Public Counsel on September 24, 1954. In oral argument on December 3, 1954, Public Counsel addressed his arguments to the complaint as well as to the petition. Both Mitsui and the Conference were allowed time to rebut the arguments of Public Counsel and were granted an additional 10 days within which to file memoranda in reply thereto.

THE COMPLAINT

Mitsui argues that the facts alleged in the complaint do not establish preference or prejudice within the meaning of section 16, or prejudice or discrimination within the meaning of section 17, of the 1916 Act. It contends that for a carrier to be guilty of preference or prejudice under section 16 it must accord different treatment to two different individuals, other than the carrier, who are in substantially the same circumstances and conditions and to whom the carrier owes the duties of a common carrier. Since a common-carrier relationship vis-a-vis the Conference does not exist, and since a triangular relationship between a carrier and two individuals other than the carrier is not alleged, Mitsui implicitly argues that the Conference has no standing to complain under section 16.

Mitsui distinguishes an early decision of our predecessors in *Intercoastal Investigation, 1935*, 1 U. S. S. B. B. 400 (1935), in which, under similar circumstances, a violation of section 16 of the 1916 act was found. Mitsui argues that the finding in that case was based on the power, conferred on the Secretary of Commerce under section 18 of the 1916 act, over rates in the domestic trade whereas in the instant case the rates involved are those in foreign commerce.

Mitsui further argues that the facts alleged do not establish a violation of section 17 of the 1916 act since (1) the first paragraph of the section extends protection to shippers, ports, and exporters of the

United States and not to carriers, and (2) the authority conferred on the Board by the second paragraph of the section, to establish "just and reasonable regulations and practices relating to or connected with the receiving, handling, storing, or delivering of property," excludes control over the payment of brokerage and the level of rates established by an individual water carrier.

The Conference submits that there is ample precedent for the Board to entertain the complaint, and relies upon the decisions of our predecessors in *Intercoastal Rates of Nelson S. S. Co.*, 1 U. S. S. B. B. 326 (1934); *Intercoastal Investigation, 1935, supra; Section 19 Investigation, 1935*, 1 U. S. S. B. B. 470 (1935); *Rates, Charges, and Practices of Yamashita and O. S. K.*, 2 U. S. M. C. 14 (1939); *Cargo to Adriatic, Black Sea, and Levant Ports*, 2 U. S. M. C. 342 (1940).

The Conference further argues that the Board's predecessors have condemned the payment of excessive brokerage in *Section 19 Investigation, 1935, supra*, and *Rates, Charges, and Practices of L. & A. Garcia and Co.*, 2 U. S. M. C. 615 (1941).

Public Counsel, in oral argument, contends that a complaint under sections 16 and 17 of the 1916 Act does not depend, for sufficiency, on the relationship of the complainant to the respondent; that a "person" filing a complaint setting forth a violation of that act need not be one directly affected by the alleged violation since the remedy does not necessarily include reparation, citing *Isthmian S. S. Co.* v. *United States*, 53 F. (2d) 251 (S. D. N. Y. 1931). Public Counsel further argues, however, that the weight of the decisions of our predecessors is against the contention of and the cases relied upon (*supra*) by the Conference; that the triangular relationship described by Mitsui is necessary to establish violations of sections 16 and 17 of the 1916 Act, and that, since no such relationship has been alleged, the complaint is insufficient.

While it is true that in previous decisions, as cited by the Conference, our predecessors have considered practices similar to those alleged in the complaint before us, we are not persuaded that they support the present complaint.

In *Intercoastal Rates of Nelson S. S. Co.*, *supra*, which was a proceeding to determine, among other questions, the feasibility of approving proposed reductions in rates by certain carriers in the intercoastal trade, the Secretary of Commerce disapproved a carrier's proposed tariff differentially lower than the tariffs of its competitors and condemned the practice *without* finding violation of the 1916 Act. The report specifically reserved for later determination in a then pending investigation the question of whether the practice of differential rate cutting was violative of the 1916 Act. In the referenced

investigation, reported as *Intercoastal Investigation, 1935*, *supra*, the Secretary of Commerce adopted as his own the findings of the hearing examiner, including the finding, at page 462:

* * * That the practice of Shepard to name tariff rates and charges lower by fixed percentages than those of its competitors (naming competing carriers) results in undue and unreasonable advantage to it and in undue and unreasonable prejudice and disadvantage to the carriers named, and is unjust and unreasonable, in violation of sections 16 and 18 of the Shipping Act, 1916.

It is this decision and this language on which the Conference primarily relies in support of its complaint. In *Section 19 Investigation, 1935*, *supra*, no violation of section 16 or of section 17 of the 1916 Act was found, although the practice of openly or secretly quoting rates by differentially lower amount or percentage was condemned as unfair. Neither *Rates, Charges, and Practices of Yamashita and O. S. K.*, *supra*, or *Cargo to Adriatic, Black Sea, and Levant Ports*, *supra*, held the practice of rate making by an amount or percentage differentially lower than the rates of competitors to be in violation of section 16 or of section 17 of the 1916 Act, although the practice was considered in both cases to be harmful and contrary to the purposes of that act.

We must consider, then, only the report in *Intercoastal Investigation, 1935*, *supra*. While we are reluctant critically to examine this report of our predecessors, the later decisions involving substantially similar practices cast doubt upon the applicability of sections 16 and 17 here, since no violations of the 1916 Act were found in those cases.

At the outset, the fact that the intercoastal investigation in 1935 was directed solely at practices existing in interstate as distinguished from foreign commerce is not significant. The Secretary of Commerce, having full power under section 18 of the 1916 Act over rates in interstate commerce, nevertheless found a violation of section 16. Section 16 applies equally to the domestic and foreign trades. It imposes prohibitions, standards, and sanctions which are not dependent, for force and effect, on the provisions of section 18. Further, apart from the intercoastal classification of the carriers involved in that investigation, we are unable to distinguish the facts there considered from the allegation in the matter before us that Mitsui has violated and continues to violate section 16 by quoting and granting rates which are differentially lower than those of the Conference.

Nor do we consider that a person filing a complaint under section 16 must be a person injured by the practice or practices alleged therein. As stated by Public Counsel, *Isthmian S. S. Co.* v. *United States*, *supra*, as well as section 22 of the 1916 Act, competely settles this point.

Although the interests of sound statutory interpretation dictate

that we follow in similar circumstances the principles enunciated by our predecessors, we must differ with the report in *Intercoastal Investigation, 1935, supra.* Insofar as that report interprets rate cutting by fixed and lower differential to be a violation *per se* of section 16, it is in conflict with other well-established principles of this Board and its predecessors.

In *Huber Mfg. Co.* v. *N. V. Stoomvaart Maatschappij "Nederland"*, 4 F. M. B. 343 (1953), we stated at page 347:

> 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 * * *.

To the same effect see *Eden Mining Co.* v. *Bluefields Fruit & S. S. Co.*, 1 U. S. S. B. 41 (1922); *H. Kramer & Co.* v. *Inland Waterways Corp. et al.*, 1 U. S. M. C. 630 (1937); *United Nations et al.* v. *Hellenic Lines Limited et al.*, 3 F. M. B. 781 (1952). Although these decisions relate primarily to a preference or an advantage given to persons other than carriers, it is unquestionably true that all persons under section 16 must be treated alike. Therefore, if the section applies to a preference given by a carrier in favor of itself as against a competitor, then the section must also apply to relationships between a carrier and one shipper. This possibility, however, is expressly excluded by the cited decisions. We see no indication that the Secretary of Commerce in *Intercoastal Investigation, 1935, supra*, found the carrier in that case to have accorded different treatment to two persons other than itself, or that the Secretary considered a triangular relationship necessary to establish a violation of section 16. On the contrary, it appears that the Secretary considered quotation of rates by fixed and lower differential or percentage to be a violation *per se* of section 16, and self-preference to constitute a violation of sections 16 and 18. We must, therefore, in the light of the *Huber* and *Eden Mining Co.* cases, *supra*, disagree with the interpretation of section 16 implicitly expressed in *Intercoastal Investigation, 1935, supra.*

It is unlawful under section 16 "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 an particular person, locality, or description of traffic to any undue (unreasonable prejudice or disadvantage in any respect whatsoever. We do not consider the language to include the concept of self-preference unless the words "to make or give" can be so construed.

The meaning of the word "give" is clear and militates against the concept of self-preference. The word "make," on the other hand, as employed in the phrase "make or give," is ambiguous. Whether "make" and "give," as used in the phrase, are synonymous and the word "or" is explanatory rather than disjunctive, or whether "make" connotes "create" or "cause generally," without reference to "any particular person, locality, or description of traffic," is not clear from the context. If the word "make" can be given the latter meaning, it includes the concept of self-preference. That the word "or" used in the phrase is explanatory rather than disjunctive, is indicated from Report No. 689 of the Senate Committee on Commerce, 64th Congress, 1st Session, where, in reporting on section 16, the Committee considered the words employed in the phrase "make or give" to be synonymous.

The words under consideration were derived from section 3 of the Interstate Commerce Act, which was modeled on the second section of the (English) Railway and Canal Traffic Act of 1854.[3] The English act provided in pertinent part as follows:

> No such company shall *make or give* any undue or unreasonable preference or advantage *to or in favour of* any particular person or company, or any particular description of traffic, in any respect whatsover, nor shall any such company subject any particular person or company or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever. [Emphasis supplied.]

In incorporating substantially the language of the Railway and Canal Traffic Act of 1854 in section 3 of the Interstate Commerce Act, Congress eliminated the words "or in favour of" appearing after the word "to." That no substantial change was intended, however, is apparent from the construction given section 3 of the Interstate Commerce Act in *Texas & Pac. Railway* v. *Interstate Com. Com.*, 162 U. S. 197 (1896), at page 219, where it was stated:

> The third section forbids any undue or unreasonable preference *in favor of* any person, company, firm, corporation or locality * * * [Emphasis supplied.]

Decisions under both the second section of Railway and Canal Traffic Act of 1854 and section 3 of the Interstate Commerce Act are persuasive and pertinent to this inquiry. Where the language of English statutes has been adopted in our legislation, the known and settled construction of the English statutes has been recognized as silently incorporated in our acts. *McDonald* v. *Hovey*, 110 U. S. 619 (1884). In the absence of something peculiar in the question under consideration or dissimilarity in the terms of the act relating thereto, the 1916 Act and the Interstate Commerce Act were intended to have

[3] 17 & 18 Vict., c. 31 ; 10 July 1854.

688-650 O - 63 - 38

like interpretation, application, and effect each in its own field. *U. S. Nav. Co.* v. *Cunard S. S. Co.*, 284 U. S. 474 (1932).

English courts have considered complaints, under the Railway and Canal Traffic Act, involving self-preference by carriers.[4] It is noted, however, that those complaints concerned preference of a carrier for itself in a capacity other than as the carrier granting the preference. This is not the self-preference in the matter before us. The preference of a carrier for itself in other capacities involves preferring, preferred, and deferred parties.

Similarly, decisions under the Interstate Commerce Act excludes self-preference as a practice regulated under section 3 of that Act. As stated in *Ilwaco Ry. & Nav. Co.* v. *Oregon Short Line & U. N. Ry.*, 57 Fed. 673 (CCA 9th, 1893), at page 676:

> The act contemplates, we think, independent carriers, capable of mutual relations and capable of being objects of favor or prejudice. There must be at least two other carriers besides the offending one. For a carrier to prefer itself in its own proper business is not the discrimination which is condemned.

See also *Little Rock & M. R. Co.* v. *East Tennessee, V. & G. R. Co.*, 47 Fed. 771 (W. D. Tenn., 1891).

The remaining language of section 16, First, of the 1916 Act describes those persons, localities, or descriptions of traffic who shall not be unduly preferred or deferred. Section 16, Second and Third, we find inapplicable to the facts alleged in the present complaint.

Our reasoning applies with equal force to the allegation that payment of brokerage fees higher than those paid by competitors is a violation *per se* of section 16. We conclude therefore that the complaint does not state a cause of action either as to rate making or as to payment of brokerage fees. We look with disfavor on the practice of quoting rates by differentially lower amount or percentage than the rates of competitors but find it, without more, not within the scope of section 16. We also look with disfavor on the payment of brokerage fees or payment for any other services which are not fairly related as to amount to the services performed. Experience has shown that the practices complained of, differentially undercutting rates and the payment of excessive fees for services, lead to disastrous rate wars, the siphoning off of freight earnings, and ultimately monopolization by a few big lines to the detriment of the commerce of the United States.

The Conference has not stated a cause of action under section 17 of the 1916 Act. Although, as previously discussed herein, a complaint need not be filed by an injured party, it must allege facts amounting

[4] *In re Baxendale and Great Western Rly. Co.*, [1858] 5 CB 336; *Phipps* v. *London and North Western Ry. Co.*, [1892] 2 QB 229.

to discrimination against or prejudice to a person whom the statute, in terms, purports to protect. We have no such allegation before us.

THE PETITION

The protection of the American merchant marine as well as American shippers and receivers from conditions unfavorable to shipping arising out of unfair foreign competitive practices is clearly within the stated purposes of section 19 of the 1920 Act.

Consistent with the purposes of the 1920 Act our predecessors have construed section 19 thereof as authorizing (1) investigations to determine whether conditions unfavorable to shipping exist and (2) the issuance of rules directed against such conditions, if found. *Section 19 Investigation, 1935, supra; Rates, Charges, and Practices of Yamashita and O. S. K., supra.* With that view we agree. If warranted by investigation, appropriate rules for the protection of American *interests* will issue whether or not incidental benefit may be derived therefrom by foreign-flag carriers and allied interests.

The issuance of rules depends on the results of investigations undertaken and not on the form or substance of a petition. For this reason, a motion to dismiss a petition for rules cannot lie as a matter of right. The petition serves the purpose of informing us of the possible existence of practices and conditions described in section 19, and may be granted or denied in our discretion if such be consistent with the purposes and policies of the 1916 Act and the 1920 Act.

The motion to dismiss the complaint is granted.

The motion to dismiss the petition is denied.

By order of the Board.

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

MARITIME ADMINISTRATION

No. S–54

PACIFIC TRANSPORT LINES, INC.—APPLICATION FOR WRITTEN PERMISSION UNDER SECTION 805 (a), MERCHANT MARINE ACT, 1936

Submitted December 30, 1954. Decided December 30, 1954

William I. Denning and *Alan F. Wohlstetter* for applicant.
Odell Kominers and *J. Alton Boyer* for Coastwise Line.
Leroy F. Fuller as Public Counsel.

REPORT OF THE ACTING MARITIME ADMINISTRATOR

This proceeding arises out of an application filed on December 23, 1954, by Pacific Transport Lines, Inc. (hereinafter "PTL"), for written permission under section 805 (a) of the Merchant Marine Act, 1936 (hereinafter "the Act"),[1] to permit its parent company, States Steamship Company (hereinafter "States"), or its affiliate, Pacific-Atlantic Steamship Co. (hereinafter "Pacific-Atlantic"), to

[1] Section 805 (a):

It shall be unlawful to award or pay any subsidy to any contractor under authority of title VI of this Act, or to charter any vessel to any person under title VII of this Act, if said contractor or charterer, or any holding company, subsidiary, affiliate, or associate of such contractor or charterer, or any officer, director, agent, or executive thereof, directly or indirectly, shall own, operate, or charter any vessel or vessels engaged in the domestic intercoastal or coastwise service, or own any pecuniary interest, directly or indirectly, in any person or concern that owns, charters, or operates any vessel or vessels in the domestic intercoastal or coastwise service, without the written permission of the Commission. Every person, firm, or corporation having any interest in such application shall be permitted to intervene and the Commission shall give a hearing to the applicant and the intervenors. The Commission shall not grant any such application if the Commission finds it will result in unfair competition to any person, firm, or corporation operating exclusively in the coastwise or intercoastal service or that it would be prejudicial to the objects and policy of this Act: *Provided,* That if such contractor or other person above-described 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 or if engaged in furnishing seasonal service only, was in bona-fide operation in 1935 during the season ordinarily covered by its operation, except in either event, 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

load approximately 1,500 tons of newsprint at Port Angeles, Washington, on or about December 28, 1954, for discharge at Long Beach, California.

Coastwise Line (hereinafter "Coastwise") and Olympic-Griffiths Lines, Inc. (hereinafter "OGL"), intervened in opposition to the application. OGL withdrew its opposition, however, because of its inability to appear on the date set for hearing.

After hearing testimony on December 30, 1954, from PTL and Coastwise, as well as oral argument, I granted written section 805 (a) permission to PTL, allowing States or Pacific-Atlantic to load the newsprint in question, having found that the permission granted would not result in unfair competition to any person operating exclusively in the coastwise or intercoastal trade, and would not be prejudicial to the objects and policy of the Act.

That decision was based on the following facts, determinations, and considerations: PTL, a California corporation, holds an operating-differential subsidy agreement (FMB–21) with the Federal Maritime Board for operation in the transpacific trade. It is wholly owned by States, an unsubsidized line, which likewise operates in the transpacific trade from United States Pacific coast ports. Its affiliate, Pacific-Atlantic, operates in the intercoastal trade. Coastwise, an Oregon corporation, is a common carrier operating in the Alaska/British Columbia/United States Pacific coastwise trade. It provides regular services from Ocean Falls, British Columbia, and Port Angeles, Washington, for the carriage of newsprint, which constitutes an important part of its traffic.

OGL is an exclusively domestic operator, operating between Puget Sound and Los Angeles Harbor via Portland and San Francisco. OGL and Coastwise currently are the only Pacific coast water carriers serving the mills of Crown Zellerbach Corporation (hereinafter "the shipper"). That corporation, a paper manufacturer operating Pacific coast mills located at Ocean Falls, B. C., Port Angeles, Washington, and Portland, Oregon, owned the 1,500 tons of newsprint here under consideration.

During the month of December 1954 the shipper's transportation requirements were unusually heavy. For the preceding year, Coastwise vessels, which at capacity carry approximately 5,300 tons of

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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.

If such application be allowed, it shall be unlawful for any of the persons mentioned in this section to divert, directly or indirectly, any moneys, property, or other thing of value, used in foreign-trade operations, for which a subsidy is paid by the United States, into any such coastwise or intercoastal operations; and whosoever shall violate this provision shall be guilty of a misdemeanor.

paper, averaged 1,624 tons of paper out of Ocean Falls and 2,906 tons out of Port Angeles, or approximately 800 tons short of capacity. During the month of December, however, Coastwise vessels were booked to capacity. Further, two of Coastwise's five vessels were inoperative during this period, the SS *North Beacon* due to breakdown and the SS *Pacificus* because of a labor dispute.

The first Coastwise vessel booked full in the month of December was the SS *Seafare*, which arrived at Ocean Falls on December 21. The succeeding Coastwise vessel was the SS *Joel Chandler Harris*, scheduled to arrive at Ocean Falls on January 1 and at Port Angeles on January 5. The original full booking for the *Joel Chandler Harris* was revised several days prior to the hearing by the elimination of some 800 tons of newsprint from Ocean Falls, subject to further revision upward or downward, prior to sailing.

The traffic manager for the shipper, appearing in support of the application, testified that he had been ordered by the shipper's sales department to move 1,500 tons of newsprint from the Port Angeles mill on bill of lading dated prior to the year end. Shipment of this cargo on or after January 1, 1955, it was testified, would not satisfy the shipper's desire to swell its total sales for 1954 or the consignee's need for paper. The witness repeatedly stated that the shipment would move by rail at an added cost to the shipper of $4 per ton in the event that no water carrier could lift the cargo prior to the year end. Although the shipment was offered to both Coastwise and OGL, neither was able to handle the cargo prior to January 1955. A Coastwise witness stated that, because of the free space for 800 tons of newsprint then available on the *Joel Chandler Harris*, that vessel could handle the entire lift if the shipper would permit deck stowage of a portion of the cargo. The *Joel Chandler Harris*, however, was not scheduled to depart from Port Angeles until January 7, 1955, and, accordingly, would not have met the shipper's requirements even assuming that on-deck carriage would have been permitted by the shipper.

After offering the 1,500 tons of newsprint to Coastwise and OGL the shipper offered it to States. Immediately thereafter, on December 17th, States applied to the Interstate Commerce Commission (hereinafter "ICC") for temporary authority to operate as a common carrier in the domestic trade in the transortation of one shipment of not more than 1,500 tons from Port Angeles, Washington, to Long Beach, California. The authorization was granted by ICC order dated December 27, 1954.

After the filing of States' ICC application, Coastwise offered to satisfy the shipper's entire requirements at Port Angeles provided that

it could be relieved of the obligation to call at Ocean Falls. Under those conditions Coastwise would have had no objection to the carriage of the Ocean Falls cargo by any other carrier, including States. States, however, was unable to accommodate the amount of cargo available at Ocean Falls, approximately 3,000 tons, and was unwilling in any event, presumably for insurance reasons, to deviate its vessel from Puget Sound to British Columbia.

States proposed to carry the 1,500 tons of newsprint from Port Angeles to Long Beach on the SS *Sea Comet*, a vessel returning from the Far East to Puget Sound. Although the vessel was originally scheduled to proceed southward via Portland and San Francisco, a later schedule revision eliminated San Francisco as a southbound port of call and added that port as an outbound call. There is no indication that the schedule revision was made to accommodate the shipper or to expedite the discharge of the newsprint concerned in this application.

Since the cargo was destined for Long Beach there was no possibility of shutting out off-shore cargoes at Los Angeles and San Francisco in favor of the domestic cargo. Only at Puget Sound and Portland did this possibility arise, and in those areas States continued actively to solicit transpacific cargoes for the *Sea Comet* in spite of the proposal to lift the 1,500 tons of newsprint at Port Angeles. In this regard, a States employee testified that the amount of the shipper's cargo which could be carried would necessarily be reduced by the amount of additional transpacific cargo which might be obtained at Puget Sound or Portland.

In opposition to the application, Coastwise argued that grant of permission for States to lift the 1,500 tons of newsprint would result in unfair competition to Coastwise since, were it not for this cargo, the *Joel Chandler Harris* would sail full. The evidence adduced, however, did not support this position. The shipper testified that the 1,500 tons would move by rail if water transportation were not available prior to January 1, 1955. In no event would the cargo have moved on the *Joel Chandler Harris* or other Coastwise vessel, since the shipper's desires and the consignee's need for paper precluded shipment at the time when those vessels could have been made available. Furthermore, no assurance was given that the *Joel Chandler Harris* would have had space available for any portion of the cargo. Although that vessel's booking out of Ocean Falls had been revised downward just prior to the hearing, there remained every possibility that a later revision might restore the original booking.

Further, Coastwise's offer to lift the entire 1,500-ton shipment on the *Joel Chandler Harris* would have involved carriage of 700 tons

on deck, contrary to the custom in the trade to stow newsprint under deck. In view of that custom, the on-deck stowage capacity could not be considered as space available for this newsprint, even assuming that the schedule of the *Joel Chandler Harris* would have fit the shipper's desires and needs.

Coastwise also argued that grant of permission for a States vessel to lift the shipper's newsprint would be prejudicial to the objects and policy of the Act. States, it was argued, reserved 1,500 tons of space for this domestic lift and failed to continue to solicit transpacific cargo.

There can be no doubt that shutting out or refusing to solicit offshore cargo by States in order to carry a domestic cargo might require denial of PTL's application. The testimony on this point, however, did not indicate such to be the case. Although, as argued by Coastwise, States informed the shipper as early as December 18 that the *Sea Comet* would have space available for 1,500 tons of newsprint, that information was not tantamount to a refusal to solicit transpacific cargo in preference to domestic cargoes. On the contrary, a States employee testified that there was no slackening of solicitation of transpacific cargo and that, in order to avoid offering tonnage for coastwise service that could be used for transpacific service, States offered space for only 1,500 tons although more space may have been available. It was partly for this reason that the *Sea Comet* did not lift the 3,000 tons of newsprint available at Ocean Falls, although Coastwise would have had no objection to that lift.

The permission granted was limited to the single voyage and to the amount of cargo specified in the application.

By the Acting Maritime Administrator.

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

FEDERAL MARITIME BOARD

No. S-46

GRACE LINE INC.—APPLICATION FOR EXTENSION OF SERVICE AND INCREASED SAILINGS ON TRADE ROUTE NO. 25 (U. S. PACIFIC PORTS—WEST COASTS OF MEXICO, CENTRAL AMERICA, AND SOUTH AMERICA)

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*Submitted November 2, 1954. Decided December 30, 1954**

Grace Line Inc. found to be operating an existing service between the Pacific coast of the United States and the west coasts of Mexico and Central Americe, Balboa, Cristobal, the North coast of Colombia, and the Gulf of Venezuela and Lake Maracaibo.

The service proposed to be operated by Grace Line Inc. on the foregoing itinerary found not to be in addition to its existing service.

Section 605 (c) of the Merchant Marine Act, 1936, as amended, found not to interpose a bar to the granting to Grace Line Inc. of an operating-differential subsidy for the foregoing service.

George F. Galland, *W. F. Cogswell*, and *E. Russell Lutz* for Grace Line Inc.

Ira L. Ewers and *A. F. Chrystal* for Moore-McCormack Lines, Inc., and *Odell Kominers* for Pacific Argentine Brazil Line, Inc., interveners.

Edward Aptaker and *Richard J. Gage* as Public Counsel.

INITIAL DECISION OF C. W. ROBINSON, EXAMINER

By letters of June 12, 1950, and February 5, 1952, as amended by letter of April 6, 1953, Grace Line Inc. ("Grace") petitioned to have its operating-differential subsidy contract extended insofar as it relates to its Line B service (Trade Route No. 25—U. S. Pacific/west coasts of Mexico, Central America, and South America). The matter was set for hearing under section 605 (c) of the Merchant Marine

*In the absence of exceptions thereto by the parties and notice by the Board that it would review the examiner's initial decision, the decision became the decision of the Board on the date shown (section 8 (a) of the Administrative Procedure Act and Rules 13 (d) and 13 (h) of the Board's Rules of Practice and Procedure).

Act, 1936 ("the Act"), as amended. Moore-McCormack Lines, Inc ("Mormac"), and Pacific Argentine Brazil Line, Inc. ("PAB") intervened in opposition to the extension.

Article I–2 (a) (2) of the subsidy agreement covering Grace's Line B service provides as follows:

> Not fewer than 18 and not more than 26 sailings with cargo vessels on the service designated Line B (Trade Route No. 25) and described as follows:
>
> > Between United States Pacific Coast ports and a port or ports on the West Coast Mexico, ports on the West Coast of Central America, and ports on the West Coast of South America, with the privilege of calling at British Columbia, Canada, and Balboa, Canal Zone.

The amendment sought to the foregoing description reads as follows:

> Not fewer than 30 and not more than 36 sailings with cargo vessels on the service designated Line B (Trade Route 25, with Caribbean extension on Trade Route 23), described as follows:
>
> > Between U. S. Pacific ports, and port or ports on the West Coast of Mexico ports on the West Coast of Central America; ports on the West Coast of South America; ports on the North Coast of Colombia; port or ports on the Gulf of Venezuela and Lake Maracaibo in Venezuela; with the privilege of calling at other ports in Venezuela and Netherlands West Indies ports to handle way cargo, and with the privilege of calling at ports in Panama ports in the Panama Canal Zone and ports in British Columbia.
>
> Of the sailings herein provided for in Line B service, not fewer than 18 shall be made to the West Coast of South America.

At the end of the presentation of Grace's case Public Counsel informed the examiner that he had been authorized to read into the record the terms of an agreement reached by Grace, Mormac, and PAB, as follows:

> Grace Line, Inc., Pacific Argentine Brazil Line, Inc., and Moore-McCormack Line, Inc., having studied the exhibits and testimony in this proceeding, stipulate and agree as follows:
>
> 1. That the application herein be and the same hereby is amended so that the requested service description as amended will read as follows:
>
> > Not fewer than 30 and not more than 36 sailings with cargo vessels on the service designated Line B (Trade Route 25, with Caribbean extension on Trade Route 23), described as follows:
> >
> > > Between U. S. Pacific ports, and port or ports on the West Coast of Mexico, ports on the West Coast of Central America; ports on the West Coast of South America; ports on the North Coast of Colombia port or ports on the Gulf of Venezuela and Lake Maracaibo in Venezuela with the privilege of calling at other ports in Venezuela and at Netherlands West Indies ports to handle way cargo but not cargo to or from the Pacific Coast of the United States or Canada, and with the privilege of calling at ports in Panama, ports in the Panama Canal Zone and ports in British Columbia.

Of the sailings herein provided for in Line B service, not more than 15 annually shall be made beyond Cristobal.

2. Such amendment being effective, PAB and Mormac withdraw their opposition to said application under the provisions of Section 605 (c) of the Merchant Marine Act, 1936.

3. Nothing contained in the amendment applied for in these proceedings shall in any way limit the right of PAB or Mormac to operate as required or permitted by their respective operating differential subsidy agreements.

DISCUSSION

Section 605 (c) of the Act provides in part as follows:

(a) No contract shall be made under this title with respect to a vessel to be operated on a service, route, or line, or line served by citizens of the United States which would be in addition to the existing service, or services, unless the Board 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; (b) 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 Board 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 Board shall find that it is necessary to enter into such contract in order to provide adequate service by vessels of United States registry. (Lettering in parentheses supplied for ease of reference.)

The withdrawal of Mormac and PAB from further participation in the proceeding leaves no articulate opposition to the application by any United States-flag operator. Under the circumstances, the issues of undue advantage and prejudice and adequacy of service, as posed by clause (b) of section 605 (c), cease to be of concern. *Grace Line Inc.—Subsidy, Route 4*, 3 F. M. B. 731, 737; *Lykes Bros. Steamship Co., Inc.—Increased Sailings, Route 22*, 4 F. M. B. 455; *American President Lines, Ltd.—Subsidy, Route 17*, 4 F. M. B.—M. A. 488; *American President Lines v. Federal Maritime Board*, 112 F. Supp. 346. There thus remain for consideration the questions raised by clause (a) of section 605 (c), namely, whether the service here involved is an existing service or a service in addition to an existing service, and if the latter, whether additional vessels should be operated thereon.

In 1946, following the termination of World War II, Grace reestablished its various services, including the unsubsidized service between

the Pacific coast of the Uinted States and the west coasts of Mexico and Central America, Balboa, and Cristobal, with transshipment at Cristobal for Colombia and Venezuela. C1-M-AV1 vessels chartered from the Maritime Commission were used until recently in this service, which has as its chief competitor the foreign-flag Independence Line. In 1947, Independence Line extended its direct service into the Caribbean to serve Colombia and Venezuela. To meet this competition Grace likewise extended its service, the first sailing being from Los Angeles on July 2, 1948. Grace consistently has given preference to its subsidized vessels on Line B when the available cargo is insufficient for the Line B vessels and the unsubsidized vessels. The C1-M-AV1s have been replaced by two owned C-1 vessels and one other vessel.

Table 1 shows the number of calls and the volume of traffic in long tons handled by the unsubsidized vessels from 1948 through March 1954.

TABLE 1

Year	West coasts Mexico-Central America, Balboa		Cristobal		North coast of Colombia		Gulf Venezuela, Lake Maracaibo	
	Calls	Tons	Calls	Tons	Calls	Tons	Calls	Tons
1948: S/B	19	53,888	18	4,001	6	1,849	6	353
N/B	20	35,992	13	509	4	86	4	443
1949: S/B	22	41,486	20	3,779	19	5,603	21	12,358
N/B	21	32,446	15	548	19	1,274	21	237
1950: S/B	20	40,982	18	1,065	18	6,393	18	4,326
N/B	18	33,928	15	512	17	3,705	18	1,720
1951: S/B	22	48,243	21	1,478	17	7,503	17	6,214
N/B	23	42,304	15	457	15	3,400	16	386
1952: S/B	17	38,740	16	2,223	14	5,327	12	6,287
N/B	18	32,895	12	72	12	2,751	12	182
1953: S/B	14	27,054	14	1,115	13	5,813	13	5,394
N/B	15	28,025	10	317	13	2,976	13	881
1954, Jan.-Mar.: S/B	3	5,279	3	252	3	1,150	3	1,508
N/B	3	8,327	3	127	3	616	3	278
Total: S/B	117	255,672	110	13,913	90	33,638	90	36,440
N/B	118	213,917	83	2,542	83	14,808	87	4,127
Yearly average:[1] S/B	18	38,787	17	2,095	14	5,298	14	5,852
N/B	18	34,128	13	417	13	2,379	13	705

[1] Based on four times the 1954 figures.

In addition to the cargo having its origin or destination on the Pacific coast of the United States, a considerable quantity of cargo has been handled by Grace's unsubsidized service to and from the west coasts of Mexico and Central Mexico and transshipped at Cristobal. The volume of this traffic in revenue tons is shown in table 2.

TABLE 2

Year	West coasts of Mexico and Central America					
	U. S. Atlantic-Gulf			Elsewhere		
	To—	From—	Total	To—	From—	Total
1948	8,970	30,587	39,557	5,630	4,005	9,635
1949	14,441	38,720	53,161	5,112	9,550	14,662
1950	16,362	27,068	43,430	6,491	21,197	27,688
1951	22,138	37,317	59,455	7,571	30,816	38,387
1952	15,572	34,284	49,856	5,785	24,208	29,993
1953	4,566	3,451	8,017	5,295	6,099	11,394
Total	82,049	171,427	253,476	35,884	95,875	131,759
Yearly average	13,367	28.571	41,938	5,980	15,979	21,959

Table 3 gives the totals of the through cargo (long tons) and the way cargo (revenue tons) handled by the unsubsidized service.

TABLE 3

Year	From/To U. S. Pacific ports	Way ports	Total
1948	97,041	74,149	171,190
1949	97,731	101,431	199,162
1950	92,631	91,695	184,326
1951	109,985	127,588	237,573
1952	88,477	108,348	196,825
1953	71,575	17,567	89,142
Total	557,440	520,778	1,078,218
Yearly average	82,906	86,796	179,703

Even a cursory study of the foregoing statistics will warrant the conclusion that Grace has been operating a consistent service since 1948 (at least) between the Pacific coast of the United States and the west coasts of Mexico and Central America, Balboa, Cristobal, the north coast of Colombia, and the Gulf of Venezuela and Lake Maracaibo. That the traffic handled at way ports has greatly augmented the other cargo is equally plain, and it is clear that the foreign commerce of the United States has profited by the handling of the way cargo.

Public Counsel contends, however, that the proposed service will be in addition to the existing service in that the vessels to be operated thereon will be larger and faster than those used in the past. He argues that the proposed minimum of 12 sailings with C–1 instead of C1–M–AV1 vessels will permit Grace to furnish a dead-weight capacity of about 103,000 tons and a cubic capacity of about 5,350,000 feet as compared with a total dead-weight capacity of 71,500 tons and 3,080,000 cubic feet provided in 1953. While it is true that Grace presently is using two C–1s and that a third C–1 or a C–2 will be added, as many as six (but usually four) C–1–M–AV1s have been

utilized in the service since 1948. The only proposed change in itinerary is that Cartagena, Colombia, will be served regularly instead of occasionally.

If the restricted view taken by Public Counsel were accepted in this case it would put a penalty on the incentive of United States-flag operators to improve their lot in the foreign commerce of the United States, and certainly would not be in consonance with the spirit of the Act. As recently as September 16, 1954, in *American President Lines, Ltd.—Subsidy, Route 17, supra*, the Board/Administrator said

> 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 substantial 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 * * *; 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 * * *", and we so conclude.

The present case is so analogous in its essentials to the case just cited that it must be found that the proposed service by Grace would not be in addition to its existing service.

In view of the finding thus made, it is unnecessary to determine whether "the service already provided by vessels of United States registry in such service, route, or line is inadequate", and whether "in the accomplishment of the purposes and policy of this Act additional vessels should be operated thereon".

CONCLUSIONS AND FINDINGS

On this record, it is concluded and found:

1. That Grace is operating an existing service between the Pacific coast of the United States and the west coasts of Mexico and Central America, Balboa, Cristobal, the north coast of Colombia, and the Gulf of Venezuela and Lake Maracaibo;

2. That the service proposed to be operated by Grace on the foregoing itinerary would not be in addition to its existing service; and

3. That section 605 (c) of the Act does not interpose a bar to the granting to Grace of an operating-differential subsidy for such service.

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 January 4, 1955. Issued January 5, 1955

REPORT OF THE BOARD AND MARITIME ADMINISTRATOR ON PETITION TO REOPEN PROCEEDINGS FOR RECONSIDERATION AND REARGUMENT

On December 20, 1954, Luckenbach Steamship Co., Inc. (hereinafter "Luckenbach"), intervener, petitioned to reopen these proceedings for reconsideration of our report of September 16, 1954, amended and clarified by our order of October 28, 1954 (hereinafter "the report"), and for reargument. Luckenbach contends that the report does not afford the full protection required by section 805 (a) of the Merchant Marine Act, 1936, as amended (hereinafter "the Act"), with respect to the permission granted to American President Lines, Ltd. (hereinafter "APL"), for intercoastal service eastbound from Los Angeles and westbound refrigerated service as part of its Trade Route No. 17 C-2 service (Atlantic/Straits service), whether subsidized (Docket No. S-33) or unsubsidized (Docket No. S-17 (Sub. 1)).

Luckenbach argues: (1) that the Board and Administrator failed to issue an order defining the scope of the written permission, if any, granted to APL pursuant to section 805 (a); (2) that the granting of permission to serve Los Angeles is completely inconsistent with the Board's own subsidiary findings of fact; (3) that in any event, there is no warrant whatsoever for the Board's relinquishing control over

APL's service; (4) that there is no evidentiary foundation whatsoever for finding that APL has grandfather rights in its round-the-world service; and (5) that the Board should remand the case to the examiner for evidence as to the meaning of "Orient" in sections 506 and 605 (a) of the Act.

Replies to the petition were filed by APL and by Public Counsel. Both replies support the report, except insofar as Public Counsel argues that an additional finding on public interest and convenience is required under section 805 (a) of the Act.

Referring to Luckenbach's arguments in the order in which they appear, we determine, first, that the Administrative Procedure Act (hereinafter "APA") does not require orders separate and apart from reports or decisions, as apparent from an examination of sections 2 (d) and 8 (a) of the APA. Moreover, the written permission required by section 805 (a) of the Act is clearly set forth in the report.

Second, we reaffirm our conclusion that a grant of permission to APL to serve Los Angeles will not result in unfair competition or be prejudicial to the purposes and policy of the Act. That conclusion is adequately supported by findings 23, 24, and 25 of the report. We have not, as stated by Luckenbach, shifted to the interveners the burden of proving the statutory requirements under section 805 (a). It is sufficiently clear from the language of the report that Luckenbach has failed to meet the burden of rebutting the *prima facie* proof required by section 805 (a).

Luckenbach further argues that if a finding on public interest and convenience is required under the Act, no such finding is here justified from the facts of record. We restate the conclusion implicit in the report that section 805 (a) does not require a separate finding on public interest and convenience. We do not consider that the phrases "public interest and convenience" and "competition in such route or trade", appearing in the proviso of section 805 (a), impose any requirement or requirements in addition to those set out in the body of section 805 (a).

Third, we see no legal basis for Luckenbach's contention that we were not warranted in relinquishing control over APL's service, since the permission granted is clearly within the scope of our authority and the absence of a condition in the order granting permission to APL pursuant to section 805 (a) does not preclude a later review, if changing circumstances warrant. We hereby explicitly state that the permission granted by the September 16, 1954, report is subject to review by the Board or Administrator in appropriate cases and at approprite times and, in any case, is subject to re-examination upon

the expiration of the proposed operating-differential subsidy agreement on December 31, 1957.

Fourth, we reject Luckenbach's request for elimination of our finding 17, that APL has grandfather rights in its round-the-world service. We based that finding on our decision in *A. P. L.—Round-the-World Subsidy, Intercoastal Operations*, 3 F. M. B. 553 (1951). Our finding was adequately supported by the decision and need not be reargued here.

Fifth, we do not agree with Luckenbach that the Board and Administrator erred in failing to remand the recommended decision to the examiner for further testimony on the issue of the meaning of the word "Orient", as used in sections 506 and 605 (a) of the Act. In advance of the hearings herein, on Luckenbach's own motion, we heard argument on the meaning of the word "Orient" and decided that issue,[1] as a matter of law, based on legislative history and other legal sources, largely presented to us in argument on the motion. Assuming, *arguendo*, that the decision was based to any extent on facts officially noticed, Luckenbach's remedy was to petition us at that time for the opportunity, provided by the APA, to show facts to the contrary. Luckenbach failed to do this. Further, that issue was not before the examiner, and he properly excluded evidence thereon.

The petition is denied.

By the Board and Maritime Administrator.

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

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[1] *American President Lines, Ltd.—Subsidy, Route 17*, 4 F. M. B. 63 (1952).

FEDERAL MARITIME BOARD

No. S-27 (Sub. 1)

INVESTIGATION OF AGREEMENT No. 7549 (MOORE-MCCORMACK-SWEDISH AMERICAN SAILING AGREEMENT)

Submitted September 10, 1954. Decided January 28, 1955

Sailing Agreement No. 7549 between Moore-McCormack Lines, Inc., and Swedish lines found to create relationships which do not eliminate competition but which do tend to diminish competition between its signatories.

Ira L. Ewers and *Albert F. Chrystal* for Moore-McCormack Lines, Inc.

John Mason as Public Counsel.

REPORT OF THE BOARD

BY THE BOARD:

This proceeding arises out of our order of investigation and hearing dated August 8, 1951, recast April 7, 1952, in which we proposed to determine the effect of pooling and/or sailing agreements Nos. 7549, 7616, 7792, and 7796 [1] on foreign-flag competition as a factor in determining the operating-differential subsidies payable under title VI, Merchant Marine Act, 1936, as amended, 46 U. S. C. 1171 et seq. (hereinafter "the Act"), to the subsidized operators which are parties thereto. The purpose of the investigation, as recast, was to develop and receive evidence with respect to the following issues:

1. Whether these agreements by (a) pooling or apportioning earnings, losses or traffic; (b) allotting or distributing sailings, traffic or areas; (c) restricting the volume, scope, frequency or coverage of services; or (d) any other means,

[1] The pooling and/or sailing agreements are:

Pooling Agreement No. 7796, between Grace Line Inc. and Chilean Line (C. S. A. V.) (Docket No. S-27, Sub. 4); Sailing Agreement No. 7549, between Moore-McCormack Lines, Inc., and Swedish lines (Docket No. S-27, Sub. 1); Agreement No. 7792 (supporting Agreement No. 7795), referred to as the Colombian Coffee Pooling Agreement, an eight-party agreement (Docket No. S-27, Sub. 3); and Pooling Agreement No. 7616, between Lykes Bros. Steamship Co., Inc., and Thos. and Jas. Harrison, Ltd. (Docket No. S-27, Sub. 2).

create relationships such as eliminate or tend to eliminate or diminish the extent of competition among their signatories.

2. If so, whether the Board is required, as a matter of law, to consider under sections 603 (b) and 606 of the Merchant Marine Act, 1936, as amended, such elimination or diminution of competition in computing the amount of operating-differential subsidy to be granted to American-flag operators, signatory to such agreements.

3. Whether, if the Board is required, as a matter of law, to consider such elimination or diminution of competition, if any, in such computation, it is precluded from so doing in the case of any approved agreement which was in effect at the time the operating-differential subsidy contract was first awarded.

4. Whether, if the Board is not required as a matter of law, to consider such elimination or diminution of competition, if any, in such computation under sections 603 (b) and 606 of the Act, it should nevertheless so consider the same in the exercise of sound administrative discretion.

As recast, the scope of investigation and hearing was narrowed to those issues presented under sections 603 (b) and 606 of the Act, which provide as follows:

Section 603 (b):

Such contract shall provide that the amount of the operating-differential subsidy shall not exceed the excess of the fair and reasonable cost of insurance, maintenance, repairs not compensated by insurance, wages and subsistence of officers and crews, and any other items of expense in which the Commission shall find and determine that the applicant is at a substantial disadvantage in competition with vessels of the foreign country hereinafter referred to, in the operation under United States registry of the vessel or vessels covered by the contract, over the estimated fair and reasonable cost of the same items of expense (after deducting therefrom any estimated increase in such items necessitated by features incorporated pursuant to the provisions of section 501 (b)) if such vessel or vessels were operated under the registry of a foreign country whose vessels are substantial competitiors of the vessel or vessels covered by the contract.

Section 606:

Every contract for an operating differential subsidy under this title shall provide (1) that the amount of the future payments to the contractor shall be subject to review and readjustment from time to time, but not more frequently than once a year, at the instance of the Commission or of the contractor. If any such readjustment cannot be reached by mutual agreement, the Commission, on its own motion or on the application of the contractor, shall, after a proper hearing, determine the facts and make such readjustment in the amount of such future payments as it may determine to be fair and reasonable and in the public interest. The testimony in every such proceeding shall be reduced to writing and filed in the office of the Commission. Its decision shall be based upon and governed by the changes which may have occurred since the date of the said contract, with respect to the items theretofore considered and on which such contract was based, and other conditions affecting shipping, and shall be promulgated in a formal order, which shall be accompanied by a report in writing in which the Commission shall state its findings of fact * * *.

At a prehearing conference on January 18, 1954, a motion to sever and to proceed separately with hearings on each agreement was granted by the presiding examiner.

Hearings on Sailing Agreement No. 7549 were held on January 18 and 19, 1954. The examiner's recommended decision, served on August 6, 1954, embraces all of the pooling and sailing agreements on which hearings were held. This present report is directed only to the specific recommended decision of the examiner in the matter of Sailing Agreement No. 7549 between Moore-McCormack Lines, Inc. (hereinafter "Scantic"), and Swedish American Line and Transatlantic Steamship Co. (hereinafter "Swedish Agreement Lines").

The examiner's ultimate findings were that—under the first issue, relationships have been created which do not eliminate but which tend to diminish competition between the parties signatories to Agreement No. 7549; under the second issue, we are required, as a matter of law, to consider under sections 603 (b) and 606 of the Act, diminution of competition in computing the amount of operating-differential subsidy; no consideration of the third issue is necessary since the agreement was not in effect when the subsidy contract was first awarded; and no consideration of the fourth issue is necessary in view of the recommended finding on the second issue. They were substantially based upon the following findings of fact, which we adopt as our own.

The parties to the agreement. Scantic, the only United States flag line on Trade Route 6, operates a subsidized service thereon between United States North Atlantic ports and Scandinavian and Baltic ports in Sweden, Norway, Denmark, and Finland, with a minimum of 36 and a maximum of 48 sailings per annum. Cargo between such ports is to have preferential treatment, but Scantic has the privilege of calling at other places, including Iceland. Scantic (or its predecessor) has operated in this trade, either on its own behalf or as agent for the United States Government, since prior to World War I, with ocean mail contracts and with operating subsidy first awarded in 1937. Its subsidy contract and its operations thereunder were suspended during World War II. Thereafter, its operations were resumed and again became subject to subsidy contract dated January 1, 1947. This contract was amended on March 8, 1951, to include Article II–18 (c). Swedish Agreement Lines operate a joint service between ports of the United States and Sweden, among other places. Swedish Agreement Lines and Scantic serve Sweden directly.

Other lines in the trade. Sweden is also served directly by one nonagreement Swedish line (Thorden Line), and seven other foreign-flag lines (Finnish, Norwegian, and Danish); and indirectly by six lines (mostly foreign) with fast transshipping service via European ports—

all of which, together with Scantic and Swedish Agreement Lines, are members of the North Atlantic Baltic Freight Conference (F. M. B. Agreement No. 7670—hereinafter called the Baltic Conference or Agreement). There are also 10 nonconference lines (mostly foreign) serving the trade indirectly through transshipment. The Baltic agreement governs the trade from United States North Atlantic ports, either direct or via transshipment, to ports in Sweden and other Baltic and Scandinavian countries, and provides for the establishment and maintenance of agreed rates, including contract rates on certain commodities.

Participation of lines in the trade. The subject agreement covers the trade from New York to Sweden. The following table shows the participation of Scantic and foreign-flag lines in eastbound traffic, both liner and bulk cargo, on Trade Route No. 6 and to Sweden during 1951 and 1952, as well as the participation of the agreement lines in the revenue from cargo to Sweden.

TABLE I

	(1) Participation in total TR/6 cargo eastbound	(2) Participation in cargo to Sweden eastbound	(3) Percent Swedish cargo of total	(4) Participation of *Agreement Lines* in revenue on Swedish cargo
1951	799,930 tons	208,643 tons	26%	
Scantic	44%	23%		42%
All Swedish	23%	69%		58%
Other foreign	33%	8%		
1952	625,174 tons	182,825 tons	29%	
Scantic	23%	*16%		36%
All Swedish	30%	73%		
Swedish agreement		61%		64%
Thorden		12%		
Other foreign	47%	11%		

*Scantic's share of cargo carried by Agreement Lines was 20 percent.

Of the total westbound movement on Trade Route No. 6, Scantic carried 43 percent in 1951 and 44 percent in 1952; foreign lines other than Swedish carried 30 percent in 1951 and 23 percent in 1952. From Sweden, Swedish lines carried 44 percent in 1951 and Scantic carried 50 percent; in 1952, Swedish lines carried 87 percent and Scantic carried only 6 percent, due apparently to its concentration on cargo from Norway. The heaviest general cargo movement is to and from Sweden, and the most important foreign-flag competition on Trade Route No. 6 is Swedish.

Scantic's percentage of revenue on cargo to Sweden has declined steadily from a high of 53 percent in 1949. This is attributed to the fact that the Swedish Agreement Lines carry coal whereas Scantic does not; also, to Scantic's diversion of ships to carry United States

Government defense cargo to Iceland, which is not available to foreign lines.[2]

Prior pooling agreements. Scantic was a member of several pooling agreements prior to World War II. It entered into its first pooling agreement with Swedish lines in 1924, as agent for the United States Shipping Board, with a division of 20 percent of the traffic, later increased to 33⅓ percent. This agreement or its successor was mentioned by Scantic in its first application for operating subsidy filed in December 1936. Apparently, reference is made to Agreement No. 2687 which, however, was canceled on January 8, 1935. No mention is made of such pool in Scantic's application for subsidy dated February 24, 1937, upon which was based the first (temporary) subsidy contract awarded to Scantic, dated June 18, 1937. Neither did a subsequent application, dated October 11, 1937, mention such pool. The record does not indicate there was any similar subsequent agreement until late 1945, when No. 7549 was executed and approved.

The present sailing agreement (No. 7549), dated October 17, 1945, was approved under section 15 of the Shipping Act, 1916, on December 4, 1945. It is styled as temporary pending development of conditions permitting reestablishment of prewar conference arrangements which existed in the trade. It is cancelable on 30 days' notice. The signatories agree to alternate sailings under Swedish and American flag every Friday from New York, ships to sail as scheduled whether loaded or not. Swedish Agreement Lines are permitted to berth more than one ship during Swedish-flag periods when necessary to offset the larger American ships. The stated purpose of the alternating sailings is:

> to maintain a regular service to Sweden with an approximately even division of Swedish and United States freight, East and Westbound, originating from or destined to United States North Atlantic ports, between Swedish and American flag ships, both from a freight revenue point of view and of volume.

Manifests are to be exchanged on each vessel sailing. In practice, the names of shippers and consignees are deleted therefrom. Rates quoted by the signatory lines (eastbound) are to be in accordance with the Baltic Agreement (7670), of which they were members prior to their execution of No. 7549. No provision is made for westbound rates.

Amendment No. I to No. 7549, approved March 5, 1946, recites that trade between the United States and Sweden has so developed that it becomes necessary to increase alternate sailings. Made in con-

[2] Permission of the Maritime Administration is required to carry bulk cargoes. The overcarriage by Swedish Agreement Lines in terms of revenue was $434,753 in 1951, $878,898 in 1952, and $1,233,515 in 1953.

templation of larger postwar trade, it has been inoperative since about 1950.

A proposed Addendum No. II, which would have extended No. 7549 to the Finnish trade and included Finnish lines, was negotiated in March 1946. Tariffs were filed thereunder but it was never completed. The parties to No. 7549 have made a continuing effort to develop it into a full conference agreement including not only Finnish lines but all of the regular Danish and Norwegian lines in the trade. The purpose is to secure rate stability, particularly westbound and especially on woodpulp.

Operation of the agreement. The agreement in No. 7549 on westbound traffic was never effectuated, primarily because of disagreement between Scantic and Swedish shippers on woodpulp rates. This commodity constitutes approximately 90 percent of the westbound movement and is handled on a contract or charter basis. Scantic does not solicit Swedish woodpulp because it does not care to assume the burden of supplying tonnage required by the charters at the rate obtainable.[3] On its small westbound general cargo movement, Scantic generally applies tariff rates published by Swedish America Line, but its competition for such cargo is limited. Its wide diversity of trade prevents it from giving full continuity of service required for westbound general cargo.

Eventually, the plan to alternate sailings every Friday was abandoned and ships were scheduled alternately, as frequently as cargo offered. An attempt was made to have the berth covered at all times.

When the manifests exchanged showed overcarryings by the Swedish Agreement Lines, due frequently to overlap of sailings, *Scantic requested them to close their books after the ship was due to sail; or to reduce their sailings when the berth was overtonnaged; or to prevail upon their shippers to route cargo via Scantic, particularly that which is controlled by the Swedish Government. There is no evidence of record that Scantic ever succeeded in these attempts.* In the reverse situation, no similar requests were made upon Scantic. *None of the parties has refused cargo for the purpose of diverting it to the other.*

While no action has been taken to enforce an exact division of traffic, it is testified that adjustments are made at the end of every six months or year, and that it has never happened that any material adjustment has not been made or considered necessary by the principals. No money changes hands. The subject agreement does not

[3] Because of the safety factor involved, Scantic does not solicit Swedish ore but carries it occasionally for an important customer.

guarantee or assure either participant a fixed share of either traffic or revenue, but does purport to provide "an approximately even division of Swedish and United States freight, East and Westbound, * * * both from a revenue point of view and of volume." Although, as hereinabove stated, Scantic has not realized a 50 percent or greater participation in revenue on cargo carried to Sweden by agreement lines since 1949, Scantic is satisfied that it gets a reasonably fair share of the type of cargo which it accepts.

Effect of the agreement on solicitation. There is always a highly competitive condition existing between the parties in the traffic departments, especially when there is too much overlap on sailings. Witness Lee stated: "There is always a fight going on between traffic offices . . . What we [member lines] attempted to do as principals . . . was to convince our own traffic departments that we were attempting to run a friendly cooperation . . . attempting to fight a common enemy, which was the outside competition." He testified further that the primary purpose of Scantic is to develop the trade by active solicitation; that the subject agreement had no effect on Scantic's competition because the parties thereto did not control all of the trade; that solicitors for Scantic made from 5 to 68 calls on its patrons making substantial shipments to Sweden in 1953; and that there would not have been more calls if the agreement had not existed.

Effect on competition. Scantic carried 13,949 tons of defense, and 4 tons of commercial, cargo to Iceland in 1952. Ships carrying defense cargo and calling first at Iceland are also offered to Sweden, but the resulting delay puts them at a definite competitive disadvantage as against Swedish ships. Consequently, Scantic is satisfied to permit the Swedish Agreement Lines to carry an increased portion of Swedish cargo as a temporary situation, confident that Scantic can regain its full quota upon cessation of the defense movement to Iceland. Scantic concedes that when its service is inadequate to meet the demands of the Swedish trade, it relies upon the Swedish Agreement Lines to supply such demands.

Justification of the agreement. Were it not for the agreement, *Scantic's portion of the traffic would be around 15–20 percent. This is based upon the fact that Swedish buyers control approximately 90 percent of eastbound cargo, which is the dominant movement in the trade.* Many of them are financially interested in the shipping companies and are naturally inclined to patronize Swedish lines exclusively. Witness Lee testified that the reasons why the Swedish Agreement Lines agreed to an even division of the business were (1) the resulting stability of rates on a compensatory level, (2) an opportunity for the member lines to control cargo as against the trans-

shipping lines, particularly the nonconference lines which offer the most serious competition, and (3) governmental support received by Scantic. He emphasized that while the Baltic Agreement (7670) controls the eastbound rates, that agreement is founded upon the stabilized competition provided by No. 7549 and its predecessors. His prediction was that if No. 7549 were dissolved, cut-throat competition and rate wars would ensue in times of stress.

Relation of the agreement to Scantic's subsidy. If Swedish competition were eliminated from the subsidy calculations, and the only competition used was that of Norwegian and Danish lines, the operating-differential subsidy rate on wages would be substantially increased. The comparative wage costs per month and differential rates for a C-3 vessel operating on Trade Route No. 6 in 1949 is illustrated by the following table:

TABLE II

(Wage-differential rates on C-3 vessel—1949 [1])

Flag	Wages per month	Unweighted differential (percent)	Competition weight factor (percent)	Weighted differential (percent)
United States	$22,285			
Denmark	5,806	73.95	21.7	16.05
Norway	6,619	70.30	26.7	18.77
Sweden	7,650	65.67	51.6	33.89
Composite weighted differential				68.71

[1] The wage differential for 1951 was 73.6 percent.

Witness for Scantic testified that the parity it now enjoys with its competitors in the trade through its subsidy contract makes it possible for Scantic to stay in the trade; that the fact that it may obtain as much as 50 percent of the business by virtue of the subject agreement has no relation to the need for parity; and that if the operating-differential subsidy on wages is discontinued, or substantially reduced, by the elimination of Swedish competition, United States-flag vessels could not continue to be operated in this trade for two reasons, as witness Lee put it: first, "this support that we have from the Government is the primary motive for the Swedes doing business with us; and the second is the financial angle which would of course be utterly impossible for us to meet."

The basic facts derived from the foregoing findings under issue 1 are:

(a) The subject agreement creates a relationship which tends to diminish competition. This is true to the extent the agreement *permits* Scantic to divert its service to Iceland for the carriage of noncompetitive cargo, to thus impair its regular direct service to Sweden, and to

rely upon the Swedish Agreement Lines to fill the void, expecting to resume its position when the defense movement ends.

(b) *Aside from the Iceland diversion*, the agreement is not shown to have had any appreciable effect on competition among its signatories, which appears to be substantial. Scantic actively solicits shipments against the other parties, and vice versa; and against the nonmember lines, including Thorden, which together carried approximately 23 percent of the eastbound traffic to Sweden in 1952. The agreement does not guarantee or assure any participant a fixed or ascertainable share of either traffic or revenue. While it is estimated that Scantic's share of the traffic would be about 15 to 20 percent without the agreement, nevertheless, with the agreement it has obtained only slightly more—23 percent in 1951 and 16 percent in 1952. Indeed, it is difficult to conceive how the agreement could materially affect competition considering the perfunctory manner in which it is carried out. Despite overlapping of sailings, the ship which is due to sail continues to receive cargo, which would seem largely to thwart the purpose of alternating sailings. It is testified that periodical adjustments are made, but the record does not disclose what is adjusted. The ambiguous statement that no material adjustment has been made or "considered necessary" by the principals, fails to shed any light on what kind of adjustments, if any, are made.

Exceptions to the recommended decision were filed by both Scantic and Public Counsel.

Scantic excepts to the examiner's finding of diminution of competition and requests amended findings of fact, including and consistent with an ultimate finding that competition has not been diminished by virtue of the sailing agreement or the practices thereunder. Scantic urges in support of its proposed amended findings that, since the sailing agreement does not specifically permit or otherwise purport to control the diversion of Scantic ships to Iceland, that diversion is unrelated to this investigation, and the examiner's finding of diminution of competition between the signatories to Agreement No. 7549, based entirely on the diversion to Iceland, is therefore erroneous.

On the other hand, Public Counsel excepts to the recommended decision on the grounds, among others, that the examiner erred in concluding that the relationship between Scantic and Swedish Agreement Lines tends to diminish the competition only to the extent that it permits Scantic to divert its service to Iceland for the carriage of non-competitive cargo and in concluding that, aside from the Iceland diversion, the agreement is not shown to have had any appreciable effect on competition.

Viewing the evidence adduced before the examiner, we agree with him; we cannot agree with Scantic's contentions or adopt the amended findings of fact proposed. We find that the diversion bears a direct relationship to the sailing agreement. That relationship is evident from Scantic's reliance on the Swedish Agreement Lines to cover the berth during the periods in which Scantic does not provide a direct service to Sweden, from Scantic's assurance of regaining, presumably through the continuing agreement, its proportionate share of Swedish cargo upon termination of the Icelandic movement, and from the fact that the agreement remained in force during Scantic's participation in that movement in spite of the termination provisions of the agreement.

Although Public Counsel urges that the diminution of competition is not confined to the diversion, we see no other present evidence of diminution. It is true that the terms of the agreement contain a potential for other practices tending to diminish competition and that performance under the agreement has been inconsistent with the relationships ostensibly created. In view of the testimony concerning the present relationship of the parties to the agreement, the purpose thereof, and the level of nonpool competition, we consider the probability of realizing the potential for diminution of competition to be slight. We are concerned therefore with the actual state of competition rather than the potentials inherent in the agreement. Public Counsel further urges that the examiner erred in holding that the question of whether or not the subject agreement comports generally with the purposes and policy of the Act is foreclosed in this investigation. We are of the opinion that consideration of those matters would violate the notice requirements of the Administrative Procedure Act in view of the confines of the order of investigation.

Finally, Scantic excepts to the examiner's conclusions of law in so far as inconsistent with the joint brief of respondents filed March 10, 1952. This general exception fails to provide the particularity with which errors are to be indicated under Rule 13 (h) of the Board's Rules of Practice and Procedure. We consider the reasoning in our opinion in *Lykes-Harrison Pooling Agreement*, 4 F. M. B. 515, to constitute a full answer to Scantic's general exception.

The ultimate findings of the examiner are adopted as our own.

The investigation is discontinued.

By order of the Board.

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

FEDERAL MARITIME BOARD

No. S-44

American Export Lines, Inc.—Application for Increase in Number of Subsidized Voyages on Lines A, B, and C (Trade Route No. 10)

Submitted January 4, 1955. Decided January 31, 1955

Applicant found to be an existing operator on Trade Route No. 10 within the meaning of section 605 (c) of the Merchant Marine Act, 1936.

The Board is unable to find that permitting an increase in the combined number of subsidized sailings on Trade Routes Nos. 10 and 18 would 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, does not interpose a bar to granting a prospective increase in the number of applicant's subsidized sailings on Trade Route No. 10.

Gerald B. Brophy, *Carl S. Rowe*, and *Donald L. Deming* for American Export Lines, Inc.

John J. O'Connor for Isbrandtsen Company, Inc.

John Mason and *Edward Aptaker* as Public Counsel.

Report of the Board

This proceeding arises out of the application of American Export Lines, Inc. (hereinafter "Export"), for an increase in the number of its subsidized sailings on Trade Route No. 10 (U. S. North Atlantic/ Mediterranean).

Presently, under the terms of operating-differential subsidy contract No. FMB-1 (hereinafter "the contract"), Export is permitted a combined maximum of 104 sailings on Lines A, B, and C (Trade Route No. 10) and Line E (Trade Route No. 18), described in Article I-2 (f) of the contract as follows:

(f) The description of the services, routes and lines and sailings required thereon shall be as follows:

Line A—North African Service (Trade Route 10)

Between United States North Atlantic ports (Maine to and including Hampton Roads, Virginia) and ports in North Africa from Casablanca to the western boundary of Egypt; with the privilege of calling at Gibraltar, ports in Portugal, Spanish Atlantic ports south of Portugal, Spanish Mediterranean ports, Adriatic ports, and Sicily, and with the further privilege, when traffic offers, of calling at any other ports within the limits of Lines B, C, and D, as herein described.

	Minimum	Maximum
Sailings per annum	22	The combined maximum for Line A and Lines B, C, and E, below, is 104.

Line B—West Coast of Italy Service (Trade Route 10)

Between United States North Atlantic ports (Maine to and including Hampton Roads, Virginia) and ports on the West Coast of Italy and in Mediterranean France, and Adriatic ports on and after January 1, 1951; with the privilege of calling at Gibraltar, ports in Portugal, Spanish Atlantic ports south of Portugal, Spanish Mediterranean ports, Adriatic ports, and Sicily, and with the further privilege, when traffic offers, of calling at any other ports within the limits of Lines A, C, and D, as herein described.

	Minimum	Maximum
Sailings per annum	22	The combined maximum for Line B, Line A, above, and Lines C and E, below, is 104.

Line C—Black Sea Service (Trade Route 10)

Between United States North Atlantic ports (Maine to and including Hampton Roads, Virginia), and ports in Turkey and the Black Sea, and in the eastern Mediterranean Sea (from the northern entrance of the Suez Canal to and including Greece); with the privilege of calling at Gibraltar, ports in Portugal, Spanish Atlantic ports south of Portugal, Spanish Mediterranean ports, Adriatic ports, and Sicily, and with the further privilege, when traffic offers, of calling at any other ports within the limits of Lines A, B, and D, as herein described.

	Minimum	Maximum
Sailings per annum	22	The combined maximum for Line C, Lines A and B, above, and Line E, below, is 104.

Line E—India Service (Trade Route 18)

Between United States Atlantic ports and (via the Suez Canal) ports in the Gulf of Suez, Red Sea, Gulf of Aden, Pakistan, India, Ceylon, and Burma; with the privilege of calling at ports in Egypt, Palestine, Israel, Syria, Lebanon, and

North Atlantic Canadian ports (but not for cargo to or from the United States), and with the further privilege, when traffic offers, on and after November 1, 1949, of calling at any other ports within the limits of Lines A, B, C, and D, as herein described.

	Minimum	Maximum
Sailings per annum	20	The combined maximum for Line E and Lines A, B, and C, above, is 104.

In addition, Article I-2 (d) of the contract authorizes Export to operate on Trade Route No. 10, on an unsubsidized basis, four vessels purchased in 1949 from Shepard Steamship Company (hereinafter "the Shepard ships"). The article provides as follows:

* * * Until the United States shall direct otherwise, sailings on Lines A, B, and C, Trade Route 10, and Line E, Trade Route 18, may, for any calendar year after the calendar year 1949, exceed by 26 the combined maximum of 104 sailings per annum set for Lines A, B, C and E by this Article I-2 as a result of sailings on Lines A, B and C by the four vessels *Excellency* (ex *Bunker Hill*), *Exilona* (ex *Minute Man*), *Expeditor* (ex *Paul Revere*) and *Exermont* (ex *Bostonian*), acquired by the operator in 1949, and for the calendar year 1949 may exceed the combined maximum of 104 sailings by 9, in each case without the prior approval of the United States. No sailings by said four vessels shall be taken into account in determining whether the Operator has complied with the minimum and maximum sailing requirements set forth in this Article I-2. No subsidy shall be payable with respect to any sailings by any of said four vessels unless the Board shall first have made all determinations and taken all other action antecedent to such payment. In no event shall any subsidy be payable with respect to sailings on Lines A, B, C, and E in excess of 130 per annum.

In its application Export asks that in addition to the combined maximum of 104 sailings per annum there be designated as subsidized sailings, effective February 1, 1950, a maximum of 26 outward sailings per annum to Israeli ports by the four Shepard ships, with the privilege of calling at other ports on Lines A, B, and C as traffic offers.

In the notice of hearing under section 605(c) [1] of the Merchant Marine Act, 1936 (hereinafter "the Act"), served on September 30, 1953, we stated the issues to be:

(1) Whether the application is one with respect to a vessel or vessels to be operated on a service, route, or line served by citizens of the United States which

[1] Section 605 (c) provides 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

would be in addition to the existing service, or services, and, if so, whether the service already provided by vessels of United States registry in such service, route, or line is inadequate, and in the accomplishment of the purpose and policy of the act additional vessels should be operated thereon;

(2) whether the application is one 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, and, if so, whether the effect of the subsidy 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, and

(3) whether it is necessary to enter into such contract in order to provide adequate service by vessels of United States registry.

Hearings were held in Washington, D. C., on September 29 and 30, 1954. On December 8, 1954, the examiner issued a recommended decision in which he found that section 605 (c) of the Act is not a bar to the grant of Export's application. Public Counsel excepted to the recommended decision in so far as the examiner found that "* * * Export has been an existing operator on Lines A, B, and C with respect to the * * * (Shepard ships) since 1949."

Since the Act neither contemplates nor authorizes retroactive payment of operating-differential subsidy, we will consider Export's application only in so far as it seeks a prospective award.

The Shepard ships, modified C–3 type vessels, were introduced into the Mediterranean trade in the latter part of 1949, and serve various ports eastbound and westbound on Lines A, B, and C. Eastbound, the vessels call principally at the Adriatic ports of Trieste and Rijeka, at Iskenderun, Turkey, at Tel Aviv and Haifa, Israel, and at Larnaca, Cyprus. The number of calls and the amount of cargo carried to these ports, as well as the number of outward sailings on Lines A, B, and C, are set forth in the following table:

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to be operated in a service, route, or line served by two or more citizens of the United States with vessels of United States registry, if the Commission shall determine the effect of such a contract would be to give undue advantage or be unduly prejudicial, as between citizens of the United States, in the operation of vessels in competitive services, routes, or lines, unless following public hearing, due notice of which shall be given to each line serving the route, the Commission shall find that it is necessary to enter into such contract in order to provide adequate service by vessels of United States registry. The Commission, in determining for the purposes of this section whether services are competitive, shall take into consideration the type, size, and speed of the vessels employed, whether passenger or cargo, or combination passenger and cargo, vessels, the ports or ranges between which they run, the character of cargo carried, and such other facts as it may deem proper.

TABLE I

Year	No. of sailings	Calls: Port	Calls: No.	Cargo carried (tons of 2,240 pounds)
1949 (4 mos.)	9	Trieste	6	10,215
		Rijeka	1	331
		Iskenderun	1	3,122
		Tel Aviv	9	11,292
		Haifa	9	14,374
		Larnaca	0	0
1950	21	Trieste	21	33,440
		Rijeka	7	3,257
		Iskenderun	5	1,933
		Tel Aviv	21	13,984
		Haifa	21	12,764
		Larnaca	1	132
1951	21	Trieste	18	27,332
		Rijeka	16	20,852
		Iskenderun	18	8,404
		Tel Aviv	21	17,675
		Haifa	21	39,899
		Larnaca	0	0
1952	18	Trieste	15	19,138
		Rijeka	14	14,904
		Iskenderun	17	7,634
		Tel Aviv	17	6,956
		Haifa	17	16,481
		Larnaca	8	767
1953	23	Trieste	21	16,596
		Rijeka	21	31,362
		Iskenderun	21	6,051
		Tel Aviv	21	13,372
		Haifa	21	28,028
		Larnaca	12	1,601
1954 (6 mos.)	11	Trieste	9	1,802
		Rijeka	10	18,012
		Iskenderun	11	3,152
		Tel Aviv	11	6,123
		Haifa	11	18,894
		Larnaca	5	376

Considering the first issue outlined in the notice of hearing, it is clear from the foregoing table that the service operated by the Shepard ships on Lines A, B, and C is an existing service, and accordingly not in addition to the existing service.

As to the second issue, there is no evidence before us tending to show that award of subsidy for Export's Shepard-ship service would give undue advantage or be unduly prejudicial as between American-flag carriers in the operation of vessels in competitive services, routes, or lines. Since the burden of proving undue prejudice or advantage under section 605 (c) is on those opposing the award,[2] we cannot, in the absence of proof, find that the grant of the application would give

[2] *Grace Line Inc.—Subsidy, Route 4*, 3 F. M. B. 731 (1952).

undue advantage or be unduly prejudicial as between citizens of the United States.

In view of our determinations on the first and second issues, both the third issue and the exceptions of Public Counsel are rendered moot.

We conclude that section 605 (c) of the Act does not interpose a bar to granting a prospective increase in the number of Export's subsidized sailings on Trade Route No. 10. We do not hereby determine questions other than those arising under section 605 (c) of the act.

By the Board.

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

FEDERAL MARITIME BOARD

No. M-62

HAWAIIAN STEAMSHIP COMPANY, LTD.—APPLICATION TO BAREBOAT CHARTER THE SS *La Guardia*

Submitted February 3, 1955. Decided February 25, 1955

Joseph A. Klausner for applicant.

Willis R. Deming for Matson Navigation Company and The Oceanic Steamship Company.

Allen C. Dawson and *L. F. Fuller* as Public Counsel.

REPORT OF THE BOARD

This proceeding was instituted by order of the Board, pursuant to sections 5 (e) and 5 (f) of the Merchant Ship Sales Act of 1946, as amended by Public Law 591, 81st Congress, and Public Law 757, 83d Congress, for the purpose of considering the application of Hawaiian Steamship Company, Ltd. (hereinafter "applicant"), to charter the SS *La Guardia*, a Government-owned P2-S2-R2 vessel.

Applicant, a corporation organized and existing in the Territory of Hawaii, seeks a six-year bareboat charter of the *La Guardia* for the carriage of passengers and cargo between San Francisco, California, and Honolulu, T. H., with the privilege of making occasional calls, for passengers only, at Hawaiian ports other than Honolulu and at United States Pacific coast ports other than San Francisco. Applicant does not now own or operate any vessels.

The application is opposed by Matson Navigation Company (hereinafter "Matson") and The Oceanic Steamship Company (hereinafter "Oceanic"). Interveners agree that the service between the Pacific coast of the United States and Hawaii is in the public interest, that the present passenger service is inadequate, and that no privately owned United States-flag vessels are available for charter by private operators for use in such service. They oppose the application, however, insofar as applicant seeks the right to lift cargo.

Hearings were conducted on December 14, 15, and 16, 1954, and oral argument, in lieu of briefs, was made before the examiner on December 17, 1954. Thereafter, the examiner found and certified to the Secretary of Commerce that the service under consideration is in the public interest; that such service is not adequately served; and that privately owned American-flag vessels are not available for charter by private operators on reasonable conditions and at reasonable rates for use in such service. The examiner recommended that the rate of charter hire for the *La Guardia* be fixed by negotiation with applicant and that the charter contain no provisions restrictive of applicant's right to carry cargo as well as passengers.

Exceptions to the initial decision of the examiner were filed by Matson and Oceanic and by Public Counsel, and replies thereto were filed by Public Counsel and by applicant. Matson and Oceanic submitted but subsequently withdrew a request for oral argument.

Under the application the *La Guardia* would be converted to carry about 600 passengers and would have about 150,000 cubic feet of dry-cargo space and 35,000 cubic feet of refrigerated space. Applicant proposes to bear all expenses of breaking out, converting, and laying up the vessel. The *La Guardia's* present dormitory-type accommodations would be converted to cabins accommodating 2, 3, and 4 persons. At a speed of 19 knots, the vessel would have a transit time of 4½ days between San Francisco and Honolulu and would spend about 32 hours in each port, giving it a voyage turnaround time of about 12 days. Since the prime purpose of the proposed charter is the carriage of passengers, the amount of cargo which the *La Guardia* would carry would be limited by the amount of time available for loading, the number of hatches worked, and applicant's stated intention of employing only one set of cargo gear on double rigged hatches. It is contemplated that cargo, if available, would be worked during 21 of the 32 hours available; no cargo operations are planned during the so-called penalty hours between midnight and 0800 hours, although these hours could be used if desired. Only forward hatches Nos. 1, 2, and 3 would be utilized for dry cargo. Under these conditions, it is expected that the amount of cargo lifted by the *La Guardia* per round voyage would not exceed 693 tons of dry cargo and 315 tons of refrigerated cargo or a total of 1,008 short tons. Cargo working time would be reduced to the extent that heavy weather or other factors increased voyage transit time or would be increased by use of the "penalty" hours, if necessary. Based on a planned 28 voyages per year, applicant anticipates lifting not more than 28,000 to 29,000 tons per year.

Analysis of the existing service in the trade and the public interest therein necessarily requires a consideration of the Hawaiian economy, present and prospective.

The Territory of Hawaii has a population of approximately 500,000. Since 1939, the number of its inhabitants has increased about 20 percent. This increase has been accompanied by a substantial growth in the economic wealth of the islands. The gross product, which in 1939 amounted to $270,000,000, exceeded a billion dollars in 1953. Likewise, the personal income of the population rose from $218,000,000 in 1939 to $889,000,000 in 1953, and the disposable personal income, or total income less taxes, from $211,000,000 to $783,000,000. Per capita, the personal income increased from approximately $525 in 1939 to $1,740 in 1953, and the disposable income from $508 in 1939 to $1,532 in 1953.

The main factors sustaining the economy of the islands are sugar cultivation and processing, pineapple cultivation and canning, the so-called tourist industry, and Federal military expenditures. Authorities on economic prospects in Hawaii believe that the greatest promise of growth and stability in the Hawaiian economy lies in the expansion of the tourist industry. Tourist expenditures in Hawaii mounted from 4.5 million dollars in 1921 to 42.6 million dollars in 1953. The number of visitors from North America who stayed two days or longer in the islands rose from 21,737 in 1939 to 72,152 in 1953. An important part of the Hawaiian tourist trade consists of persons of moderate income.

The growth in water passenger traffic between the continental United States and Hawaii has not kept pace with growth in air traffic over a comparable period. The number of passengers carried by the airlines between the continental United States and Hawaii increased from 28,200 in 1950 to 50,256 in 1953 westbound, and from 35,010 in 1950 to 73,218 in 1953 eastbound. The number of passengers carried by water between the continental United States and Hawaii increased westbound from 21,177 in 1950 to 23,511 in 1953 and eastbound from 17,051 in 1950 to 19,360 in 1953. By way of comparison, it is noted that, while passenger traffic between United States and Europe experienced a similar increase in volume over a comparable period, the percentage of participation by water carriers in the total traffic increase remained roughly constant.

The present water passenger service between the continental United States and Hawaii is provided principally by Matson's *Lurline*, the only passenger vessel exclusively engaged in the California/Hawaii trade. Two vessels of American President Lines, Ltd., the *President Cleveland* and *President Wilson*, offer passenger service between Cal-

ifornia and Hawaii but as a leg of regular sailings to and from the Far East and not as an exclusive service.

The *Lurline's* transit time between California and Honolulu is 4½ days. The vessel sails from the west coast every 12 days, serving San Francisco and Los Angeles alternately. Accommodations, all first class, are rated higher than those proposed for the *La Guardia*, as indicated by the following table:

One-way fares	Lurline		La Guardia	
	No.	Percent	No.	Percent
Less than $150	24	4	72	12
$150 to $199	184	29	260	42
$200 to $299	188	29	242	39
$300 to $399	148	23	----------	7
$400	98	15	0	0

It will be noted that 43 percent of the *Lurline* accommodations are rated at $300 or more for one-way passage as contrasted with 7 percent of the *La Guardia* accommodations priced in that range.

In addition to passenger accommodations, the *Lurline* has dry-cargo space which is used solely for the carriage of a maximum of 25 automobiles and 55,000 cubic feet of refrigerated space, 16,000 cubic feet of which is the maximum used on any sailing. The small amount of cargo lifted by the *Lurline* is due primarily to the limited time available for cargo working.

Cargo service between San Francisco and Los Angeles and Hawaii is provided principally by Matson. Although vessels operated by American President Lines, Ltd., and Pacific Transport Lines, Inc., call at Hawaii on voyages between the continental United States and the Far East, the vessels are devoted principally to the Far East trade and do not, accordingly, offer the frequency and regularity of service available on vessels employed exclusively in the United States/Hawaii trade. Neither American President Lines, Ltd., nor Pacific Transport Lines, Inc., opposes the present application. Additionally, on rare occasions, Oceanic vessels have participated in the California/Hawaii trade. Oceanic operates four C–2's from the Pacific coast to the South Sea islands over Trade Route No. 27 and has present plans for inauguration of a passenger service on the same trade route in 1956, under which space would be available for carriage of passengers and cargo to and from Hawaii.

Matson owns eighteen freighters—fifteen C–3's and three Liberties—all of which are operated between the continental United States and Hawaii. With seven of the C–3's (hereinafter "the California ships") Matson provides weekly services between the San Francisco Bay area

and Hawaii and between Los Angeles and Hawaii. The *California* ships average approximately 530,000 cubic feet of dry-cargo space and 55,000 cubic feet of refrigerated space per vessel.

The *California* ships sail from San Francisco to Hawaii, where they discharge San Francisco cargo and load cargo inbound to Los Angeles. They return to Los Angeles via Oakland, California, there load military cargo, proceed to Los Angeles and discharge cargo lifted at Hawaii. The vessels then return to Hawaii, discharge Los Angeles cargo and load cargo for San Francisco. The vessels operate at 16 knots and arrive at Honolulu on the sixth day after departure from California. Since general cargo must be delivered to the pier at San Francisco not later than the Friday night preceding the regular Wednesday sailing, the *California* ships deliver general cargo to Hawaiian consignees not earlier than the 14th day after delivery dockside.

Inbound voyages of Matson freighters regularly employed in the Hawaii/Pacific Northwest trade are occasionally devoted to carriage of California cargo, particularly during the peak movement of sugar from Hawaii. Further, two other Matson vessels have been, during peak sugar movements, operated in ballast from California to Hawaii for return with full loads of sugar. Although Matson asserts that these vessels sailed light only for lack of cargo, the record indicates that the sailings were unadvertised.

Eliminating from computation the *Lurline* and the freighters not regularly operated from San Francisco to Hawaii, the regular vessels in the trade were employed during the first three quarters of 1954 to 87 percent of drycargo capacity and 82 percent of reefer capacity. Adding a small factor for broken stowage, it is probable that the percentage of dry-cargo space utilization reached 90 percent.

Homebound cargo moves on a weight rather than a measurement basis. From information supplied by a witness for Matson, we find that the percentage of utilization is approximately as high homebound as outbound. No cargo has been declined by Matson, however, although on infrequent occasions reefer cargo offered a particular vessel has been deferred until the succeeding sailing.

Applicant has endeavored without success to locate a suitable privately owned American-flag vessel available for charter to it for use in the service hereinabove discussed.

From the foregoing we find:

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

2. That the present passenger service is inadequate to meet the needs and demands of tourists of moderate income;

3. That the present cargo service is inadequate to meet the need for a faster service, as proposed for the *La Guardia*, represented as being an "express" or "expedited" service which would substantially reduce elapsed time between delivery dockside for shipment and delivery to consignee; and

4. That privately owned American-flag vessels are not available for charter by private operators on reasonable conditions and at reasonable rates for use in such service.

In addition to the statutory findings required in this application we may, in our discretion, recommend to the Secretary of Commerce restrictions on and conditions to the charter which we deem necessary or appropriate to protect the public interest and to protect privately owned vessels against competition from Government-owned vessels. Accordingly, we recommend execution of a demise charter for the *La Guardia* for a period of six years, subject to annual review, at a minimum charter hire rate of 8½ percent of the statutory sales price, plus 50 percent of profits above 10 percent of the capital necessarily employed. We recommend no restrictions in the employment of the vessel other than those created by the application itself.

Many of the exceptions to the examiner's initial decision have been rendered moot by the findings and recommendations herein. There remain for consideration, other than those exceptions unrelated to material issues or unsupported by evidence, only the exceptions of Matson and Oceanic to the examiner's failure to find, in relation to cargo service, that service in the California/Hawaii trade is not adequate and the examiner's failure to recommend that the proposed charter prohibit the carriage of cargo. As we have previously indicated, evidence adduced at the hearing showed a need for a service which would substantially reduce elapsed time between delivery dockside and delivery to the consignee. Since we need not, for the purpose of this application, determine the extent of inadequacy of the existing service, we express our finding solely in terms of the cargo service proposed by applicant. Having so found, we cannot recommend a charter restriction against the carriage of cargo.

By the Board.

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

FEDERAL MARITIME BOARD

MARITIME ADMINISTRATION

No. S-50

Pacific Far East Line, Inc.—Application Under Section 805 (a), Merchant Marine Act, 1936, to Act as General Agent for Coastwise Line

Submitted December 3, 1954. Decided February 25, 1955

To permit Pacific Far East Line, Inc., to act as general agent for Coastwise Line, Inc., would be prejudicial to the objects and policy of the Merchant Marine Act, 1936. On the evidence adduced, the Board cannot find that the proposed general agency agreement would not result in unfair competition. To permit Pacific Far East Line, Inc., to charter to Coastwise Line, Inc., its unsubsidized vessels returning in ballast from the Orient would result in unfair competition and would be prejudicial to the objects and policy of the Merchant Marine Act, 1936. Applications for such permission under section 805 (a) of the Merchant Marine Act, 1936, denied.

Odell Kominers and *Robert S. Hope* for Pacific Far East Line, Inc.

John Ambler, *Albert E. Stephan*, and *L. W. Hartman* for American Mail Line, Ltd., *William J. Lippman* for American Tramp Shipowners Association, Inc., *Warner W. Gardner* for American President Lines, Ltd., *James L. Adams* and *Tom Killefer* for Pacific Transport Lines, Inc., *Harry Henke, Jr.*, for Olympic-Griffiths Lines, Inc., *Sterling F. Stoudenmire, Jr.*, for Waterman Steamship Corporation, *William I. Denning* and *Alan F. Wohlstetter* for States Steamship Company, Pacific-Atlantic Steamship Co., and Alaska Freight Lines, Inc., and *Alan B. Aldwell* for Oliver J. Olson & Co., intervenors.

John Mason and *Allen C. Dawson* as Public Counsel.

Report of the Board

These proceedings arise out of applications filed by Pacific Far East Line, Inc. (hereinafter "PFEL"), in which written permission is sought, under section 805 (a) of the Merchant Marine Act, 1936, as

amended (hereinafter "the Act"),[1] (1) to act as general agent for Coastwise Line, Inc. (hereinafter "Coastwise"), in its Pacific coastwise and Alaskan services or for such services operated in combination with Coastwise's service between United States Pacific coast ports and British Columbia, and (2) to charter vessels, owned or chartered by PFEL, to Coastwise for operation by Coastwise from United States Pacific Northwest and/or British Columbia ports to California.

The two applications are not interdependent; while PFEL seeks permission for both proposals, either is desired in the event of denial of the other. The proposed general agency agreement is to replace an existing agency agreement between PFEL and Coastwise, approved by the Administrator tentatively on December 1, 1953, and plenarily on January 19, 1954. PFEL was then informed that, in the absence of changes in the scope or nature of the services to be performed, the existing agreement did not require approval under section 805 (a) of the Act.

Notice of the applications was published in the Federal Register on April 30, 1954. On July 11, 1954, we granted petitions to intervene filed by American Mail Line, Ltd., American President Lines, Ltd. (hereinafter "APL"), Olympic-Griffiths Lines, Inc. (hereinafter "OGL"), Pacific Transport lines, Inc., American Tramp Shipowners Association, Inc., Oliver J. Olson & Co. (hereinafter "Olson"), Water-

[1] Section 805 (a):

It shall be unlawful to award or pay any subsidy to any contractor under authority of title VI of this Act, or to charter any vessel to any person under title VII of this Act, if said contractor or charterer, or any holding company, subsidiary, affiliate, or associate of such contractor or charterer, or any officer, director, agent, or executive thereof, directly or indirectly, shall own, operate, or charter any vessel or vessels engaged in the domestic intercoastal or coastwise service, or own any pecuniary interest, directly or indirectly, in any person or concern that owns, charters, or operates any vessel or vessels in the domestic intercoastal or coastwise service, without the written permission of the Commission. Every person, firm, or corporation having any interest in such application shall be permitted to intervene and the Commission shall give a hearing to the applicant and the intervenors. The Commission shall not grant any such application if the Commission finds it will result in unfair competition to any person, firm, or corporation operating exclusively in the coastwise or intercoastal service or that it would be prejudicial to the objects and policy of this Act: *Provided*, That if such contractor or other person above-described 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 or if engaged in furnishing seasonal service only, was in bona-fide operation in 1935 during the season ordinarily covered by its operation, except in either event, 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.

If such application be allowed, it shall be unlawful for any of the persons mentioned in this section to divert, directly or indirectly, any moneys, property, or other thing of value, used in foreign-trade operations, for which a subsidy is paid by the United States, into any such coastwise or intercoastal operations; and whosoever shall violate this provision shall be guilty of a misdemeanor.

man Steamship Corporation, Alaska Freight Lines, Inc. (hereinafter "AFL"), States Steamship Company (hereinafter "States"), and Pacific-Atlantic Steamship Co. (hereinafter "Pacific-Atlantic").

At a prehearing conference on June 15, 1954, counsel for PFEL stipulated that the applications be deemed amended in the following particulars:

1. Vessels to be chartered by PFEL to Coastwise would exclude those owned by the Government which are or may be under charter to PFEL;

2. PFEL does not seek authority to transport cargo between points in British Columbia and the Pacific Northwest, on the one hand, and ports in the Orient served by Trade Route No. 30, on the other. The granting of the application shall not be construed as permitting PFEL to operate on Trade Route No. 30, and this stipulation shall not be construed as requiring PFEL to cease any transportation in which it has been engaged.

3. If PFEL's application to charter vessels to Coastwise is granted, vessels chartered by PFEL to Coastwise for operation in its service from United States Pacific Northwest and/or British Columbia ports to California will not (a) discharge off-shore cargo in British Columbia or the Pacific Northwest, or (b) be chartered under such terms as to permit the carriage of cargo other than that originating in British Columbia or the Pacific Northwest and ultimately destined to points in the continental United States, other than points in the Pacific Northwest.

4. Any willful breach of the foregoing shall be considered a breach of Article II-15 of PFEL's operating-differential subsidy agreement, unless PFEL has theretofore applied for and received express permission from the Board or Administrator, as the case may be, with respect to the particular cargo in question.

5. PFEL recognizes that no party to this proceeding whose protest is not pressed by reason of the above assurances thereby assents to or concurs in the operation of PFEL's unsubsidized vessels.

Hearings were conducted during the period of June 18 through June 25, 1954, and an initial decision was issued by the examiner on October 11, 1954. The examiner recommended denial of both applications on the grounds that grant of permission to act as general agent for, and to charter vessels to, Coastwise would result in unfair competition, would be prejudicial to the objects and policy of the Act, and would not serve the public interest and convenience. By a remark footnoted to the decision, the examiner expressed the following doubt as to the applicability of section 805 (a):

* * * The examiner is not fully satisfied that section 805 (a) is applicable in the present case. As the parties have proceeded on the assumption of its applicability, however, the examiner simply records his doubt at this point as a matter of record. See pages 3–4 of brief of counsel for PFEL.

Exceptions to the decision were filed by PFEL, Public Counsel, and AFL. Replies to exceptions were filed by PFEL, Public Counsel, APL, States, Pacific-Atlantic, and OGL, and oral argument thereon was held on December 3, 1954. Except as hereinafter particularly stated, we agree with the conclusions of the examiner. Exceptions or recommended findings not discussed in this report nor reflected in our findings or conclusions have been considered and found unrelated to material issues or not supported by the weight of the evidence.

Since the applications are not interdependent, we direct ourselves first to the application to act as general agent for Coastwise. We find that:

1. PFEL holds an operating-differential subsidy agreement (FMB No. 22) with the Board under the terms of which PFEL receives subsidy in the operation of not fewer than 36 nor more than 40 sailings on Trade Route No. 29, Service 2.[2]

2. PFEL further operates, under temporary permission of the Administrator, approximately five unsubsidized voyages per month from the Pacific coast to Guam and the Far East, many of the vessels returning to California in ballast. Vessels employed in its unsubsidized service are three owned AP–3's, two C–3's demise chartered from Luckenbach Steamship Company, Inc., and three C–4's time chartered from Joshua Hendy Corporation.

3. Coastwise is an Oregon corporation, certificated by the Interstate Commerce Commission (hereinafter "ICC") to act as a common carrier between United States Pacific coast ports. It currently operates, and has since September 1953 operated, two services with five Liberty vessels. Four operate on approximately a twelve-day frequency, commencing at Long Beach, California, proceeding northbound to San Francisco, Columbia River, Puget Sound, and Southwest Alaska, and returning southbound via British Columbia to Puget Sound and California. The fifth, the demise chartered *North Beacon*, operates on a fourteen-day frequency between Portland, Oregon, and Long Beach, California. In addition to its common-carrier operations, Coastwise acts as Pacific coast agent for Kawasaki

[2] Described as:

Between the California ports of Los Angeles and San Francisco and Yokohama, Kobe, Osaka, other Japanese ports (as traffic offers), Shanghai, other North China ports and ports in Manchuria and Korea (as traffic offers), Hong Kong, Manila, Philippine Island outports, French Indo-China, and Siam (as traffic offers), with privilege of calls at ports of U. S. S. R. in Asia.

Kisen Kaisha, Ltd. (hereinafter "K Line"), a Japanese-flag operator providing berth services from Japanese ports to Canadian Pacific, United States Pacific, United States Atlantic, and South American ports, and a competitor of PFEL in its subsidized and unsubsidized services. Coastwise also acts as agent for various tramps, United States and foreign, and acts as agent for PFEL in Portland, Oregon.

4. Common carriers in the coastwise trade, other than Coastwise, include OGL, Olson, American-Hawaiian Steamship Company, and Pope & Talbot, Inc. Of these, only OGL's service comes into competition with that of Coastwise.

5. On November 11, 1953, Coastwise decided to approach PFEL to act as its agent in California. Thereafter, on December 1, 1953, the existing agency agreement was executed by the parties. The existing agreement provides substantially as follows:

(a) The agency is limited to California and is for an indefinite period subject to concellation on 90 or 120-day written notice;

(b) PFEL's agency activities are subject to the general supervision and control of Coastwise through the latter's executive office in California, and PFEL is not permitted to formulate over-all operational policies nor to nominate, obtain, or schedule vessels or to take any action concerning Coastwise's activities for other carriers;

(c) PFEL solicits, books, receives, and delivers cargoes, issues bills of lading and all other similar documents, collects and disburses monies, handles claims, mans, equips, supplies, maintains, and repairs, Coastwise vessels, and places insurance thereon; PFEL maintains accounts according to PFEL accounting procedures and makes deposits and withdrawals subject to Coastwise control from bank accounts in the name of "Coastwise Line, Pacific Far East Line, Inc. Agent;"

(d) PFEL is paid 3 percent of the gross revenue derived from Coastwise's common-carrier operations.

6. Although no Coastwise official or employee testified at the hearing, a PFEL witness stated that the existing agency agreement has resulted in substantial overhead savings to Coastwise. The witness testified that, whereas Coastwise's overhead for 1952 and 1953 was $1,248,000 and $1,231,000, respectively, the overhead for 1954 had been reported by Coastwise to PFEL to be $750,000, based on a projection of the experienced overhead of $60,000 per month for the first five months of the year with the addition of a $30,000 safety factor. After deducting the agency fee payable to PFEL, estimated at $255,000, based on a projected estimated gross revenue of $8,500,000, the net savings apparently attributable to the agency agreement are $265,000. Although the witness stated these savings were primarily effected

through reduction in personnel from 153 to 78, there were other factors which may have contributed to the economies. First, the number of United States vessels operated by Coastwise as general agent and as demise charterer was sharply reduced in 1954 over the two preceding years. Although the witness stated that these operations affected general overhead expense, he was unable to isolate from similar general overhead expense that portion of savings achieved by reduction in operation of Government-owned vessels. Second, there may have been, in 1954, as compared with preceding years, a reduction in agency services performed for other lines. No evidence as to the extent of such agency services was offered. However, the witness stated that any reduction in agency expenses would be reflected in general overhead.

7. The added cost of performing the existing agency agreement according to PFEL's financial witness is approximately $75,000, which represents additional salaries, communication costs, and other miscellaneous expenses. This information was given to the witness by the comptroller of PFEL. The witness was not familiar with the components of this added cost, nor was he aware of any accounting studies undertaken to determine the total cost of PFEL of performing the agency services. Although the witness stated that PFEL has largely absorbed the additional work with little increase in personnel, no testimony was offered on the cost to PFEL attributable to the partial direction of the efforts of its employees to Coastwise agency duties, nor was this cost reflected in the added cost figure of $75,000.

8. There is, and has been, a close relationship between PFEL and Coastwise. One of Coastwise's predecessors, Coastwise (Pacific Far East) Line, a partnership formed by W. T. Sexton and K. D. Dawson, organized PFEL and was instrumental in securing vessels for PFEL from War Shipping Administration. Mr. Sexton, later president of Coastwise, was the first president of PFEL, and Mr. Dawson was the first chairman of the Board. The present president of Coastwise, W. J. Bush, holds stock in PFEL and is also president of West Coast Terminals, a stevedoring company, which presently performs services for both Coastwise and PFEL. Mr. B. L. Haviside, vice president of Haviside Co., ship chandlers performing services for PFEL, holds stock in both PFEL and Coastwise. Further interrelation is possible through ownership of Coastwise stock by Emmet and Chandler, insurance agents and brokers, and T. G. Franck, executive vice president of Wilbur Ellis Co., an important export firm, although PFEL witnesses did not know whether either company performs services for PFEL and/or Coastwise.

9. The proposed agreement differs from the existing agreement in two principal respects; first, the services are to be extended to all of Coastwise's common-carrier operations; and second, Coastwise's supervision and control over PFEL's services are to be eliminated. The responsibility and authority reposed in PFEL by the terms of the proposed agreement are restricted only by the agreement's termination provisions.

10. No additional economies are expected to result from operation of the proposed agreement other than those operational economies which might flow from centralization of control. No further personnel reduction or other saving in overhead is contemplated. As hereinbefore stated, PFEL under the proposed agreement would receive an agency fee of $255,000 earned at a stated added cost of $75,000. Since no testimony was offered to establish the total cost to PFEL, the difference, $180,000, does not reflect net profit. Identifiable overhead costs will be charged to Coastwise. All other overhead costs will be absorbed by PFEL. The agency fee, tentatively set at 3 percent of the gross revenues, will be increased if warranted by additional expenses. PFEL witnesses, however, were unable to provide the basis for the fee payable under the existing agreement or the tentative fee under the proposed agreement.

11. Under the proposed agreement, Coastwise will continue to maintain its present offices. Employees in these offices will conduct agency activities under the supervision of Coastwise and perform duties relating to Coastwise common-carrier operations under the supervision of PFEL. Further, in the Portland office, agency services will be performed by Coastwise employees for both PFEL and K Line, one of PFEL's foreign-flag competitors.

Considering the application to charter vessels to Coastwise, we find:

12. As stated, PFEL has approximately five unsubsidized vessels per month returning to California from the Far East. Under the application, all five vessels as well as any other unsubsidized vessels which may be operated by PFEL could be time-chartered to Coastwise for employment in the British Columbia/United States Pacific Northwest/California trade. The plan is to utilize the unsubsidized vessels wherever it is felt that Coastwise has need for a vessel. PFEL does not expect, however, that the service by PFEL vessels would differ substantially from the service now provided by Coastwise.

13. As previously stated herein, Coastwise currently operates two common-carrier services with five Liberty vessels. It is the service presently operated by the *North Beacon* which is primarily affected by the chartering arrangement since the chartered vessels would re-

place the *North Beacon*. Coastwise is not prevented, under the application, however, from employing the *North Beacon* in the Alaska trade. PFEL witness stated that it would be so employed only if business needs require.

14. The *North Beacon*, demise chartered at the rate of $6,000 per month and formerly employed in the Pacific coastwise/Alaska trade, is presently operated on a 14-day frequency from Long Beach to Portland and return. The vessel normally runs northbound in ballast and returns southbound to Long Beach, and occasionally San Francisco, via Portland. The vessel carries about 3,000 tons of paper per voyage from Portland plus an occasional deckload (about 500,000 bd. ft.) of lumber from Rainier. The operation of the *North Beacon* results in a loss varying from $4,400 to $8,000 per voyage, dependent on whether deckloads of lumber are carried.

15. OGL's sole ship, the *Olympic Pioneer*, a time-chartered Liberty, currently operates between Puget Sound and Los Angeles Harbor, via Portland and San Francisco. The vessel carries bulk salt from the San Francisco Bay area to Tacoma and Portland and occasionally automobiles from Richmond, California, to Seattle. Since the degree of profit on the northbound leg is insufficient to sustain both legs of the voyage on an annual basis, OGL solicits, and has obtained since the spring of 1953, paper southbound from Portland. The vessel has averaged 2,300 tons of paper on those voyages on which paper is carried and 1,560 tons of paper on all voyages. Since paper moves as it is produced, OGL's ability to secure such cargo is said to be dependent on spacing the sailing of the *Olympic Pioneer* between sailings of Coastwise vessels. There is evidence, however, that the principal shipper of paper desires at least two carriers in the trade.

16. AFL, an Alaskan corporation, with its principal place of business in Seattle, operates a twice-weekly common-carrier service by means of tug and barge between Seattle and points in Alaska served by Coastwise. About half of Coastwise's Alaskan traffic originates in the Puget Sound area. The movement is predominantly northbound, with little cargo available southbound. Although AFL produced no witnesses, a witness for PFEL stated that there is no present need for additional sailings in the trade.

17. Under the application, PFEL vessels will be time chartered under the New York Produce Exchange form of time charter modified to fit the requirements of the parties, with new charters executed for each voyage. Testimony was offered that vessels under time charter to PFEL will be time chartered to Coastwise at the same rate of hire. Owned and demise-chartered vessels will be chartered at the current

world market rate in the absence of established market rate in the trade. The proposed charter itself merely specifies that the rate of hire is "variable". Charter hire will commence upon arival of the PFEL vessel at or off quarantine station, inbound at the port of loading, whether British Columbia or Puget Sound. After deviation from the Great Circle route PFEL vessels will require approximately 12 hours' operation prior to arrival at the port of loading. The cost of the deviation will be borne by PFEL. The vessel will be redelivered at a California port to be nominated by PFEL.

18. The chartering plan will clearly benefit PFEL and will probably benefit Coastwise. PFEL will save charter hire (on its time-chartered vessels) or operational costs on owned vessels on about 2½ days of the ballast legs from the Far East. Coastwise will benefit to the extent that the total of charter hire and other costs fall short of the cost of operating the *North Beacon* per round voyage. Present operational costs for the *North Beacon* are said to be $25,200, exclusive of cargo costs. Since the amount of southbound cargo is presently limited and since PFEL does not anticipate the generation of new cargo in the trade, the benefit to Coastwise will vary inversely with the number of charters executed per month. In this regard it is noted that PFEL, under the proposed agency agreement, will have the sole right to nominate the vessels to be chartered to Coastwise, will control the number of vessels to be so chartered, and will, in any event, benefit in direct proportion to the number of vessels time chartered per month.

19. Probable per diem costs to Coastwise under time charters of each of the three types of vessels available are set out in the following table, based on information current at the time of hearing:

Per day	AP-3		C-3		C-4	
	In port	At sea	In port	At sea	In port	At sea
Charter hire	$1,850	$1,850	$2,045	$2,045	$2,500	$2,500
Fuel oil	90		170		170	800
Cargo overtime	250		250		250	250
Total	2,190		2,485		2,900	3,550

Assuming a voyage of 6½ to 7½ days under the charter, and assuming the current market rate for C-4's to be the rate of hire actually paid by PFEL to Luckenbach, the cost to Coastwise would be lower in chartering any of the three types of vessels for the southbound leg than for the operation of the *North Beacon* per round voyage. It was not established, however, that Coastwise would show a profit from charter of AP-3's, C-3's, or C-4's.

DISCUSSION

Jurisdiction

Although the examiner expressed doubt as to the applicability of section 805 (a) of the Act to the present applications, his misgivings do not weaken the ultimate confirmation of applicability implicit in his conclusion. We find that the examiner did dispose of the jurisdictional question notwithstanding his doubt. We do not share that doubt nor do we see merit in applicant's arguments that the section is inapplicable. First, the application to become general agent for Coastwise, under which PFEL would have complete control of Coastwise's common-carrier activities, is an application to *operate* vessels engaged in the coastwise trade; second, the application to time charter vessels to Coastwise for employment in the coastwise trade is anticipated in section 805 (a) by any or all of the words "owns, charters, or operates". PFEL *owns* some of the vessels to be so employed, would *operate* all of the vessels under time charter, and would *charter* the vessels to Coastwise. PFEL has argued that Coastwise would not be divested of control of its operations and therefore PFEL would not "operate" vessels in the Coastwise trade. Articles 3 (b) and (f) of the proposed agreement, however, clearly give PFEL ultimate control and responsibility for the operation of Coastwise vessels. Although PFEL stated its intentions of consulting Coastwise, it is not required to do so under the terms of the agreement. This, unquestionably, is operation of vessels within the meaning of the statute.

We likewise reject PFEL's argument that the statute, in prohibiting subsidized operators from chartering vessels in the domestic trade, contemplates *chartering* in the sense of *chartering from* rather than *chartering to* domestic operators. The distinction is unjustified from the language, its history, or the prior interpretations of our predecessors. See *Balto. Mail S. S. Co.—Use of Vessels*, 3 U. S. M. C. 294 (1938). Further, even assuming PFEL's interpretation of the word to be correct, the vessels under time charter to Coastwise would nevertheless be operated by PFEL and some of those vessels are owned by PFEL

PFEL, in exceptions, argues that in two unreported decisions chartering of vessels by a subsidized operator to a domestic operator was considered not within the scope of section 805 (a), citing the chartering of the SS *Robin Mowbray* and the SS *Mormacfir*. The argument is unsound; in neither case did the Board decide that an 805 (a) permission was unnecessary.

Public Counsel similarly argues that the examiner erred in failing to dispose of the jurisdictional question as to the applicability of sec-

688-650 O - 63 - 41

tion 805 (a), and further urges that the examiner erred in failing to find that the administration of section 805 (a) is exclusively a function of the Board. Public Counsel cites an apparent inconsistency in previous decisions of the Board, the Administrator, or of the Board and Administrator jointly.

The problem was recently considered by us on motion to clarify our report in *American President Lines, Ltd.—Subsidy, Route 17*, 4 F. M. B.—M. A. 488 (1954). In that report, although specific permission to serve San Francisco was denied American President Lines, Ltd., we stated:

> * * * 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 coastal cargo, and he will decide at such times whether or not such permission should be granted.

In our order served on December 16, 1954, we implicitly confirmed the Administrator's jurisdiction under the facts there presented to determine 805 (a) matters after compliance with the hearing requirements of that section. We hereby reaffirm the determination therein and state that the Administrator has jurisdiction to hear and determine applications under section 805 (a) where it appears therefrom that the application cannot result in making, amending, or terminating subsidy contracts.

We consider that section 805 (a) issues are pertinent to these applications, as indeed did the examiner, in spite of his expressed doubt. Those issues we state to be whether the proposed agency and chartering arrangements would (1) result in unfair competition to any person, firm, or corporation engaged exclusively in the coastwise service, or (2) be prejudicial to the objects and policy of the Act. We do not agree with the examiner that a third and separate finding on public interest and convenience is required. As we indicated in *American President Lines, Ltd.—Subsidy, Route 17*, 4 F. M. B.—M. A. 555, the phrase "public interest and convenience" appearing in the proviso of section 805 (a) is there employed in substitution of the phrase "not prepudicial to the objects and policy of the act," and imposes no additional requirements. Matters affecting public interest and convenience are necessarily to be considered in the light of the purposes and policy of the Act.

We consider that the Board rather than the Administrator has jurisdiction of both of the present applications since either may result in amending PFEL's subsidy contract.

General Agency Agreement

Interveners argue that the proposed general agency agreement would result in unfair competition in that: (1) Coastwise would have the advantage of the large PFEL solicitation staff; (2) the purchasing power of the PFEL organization would enable PFEL to offer trade reciprocity to prospective shippers; (3) PFEL would be able to offer space on its offshore vessels in return for Coastwise cargo shipments; and (4) performance of the agreement by PFEL on an added cost basis would give Coastwise financial advantage not available to domestic operators and would result in contribution by PFEL to Coastwise's costs, in violation of the second paragraph of section 805 (a).

The evidence adduced at the hearing does not support the arguments relating to trading of coastwise and offshore space and to solicitation and reciprocity advantages. Performance of the proposed general agency by PFEL on an added cost basis, however, would result in an advantage to Coastwise. Whether this advantage amounts to unfair competition, however, cannot be determined from this record. PFEL's general-agency fee, although tentatively set at 3 percent of the gross revenues realized from Coastwise's common-carrier operations, is not specified in the proposed agreement and witnesses for PFEL were unable to provide the basis for the fee or to state whether the fee would be compensatory. While a PFEL witness estimated the net return to PFEL, based on 3 percent of the estimated gross operating revenues, less an anticipated added cost of $75,000, the witness was unfamiliar with the components of the estimated added cost and stated that no study had been made by PFEL of the costs of performing general-agency services. Our inability to determine the effect on competition of the financial aspects of the proposed agreement stems solely from applicant's failure to furnish competent evidence in this regard. We cannot, therefore, make the statutory finding that the proposed agreement will not result in unfair competition.

PFEL, in exceptions, argues that performance of the proposed agreement on an added-cost basis would not violate the second paragraph of section 805 (a) since (1) only overhead costs, for which no subsidy is paid to PFEL, could be diverted to Coastwise, and (2) Coastwise's competitor, OGL, operates on a similar basis. We do not agree with PFEL's construction of section 805 (a). Further, since OGL is not associated with a subsidized operator, its financial structure is not relevant to this inquiry.

PFEL argues that evidence on this and other issues was produced at the hearing to the extent permitted by the examiner; that the examiner first excluded evidence offered by PFEL then drew adverse

inferences to the detriment of PFEL in the absence of such evidence. The record does not support this contention. The examiner held only, and properly, that he would not direct PFEL to furnish information necessary to support its application.

Arguments have been directed by interveners to the conflicts between the proposed agreement and the objects and policy of the Act. In this regard interveners argue that present as well as proposed relationships between PFEL and Coastwise violate or may violate sections 803,[3] 804,[4] and 805 (a) of the Act.

While none of the interveners assert that a violation of section 803 exists, it is nevertheless argued that because of the corporate relationships hereinabove described, Coastwise may be an "associate company" of PFEL. For this reason, it is asserted, performance of services for PFEL by concerns in which present Coastwise stockholders also own interests *may be* in violation of section 803. This present relationship between Coastwise and PFEL would be strengthened, it is said, by the proposed agreement.

We do not find that the evidence adduced at the hearing substantiates a violation of section 803. While we recognize that the matter was incompletely explored, the evidence adduced was not sufficiently indicative of a violation to require rebuttal by PFEL.

It is also alleged, however, that the relationships between Coastwise and PFEL are or may be such as to make PFEL an indirect agent of a foreign-flag competitor, in violation of section 804. The violation, it is argued, would result from the possibility that Coastwise is (1) an "associate" or (2) an "agent" of PFEL and that PFEL has not been granted waivers, under section 804, in either capacity. This relationship we consider to be contrary to the purposes and policy of the Act. Although the proposed agreement specifically excludes PFEL participation in any agency services performed by Coastwise, the absolute separation of Coastwise common-carrier activities from Coastwise agency functions outlined in the proposed agreement cannot practically be achieved under the proposed organization. In Portland, for example, Coastwise employees, who will act under Coastwise supervision for K Line, a foreign-flag competitor of PFEL, will also perform services for PFEL under Coastwise supervision and will act for Coastwise under PFEL control and direction. Similarly, in Seattle, Coastwise employees will act for K Line as well as for Coastwise.

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[3] Section 803 makes it unlawful for a subsidized operator, except upon written permission, to obtain services from any company in which the operator has a pecuniary interest.

[4] Section 804 makes it unlawful for a subsidized operator or an associate or agent of the subsidized operator to act as agent for a foreign-flag vessel with which it competes, except by permission under special circumstances and for good cause.

It is also argued by interveners that the proposed agreement would be prejudicial to the objects and policy of the Act in that Coastwise now performs and would, under the agreement, continue to perform agency services for PFEL at Portland although PFEL has not obtained written approval therefor under section 805 (a). No indication was given, however, of the manner in which this relationship would result in unfair competition or in prejudice to the objects and policy of the Act. Although we must require PFEL to seek written approval of that relationship, we see no present indication that approval would not be granted.

It is further argued that performance of the proposed agreement will in some measure divert PFEL officials and employees from full devotion to the off-shore trade, in contravention of the requirements of the PFEL subsidy contract. Since Coastwise agency duties, with certain exceptions, will be absorbed by PFEL's present staff, we must assume that the efforts of the present staff will, to some extent, be divided between off-shore and domestic duties. In the absence of any evidence of the extent of that division, we cannot determine the effect of the proposed agreement on PFEL's operations in foreign trade.

Finally, it is argued that no convincing reason has been advanced for giving control of a domestic operation to a subsidized line. We agree that the sole reasons advanced relate to minor operational and space allocation problems which would readily be resolved by amendment of the existing agency agreement. In the absence of some further indication of the desirability and need for the proposed agreement, the purposes and policy of the Act would not be served by grant of the application.

Application to Charter

Under the application PFEL seeks blanket permission to charter to Coastwise all unsubsidized transpacific vessels which are or may be owned or operated by it, the vessels to be delivered in any of various Pacific Northwest ports. Both parties would probably benefit from such arrangement. PFEL would receive several days' charter hire on otherwise unprofitable ballast legs of transpacific voyages and Coastwise would reduce losses now suffered in operation of the *North Beacon*.

That the application would result in unfair competition is argued by OGL, Public Counsel, States and Pacific-Atlantic, AFL, and APL, either in some or in all of the following respects:

(1) The *North Beacon* is presently being operated as a "fighting ship" with intent to drive OGL's sole vessel, the *Olympic Pioneer*, out

of the coastwise trade. The proposed chartering arrangement constitutes an increased service and poses a greater threat to OGL than the present service provided by the *North Beacon;*

(2) The proposal makes available to Coastwise, at no cost to itself other than charter hire when earned, an unlimited number of vessels for operation in the coastwise trade;

(3) Under the proposed charters, the amount of hire paid by Coastwise may be insufficient to reflect overhead and operational costs to be borne by PFEL. Under these circumstances, Coastwise will be placed in a better position than if it chartered vessels in the open market; and

(4) Under the proposed chartering arrangement, the *North Beacon* could be released by Coastwise for service in the Alaskan trade. Interveners allege that since there is no need for additional sailings in that trade, the proposed chartering arrangement will result in unfair competition to AFL insofar as it will release the *North Beacon* for service in that trade.

We have been presented with no evidence that the *North Beacon* is employed by Coastwise as a fighting ship. Sailings of the *Olympic Pioneer* have not been blanketed, and freight rates have not been reduced.

We agree, however, that unlimited chartering of PFEL's vessels to Coastwise would result in unfair competition. Coastwise would be able, because of the lack of cargo available for the northbound leg of the *North Beacon*, to operate all the vessels required in the Southbound trade without the necessity of finding cargo for the return leg. It may operate as many or as few such vessels as required with no continuing operational, maintenance, or overhead expense attributable to those vessels. No such solution is available to its competitor, which must, because of its ability to procure northbound cargo, continue to operate vessels both northbound and southbound. While it is recognized that, because of intensive rail and trucking competition, cargo offerings both northbound and southbound are limited, we cannot penalize OGL for its ability to obtain northbound cargo and to maintain a whole operation. Permission to charter an unlimited number of PFEL vessels for southbound voyages would impose such a penalty. Further, under this broad application competitors are not informed of the amount of competition which they will be required to meet.

We cannot state with any degree of certainty what, if any, costs, normally borne by Coastwise, would be absorbed by PFEL under the proposed charters. Under the charter form the amount of hire is stated to be "variable". Although witnesses for PFEL have stated that owned and demise-chartered vessels would be chartered at the market rate and that time-chartered vessels would be chartered at the

rate of hire paid by PFEL, these terms are not capable of precise determination. There is no charter market in the coastwise trade for southbound voyages, and the world charter market, if this be an accurate measure of the value of these services, may, at times, become so depressed as to fail to equal or exceed the cost of operation. Further, the rate of hire paid by PFEL on its time-chartered vessels may not represent the world market rate at the time of subcharter to Coastwise. If the world market is greater than the charter rate paid by PFEL the vessels would be made available to Coastwise at rates not available to OGL.

We cannot find that the proposed chartering arrangements would result in unfair competition to AFL. From the evidence before us, the release of the *North Beacon* for possible operation in the Alaskan trade, although hard competition, does not appear to be unfair competition.

It has been submitted that the chartering of PFEL vessels to Coastwise would be prejudicial to the objects and policy of the Act since:

(1) PFEL is seeking blanket approval of employment of its ships as a leg or adjunct of a nonsubsidized operation which in itself requires approval. Approval of these unsubsidized operations have to date been given on a voyage-to-voyage basis; and

(2) There is no need for additional sailings in the coastwise trade; the addition of an unlimited number of PFEL vessels would overtonnage the trade.

These arguments are well taken. As stated, approval of PFEL's unsubsidized transpacific operation has been granted only on a voyage-to-voyage basis. Full approval of PFEL's application to charter its unsubsidized vessels to Coastwise would also be a full approval of a leg of that operation without consideration of the effect on PFEL's competitors or other relevant inquiries.

We also agree that the proposed time charters, unrestricted in scope, would seriously overtonnage the coastwise trade, in which there is presently no need for additional sailings.

Finally, the logical extension of such operation of off-shore vessels in trades now served by exclusively domestic vessels would be the elimination of exclusively domestic operations. This result would clearly contravene the policy of the Act.

PFEL excepts to the examiner's recommendation that the application to charter would be prejudicial to the objects and policy of the Act and would result in unfair competition to exclusively domestic operators, asserting (1) that Coastwise would benefit from the arrangement, (2) that we could grant the application subject to such restrictions as would only permit the chartered vessels to be substituted

for the service now performed by the *North Beacon*, and (3) that we could require administrative approval of each charter and the rate of hire specified therein prior to delivery to Coastwise.

We find no merit to the arguments and suggestions advanced. First, although we have found herein that the arrangements probably would be beneficial to Coastwise, benefit to Coastwise is not the prime issue in this proceeding. Such advantage to Coastwise cannot be determinative of the issues where the application is otherwise prejudicial to the objects and policy of the Act. Second, we cannot approve, as suggested by PFEL, a revised application on which specific section—805 (a) hearings have not been held. To permit PFEL to charter vessels to Coastwise solely in substitution for the present *North Beacon* service would be to grant an application on which the interveners have not been heard. Although it might be argued that the unlimited application includes the request in the limited one, the arguments of interveners have been directed to a particular proposal and did not anticipate a limited application. We cannot assume that interveners would not, if given the opportunity, offer particularized, vigorous, and sound objections to the proposal now presented.

Similarly, we cannot grant the application subject to administrative approval of charter-hire rates prior to execution of each charter. As hereinbefore discussed, the amount of charter hire to be paid under the proposed arrangement is potentially a source of unfair competition. We cannot, then, exclude the amount of charter hire payable from the hearing requirements of section 805 (a).

Conclusions

1. To permit PFEL to act as general agent for Coastwise would be prejudicial to the objects and policy of the Act.

2. On the evidence before us we cannot state that the proposed general agency agreement would not result in unfair competition.

3. To permit PFEL to charter its unsubsidized vessels to Coastwise would result in unfair competition.

4. To permit PFEL to charter its unsubsidized vessels to Coastwise would be prejudicial to the objects and policy of the Act.

The applications are denied.

By the Board.

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

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

FEDERAL MARITIME BOARD

No. M–63

COASTWISE LINE—APPLICATION TO BAREBOAT CHARTER A GOVERNMENT-OWNED, WAR-BUILT, DRY-CARGO VESSEL FOR USE IN THE PACIFIC COASTWISE/ALASKA/BRITISH COLUMBIA SERVICE

REPORT OF THE BOARD

This is a proceeding under Public Law 591 of the 81st Congress upon the application of Coastwise Line (Coastwise) for the bareboat charter of a Government-owned, war-built, dry-cargo Liberty-type vessel for use in the Pacific coastwise/Alaska/British Columbia service for a period of some four to six months. A hearing was held on the application and an initial decision was issued by the examiner. Exceptions thereto were filed by Alaska Freight Lines, Inc. ("AFL"), a competitor of Coastwise in the Alaska trade, by American Tramp Shipowners Association, Inc. ("ATSA"), and by Public Counsel.

The examiner found that the services under consideration are in the public interest, that such services are not adequately served, and that privately owned American-flag vessels are not available for charter on reasonable conditions and at reasonable rates for use in such services.

Coastwise is an Oregon corporation, certificated by the Interstate Commerce Commission to act as a common carrier between United States Pacific coast ports. It normally operates two services with five Liberty-type vessels, two owned and three operated under bareboat charter. Normally, four vessels are employed in the service (hereinafter "the Alaska service"), commencing at Long Beach, California, proceeding northbound to San Francisco, Columbia River, Puget Sound, and ports in southwest Alaska, returning by British Columbia ports to Puget Sound and California. The remaining vessel, until recently the bareboat-chartered *North Beacon*, normally operates on a 14-day frequency in a service between Portland, Oregon, and Long Beach, with occasional calls at San Francisco. That service is hereinafter described as "the Columbia River service."

Since late October 1954 Coastwise has not had five vessels employed in the two services. On October 27, 1954, the bareboat-chartered *Pacificus*, then engaged in the Alaska service, became strikebound at Long Beach as a result of a maritime labor jurisdictional dispute, remaining idle until January 28, 1955. In March 1955, when the redelivery of the *North Beacon* necessitated substitution of the *Pacificus* for the *North Beacon* in the Columbia River service, again the *Pacificus* became strikebound, remaining in an idle status during the period March 24, 1955, to April 16, 1955. During the entire period, commencing in October 1954, the Alaska service was served with three vessels, and the Columbia River service, during a great part of this period, was not served by any Coastwise vessel.

Under Public Law 591 we are required, prior to chartering a Government-owned vessel for use by a private operator in competition with privately owned vessels, to find that the service in which that vessel is to be employed is required in the public interest, that the service is not adequately served, and that privately owned American-flag vessels are not available for charter by private operators on reasonable conditions and at reasonable rates for use in such service. We do not consider the first statutory requisite to be here at issue. We agree with the examiner's finding that either or both of the services in which Coastwise is engaged is or are in the public interest, to which finding no intervener has excepted. The issue before us, however, is this: In which of these two services must inadequacy of service be shown?

Although the Government-owned Liberty-type vessel sought to be chartered would, under the application, be used in the Columbia River service, the vessel is desired primarily in order to free for Alaska service the Coastwise-owned or operated vessel now employed in the Columbia River service. This purpose is evident from the application itself, which advises that the specific vessel desired by Coastwise (the *Ira Nelson Morris*) is not fully fitted with special equipment necessary to operate in the Alaska service, while the vessel to be replaced is so equipped.

The application further states that the four-to-six-month charter period desired roughly coincides with the peak traffic movement in the Alaska service. Applicant has argued, however, that although Coastwise's total service, as augmented by the Government-owned vessel, would result in the operation of four rather than three vessels in the Alaska service, the application, nevertheless, ultimately has been made necessary by the loss of the *North Beacon* to Coastwise. Applicant concludes that, from these considerations, the service to be considered

is the Columbia River service, in which the *North Beacon* was engaged, and not the Alaska service.

Interveners AFL and ATSA argue that the Columbia River service is presently adequately served by a Coastwise vessel; that no additional vessel is needed for that service; and that, since a vessel would be released for Alaska service by grant of this application, it is the adequacy of the Alaska service which must be considered in the light of the statutory requirements and not the adequacy of the Columbia River service.

Interveners state that the Board has previously refused to bareboat charter a Government-owned vessel to an operator for use in a particular service in substitution for other vessels operating in that service, citing *Prudential S. S. Corp.—Charter of War-Built Vessels*, 3 F. M. B. 627 (1951).

This application does not involve a substitution of vessels within the meaning of the cited decision. The need for a vessel was created by the sale of the *North Beacon* by her owners and redelivery in March of this year. Although it is true that another Coastwise vessel, the *Pacificus*, has been employed in the Columbia River service since that time, it also is true that the vessel has been taken from its usual service in Alaska as a stopgap measure, with the intention of returning the vessel to its Alaska service. We find, therefore, that this application concerns the Columbia River and not the Alaska service. A substitution of vessels, as contemplated by the *Prudential* case, *supra*, would result, however, if the vessel were desired for the Alaskan service in order to retain the *Pacificus* in coastwise operation.

Having determined that it is only the Columbia River service which would be affected by this application, we must consider whether this service would be adequately served without the addition of a Government-owned vessel.

Applicant originally sought a four-to-six-month charter period at the annual rate of 15 percent of the statutory sales price, or, roughly, $8,000. During the course of the hearing, however, it became apparent that under a four-to-six-month charter, the estimated cost of breakout, repair, and lay-up of the Government-owned vessel might well exceed charter-hire receipts accruing at the standard rate. Coastwise, to meet this objection, amended its application by proposing to assume repair costs in order that the Government would not sustain an out-of-pocket loss as a result of the charter. We understand the amended application to be as follows: Coastwise would assume repair costs, which could be amortized over the period of a charter in an amount equal to charter-hire payments, repair costs to be credited against charter hire. The period of the amortization would be suffi-

ciently long to reduce monthly payments to a rate which Coastwise could afford to pay. That rate, it was alleged, was less than the amount of monthly charter-hire payments at the annual rate of 15 percent of the statutory sales price. From the evidence adduced at the hearing, the probable cost of breakout, lay-up, and repair would range from $40,000 to $110,000, with the highest figure the more probable one. Although Coastwise suggested a period of 12 months, the application was not limited to that period, but, rather, extended to a period within which Coastwise might operate the vessel without loss. Since we would require Coastwise to bear breakout, lay-up, and repair costs in addition to payment of charter hire, we consider that the period for which the vessel is desired, as amended, extends to an 18-month period.

We must consider then whether an inadequacy of the Columbia River service has been shown for such an extended period. Coastwise's only competitor in this service is Olympic-Griffiths Line, Inc. (OGL), not represented in this proceeding. OGL operates a single vessel, the *Olympic Pioneer*, between Puget Sound and Los Angeles Harbor via Portland and San Francisco. The vessel has been sailing full northbound and with some free space southbound. From the evidence adduced, it is clear that the Columbia River service requires regularity of service to coincide with specific needs of shippers of paper and lumber. There is evidence tending to show that OGL could not serve the trade without the aid of another vessel. The principal commodity carried by OGL is salt, handled on its northbound leg. Because of its carriage of salt, OGL is not in position to carry lumber regularly since the lifting of that commodity must be scheduled, on a common-carrier basis, to coincide with the absence of the shipper's proprietary vessel from the loading berth. Similarly, the evidence does not indicate that OGL, in the absence of Coastwise, would be able to serve the paper shippers now served by Coastwise. Since the trade under consideration is not seasonal, and since forecasts for the service indicate increased rather than decreased traffic, we conclude that Coastwise has met its burden of showing that the trade would be inadequately served for an 18-month period without the addition of the Government-owned vessel here sought.

Prior to application for the Government-owned vessel, and upon learning of the imminent sale and redelivery of the *North Beacon*, Coastwise contacted various ship brokers in an effort to replace that vessel, for which Coastwise had paid a $7,400 monthly bareboat rate of hire. A canvass of the market revealed but one offer of a suitable vessel at less than the general time charter market rate of approximately $60,000 per month or the monthly bareboat equivalent of ap-

proximately $15,000. The one suitable vessel offered was available for June–July, Florida delivery, at $8,500 per month, the highest rate which Coastwise was prepared to pay. The cost of positioning the vessel for operation in the Columbia River service, however, would have raised the monthly cost to Coastwise to $11,900.

Although the evidence is inconclusive on Coastwise's alleged inability, because of labor obstacles, to employ a time-chartered vessel in the trade, we consider that question immaterial to the issue here presented, namely, are privately owned vessels available for charter on reasonable conditions and at reasonable rates for use in the service? Reasonableness of rates must be measured in terms of the particular trade in which the vessel is to be employed. *Coastwise Line—Charter of War-Built Vessels*, 4 F. M. B. 211 (1953); *Pacific-Atlantic Steamship Co.—Charter of War-Built Vessels*, 3 F. M. B. 705 (1951). The vessels offered to Coastwise on time charter or bareboat-charter terms have been offered at rates beyond Coastwise's estimated income from operations in the Columbia River service.

Interveners variously estimate that Coastwise will have $16,000 or $16,500 available for charter hire. Those estimates, however, have been reached without regard to overhead allocation in this trade. Although a Coastwise witness testified that as an internal accounting matter all overhead is allocated to the Alaska vessels, overhead, wherever allocated, is nevertheless a genuine factor to be considered in determining funds available for payment of charter hire. We find, then, that the sum available for payment of charter hire will be about $7,000 per month, assuming applicant's optimistic traffic forecasts are justified. The vessel which was available for Florida delivery, then, whether or not still firm, it not now a reasonable rate for this service nor are other privately owned vessels available for charter at reasonable rates for use in this service.

On the basis of the facts adduced, we find and hereby certify to the Secretary of Commerce that:

1. The service considered is in the public interest;
2. Such service is not adequately served; and
3. Privately owned American-flag vessels are not available for charter by private operators on reasonable conditions and at reasonable rates for use in such service.

We recommend denial of Coastwise's application for an option to substitute the chartered vessel in the Alaska service in the event of casualty to one of the Alaska vessels. Whether or not applicant has shown an inadequacy of that service for the four-to-six-month peak movement season, the burden of proving such inadequacy of service for an extended period has not been met.

We recommend that any charter which may be granted be for a period of 18 months, subject to the usual right of cancellation by either party on 15 days' notice, and subject to annual review as provided in Public Law 591. We further recommend that all breakout, lay-up, and repair costs be for the account of the charterer, and that the basic charter hire for the vessel be set at a rate of 15 percent per annum of the statutory sales price, of which 8½ percent is payable unconditionally and the remainder of 6½ percent is payable if earned, on a cumulative basis.

By the Board.

JUNE 14, 1955.

(Sgd.) THOS. E. STAKEM, Jr.,
Acting Secretary.

FEDERAL MARITIME BOARD

No. 766

PONCE CEMENT CORPORATION—INCREASED RATE ON "TRAILER RATE CARGO N. O. S."

No. 769

PONCE CEMENT CORPORATION—RETURNED EMPTY PROPANE GAS TANKS

Submitted April 27, 1955. Decided July 7, 1955

Ponce Cement Corporation found to be a common carrier in its operations between Puerto Rico and Florida.

Publication of indivisible round-trip rates on trailers and propane gas tanks found to contravene section 2 of the Intercoastal Shipping Act, 1933, as amended, and to be an unjust and unreasonable practice under section 4 thereof and under section 18 of the Shipping Act, 1916, as amended.

Respondent's indivisible round-trip rates not found to have resulted in violation of section 14-Fourth or 16-First of the Shipping Act, 1916, as amended.

Respondent's dual common and proprietary carriage on the same voyage is not unlawful per se under sections 14-Fourth or 16-First of the Shipping Act, 1916, as amended.

Tariff trailer measurement requirements found to be unreasonable as arbitrarily selected.

John H. Green for Ponce Cement Corporation.

Mark P. Schlefer for United States Atlantic and Gulf-Puerto Rico Conference and member lines.

John C. Bradley for Trans-Caribbean Motor Transport, Inc.

James L. Pimper, *Edward Aptaker*, and *Leroy F. Fuller* as Public Counsel.

REPORT OF THE BOARD

BY THE BOARD:

Exceptions have been filed to the initial decisions of the examiners in the above-numbered proceedings, and both matters have been argued orally before the Board. We differ to some extent with the examiner's decision in each case. Exceptions taken and recommended findings not discussed in this report nor reflected in our find-

ings have been given consideration and found not related to material issues or not supported by evidence.

The two matters are presented on substantially similar facts. Respondent Ponce Cement Corporation (hereinafter "respondent") is a manufacturer of cement in Ponce, Puerto Rico, and is the owner and operator of a single vessel, the MV *Ponce*. A former lumber carrier now specially fitted for carriage of bulk cement, the vessel is employed primarily in carriage of respondent's own cement northbound from Ponce to Port Everglades, Florida, and, secondarily, in carriage of cargoes owned by other shippers between those ports.

Respondent has on file with the Board general commodity tariff FMB F–No. 2, applicable southbound from Miami and Port Everglades to Ponce. No tariff is on file for northbound service, but the southbound tariff includes in the rates for carriage of cargo in trailers and propane gas in tanks the return of the empty trailers and tanks northbound. Southbound, inasmuch as the residue of the bulk cement is not cleaned out of the holds, the vessel transports loaded trailers and tanks of propane gas stowed on deck, and small quantities of general cargo stowed in the forepeak and, occasionally, in No. 1 hold. Northbound, in addition to proprietary cement, the vessel returns the empty trailers carried full southbound and some general cargo in trailers.[1] Under the proposed indivisible round-trip rate for propane gas tanks, the vessel will return the empty tanks carried full southbound.

Respondent's services for trailers, to date, have been utilized only by Trans-Caribbean Motor Transport, Inc. (T. M. T.), a Florida corporation engaged in transportation as a common carrier by motor vehicle between Florida points and points in Puerto Rico under temporary authority granted by the Interstate Commerce Commission. Similarly, only one shipper has shown any interest in shipping propane gas tanks under the proposed tariff rate.

Docket No. 766

On protest of T. M. T. against a proposed tariff revision [2] increasing rates on cargo loaded in trailers from $1.00 to $1.20 per 100 lbs. and

[1] During the period November 27, 1953, through November 7, 1954, a total of 392,256 pounds of general cargo was carried in the so-called "empty" trailers. This practice was discontinued prior to the hearings herein.

[2] Proposed 5th Revised Page 74, Ponce Cement Corp. Tariff FMB F–No. 2, provides:

"Trailer Rate Cargo N. O. S.

General merchandise exclusive of hazardous or perishable cargo and self-propelled vehicles. Shipped in trailer bodies without wheels measuring 8′ x 8′ x 30′. Not exceeding a total weight of nine net tons of 2,000# to ton. Shipped on deck of vessel at shipper's risk. Rate includes return of empty trailer for discharge at Miami or Port Everglades at vessel's option. Rate based on gross weight of trailer and contents. Per 100 lbs. $1.20."

excluding self-propelled vehicles, the Board, under the authority of section 3 of the Intercoastal Shipping Act, 1933 (hereinafter the "1933 Act"), suspended application of the proposed tariff revision for a period of four months and ordered a hearing on the reasonableness of the rate and its lawfulness under the Shipping Act, 1916 (hereinafter the "1916 Act"). There was a hearing in the matter and U. S. Atlantic and Gulf-Puerto Rico Conference (hereinafter "the Conference") and member carriers [3] intervened in opposition to the suspended item. It was the position of the Conference that (a) an indivisible round-shipment rate is unfair and discriminatory in violation of the 1916 Act; (b) the proposed rate is illegal, since it contemplates employment of a vessel in common and proprietary carriage at the same time; (c) the differential between rates on trailer cargo and break-bulk cargo is unreasonable and unlawful; and (d) the tariff is unreasonable, since it is designed to meet the needs of one shipper.

The Conference did not challenge the level of the rates charged. Public counsel urged that the then current rate, as well as the proposed rate, was unreasonable, in that it provided measurements for trailers arbitrarily arrived at and unlawful in that it assessed handling charges and a charge for use of a place of rest without indicating that the rates are applicable tackle-to-tackle only. Public counsel further urged that the examiner find respondent's duality of operation to be not unlawful *per se*. Protestant T. M. T. withdrew from the proceedings after temporary suspension of respondent's common-carrier service and did not appear at the hearing. Although respondent appeared at the hearing, it neither filed briefs nor excepted to the examiner's initial decision.

The examiner found the suspended schedule unlawful only to the extent that it provides measurements for trailers arbitrarily arrived at and therefore unreasonable. He further stated that the record failed to support a finding of other violations of the 1933 Act or of the 1916 Act, as alleged.

The Conference excepted to the initial decision insofar as it failed to determine that (1) an indivisible round-voyage rate is *per se* illegal under section 2 of the 1933 Act; (2) in any event, discrimination, preference, and unfair competition by reason of such a rate have been shown; and (3) the dual common and proprietary carriage on the inbound voyage has been shown to be discriminatory, preferential, and illegal. The Conference further urged that we treat the records in both proceedings as one record for the purposes of their disposal.

[3] Member lines are: Alcoa Steamship Company, Inc., Bull-Insular Line, Inc., Lykes Bros. Steamship Co., Inc., Waterman Steamship Corporation.

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Public Counsel excepted to the initial decision on the sole ground that it failed to conclude that the indivisible round-shipment rate contravenes section 2 of the 1933 Act and is an unjust and unreasonable practice under section 4 of the 1933 Act and under section 18 of the 1916 Act.

DOCKET No. 769

Proceedings in this matter commenced on protest of the Conference against the rate on propane tanks set out in proposed 2nd revised page No. 42 of respondent's Tariff FMB F-No. 2, providing as follows:

Gas, Propane, in Tanks, on Skids, Strapped. Rate includes return of empty tank for discharge at Port Everglades or Miami at Vessel's option. * * * Each $60.00.

By order dated December 10, 1954, the rate applicable from Port Everglades and Miami to Ponce was suspended until April 13, 1955, and hearing was set on the question of whether publication of an indivisible round-trip rate is an unfair and unreasonable tariff regulation or practice within the meaning of section 18 of the 1916 Act or is violative of sections 14–Fourth and 16–First of the 1916 Act and of the 1933 Act. By voluntary action of respondent, approved by the Board, the rate was further suspended until May 18, 1955.

Hearing was held and the examiner found in his initial decision that (1) respondent is operating as a common carrier from Puerto Rico to Florida without having on file with the Board a proper tariff therefor; (2) the publication of the suspended round-trip rate on propane gas tanks contravenes section 2 of the 1933 Act and is an unjust and unreasonable practice under section 4 of the 1933 Act and section 18 of the 1916 Act; and (3) that the suspended rate is in violation of sections 14–Fourth and 16–First of the 1916 Act.

The examiner also found that, while respondent must separately state one-way rates on propane tanks, the publication of two rates on empties, one applicable to empties generally and a lower rate applicable to empties that went out full via respondent's vessel, would not be unlawful.

The examiner further found that Ponce should cancel the suspended rate in the manner provided by Rule 20 (g) of the Board's Tariff Circular No. 3, and that if it should continue to operate as a common carrier from Puerto Rico to Florida it should file with the Board a proper tariff therefor.

Both the Conference and Public Counsel excepted to the initial decision. The Conference excepted on the grounds that (1) the examiner should have found that Ponce may not publish as part of its

tariff a provision which states that cargo would be accepted only to the extent that space is not needed for the cement; (2) the examiner should have found that the joint proprietary and common-carrier movement inbound, while not *per se* illegal, has been shown to be discriminatory, preferential, and unfairly competitive; and (3) the recommended lower return rate on empty propane tanks must be limited to a reasonable differential on return tanks specifically identified as such.

Public Counsel excepted to the examiner's findings that the suspended rate is in violation of sections 14–Fourth and 16–First of the 1916 Act.

DISCUSSION

We find that respondent's northbound carriage of empty trailers, empty propane tanks, and general cargo has been a common-carrier service for which a tariff must be filed with the Board in accordance with section 2 of the 1933 Act. On the facts as presented, we agree with the initial decision of the examiner in Docket No. 769 that publication of an indivisible round-trip rate on propane gas tanks is an unjust and unreasonable practice under section 4 of the 1933 Act and section 18 of the 1916 Act, since the rate limits the carriage of empty tanks to those that have been carried full southbound, and no other shipper of empty tanks could avail himself of this northbound service. We further agree that the quoting of the indivisible round-trip rate on tanks without separately stating the charge for northbound and southbound transportation is here in violation of the terms of section 2 of the 1933 Act.

We see no distinction between the indivisible round-trip rate on propane gas tanks in Docket No. 769 and the indivisible round-trip rate on trailers in Docket No. 766. We therefore disagree with the initial decision in Docket No. 766, and find on the facts presented that the indivisible round-trip rate on trailers is an unjust and unreasonable practice under section 4 of the 1933 Act and section 18 of the 1916 Act, and is in contravention of section 2 of the 1933 Act.

We do not find, however, as did the examiner in Docket No. 769, that the rate on propane gas tanks has resulted in actual violation of sections 14–Fourth and 16–First of the 1916 Act. Although we have applied the standards of those sections in determining the reasonableness of the rates under the 1916 Act and the 1933 Act, no actual violation of those sections has occurred. Under section 14–Fourth the Board's jurisdiction over unfair treatment and unjust discrimination is confined to existing practices and actions. *Carrier-Imposed Time Limits For Freight Adjustments*, 4 F. M. B. 29 (1952). No such

practice or party discriminated against has been shown to exist here. Similarly, only actual unequal treatment of two or more persons, localities, or descriptions of traffic constitutes a violation of section 16-First. Since there is but one shipper of propane tanks, no actual unequal treatment has been shown. *Huber Mfg. Co.* v. *N. V. Stoomvaart Maatschappij "Nederland"*, 4 F. M. B. 343 (1953); *Eden Mining Co.* v. *Bluefields Fruit & S. S. Co.*, 1 U. S. S. B. 41 (1922); *H. Kramer & Co.* v. *Inland Waterways Corp. et al.*, 1 U. S. M. C. 630 (1937); *United Nations et al.* v. *Hellenic Lines Limited et al.*, 3 F. M. B. 781 (1952); *Anglo Canadian Ship. Co., Ltd.* v. *Mitsui S. S. Co., Ltd.*, 4 F. M. B. 535.

The examiner's discussion of publication of two return rates was unnecessary to the decision in Docket No. 769 and does not require our consideration.

In exceptions to each decision, the Conference urges that the examiner improperly failed to find that such dual common and proprietary carriage on inbound voyages has been shown to be discriminatory, preferential, and illegal within the meaning of sections 14–Fourth and 16–First of the 1916 Act. The discrimination and preference is alleged to arise out of allotment of space; that is, since cement is a weight rather than a measurement cargo, any common-carriage cargoes carried on deck will displace an equal weight of cement. In this regard, reliance is placed by the Conference on a witness's testimony [4] that northbound common-carrier cargo would be shut out if the vessel should be needed for full cargoes of cement. But this statement does not establish actual violation of sections 14–Fourth and 16–First of the 1916 Act. At the most, it indicates an ability to discriminate or prefer, if necessary, on some future voyage. Whether the discrimination or preference which might occur would be unjust, undue, unreasonable, or unfair would depend on the facts alleged to establish a violation of the 1916 Act at that time. While, as argued, a violation of section 16 of the 1916 Act might arise out of undue preference by a carrier for itself in the capacity of shipper rather than carrier, undue preference must be actual and not potential, as here.

The Conference further urges that the Board cannot approve a tariff which allows a carrier to accept common-carrier cargo only to the extent that space is not needed for proprietary cargo, arguing that carriage of predominantly private cargo on the same voyage on which public cargo is carried is unlawful. In this regard the Conference excepts to the following language of the initial decision:

[4] Green, Tr. p. 48, Docket No. 769.

The tariff also should clearly state that the specific type or types of cargo would be accepted only to the extent that space was not needed for cement.

The argument is not convincing. Combined contract and common carriage was condemned in *Philip R. Consolo* v. *Grace Line Inc.*, 4 F. M. B. 293 (1953), upon a finding of actual discrimination. That decision did not consider the combination of proprietary and common carriage on the same vessel, which is here involved. The fact that private cargo exceeds public cargo in volume, without any showing of discrimination or preference, does not make the combined carriage unlawful *per se*. The motor carrier cases cited [5] in support of the theory that carriage of predominantly proprietary cargo is unlawful stand only as authority for the proposition that such carriage may be considered inconsistent with or repugnant to a motor carrier's certificate of public convenience and necessity and are not controlling or analogous here.

We do not understand the examiner in the foregoing quoted language to have implied that respondent may adjust his carriage of proprietary cement in such a way as to discriminate against or prefer certain shippers, or shut out all common-carrier cargo at his option where a full load of proprietary cement is desirable. Such actions, in addition to possessing potentialities for discrimination and preference, would violate the filing requirements of section 2 of the 1933 Act where done without intention to abandon or discontinue common-carrier service.[6]

The exceptions of Public Counsel have been answered in our discussion of the Conference's exceptions.

CONCLUSIONS

WE CONCLUDE:

1. The publication of an indivisible round-trip rate on propane gas tanks and on trailers contravenes section 2 of the 1933 Act and is an unjust and unreasonable practice under section 4 of the 1933 Act and section 18 of the 1916 Act.

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[5] *Bartel Common Carrier Application,* 7 M. C. C. 755, 757; *Davidson Extension—Specified Commodities,* 51 M. C. C. 401, 404–5; *Shoemaker Common Carrier Application,* 44 M. C. C. 765, 767; *Eastern Trailer Transport Corp. Common Carrier Application,* Report of the Commission, sheet 5; *Dwyer and Anderson Common Carrier Application,* 11 M. C. C. 749, 751; and other cases.

[6] Although the Board has no authority to prevent discontinuance or abandonment of common-carrier service under the 1933 Act, such a discontinuance is to be distinguished from the duty to furnish reasonable service while engaged in business as a common carrier. See *Gulf-Puerto Rico Rates Via N. Y. & P. R. S. S. Co.,* 2 U. S. M. C. 410 (1940); *Lucking* v. *Detroit Nav. Co.,* 265 U. S. 346 (1924); *McCormick S. S. Co.* v. *United States,* 16 F. Supp. 45 (N. D. Calif. 1936).

2. Respondent's indivisible round-trip rates do not violate sections 14-Fourth or 16-First of the 1916 Act.

3. Respondent's dual common and proprietary carriage on the same voyage is not unlawful *per se*.

We agree generally with the decisions of the examiners in Docket Nos. 766 and 769, not inconsistent herewith. A separate order will be entered dealing with the conclusions herein.

By the Board.

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

Amended Order

At a Session of the FEDERAL MARITIME BOARD, held at its office in Washington, D. C., on the 15th day of July A. D. 1955

No. 766

Ponce Cement Corporation—Increased Rate on "Trailer Rate Cargo N. O. S."

No. 769

Ponce Cement Corporation—Returned Empty Propane Gas Tanks

The Board, pursuant to its orders dated October 14, 1954, and December 10, 1954, having entered upon hearings concerning the lawfulness of the tariff schedules set forth in said orders, and the Board having suspended the operation of said tariff schedules and no decision having been issued prior to the expiration of the suspension period provided by law; and

Full investigation of the matters involved having been made and the Board, on July 7, 1955, having made and entered of record a combined report in both proceedings, stating its conclusions and decisions thereon, which report is hereby referred to and made a part hereof; and

The Board having determined, *inter alia*, that respondent Ponce Cement Corporation has engaged in the transportation of property between Florida and Puerto Rico under indivisible round-trip rates in contravention of section 2 of the Intercoastal Shipping Act, 1933; and

The Board having further determined that respondent Ponce Cement Corporation has engaged in the transportation of property from Puerto Rico to Florida without having on file with the Board a schedule of rates and charges therefor, in violation of section 2 of the Intercoastal Shipping Act, 1933; and

The Board having further determined that the trailer measurement requirements set out on fifth revised page No. 74 of Ponce Cement Corporation Tariff F. M. B. No. 2 are unreasonable, under sec-

tion 4 of the Intercoastal Shipping Act, 1933, in that they were arbitrarily arrived at without regard to the lifting or spatial capacity of the vessel, or to the range of measurements of trailers which reasonably could be accepted for shipment;

It is ordered, That respondent Ponce Cement Corporation be, and it is hereby, notified and required to cease and desist on or before August 15, 1955, and thereafter abstain from engaging in the transportation of property between Puerto Rico and Florida without the filing of proper schedules therefor in accordance with section 2 of the Intercoastal Shipping Act, 1933; and

It is further ordered, That these proceedings be, and they are hereby, discontinued.

This order supersedes and cancels the order heretofore served in these proceedings on July 13, 1955.

By the Board.

[SEAL] (Sgd.) A. J. WILLAMS, *Secretary*.

FEDERAL MARITIME BOARD

No. 768

ALLEGED PRACTICES OF COMPAGNIE DE NAVIGATION CYPRIEN FABRE (FABRE LINE) AND OF GULF/MEDITERRANEAN PORTS CONFERENCE

Submitted July 6, 1955. Decided August 18, 1955

Evidence found insufficient to support findings that Fabre Line has violated section 16-Second of the Shipping Act, 1916, in connection with shipments of certain commodities, including cotton, from United States Gulf and South Atlantic ports to Mediterranean ports in Italy and France.

Action of Gulf/Mediterranean Ports Conference in expelling Fabre Line from membership found not to be unfair or otherwise unlawful.

Periodic reports by Fabre Line ordered under the authority of section 21 of the Shipping Act, 1916.

Charges against respondent Lykes Bros. Steamship Co., Inc., and allegations under sections 15, 16-First, and 17 of Shipping Act, 1916, found not sustained.

Walter Carroll, *Wendell W. Lang*, and *Thomas F. Lynch* for Gulf/Mediterranean Ports Conference.

Burton H. White and *Elliot B. Nixon* for Fabre Line.

James L. Pimper, *John Mason*, and *Edward Aptaker* as Public Counsel.

REPORT OF THE BOARD

BY THE BOARD

This is a proceeding undertaken on the Board's own motion for the purpose of determining whether respondent Compagnie de Navigation Cyprien Fabre ("Fabre") or any other respondent [1] has violated sections 15, 16, or 17 of the Shipping Act, 1916 ("1916 Act"), and whether the Gulf/Mediterranean Ports Conference ("the Conference") acted unfairly in expelling Fabre from membership in the Conference. The order of investigation, dated November 4, 1954, also invokes the rule-making provisions of section 19 of the Merchant

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[1] List of members of the Gulf/Mediterranean Ports Conference is attached as Appendix A.

Marine Act, 1920 ("1920 Act"), and section 204 of the Merchant Marine Act, 1936 ("1936 Act").

The investigation was undertaken upon receipt of information that the Conference had expelled Fabre from its membership, that Italian lines Navigazione Alta Italia (Creole) and Societa Italiani di Armamento (Sidarma) had resigned from the Conference subsequent to Fabre's expulsion, and that the Conference was in imminent danger of disintegration.[2]

Hearings were conducted before the Chief Examiner during the period February 10–25, 1955, and a recommended decision in the matter was served on May 19, 1955.

The examiner found Fabre guilty of granting rebates or rate concessions in violation of section 16-Second of the 1916 Act on cargoes of woodpulp, lubricating oil, carbon black, tinplate, and cotton, and found that the action of the Conference in excluding Fabre from membership was not unfair, unlawful, or unjustified. The examiner further found that Fabre, in violating section 16-Second, was guilty of competitive methods creating conditions unfavorable to shipping in the foreign trade of the type contemplated by section 19 of the 1920 Act, and recommended issuance of rules under that section in order to adjust or meet such conditions.

Countercharges of malpractices by Lykes, raised by Fabre, were found by the examiner to be unjustified.

Exceptions to the recommended decision have been filed by Fabre, replies thereto have been filed by the Conference and by Public Counsel, and oral argument on the issues has been heard. Contentions of the parties or requested findings not discussed in this report nor reflected in our findings have been considered and found not related to material issues or not supported by the evidence.

We adopt the examiner's findings of evidentiary facts, set forth as follows:

The evidentiary facts are as follows:

Parties. 1. All conference members were named respondents, but only the principal lines carrying cotton from United States Gulf ports to Italy are importantly involved. They are Fabre, Lykes Bros. Steamship Co., Inc. (Lykes), Navigazione Alta Italia (Creole Line), States Marine Lines, Societa Italiani di Armamento (Sidarma Line), Bloomfield Steamship Co. (Bloomfield). Fabre is a French-flag line; Creole and Sidarma, Italian; the others, United States.

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[2] At our request, the Conference postponed the effective date of its action in expelling Fabre until completion of the investigation. Similarly, Creole and Sidarma temporarily postponed their resignations from the Conference. Sidarma is no longer a member, although Creole has indicated its intention of remaining permanently in the Conference.

2. Fabre operates from the North Atlantic (since 1880), Great Lakes, and Gulf. It joined the Gulf-Mediterranean Conference in 1950, operated briefly, and resumed service in January 1954, actively since June. It began with one sailing monthly, increasing them approximately to two. The voyages averaged 30 days, the earlier ones 36 days. Sidarma joined the Conference in 1950, resigned in September 1951, and rejoined in December 1953. It has sailings every 5 or 6 weeks, transit time 31–35 days. Transit time of other lines is 14–20 days; sailings per month—Lykes 4, Creole 2 to 3, and States Marine 1 to 2. Creole has been in the Gulf-Italian cotton trade since 1902, Lykes since 1920.

Witnesses. 3. Testifying as Board witnesses: H. A. Carlys, Chairman and Executive Secretary of the Conference; Max J. Wolfson of Genoa, Lykes' Mediterranean manager; Beppe Ansaldo of Genoa, General Manager of Creole; Mario Scerni, Lykes' agent at Genoa; H. W. Roberts, Vice-President of Texas Terminal and Transport Co. and Creole's agent at United States Gulf ports; Alec C. Cocke, Vice-President in charge of traffic, Lykes; G. Parisi of Trieste, freight forwarder with branch offices at Genoa; and Thomas E. Stakem, Assistant Deputy Administrator, Maritime Administration. Stakem went to Italy in December 1954 to investigate charges of rebating, where he interviewed steamship representatives, cotton spinners (receivers), forwarders, and agents of United States cotton exporters. Later, he interviewed Roland Fraissinet, Fabre's president, in France.[3] Carlys also made certain investigations in Italy for the Conference in early October 1954.

Testifying for Fabre: Edward A. McDonnell, Vice-President of James W. Elwell & Co., Inc., Fabre's general agent for North America; Jacques Nahas, Permanent Delegate for Fabre in North and Central America; and Astor W. Norrish, partner in Lertora Bros. & Courtman, who is the agent of Fabre at Genoa, as well as agent of several other lines.

4. A considerable part of the testimony and evidence given by these witnesses consisted of information secured from persons abroad—from letters and documents or from interviews—who were not presented for cross-examination. Such evidence was admitted, over the objection of counsel for Fabre, on various grounds and for various purposes (infra). Most of it was admitted, among other reasons, because, whether true or false, it motivated the Conference in expelling Fabre.

[3] Stakem's interview with Fraissinet and Guido Mosti, a forwarder who patronizes Fabre, was reduced to writing by them and mailed to Stakem at his request. These letters, signed by Fraissinet and Mosti, are of record.

Thus it is relevant and material on the question of the fairness or unfairness of the action of the Conference.

Conference agreement. 5. The agreement (F. M. B. No. 134) governs the trade from United States Gulf and South Atlantic ports to Mediterraneon ports and others. It provides for strict adherence to conference tariffs, prohibits rebates and other concessions, and prohibits brokerage in excess of 1¼ percent of freight earned by initial carrier. It provides that at a meeting especially called for that purpose, after due notice, any party may be eliminated by a majority vote for any violation of the letter or spirit of the agreement proved to the satisfaction of the majority to be sufficient for expulsion, and confers certain duties of investigation on the Executive Secretary in event of a breach of the agreement.[4] This conference has had no case of expulsion since World War II, except Fabre's; and Lykes, the principal complaining line, has never before registered any formal complaint as a result of any loss of traffic due only to what its witness characterized as regular competitive practices.

CHARGES AGAINST FABRE

Woodpulp. 6. Fabre concedes that, contrary to conference tariff rule, it absorbed consignee's discharging costs at Marseilles, France, on the first 2 of 3 shipments of woodpulp, of approximately 500 tons each, which it transported from Fernandina, Fla., in January 1954, on the *C. G. Thulin*, February 1954 on the *Foria*, and June 1954 on the *Bastia.* The rule provides that discharge from the hold to dock at Marseilles is for account of consignee or cargo owner. Fabre's president, Fraissinet, upon learning of Lykes' protest made at a conference meeting in February 1954, wrote his agent Elwell on April 14, 1954, that the absorption (on a "lot" of woodpulp negotiated "under tackle" f. a. s.) was due to an error of the broker who closed the business in Paris, and who did not know that Fernandina was included in the Gulf Conference ports. He gave assurance of no further violations. After Fabre's expulsion in October 1954, Fraissinet advised Elwell, on November 30, 1954, (1) that the first two shipments were obtained for Fabre by Lykes' agent at Marseilles (Michel), (2) that "unless we are mistaken," Lykes' agent told Fabre that Lykes could not handle the shipments, and (3) that Fabre accepted the business on the same conditions that Lykes had allowed, including absorption of discharging costs.[5] Fraissinet stated to Stakem later that Fabre's

[4] The agreement also provides for a $10,000 deposit to insure compliance with conference rules and regulations, for arbitration to determine any assessment against such deposit in event of a breach of the agreement, together with the procedures for such arbitration.

The vote to expel Fabre was 10 to 2 (2 abstaining).

[5] Cocke denied these three assertions.

commercial service had held the opinion that Fernandina was not subject to control of the Gulf Conference.

7. Lykes had booked the first shipment referred to above for the shipper, Rayonier, Inc., New York, N. Y., on November 30, 1953, on the *Helen Lykes.* It was to load on December 20, 1953, and arrive at Marseilles on January 31, 1954, or 21 days ahead of the Fabre vessel *C. G. Thulin.* The Lykes booking was canceled by Rayonier on December 12, 1953, upon instructions from the consignee abroad, who requested January shipment. Lykes offered a vessel for January and Rayonier urged consignee to accept it. Shortly after the cancellation Lykes was requested, but declined, to absorb the cost of discharging at Marseilles.

8. The second shipment was offered to Lykes by Rayonier, but not actually booked. Request was made for absorption. The Fabre vessel *Foria* lifted the shipment on February 7, 1954, and arrived at Marseilles on March 21, 1954, 21 days after arrival of an available Lykes vessel. Lykes urged the Conference, in February 1954 and at subsequent meetings, to eliminate the discharge rule at Marseilles (without success), attributing to the rule loss of woodpulp shipments. As a result, the Conference chairman circularized the rule to member lines on February 19, 1954. The *Thulin* and *Foria* were primarily engaged in the North Atlantic-Mediterranean trade, and were the first Fabre vessels to carry woodpulp out of Fernandina within the Gulf-Mediterranean Conference range.

9. Lykes' Marseilles agent confirmed the third shipment. Lykes was requested to and did name a ship for it in the required position. And Lykes was informed by Rayonier that the cargo would be delivered to the vessel. When this shipment was offered, Lykes was requested not only to absorb discharging costs, but to allow a reduction of $1 under the conference rate. The Fabre vessel *Bastia* lifted this shipment on June 18, 1954, and arrived at Marseilles on July 13, 1954, or 16 days after arrival of an available Lykes ship. Nahas testified that Fabre got no more woodpulp from Fernandina after this shipment.

10. Prior to the third shipment, at a conference meeting on May 6, 1954, Lykes renewed its complaint about losing shipments, whereupon Fabre's Gulf agent offered the "broker's error" explanation of April 14, 1954. The Conference considered this explanation unsatisfactory because it referred only to a "lot" of woodpulp, whereas two shipments had already moved, and the third apparently was being booked for the *Bastia,* then scheduled to sail in late May. Accordingly, the Chairman cabled Fabre on May 6, 1954, for full information

regarding woodpulp bookings, particularly for *Bastia* late May, and reminded Fabre in effect that Fernandina shipments were subject to conference jurisdiction. Fabre replied on May 12 that it was observing conference rules, but that Lykes has been "offering our friend consignee to absorb discharging cost." [6]

11. Lykes renewed its charges at various conference meetings. Fabre did not offer any further explanation. It did not place before the Conference for decision the question as to what should be done about absorptions it had made. Finally Lykes, after notice of intent on October 7, 1954, made formal charges as to woodpulp and other commodities at the conference meeting of October 29, 1954, which culminated in the expulsion of Fabre.

Tinplate. 12. Wolfson (Lykes) produced a letter dated June 5, 1954, concerning a commission on tinplate shipments. He testified he received the letter from B. L. R. Trading Co. of Naples, which sells the product of Inland Steel Co., Chicago, in Italy. The letter (1) asked for "the usual commission paid to anyone who procures cargo", on 900 metric tons which had been carried by Lykes, (2) pointed out that 700 tons were scheduled to move via Lykes' vessels in July, August, and September 1954, with 2,000 tons to follow, but (3) warned that B. L. R. would not ship via Lykes so long as the commission remained unpaid. This correspondence was referred to Cocke (Lykes), who advised Wolfson that Lykes could give no commission, rebate, or concession, which information Wolfson relayed to B. L. R. on July 9, 1954. Thereafter, Lykes received no more shipments from B. L. R. who explained, according to Wolfson, that B. L. R., while they liked the service of Lykes, they had to have a rebate or concession to be competitive with other importers receiving same.

13. Lykes had a written booking, made on November 18, 1954, with Inland Steel's forwarder for 231 short tons of tinplate for loading at New Orleans about December 15, 1954, for shipment to Naples. It was canceled on December 8 and the shipment moved from New Orleans on Fabre's *Marseilles* in early January 1955.[7] The receiver was Ciro Piro, Naples, a customer of B. L. R. This was the first time Fabre had carried tinplate out of the Gulf. Prior to this, Fabre had carried tinplate from Inland Steel's plant at Chicago to Italy in its Lakes service.

14. Lykes was negotiating with Ubbelohde Co., New York, for a second shipment of 120 tons to be shipped from New Orleans Decem-

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[6] See "Charges against Lykes" (infra).

[7] Although the booking was canceled on December 8, and presumably rebooked then with Fabre, Fraissinet (Fabre) wrote to Stakem on December 20, 1954, that Fabre had not disembarked any tinplate at Naples coming from the Gulf.

ber 26, 1954, to Bevilacqua and Co., Naples. After reserving space on the *Zoella Lykes*, Ubbelohde transferred the booking to Fabre upon instructions from the receiver. According to Cocke, Ubbelohde strongly urged the receiver to ship via Lykes' vessel, which was in good position, but the latter refused to do so.

15. Ubbelohde promised Lykes a third shipment of 50 tons for loading in February 1955, which Lykes ordered to its wharf. Cocke testified that Ubbelohde received instructions later from Bevilacqua to ship via Fabre. Eventually, the shipment was drayed from Lykes' wharf, and moved via a line other than Fabre.

16. Pursuant to instructions from Lykes, Wolfson made an investigation of the first two cancellations. As to the first shipment, he testified that Piro, the receiver, informed him that he (Piro) paid the conference rate of $17 per ton and that the cancellation was ordered by B. L. R. Wolfson said that Armando Facelli, a partner in B. L. R., told him, on January 14, 1955, in the presence of American Vice-Consul Moran at Naples, that B. L. R. could not do business without a rebate; that Facelli stated a reduction in the rate would be of no help as he needed a private rebate to distribute as a concession on the price of tinplate to customers in order to cope with competitors allegedly doing the same thing; that Facelli offered to prove rebating if Lykes would guarantee to match what B. L. R. was receiving elsewhere, which Lykes refused to do; that Facelli, after consulting some papers, stated that Fabre was offering him a rebate of $2 per ton, and that this offer, according to Facelli, was supported by a paper in his possession signed by Carlo DeLuca, Fabre's agent at Naples, and countersigned by a Fabre official whose signature was illegible.

17. In a letter to DeLuca dated February 17, 1955, Facelli denied having stated that his firm received a rebate from Fabre, and indicated his intention of suing the person making the accusation. And DeLuca, in an affidavit executed before American Vice-Consul Rogers at Naples, on February 17, 1955, denied that any rebates have been paid "to any Naples Importers" for any cargo from Gulf ports transported to Naples on Fabre vessels.[8]

18. As to the second shipment, Wolfson, on January 13, 1954, called on Alisandro of Bevilacqua, who is also a partner in B. L. R. He told Wolfson, according to the latter's testimony, much the same story as did Facelli, intimating that the cancellation was due to the fact that he would be better off financially if the shipment went via Fabre.

19. Cocke testified, as to the third shipment, that Lykes received

[8] Nahas denied Fabre gave a rebate of $2 per ton, and suggested that mention of such figure could have been in reference to a $2 differential in cost of shipping from Chicago via the Gulf and via the Great Lakes.

word from its Genoa agent on January 31, 1955, stating that Bevilacqua says: "Not prepared change without concession."

20. Ansaldo (Creole) instructed his agent at Naples, Gastaldi, to investigate the reason why tinplate shippers in the United States were receiving instructions to ship via another line. As a result of this request for investigation, Ansaldo received a letter dated February 5, 1955, addressed to Gastaldi by Camagna, a tinplate receiver, stating that he had been offered freight rates by other conference members, more advantageous than those indicated by Creole; and that if Creole would meet what had been offered by its colleagues, "by reducing substantially the conference freight rates", Camagna would do his best to favor Creole. The charges as to tinplate were made at the hearing and concerned shipments made after the expulsion of Fabre.

Lubricating Oil. 21. In July 1954, the Spanish Luboil Consorcio, Madrid, which had purchased 1,860 tons of lubricating oil for the Spanish Government, inquired of Lykes' Barcelona representative, O'Neill, about space for August shipment of a portion of such cargo. The oil was to be supplied one-half by Sterns, London, and the other half by Petroleum Specialties Co., New York. It was to move from Gulf to Spanish Mediterranean ports. Cocke testified that Petroleum Specialties considered the Lykes vessels in satisfactory position; that they asked for and were quoted a rate, i. e., the conference rate of $24 per ton; that Consorcio and Petroleum Specialties asked Lykes what "benification" or rebate would be given; and that when Lykes refused same they booked with Fabre about August 9, explaining to Lykes' representatives that Fabre got the business because it granted them a 10 percent rebate. The shipments moved on Fabre's *Marseilles* and *Dufour*, which arrived, or were scheduled to arrive, some days later than available ships of Lykes. The information regarding the alleged rebate was supplied to Cocke upon his instructions to O'Neill to investigate the loss of the bookings. Substantially the same information was given by O'Neill in letters to Stakem dated December 20 and 31, 1954, upon the latter's request for all facts regarding alleged rebating on lubricating oil.

22. Fraissinet admitted in his summary of his interview with Stakem that Fabre allowed its "broker" in Madrid, Maresa, a commission[9] of 10 percent on the oil shipments in question, but stated that Maresa had respected the conference tariff. Nahas testified that Fabre maintains two "agents" in Madrid, Maresa, the "nonofficial agent," and an elderly lady, Josefa di Gibert, the "official agent"; that Maresa does all the work—solicitation—and Gibert does noth-

[9] Stakem testified that Fraissinet said: "if [Maresa] passed [the commission] on he was very foolish, because it was intended merely as a brokerage fee."

ing, except perhaps to make contacts; that he (Nahas) had instructed Maresa to observe conference rates; and that the commission paid to Maresa was not brokerage.[10] The conference rule provides that brokerage shall not be paid abroad, and that it be limited to 1¼ percent.

23. Lykes complained to the Conference regarding the alleged rebates on lubricating oil at a meeting on October 7, 1954. And not having received any explanation from Fabre, it brought formal charges at the meeting on October 29, 1954.

Carbon Black. 24. Carbon black moves from the Gulf, primarily from Houston, to the French Atlantic port of La Pallice via lines of the French-Atlantic Hamburg-Range Freight Conference. Shippers and receivers require and insist upon a direct service. The rate is 35 cents per cubic foot to La Pallice. In August 1954, two parcels of carbon black which had been booked by the French Line and Bloomfield, respectively, for La Pallice were canceled and rebooked with Fabre from the Gulf to Marseilles. This, despite the fact (1) that La Pallice is a regular port of discharge for carbon black, (2) that cargo delivered at Marseilles takes a higher rate (40 cents) and has to bear the additional cost of discharge, and (3) the Fabre vessels scheduled to lift the cargo were indirect sailings to Marseilles. Fabre had asked the Conference, on August 27, 1954, to reduce the 40-cent rate to 35 cents, but it refused to do so.

Nahas testified that in June 1954 he and Fraissinet solicited carbon black from the representative of two French firms in New York, quoting the conference rate of 40 cents, which he said was actually charged on the shipments without rebate or concessions. His recollection was that the booking was made in late June or early July. He erroneously thought that the rate to La Pallice was 40 cents instead of 35 cents.

So far as the record shows, no charges as to carbon black were made against Fabre at the conference meeting on October 29, 1954, when Fabre was expelled. However, Cocke testified that Fabre's agent in the Gulf was fully informed about the matter.

Cotton—Movement of cotton. 25. Cotton is the most important commodity moving in the Gulf-Mediterranean trade. And the movement to Italy is a very substantial part of the cotton exported from the Gulf. Traditionally, it has moved c. i. f., freight prepaid in United States currency, the United States exporter selecting the carrier. Dollar shortages influenced a trend toward f. a. s. purchases of f. o. a. cotton, beginning in 1952, and the Conference allowed Italian lines only to accept shipments freight collect, payable in lire

[10] Nahas did not know if Gibert was paid any fees. When asked whether Maresa solicited for any other lines, he replied: "I don't believe so, no, I am positive of that."

on f. o. a. cotton. But routings were not usually designated by Italian receivers until Fabre's entry into the trade. The following table summarizes the cotton carryings to Italy of the conference lines during the calendar year 1954, and shows the average carryings per sailing prior to Fabre's entry into the cotton trade, and subsequent thereto:

TABLE I

Line	Sailings (total)	Cotton (bales)	Average bales per sailing		
			1954	Jan.-May (before Fabre entry)	June-Dec. (after Fabre entry)
Lykes	46	90,556	1,970	1,951	1,980
Creole	24	68,815	[1] 2,870	1,208	[1] 3,862
Fabre	11	51,540	4,680	0	[2] 5,154
States Marine	21	49,202	2,343	1,757	2,782
Sidarma	9	18,050	[1] 2,010	420	[1] 2,728
		278,163	Average: Fabre		5,154
			Average: Other lines		2,686

[1] The carryings of Creole and Sidarma were materially increased by Mosti's patronage in June, when Fabre was unable to handle cotton on a collect basis.
[2] Based on 10 sailings during June-December.

Forwarding of cotton. 26. Cotton landed at Genoa is received by a freight forwarder who clears it through customs and arranges for delivery from warehouse at dock to mill at final destination. Accessorial services consist of stevedoring, weighing, sampling, verification of tares, loading to rail or truck, and weighing of truck or rail car. Tariff charges for these services are fixed and regulated by a port authority, the "Consorzio Autonomo," which is a public body. Tariff charges also apply to rail transportation. Truck charges are open to negotiation, but are generally known in the market. On behalf of the consignee, the forwarder pays the above charges, ocean freight, and certain fees, taxes, and custom duties which are also fixed by governmental authority.

Soliciting and forwarding activities of Guido Mosti. 27. The following paragraphs (28, 29, 30, 31, 32, 33, 34) contain a summary of Stakem's testimony regarding his interview with Mosti in Italy on December 14, 1954. It is confirmed in essential respects by Mosti's letter to Stakem of the same date, with supporting documents furnished by Mosti, all of which are of record.

28. Mosti owns or controls two forwarding firms—Spedixioni Cotoni Alta Italia (S. C. A. I.), Milan, and Docks Cotoni, Venice (hereafter collectively called Mosti).[11] He handles approximately 60 percent of cotton shipments to Italy. His policy is to try to get

[11] Norrish (Fabre) testified that a number of cotton spinners have an interest in S. C. A. I.

a discount or rebate from all shipping lines of about $2 per bale.[12] He patronized, and obtained a 10 percent discount from, Sidarma in 1953 before it rejoined the Conference. He had arranged in March 1954 for a reduction of 15 percent with the Flomarcy Line, and thereafter offered "a special rebate of 15 percent" on cotton shipped f. o. b. freight collect, payable in lire. This offer was made to at least two receivers—Cotonificio di Solbiate on April 14, 1954, and Cotonificio Legler on April 20, 1954. The offer to Solbiate was withdrawn on April 29, 1954, because the Flomarcy service failed to materialize. On that date, Mosti requested the Conference to grant a rebate, which was denied on May 10, 1954. In the meantime, in late April or early May 1954, Mosti visited Norrish, Fabre's agent in Genoa, to inquire about Fabre's new service. He did not know of this line until he read its advertisement of the *Bastia* sailing scheduled for late May. Mosti asked whether, and was assured that, Fabre had a regular service and would book cotton collect, payable in lire.

29. Such booking was contrary to the conference rule which required prepayment of freight in United States dollars, except as to Italian-flag lines. Norrish testified he had no knowledge then of this rule (infra). Mosti booked 1,000—2,000 bales with Norrish on a collect basis, on the *Bastia*.[13] Moreover, the bookings were made at the contract rate of $1.45 per cwt. rather than the applicable noncontract rate of $1.75, although none of Mosti's customers had executed conference contracts. Upon protest of the Conference (infra), Fabre canceled this booking about May 13, 1954, and Mosti transferred the cotton to the Italian lines Sidarma and Creole. But after the conference rule was changed on June 14, 1954, to permit collect shipments, Mosti resumed business with Fabre.[14] (See infra.)

30. Mosti stated, and Norrish testified, that no rebate was requested at their meeting.[15] As to rebates, Mosti stated that he "thought that it would be more opportune to direct our request directly to the management of the company in Marseilles." (Fraissinet confirmed that such request was made, but said it was denied, and that Fabre granted no rebates). Also, Mosti denied that he had received any rebates from Fabre.

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[12] Mosti sought to obtain a rebate or reduction from Creole in 1951 and from Lykes, without success.

[13] According to Ansaldo (Creole), Norrish told him on May 17, 1954, that 6,000 bales were fixed for the *Bastia*.

[14] In July 1954, Mosti had "very considerable" space engaged with Fabre, and in September 1954 he had space engaged with Fabre for 40,000 bales.

[15] When asked if he thought it strange that Mosti had asked rebates of other lines and not Fabre, Norrish testified that when he informed Mosti that Fabre follows the conference rates, presumably Mosti "didn't have the courage to ask me for any rebate."

31. Mosti stated that he has favored Fabre with his business—amounting to 80–90 percent of Fabre's cotton carryings (Norrish)—because of (a) the fight Fabre made in the Conference for the change in the prepaid freight rule, and (b) the fact that Fabre's agent in Genoa extends credit to Mosti on freight monies, which Mosti pays gradually as he receives payment from the cotton receivers. As of December 9, 1954, the credit was approximately 63 million lire, or about $100,000.[16] It is noteworthy that by May 6, 1954, Fabre had booked for Mosti substantial quantities of cotton on its first ship, the *Bastia*, on a freight collect basis, payable in lire, contrary to the conference prepaid freight rule. This was prior to any fight being started for a change. In fact, it was at a time when Fabre did not know of the rule, according to Norrish. Also, it was at a time when the exception to the rule permitted Mosti to ship via Italian lines Creole and Sidarma, freight collect, payable in lire.[17] Note that Mosti discontinued using Sidarma's services, except for the unusual shipment of June 1954 (infra), after that line withdrew its discount in January 1954.

32. Mosti stated that he bills his customers for ocean freight at the conference rate, and that he receives no rebates thereon. Stakem secured from Mosti's customers several invoices showing that the conference rate was billed. These are accompanied by copies of bills of lading issued by Fabre, indicating that Fabre also charged the conference rate. However, Mosti also bills the receiver for accessorial charges and fees on a separate invoice. According to Stakem, and at his request, Mosti consented with some reluctance to furnish copies of these involves on certain designated shipments. But thus far he has failed to do so, even after a second request.

33. Stakem called Mosti's attention to an over-all lump-sum price the latter had quoted to certain receivers in August 1954, including Legler, who had furnished Stakem with a statement of the offer. This was an innovation since lump-sum quotations of forwarders in Italy customarily are confined to charges and services which they directly handle or perform, i. e., from discharge port to mill. The offer included cost of ocean freight, forwarding fee, and accessorial and transportation charges incurred in handling cotton from ship-

[16] Fraissinet stated he never authorized extension of credit, and that it was the agent's responsibility. There is no conference rule governing credit. Mosti also pointed out to Stakem that there had been complaints about Lykes' and Creole's handling of cargo.

[17] The fight started on May 12, 1954, when Fabre threatened to resign if the rule were not changed. (See infra.) The change in the rule eliminated an exchange difficulty and made it possible for Italian spinners to buy more cotton.

side to receiver's mill. Mosti's price was 24,300 lire per ton.[18] (See table II, col. (1).) This, less ocean freight at the conference rate of $1.45 per 100 pounds (20,000 lire per ton), leaves 4,300 lire per ton for accessorial charges, inland transportation, forwarding fee, etc. The charges of a competing forwarder, Gandolfo (S. A. C. I. S. A.), who handled Legler's business, computed at a comparable lump sum figure, were 27,389 lire per ton, which amount, less ocean freight, equals 7,389 lire per ton. (See table II, col. (2).) Thus, Mosti's price was 3,089 lire ($5) per ton or approximately 750 lire ($1.20) per bale lower than that of Gandolfo's.

34. Gandolfo is head of the freight forwarders association at Genoa. At Stakem's request, he computed direct accessorial charges from official tariffs of the Consorzio at Genoa, which, including trucking (from Genoa to Bergamo) and insurance but no forwarding fee, amounted to 5,865 lire per ton. (See table II, col. (3).) This amount, which is represented to be the minimum direct, actual cost without forwarding fee, is 1,548 lire higher than Mosti's quotation, which includes his forwarding fee. About the only flexible item in the forwarder's charge is his fee which, according to Parisi, ranges from 700 ($1.10) to 1,700 lire ($2.70) per ton, or about 175 ($.27) to 425 lire ($.68) per bale. This is far less than the 3,089 lire per ton difference between the offer of Mosti and Gandolfo.

TABLE II

Charges per ton-lire	Mosti (1)	Gandolfo (2)	Tariff (3)
Accessorial	X	3,889	3,865
Inland transportation	X	2,000	2,000
Forwarding fee	X	1,500	
Subtotal	4,300	7,389	5,865
Ocean freight ($1.45 cwt.)	20,000	20,000	19,983
Total (lire)	24,300	27,389	25,848

35. As noted, Mosti's offer averages $1.20 per bale lower than Gandolfo's. Both inland transportation costs ($0.80 per bale) and the forwarding fee ($0.27 to $0.68 per bale) add up to barely enough to make up the difference. Thus, assuming that Mosti charges the full ocean freight, he could underquote competing forwarders, to the ex-

[18] This covered "Maritime dues from the loading ports of the Gulf; Disembarking at Genoa or at Venice; loading and delivery to your establishments;" also weighing, sampling, checking tares, "fidejussion" (custom bond), forwarding fee, etc. Mosti told Stakem that sometimes he cuts his price to various spinners, and that it would not necessarily be the same to all spinners.

tent he has done, only if he were able to move the cotton inland substantially free of any cost, and to operate without any fee to cover his overhead and profit.

36. According to Stakem, Gandolfo said he could not meet Mosti's offer to Legler and still charge the full conference rate. When informed of this statement by Stakem, Mosti, according to Stakem, said that his price represented all of the charges plus a fee profitable to him.[19]

The BASTIA *bookings.* 37. As stated, the collect bookings at contract rates were made by Fabre with Mosti on the *Bastia* in late April and early May 1954. On May 5, 1954, Creole and Lykes learned of these bookings, which were allegedly made at a 10 percent reduction of the conference rate. A meeting of the Conference was held on May, 6, resulting in an exchange of cables between the chairman and Fabre. In these the chairman warned Fabre against violation of the rules concerning collect shipments and contract rates, and asked for details of bookings on the *Bastia* and *General Dufour*, and alleged concessions in connection therewith. Fabre cabled its resignation on May 11, 1954; and on May 12 cabled that no bookings would be made on the *Bastia* contrary to rules (for which the Conference expressed its appreciation), and offered to withdraw its resignation if the rule were changed to permit it to accept freight collect in lire. Fabre's position was that otherwise it could not participate in the traffic since United States-flag lines obtained 50 percent of f. o. a. cotton and Italian-flag lines were in a preferential position because they could accept collect freight payable in lire. The non-Italian-flag lines, except Fabre, were reluctant to change the rule because of the lack of convertibiliy of Italian lire into United States dollars.

38. In the meantime, Wolfson (Lykes) and Ansaldo (Creole) remonstrated with Norrish (Fabre) against the collect bookings, at Genoa on or about May 4. Later, at a meeting of the Genoa committee of the Conference, Norrish explained that he did not have a copy of the conference tariff; that until then he had no knowledge of the Conference rule against collect shipments; and that the bookings were based upon his erroneous assumption that the rules of the Conference were the same as those of the Gulf-French Atlantic-Hamburg Range Conference, which did permit such arrangement.[20] Norrish communicated with Fabre at Marseilles for instructions, and was ad-

[19] Norrish testified that he was told that Mosti owns some trucks and consequently saves on inland transportation costs.

[20] However, both Nahas and Norrish testified that in January 1954 Nahas told Norrish that Fabre was a member of the Gulf-Mediterranean Conference, and that the rates and rules of that conference had to be observed.

vised not to accept further bookings. Thereupon, the bookings were canceled and Mosti was required to book with Sidarma and Creole, who were permitted to accept collect shipments. Mosti's shipments, on their June sailings, were substantial.

39. The Conference, following further exchanges of cables and meetings both at New Orleans and Genoa, extended permission to Fabre to load 4,500 bales on the *Bastia*, freight collect, which sailed on June 3, 1954, with 2,289 bales. Thereupon, Fabre withdrew its resignation. On June 14, 1954, the Conference amended the rule to permit all members to book shipments freight collect, payable in lire.[21]

Mosti's offer—charges of rebating. 40. As stated, Mosti resumed business with Fabre after the change in the rule, and since then very little Mosti-controlled cotton has been handled by Lykes, Creole, or any line except Fabre. On the other hand, Fabre was markedly successful in securing cotton (see table I), most of which was controlled by Mosti. Mosti actively solicited the cotton industry in Italy, making the offer of substantial savings heretofore mentioned. His offer to Legler of August 1954 (ante) was transmitted by Legler by letter to his forwarder Gandolfo, who relayed the letter to the conference chairman (Carlys) by letter of September 11, 1954. Legler stated in effect that the over-all price (Mosti's) was so greatly below the usual cost, based on Legler's experience, that the difference could not be explained except by concluding that some line "grants rebates in no mean measure and others do not." Legler regretted having signed the cotton contract with the Conference, and both Legler and Gandolfo demanded an explanation from the Conference. This correspondence was circulated to the conference membership.

41. Ansaldo testified that in August 1954, Gandolfo, Parisi, and Cabella, cotton forwarders of Genoa, visited him and reported that a conference line was granting rebates through Mosti.[22] They complained of losing business to Mosti, and demanded some form of relief in meeting his competition. Wolfson testified he received the same information from Gandolfo and Parisi. Carlys testified that

[21] Wolfson testified that just prior to the change in the rule the traffic manager of Fabre's Genoa agent called him by phone to borrow a Gulf-Mediterranean tariff. Wolfson asked how the bookings were being made then, and the purported reply was that quotation was made on basis of the North Atlantic Conference tariff "less the usual dollar." (Norrish testified that such statement could not have been made.) Wolfson stated he reported this conversation to his principals by letter of June 19, 1954; also to Ansaldo, chairman of the conference committee at Genoa. (The chairman wrote to Fabre's agent about the matter, who replied, according to Wolfson, that they did not know of the existence of a Gulf-Mediterranean tariff until they so heard from Wolfson and Ansaldo.

[22] Norrish states that there is a bitter personal animosity between Gandolfo and Mosti, and that Gandolfo himself has requested a rebate from Fabre. So far as Norrish knows, there is no animosity, other than ordinary competition, between Mosti and Cabella and Parisi.

pursuant to his duties as chairman, he visited Hefti, Managing Director of Legler, at Bergamo, Italy, and Legler's forwarder Gandolfo, in early October 1954, to investigate Legler's complaint about rebating and the cotton contract. Reportedly, Hefti said he was being harmed by the advantages given his competitors; Gandolfo said the only "room" for rebating was in the ocean freight since the other incidental charges are fixed prices; and Hefti showed Carlys Mosti's written (August) offer of 24,300 lire per ton on f. a. s. and f. o. b. transactions. (See table II, col. (1).) Mosti did not name any particular line.[23] Staken testified that he interviewed Hefti and Gandolfo; that Hefti furnished him with a statement of Mosti's offer, and that Gandolfo told him he could not meet Mosti's offer and still charge the full conference rate; but that Gandolfo did make an offer to Legler to cut the differential between his price and Mosti's by 50 percent.

Cancellations of bookings. 42. Coincidentally with the dissemination of Mosti's offer and the charges of rebating, there occurred a series of cancellations of cotton bookings via Creole and Lykes, and rebooking of the cargo with Fabre. They began in late August 1954 and continued through September, October, November, and December 1954 and January 1955. Creole received cancellations of seven written and seven verbal bookings; Lykes received five cancellations of firm bookings. These lines were advised by the exporters in the Gulf that they were obliged to make the cancellations and rebookings upon instructions from the importers abroad.

43. Of these shipments, three had actually been wholly or partly delivered to the Creole dock and had to be physically removed to the Fabre dock. In one instance, the transfer cost was $0.75 to $1 per bale. Neither line had ever before experienced a similar series of cancellations, all in favor of a single competitor.[24] In no case was a cancellation attributed to any defect in the service of Lykes or Creole, or to any particular merit in the service of Fabre. On the other hand, Lykes and Creole are older in the trade and both have a more frequent and regular service than Fabre, particularly Lykes.

44. The cancellations caused delays in shipment as much as 17 days. The record establishes the fact that cotton is a high-value commodity; that shippers usually insist upon fast service in order to secure prompt

[23] Later, Mosti, after learning that his offer had been revealed to Gandolfo and the Conference, advised Legler it could use any line of its choice in connection with the offer, which apparently was not accepted. However, in connection with Mosti's offer to another spinner, Solbiate, he advised the latter on September 17, 1954, that Fabre Line would be used.

[24] McDonnell (Fabre's United States agent) has never experienced such a series of cancellations and would regard as unusual such cancellations if all were in favor of a single competitor.

payment for cotton; that delay increases carrying charges for warehousing, insurance, and interest; that if instructed routing continues, shippers indicate they will have to pass the charges on to receivers; and that instructed routing by the receiver interferes with the warehousing and efficient shipping of cotton because the receiver in Italy cannot keep currently informed of vessel schedules from the Gulf.

45. Roberts testified as to one cancellation of a booking with Creole, that some part of the shipment could not be made ready for the Fabre vessel designated; that the exporter sought permission from the buyer to load on a vessel of another line; and that the buyer replied that he was willing to be assessed carrying charges as much as $1 per bale, but insisted that the cotton move via the Fabre Line.

46. Cocke testified that in the course of his solicitation a complaint was made to him by an exporter that, in a case where contrary to instructed routing via Fabre the exporter had shipped via Lykes because its vessel was in better position, the exporter received a complaint from the Italian buyer that it cost the latter $112.75 more to ship the 100 bales via Lykes. That is, the buyer lost $1.13 per bale on the shipment.

47. Some of the bookings canceled and transferred to Fabre covered cotton to Venice, which is served by Lykes and Creole. Fabre has never called at Venice, a fact known to the receivers abroad. Notwithstanding the fact that discharge costs at Venice run about 1,000 lire ($1.50) per ton lower than at Genoa, Norrish testified that receivers have been content to accept delivery by Fabre at Genoa without any protest, explanation, or request for compensation. He conceded that there was an inconsistency in such practice, was puzzled by it, and has never been able to find an explanation for it.[25]

Fabre's explanation of cancellations and instructed routings. 48. After the cancellations became pronounced the Conference, through its Genoa committee, on October 4, 1954, called on Norrish for an explanation of the volume of instructed f. o. b. routings via Fabre.[26] Norrish's reasons were that (1) Fabre has an internal organization in the United States second to none, and (2) Mosti was grateful to Fabre for causing the Conference to change its rule to permit payment of freight in lire. At the hearing he added, (3) that Fabre had given "good service by keeping ships waiting in New Orleans and in other small ports"; and (4) that his firm extended credit to Mosti, as they "give credit to

[25] Norrish testified that recently a receiver requested him to forward a shipment from Genoa to Venice at Fabre's expense, and that such request was still under consideration. He thinks that Lykes and Creole absorb such expense when unable to make delivery at Venice.

[26] This meeting, in Genoa, was attended by Wolfson, Ansaldo, Roberts, and Chairman Carlys, who sent a report of the proceedings, the same day, to the Conference.

any other reliable firm." Norrish testified that neither his firm nor Fabre had ever granted Mosti or spinners any rebates or other concessions. When asked on cross-examination how he knew that Fabre did not pay rebates, he answered that he did not know but he presumed Fabre would inform him about it, in spite of the fact that Fabre would be violating the law and the conference tariff and rules.

49. Additional reasons for Fabre's success were given by Nahas at the hearing and by Fraissinet to Stakem. Nahas mentioned Fabre's willingness to call at secondary ports like Brownsville, Texas, and (5) Fabre's breaking of the alleged monopoly of the business by Lykes and Creole. Fraissinet added that (6) Fabre resumed service "at the psychological moment when certain importers were in litigation with certain companies, members of the Conference," no explanation given; and (7) "personal ties" between the directors of S. C. A. I. (Mosti's firm) and Fabre.

50. As to (1), Fabre's representation in the United States—Mosti's traffic is almost invariably f. o. b. and the routing is instructed by Mosti or his clients in Italy. The bookings are made and the freight monies are collected in Italy.[27] Upon cross-examination, Norrish could say only that the United States organization prevents "monkey business," i. e., attempts by competitors to divert cargo to themselves in spite of routing orders in favor of Fabre.

51. Regarding (2), Nosti's gratitude for Fabre's forcing a change in the conference payment rule—prior to the change, Italian receivers had the services of Creole and Sidarma, offering about three sailings per month, which accepted payment in lire.

52. With respect to (3), Fabre's service at secondary ports—while Fabre made four calls at Brownsville between August and December 1954, Creole made 6, Sidarma 3, States Marine 5, and Lykes 8. As noted, Fabre does not call at Venice. The frequency and regularity of service of Lykes and Creole at New Orleans surpasses, and that of States Marine equals, that of Fabre. Fabre's vessels are slower than those of other conference lines.[28]

53. Respecting (7) "personal ties" between Fabre and Mosti—the first contact Mosti had with Fabre resulted from his reading of a newspaper advertisement of the new service beginning with the proposed May sailing of the *Bastia*. Upon this brief acquaintance, Mosti proposed to give between 5,000 and 7,000 bales to Fabre for the *Bastia*.

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[27] McDonnell testified that Elwell (Fabre's United States agent) has never booked any cargo for Fabre at other than conference tariff rates.

[28] Norrish testified that a regular service for cotton is more important to spinners than a speedy service. The consensus of other steamship witnesses was that time in transit is a very important factor.

Formal charges against Fabre—investigation of preference for Fabre. 54. Following the October 4 meeting at Genoa, Lykes, feeling that Fabre's explanation was unsatisfactory, gave notice at a meeting of the Conference on October 7, 1954, that at a meeting called for October 11, 1954, it would move to expel Fabre from the Conference on charges of granting rebates or other concessions with respect to cotton and other commodities.[29] As the cancellations continued, Cocke cabled Wolfson to investigate the reasons for the cancellations and for Lykes' failure to obtain cotton bookings. Cocke testified that the invariable reply was that Fabre was granting rebates or other concessions, which testimony was confirmed by Wolfson.

55. In one instance, on October 26, 1954, Wolfson and Morgavi, traffic manager of Creole, visited Cotonificio Vittorio Olcese, a spinning firm which had transferred its business from Lykes and Creole to Fabre.[30] In response to their solicitation for his business, the general manager Pozzi told them, according to the testimony of Wolfson and Ansaldo, that he had been offered a rate concession from a conference line through a forwarder, but did not identify them. Later, in November or December 1954, Creole received a cancellation from a Memphis exporter of a booking of 400 bales of cotton destined to Olcese, which was rebooked via Fabre Line. Olcese had no complaints to make about the service afforded by Creole.

56. On another occasion, on November 10, 1954, Wolfson had his representative in Milan, Cicogna, interview the spinning firm of Cotonificio Bresciano—Ottolini regarding some cotton which had been booked by Lykes for Venice, but then was canceled and rebooked for Venice by Fabre. According to Wolfson's testimony, this firm informed Cicogna that the cancellation was not made by Bresciano—Ottolini but by its forwarder Mosti; that the firm was induced to agree to the cancellation although they knew that Fabre never calls at Venice, upon Mosti's assurance that they would receive a sizeable rebate as compensation for having to truck their cotton from Genoa to destination instead of from Venice.

57. Several agents in Italy who represent United States cotton exporters were interviewed by Carlys, conference chairman, in early October 1954, and by Stakem later. Both testified that these agents stated that their spinner customers told them that their preference for Fabre was based upon a financial advantage on cotton carried by

[29] This meeting was postponed once at Fabre's request, and finally held on October 29 1954, at which Fabre was expelled.

[30] Mosti switched some of Olcese's cotton from the *Bastia* to Creole in June 1954. Ansaldo (Creole) was unable to remember receiving any Mosti-controlled cotton after that, including cotton destined to Olcese.

that line.[31] Stakem was told this amounted to about $1.10 per bale. Stakem also interviewed officials of Olcese, Somaini and Solbiate, spinners who, according to Stakem, advised him they patronized Mosti, and through him Fabre; that they were billed at the conference rate; and that there was a financial advantage in dealing with Mosti which lay in the accessorial charges of Mosti, and according to Solbiate, in lower insurance rates obtainable by Mosti.

Fabre's reaction to charges and expulsion. 58. At the conference meeting of October 29, 1954, Fabre's Gulf agent, Strachan, stated that all cargo handled by him is manifested strictly in accordance with conference rates, rules, and regulations. Thereupon, he read a cable from Fraissinet (Fabre) in which, among other things, he expressed unhappiness over Lykes' alleged domination of the Spanish-Gulf olive trade, and Creole's alleged control over carbon black and timber in the Gulf-Italian trade; accused other conference lines of rebating; denied rebating on the part of Fabre, and in effect invited inspection of Fabre's accounts; threatened legal action if the Conference took any "hasty action" against Fabre "except what we could produce ourselves against most conference members"; and concluded by saying that he (Fraissinet) would be in New Orleans in mid-November for discussion.

59. Norrish testified that at the meeting on October 4, 1954, he informed the Genoa committee that Fraissinet had phoned him that he (Fraissinet) was prepared to go to New York with his general manager, Gauz, and swear that he had not given any rebates on cotton. In reply to Board Chairman Rothschild's invitation to attend the hearing in this proceeding, Fraissinet cabled on January 20, 1955, that he could not attend due to previous commitments, but suggested a meeting in Europe of presidents of companies most interested to solve outstanding problems.

60. On January 19, 1955, Fraissinet sent a letter to Carlys requesting that the expulsion motion be rescinded, and that the Board be requested to discontinue this investigation, stating that Fabre, without admitting any violations, was prepared to participate in any appropriate policing agreement designed to assure strict adherence by all members to conference rules and regulations. Carlys replied that the Board undertook the investigation only after every effort by the Conference to correct the situation had proved unavailing; and that in the absence of specific proposals and undertakings by Fabre which would assure discontinuance of practices complained of, the Con-

[31] Carlys reported to the Conference, on October 29, 1954, on his interviews with shipper agents and spinners in Italy. According to him, the former suspected rebating but could offer no proof; and the spinners did not offer any such proof. In fact, Carlys reported that: "I have no proof and it is impossible to prove it."

ference could not in good faith request the Board to discontinue the proceeding.

EFFECT OF RATE INSTABILITY IN GULF-MEDITERRANEAN TRADE

61. Steamship services out of the Gulf are highly competitive with North Atlantic services on commodities originating in the Midwest. This is true particularly as to machinery, agricultural implements, tinplate, and general cargo. Rate adjustments in one trade might require corresponding adjustments in the other trade. A similar situation exists in the competitive relation between Mediterranean and Atlantic ports in Europe. For example, Switzerland and Austria may import and export cargo via either group of ports. The Gulf-Mediterranean Conference has been asked on occasions to adjust its rates to meet rate changes of conferences serving the Antwerp, Rotterdam, Hamburg, range. Ports affected by these changes are Genoa, Trieste, and Venice.

62. Cocke, who is chairman of the Cotton Rate Committee of the Conference, testified it has been the experience of the Committee that rate discrimination and instability have an adverse effect on United States exports of cotton; that present contracts with shippers were negotiated on the basis that shippers required stability of rates and equal treatment for all, with no discrimination as between shippers and receivers; and that such shippers have demanded that this situation be cleared up.

CHARGES AGAINST LYKES

63. Fraissinet informed Stakem on December 20, 1954, that unless the charges against Fabre of rebating were dropped, he intended to use evidence he had of rebating by Lykes. This consisted of two letters which are of record: (1) A letter from Lykes' Marseilles agent, Michel, to Kerr, Lykes' European manager, dated November 3, 1954, stating that Michel had arranged with the stevedore for a special rebate of 5 percent on stevedoring charges for discharging woodpulp at Marseilles; (2) An unsigned, unaddressed letter allegedly written by Scerni, Lykes' agent in Genoa, to an Italian importer, dated September 24, 1954, offering a reduction of 1 percent on freight charges on scrap brass and copper if shipments were routed via Lykes.

64. Lykes denied the charges of rebating on woodpulp and offered evidence to show that its agent Michel did negotiate a 5 percent reduc-

tion in stevedoring, which is for account of the consignee and has no relation to the ocean freight rate. It is explained that this was done in an attempt more nearly to equalize the costs at Merseilles with those at LeHavre, where the steamship lines absorb discharging costs.

65. Scerni testified that he did not write the letter regarding the 1 percent rebate. Norrish, who had sent the letter to Fraissinet, testified it was not from Lykes' agent, but from a forwarding agent who had offered to sell a photostatic copy of the original to Fabre. Thereupon, counsel for Fabre withdrew the assertion that the letter was signed by Lykes' agent.

66. At the hearing Fabre introduced a Lykes' bill of lading dated July 15, 1954, indicating that a rate of $18 per ton, instead of the applicable rate of $36.25 had been charged on a shipment of 294 drums of turpentine substitute from Houston to Venice. Cocke testified this was an error, that it was detected by Lykes' Genoa office on October 1, 1954, that the correct rate was verified with the Conference, that on October 6, 1954, the shipper was billed for the undercharge, that the shipper then negotiated with the Conference for a lower rate which was denied on February 16, 1955, and that Lykes was still pressing for payment of the undercharge.

The examiner recognized that the evidence adduced was, to a large extent, hearsay in nature. He concluded, however, on consideration of direct and hearsay evidence in relation to malpractices, as well as inference of fact drawn against Fabre from the direct evidence, that Fabre had been shown to have violated section 16–Second of the 1916 Act by granting rebates or concession to secure shipments of woodpulp, lubricating oil, carbon black, tinplate, and cotton.

The examiner further found that the record did not support findings of violation, by any respondent, of sections 15, 16–First, or 17 of the 1916 Act, and that the action of the Conference in expelling Fabre from conference membership was not unfair, unlawful, or unjustified.

Fabre excepted both generally and specifically to the recommended decision. In so far as is material to this report, the exceptions relate solely to the examiner's acceptance of hearsay evidence, his use of inferences, and his failure to give credence to testimony favorable to Fabre. Fabre asserts that the evidence relied on to establish violations of the 1916 Act falls short of the standard of "reliable, probative, or substantial" evidence required by section 7 (c) of the Administrative

Procedure Act ("APA") [32] and the standards set forth in our Rules of Practice and Procedure.[33]

Fabre further asserts that the evidence relied on by the Conference in expelling Fabre from conference membership was insufficient to justify that action, the examiner's finding to the contrary notwithstanding.

Public Counsel and the Conference have asserted, and the examiner has found, that section 7 (c) of the APA makes inapplicable to administrative proceedings such as this the strict exclusionary rules of evidence employed in judicial proceedings and permits use of hearsay evidence if corroborated by substantial direct evidence. The examiner rejected Fabre's argument that this is a quasi-criminal proceeding requiring adherence to "rigid rules of evidence", pointing out that the fines authorized in section 16 of the 1916 Act could not be imposed in this hearing.

Character of evidence required in administrative proceedings generally. We concur in the examiner's citation of authorities construing section 7 (c) of the APA specifically and administrative law evidentiary requirements generally. The congressional intent underlying sections 7 (c) and 10 (e) [34] of the APA is clear both from legislative

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[32] Section 7 (c):

EVIDENCE.—Except as statutes otherwise provide, the proponent of a rule or order shall have the burden of proof. Any oral or documentary evidence may be received, but every agency shall as a matter of policy provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence and no sanction shall be imposed or rule or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the reliable, probative, and substantial evidence. Every party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses any agency may, where the interest of any party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

[33] Rule 10 (b):

"*Hearings required by statute.* In complaint and answer cases, investigations on the Board's own motion, and in other rulemaking and adjudication proceedings in which a hearing is required by statute, formal hearings shall be conducted pursuant to section 7 of the Administrative Procedure Act. * * *

Rule 10 (q).:

Written evidence. * * *(2) Where a formal hearing is held in a rulemaking proceeding, interested persons will be afforded an opportunity to participate through submission of relevant, material, reliable and probative written evidence properly verified: *Provided,* That such evidence submitted by persons not present at the hearing will not be made a part of the record if objected to by any party on the ground that the person who submits the evidence is not present for cross-examination.

[34] Section 10 (e) Administrative Procedure Act:

SCOPE OF REVIEW.—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall * * * (B) hold unlawful and set aside agency action, findings, and conclusions found to be * * * (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; * * *.

reports and judicial interpretation. In relation to evidentiary requirements, H. R. Report No. 1780 of the 79th Congress, 2d session, states:

The second and primary sentence of the section is framed on the premise that, as to the admissibility of evidence, an administrative hearing is to be compared with an equity proceeding in the courts. Thus, the mere admission of evidence is not to be taken as prejudicial error (there being no lay jury to be protected from improper influence) although irrelevant, immaterial, and unduly repetitious evidence is useless and is to be excluded as a matter of efficiency and good practice; and no finding or conclusion may be entered except upon consideration by the agency of the whole record or so much thereof as a party may cite and as supported by and in accordance with evidence which is plainly of the requisite relevance and materiality—that is "reliable, probative, and substantial evidence." Thus while the exclusionary "rules of evidence" do not apply except as the agency may as a matter of sound practice simplify the hearing and record by excluding improper or unnecessary matter, the accepted standards and principles of probity, reliability, and substantiality of evidence must be applied. These are standards or principles usually applied tacitly and resting mainly upon common sense which people engaged in the conduct of responsible affairs instinctively understand. But they exist and must be rationally applied. They are to govern in administrative proceedings. These requirements do not preclude the admission of or reliance upon technical reports, surveys, analyses, and summaries where appropriate to the subject matter.

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* * * The right of cross-examination extends, in a proper case, to written evidence submitted pursuant to the last sentence of the section as well as to cases in which oral or documentary evidence is received in open hearing. * * * To the extent that cross-examination is necessary to bring out the truth, the party must have it.

On May 24, 1946, Representative Walter, on the floor of the House of Representatives, described the evidentiary requirements of section 7 (c) of the APA in the following manner:

The requirement that agencies may act only upon relevant, probative, and substantial evidence means that the accepted standards of proof, as distinguished from the mere admissibility of evidence, are to govern in administrative proceedings as they do in courts of law and equity. The same provision contains two other limitations—first, that the agency must examine and consider the whole of the evidence relevant to any issue and, secondly, that it must decide in accordance with the evidence. Under these provisions the function of an administrative agency is clearly not to decide arbitrarily or to act contrary to the evidence or upon surmise or suspicion or untenable inference. Mere uncorroborated hearsay or rumor does not constitute substantial evidence—see *Edison Co.* v. *Labor Board* (305 U. S. 197, 230). Under this provision agencies are not authorized to decide in accordance with preconceived ideas or merely to sustain or vindicate prior administrative action, but they must enter upon a bona fide consideration of the record with a view to reaching a just decision upon the whole of it.

While the APA permits the introduction of hearsay evidence and relaxes the strict evidentiary rules obtaining in courts of law,[35] it is designed to eliminate wholesale use of hearsay evidence, the drawing of expert inferences not based upon evidence, and the consideration of only one part or one side of a case.[36] This limitation on the use of hearsay evidence results from the requirement[37] that rules or orders be "supported by * * * reliable, probative, and substantial evidence," from the power in reviewing courts to set aside actions unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 of the APA, and from the right of parties to administrative proceedings "to conduct such cross-examination as may be required for a full and true disclosure of the facts."[38] Thus, while all but "irrelevant, immaterial or unduly repetitious evidence"[39] may be admitted, agency determinations must be based on substantial evidence. The more liberal the practice in admitting testimony, the more imperative the obligation to preserve the essential rules of evidence by which rights are asserted or defended.[40]

The "substantial evidence" requirement has been frequently discussed by the courts both before and after the passage of the APA. It has been said that "the rule of substantial evidence is one of fundamental importance and is the dividing line between law and arbitrary power."[41] In *Edison Co.* v. *Labor Board* (1938), 305 U. S. 197, 229, 230, the Supreme Court stated:

> Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.
>
> * * * * * * *
>
> Mere uncorroborated hearsay or rumor does not constitute substantial evidence.

To the same effect see *Labor Board* v. *Columbian Co.* (1939), 306 U. S. 292; *National Labor Relations Bd.* v. *Union Pacific Stages* (C. A. 9th Cir., 1938), 99 F. 2d 153.

Fabre states that the examiner erred in overruling objections to the introduction of hearsay evidence, arguing that the decision in *Edison Co.* v. *Labor Board*, *supra*, on which the examiner relied, was

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[35] *Willapoint Oysters* v. *Ewing*, 174 F. 2d 676; *Interstate Commerce Commission* v. *Baird* (1904), 194 U. S. 25.

[36] *Pittsburgh S. S. Co.* v. *National Labor Relations Bd.* (C. A. 6th Cir., 1950), 180 F. 2d 731.

[37] Section 7 (c) APA, *supra*.

[38] Section 7 (c) APA, *supra*.

[39] Section 7 (c) APA, *supra*.

[40] *United States* v. *Watkins* (S. D. N. Y. 1947), 73 F. Supp. 216.

[41] *National Labor Relations Board* v. *Thompson Products* (C. A. 6th, 1938), 97 F. 2d 13, 15.

688-650 O - 63 - 44

based on a statute which specifically relaxed the rules of evidence, which has since been amended, and which does not represent the law applicable to proceedings before this agency. These contentions are unsound; hearsay evidence is clearly *admissible* under the terms of the APA and under our rules which, as hereinbefore stated, follow the APA. Further, the cited decision was relied on in drafting section 10 (e) of the APA. See Appendix to Attorney General's Statement Regarding Revised Committee Print of October 5, 1945, contained in Senate Document 248 of the 79th Cong., 2d session, at page 414, where it was stated:

> Section 10 (e): This declares the existing law concerning the scope of judicial review. * * * Clause (5) is intended to embody the law as declared, for example, in *Consolidated Edison Co.* v. *National Labor Relations Board* (305 U. S. 197).

The subsequent amendment to the National Labor Relations Act does not alter the reliance placed by Congress in enacting the APA on the principles enumerated in the *Edison* case.

Nor do we consider, as argued by Fabre, that the nature of this proceeding requires application of evidentiary standards proper in criminal or "quasi-criminal" proceedings. Although section 16–Second of the 1916 Act provides criminal penalties, those penalties may only be imposed in a proceeding commenced by the Department of Justice [42] in a court of competent criminal jurisdiction. No penalties may be imposed in this proceeding nor may the record here be used as the basis for collection of fines.[43]

Interpretation of Section 16–Second.—Since both Fabre and Lykes have defended against charges of section 16–Second violations on the ground that reductions in transportation charges were unintentional, it is necessary to examine section 16–Second prior to evaluation of the evidence advanced in support of such charges.

In so far as is here pertinent, section 16–Second provides:

> That it shall be unlawful for any common carrier by water, or other person subject to this Act, either alone or in conjunction with any other person, directly or indirectly—
>
> * * * * * * *
>
> Second. To allow any person to obtain transportation for property at less than the regular rates or charges then established and enforced on the line of such carrier by means of false billing, false classification, false weighing, false report of weight, or by any other unjust or unfair device or means.

Although, unlike the first paragraph of section 16, the quoted language does not contain the words "knowingly and willfully" or simi-

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[42] 28 U. S. C. A. 507.

[43] See Davis, Administrative Law, 1951, at pp. 305, 306, on the constitutional requirement for trial by jury in criminal matters.

lar words, intent is, nevertheless, an element essential to establishment of violation of section 16–Second, which makes unlawful allowing, *by unjust or unfair device or means*, any person to obtain transportation at less than the regularly established and enforced rates or charges. No resort to lexicography is necessary to determine that a "device" must be a willful, knowing scheme or means to an end.

It is apparent, then, that a carrier does not violate section 16–Second by inadvertence unless the evidence reveals such a wanton disregard of the duty to exercise reasonable diligence to collect applicable rates and charges for transportation as to amount to an intent to collect less than the applicable rates and charges.[44]

In accordance with our view of the evidentiary standards applicable to this proceeding and our construction of section 16–Second of the 1916 Act, we make the following determinations in respect to the ultimate facts found, inferences drawn, and conclusions reached by the examiner.

Woodpulp. Fabre contends that, of three shipments of woodpulp from Fernandina to Marseilles, discharging costs were inadvertently absorbed on two shipments through a broker's error, contrary to conference regulations; that Fabre had not previously carried woodpulp between these ports and was not aware of the conference rule *re* discharging costs. In spite of the fact that these shipments were booked with or offered to Lykes prior to booking with Fabre, and the report that Lykes was requested to allow a reduction of $1 under the conference rates on these shipments, we cannot conclude that Fabre has knowingly granted rebates or concessions to secure any or all of the aforementioned shipments of woodpulp. Neither an intent to grant a lower rate nor a deliberate failure on the part of Fabre to keep itself informed has been shown. Although the evidence does not justify a finding of violation of section 16–Second, there is no doubt that Fabre violated the conference agreement in absorbing discharging costs on two of the three shipments of woodpulp[45] and in failing properly to respond to the conference's request for information concerning such shipments.

Tinplate. Direct testimony, of significance, in relation to charges against Fabre of rebating on tinplate shipments is confined to the following:

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[44] See *Rates from Japan to United States*, 2 U. S. M. C. 426 (1940), where the Maritime Commission held that carriers purposely keeping themselves in ignorance of false billing by shippers, in order to deny actual knowledge, were estopped to deny that which could be learned by the exercise of reasonable diligence.

[45] Agreement No. 134 does not make intent an element necessary to a violation of conference rules or regulations.

(a) In June 1954 Lykes was requested to grant a commission on tinplate shipments.

(b) Lykes refused to grant the requested commission.

(c) Lykes received no further tinplate shipments after its refusal to rebate. A Lykes booking made in November 1954 was cancelled on December 8, 1954. The shipment moved in January 1955 via Fabre.

(d) Prior to January 1955 Fabre had not carried tinplate in this trade.

(e) A second shipment of tinplate actively solicited by Lykes moved via Fabre.

(f) A third shipment of tinplate promised to Lykes moved via a conference line other than Fabre or Lykes.

Eliminating hearsay evidence, which tends to show rebating by Fabre, the evidence merely shows one cancellation and two unsuccessful solicitation efforts on three shipments of tinplate, of which two moved via Fabre and a third moved via another conference line, apparently Levant. From the cancellation of the booking with Lykes and subsequent shipments via conference carriers other than Lykes, any of the following inferences reasonably may be drawn: Fabre and/or Levant may have granted rebates to obtain the shipments; the shipper may have been motivated by dislike for Lykes' personnel, a dissatisfaction with Lykes' service, or a desire to retaliate against Lykes for refusal to grant a rebate.

Supplementing this scanty direct evidence with hearsay evidence, a conclusion may be reached from witness Wolfson's testimony of conversations with B. L. R. principal Facelli that Fabre has granted unlawful concessions to B. L. R. On the other hand, Facelli vigorously denied having told Wolfson of a letter from Fabre's Naples agent, DeLuca, which would prove that Fabre had granted rebates on tinplate to B. L. R. Further, DeLuca, in a sworn affidavit, denied having granted rebates "to any Naples importers." Looking at all of the hearsay evidence on this point, it is apparent that Wolfson's testimony of conversation with Facelli is fatally deficient for lack of opportunity for cross-examination, that hearsay evidence adduced by Fabre in the form of denials by Facelli and DeLuca is entitled to as much weight as and neutralizes Wolfson's testimony in this regard.

We conclude that the evidence adduced fails to establish violation of section 16–Second by Fabre or other line on shipments of tinplate. Since this matter was not before the Conference when it voted to expel Fabre, we needn't consider whether the shipments violated conference regulations.

Lubricating Oil. The only direct evidence of significance in relation to the shipment of lube oil is the admission by Fabre that a commission or brokerage fee of 10 percent was paid to the Madrid agent or broker for procurement of the shipment. This admission, however, falls far short of prima facie evidence of violation of section 16–Second of the 1916 Act, although we find, as did the examiner, that payment of 10 percent brokerage fee is in violation of article 5 of Agreement No. 134.

Far from furnishing support to or corroboration of substantial evidence regularly adduced, the hearsay evidence adduced itself constitutes the entire proof of rebating here. Although it reasonably might be inferred from the evidence that Fabre's agent was guilty of rebating to the consignee and that Fabre knew, or should have known, of such rebating, the evidence is not logically compelling to the exclusion of other conclusions inconsistent therewith.

Carbon Black. The Conference, in brief, states: "*While there is no specific proof* that a rate concession was allowed by Fabre, the circumstances attending this incident eliminate all other possible explanations of how Fabre could have taken over the cargo already booked by other lines." (Emphasis supplied.) We find that there is no logically probative evidence, direct or hearsay, tending to show (a) an intent, constructive or actual, to allow the shippers of carbon black to obtain transportation at less than the regular enforced rates, (b) that lower rates were charged and collected, or (c) that lower rates were granted as a result of an unjust or unfair device or means, assuming that less than the regular enforced rates were charged. No element of a violation of section 16–Second has been shown. While it might be inferred from the face of cancellations of shipments booked for other vessels and the fact of subsequent shipment via Fabre at a higher rate, that rebates had been granted, other inferences are equally reasonable. Although the testimony of the Fabre witness Nahas was far from satisfactory as an explanation of the reasons for the shipment moving via Fabre, Fabre cannot be subjected to a legal disability for failure to rebut less than a prima facie case.

We conclude that shipments of carbon black hereinabove discussed have not been in violation of section 16–Second of the 1916 Act or in breach of conference rules or regulations.

Cotton. The uncontroverted direct evidence bearing on the charges against Fabre of unlawful rebating on cotton shipments consists of the following:

1. Nineteen bookings for cotton shipments with Lykes or Creole were canceled reportedly at the request of consignees of receivers; the shipments later moved via Fabre.

   (a) In three instances all or part of the cotton had been delivered to Creole's installation for shipment.

   (b) In one of the aforementioned three instances the movement of cargo from Creole's wharf to Fabre's wharf cost the consignee between $0.75 and $1 per bale.

   (c) The conference rate on cotton is $1.45 per 100 pounds.[46]

2. Despite the facts that Fabre was new to the trade and that Lykes and Creole were long-established cotton carriers, Fabre's average carryings in 1954 far exceeded those of Lykes and Creole.

3. Fabre books cotton for Venice although its vessels discharge the cargo at Genoa and do not call at Venice.

   (a) Discharging costs at Genoa exceed discharging costs at Venice.

4. Lertora Bros. & Courtman, Fabre's Genoa agents, extend substantial credit to Mosti on cotton shipments.

   (a) Fabre does not agree to indemnify its agents against losses sustained by its agents as a result of extension of credit to forwarders and receivers.

While a practice of rebating may reasonably be inferred from the foregoing facts, we cannot say that other inferences, urged by Fabre, are unreasonable. We must, therefore, examine the hearsay evidence of record[47] for probative value, freedom from controversy, and reliability in relation to the APA's provisions for cross-examination as required for a full and true disclosure of the facts.

As more fully indicated in our basic evidentiary findings, there is a great volume of hearsay evidence in the matter of Fabre cotton shipments, much of which is relevant and logically probative of the issues on which offered. Briefly summarized, testimony was introduced to the effect that financial advantages accrued to Italian spinners and receivers out of shipping via Fabre vessels. While none of the evidence indicated direct rebates by Fabre, (a) cotton spinners have indicated an advantage of about $1.10 per bale in dealing with Fabre through Mosti; (b) a buyer has stated that it cost $1.13 more per bale to ship via Lykes than via Fabre; (c) routing of cotton shipments customarily left, prior to early 1954, to United States exporters, became thereafter dominantly controlled by Italian receivers;

[46] Cotton measures roughly four bales to the ton.

[47] Admitted for the purpose of showing the fairness or unfairness of the conference action in expelling Fabre.

(d) as hereinabove indicated, if Mosti's lump-sum offer to two spinners includes ocean freight at conference contract rates, the sum at the worst represents, after deduction of fixed accessorial charges, less than cost to Mosti and, at best, yields Mosti little or no forwarding fee.

On the other hand, (a) charges of rebating by Fabre on cotton have met with consistent denials by Fraissinet, Norrish, and Mosti; (b) spinners reported to have spoken of financial advantage in dealing with Fabre through Mosti are likewise reported to have been billed for ocean freight at the conference rate and to have denied obtaining rebates; (c) the aforementioned spinners failed to specify the manner of obtaining financial advantage; (d) Mosti, the person with most knowledge of his own reasons for dealing with Fabre, is reported to have been influenced by the substantial extension of credit by Fabre's agent; (e) Mosti maintains that he would realize a profit on the aforementioned lump-sum offers, that his prices are not uniform to all spinners, and that he quotes lower rates to new customers in order to obtain new business; (f) there is no evidence tending to show that either of the two Mosti lump-sum offers were ever accepted; (g) and the information relating to fixed accessorial charges originated with Gandolfo, a bitter rival of Mosti; and (h) although the fact that many of the charges are fixed was corroborated, no corroborative testimony, direct or hearsay, was adduced as to the level of the fixed accessorial charges. No explanation was offered by Fabre as to the reasons for booking cargo for Venice, although to all intents that cargo is, in every instance, discharged at Genoa.

From the foregoing, we conclude that although the evidence in relation to charges against Fabre of rebating by unjust or unfair device or means is relevant and logically probative, the evidence does not constitute "substantial evidence" within the meaning of the APA. Further, in view of Fabre's denials and in view of the inferences favorable to Fabre's position, which reasonably may be drawn from hearsay evidence of record, we conclude that the hearsay evidence adduced in support of charges of violation of the 1916 Act is fatally deficient for failure to provide opportunity for cross-examination where used for that purpose.

We find, however, that the shipments of cotton FOB, freight payable in lire, prior to amendment of the conference pre-payment rule, was in violation of conference regulations.

As stated by the examiner, the testimony of Fraissinet, President of Fabre, or other Fabre representative would have gone far toward resolving this matter. Since, however, the law imposed no duty on Fraissinet personally to respond to charges of violation of the 1916

Act or otherwise to appear in this proceeding and, in the face of Fraissinet's communication to Chairman Rothschild stating that prior commitments prevented his attendance, we do not draw adverse inferences from his absence and failure to testify.

Fairness of conference action in expelling Fabre. Article 22 of Agreement No. 134 authorizes elimination, on majority vote, of any member for any violation of the *letter or spirit* of the agreement, proved to the satisfaction of the majority to be sufficient for expulsion. Since, as hereinabove found, Fabre has acted in violation of the letter of the agreement by (1) paying brokerage in an amount greater than 1¼ percent of ocean freight earned,[48] (2) absorbing discharging costs on shipments of woodpulp from Florida to Marseilles,[49] and (3) shipping cotton freight collect in lire,[50] the action of the Conference was clearly within the scope of its approved agreement between carriers and was not in violation of section 15 of the 1916 Act.[51]

Further, as to charges of rebating on various commodities, as hereinabove discussed, on which violations of the 1916 Act have not been sufficiently established, we cannot say that the Conference acted on proof insufficient under the terms of the agreement. The evidence required by the Conference for finding a violation of the agreement [52] need not, under the terms of section 22 thereof, be more than such evidence as will prove the violation to the satisfaction of the majority of the voting members. Our dismissal of the charges of violation of section 16–Second of the 1916 Act here is based, as indicated, on the substantial evidence rule under the APA. No such requirement is imposed on the Conference by law or otherwise. We have been presented with no evidence tending to show that the agreement between conference members to expel Fabre is unjustly discriminatory, unfair as between carriers, operates to the detriment of the commerce of the United States, or is in violation of the 1916 Act.

We agree with the examiner that the record does not support a finding of violation by Fabre of section 16–First or section 17 of the 1916 Act. Many of Fabre's exceptions to the examiner's failure to make specific findings and conclusions have been rendered moot by the foregoing. We cannot find affirmatively, however, as requested by Fabre, that no concessions have been made on cargo booked for

[48] Prohibited under revised Article 5 of Agreement No. 134.

[49] Prohibited under Article 4 of Agreement No. 134, as supplemented by tariff regulations.

[50] Prohibited under Article 3 of Agreement No. 134.

[51] Section 15 of the 1916 Act provides standards for Board approval or disapproval of agreements between carriers subject to the Act. It makes unlawful effectuating any such agreement until approved and as long as unapproved by the Board.

[52] Article 2 of Agreement No. 134 forbids payment of rebates of freight or compensation to shippers, receivers, etc.

Venice but discharged at Genoa, that no rebates have been given on cotton shipments to Italy, and that Norrish's lack of knowledge of rebates conclusively disproves the charge of rebating.[53]

Just as the APA forbids, on the evidence of record, finding violations by Fabre of the 1916 Act, so also does it prohibit the affirmative findings requested by Fabre.

Charges against Lykes. Since, as stated, intent is an element of section 16-Second violations, and since, as indicated in findings 63 *et seq.*, the undercharge on a July 1954 shipment of turpentine substitute was clearly inadvertent, the record does not support charges, against Lykes, of violation of the 1916 Act.

The remedy for threatened rate instability. The examiner concluded and found that Fabre, in violating section 16-Second of the 1916 Act, is guilty of competitive methods creating conditions unfavorable to shipping in the foreign trade and recommended issuance of rules under section 19 of the 1920 Act in order to meet such conditions. Those recommendations were as follows:

1. Fabre should be required to file a statement of cargoes carried in each vessel, together with the rates being charged, stating whether prepaid or collect, and the names of the shipper and consignee interested in each shipment.
2. The statement in (1) should include the information as to when and in what amount the ocean freight is paid, and the name of the person or firm paying such ocean freight to the carrier.
3. The statement in (1) and (2) should be certified and submitted under oath accompanied by sworn statements to the effect that no rebates, concessions, or departures from the stated rates have been effected except as expressly set forth.
4. The requirement that rates be filed by Fabre within ten (10) days after clearance from the last port of loading in the United States.

The examiner further recommended that the statement referred to in recommendations 1, 2, 3, and 4 include a statement of all brokerage or commissions paid or payable by Fabre in connection with each shipment, and to whom such payments have been or are to be made.

While the examiner recommended that the rules issue under the authority of section 19 of the 1920 Act, Public Counsel proposed issuance of an order calling for periodic reports under the authority

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[53] Proposed findings of fact 9, 15, and 16, respectively.

of section 21 of the 1916 Act,[54] such reports to convey the same information as required by the statement recommended by the examiner.

We consider section 21 machinery more adaptable to the problems of this trade than section 19 of the 1920 Act and authorized, as implicit in our November 4, 1954, order of investigation. We will, therefore, require Fabre to prepare and file with us four quarterly reports setting forth information relative to transactions in the Gulf-Mediterranean trade, as outlined in our attached order, and we will hold this record open for a period of time appropriate for the completion of filing and analysis of such reports.

Although some hearsay evidence adduced by Fabre at the hearing linked other carriers in the trade with malpractices and the current instability, in our judgment these carriers have had insufficient time to defend against such charges brought during the course of the hearing. Further, the extremely limited evidence adduced does not, in our opinion, warrant requiring special reports by those carriers. We reserve the right, however, to require such reports by those carriers in the future, if deemed useful or necessary.

At this time we will limit the filing of periodic section 21 reports to Fabre. The filing does not constitute a penalty against Fabre but is required as a step toward fulfillment of our obligation fully to inform ourselves[55] of conditions in this trade.

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[54] Section 21 of the 1916 Act:

That the board may require any common carrier by water, or other person subject to this Act, or any officer, receiver, trustee, lessee, agent, or employee thereof, to file with it any periodical or special report, or any account, record, rate, or charge, or any memorandum of any facts and transactions appertaining to the business of such carrier or other person subject to this Act. Such report, account, record, rate, charge, or memorandum shall be under oath whenever the board so requires, and shall be furnished in the form and within the time prescribed by the board. Whoever fails to file any report, account, record, rate, charge, or memorandum as required by this section shall forfeit to the United States the sum of $100 for each day of such default.

Whoever willfully falsifies, destroys, mutilates, or alters any such report, account, record, rate, charge, or memorandum, or willfully files a false report, account, record, rate, charge, or memorandum shall be guilty of a misdemeanor, and subject upon conviction to a fine of not more than $1,000, or imprisonment for not more than one year, or to both such fine and imprisonment.

[55] *Federal Comm'n* v. *Broadcasting Co.* (1940), 309 U. S. 134.

APPENDIX A

MEMBERS OF THE GULF/MEDITERRANEAN PORTS CONFERENCE

Alexandria Navigation Co. S. A. E., Societe Misr de Navigation Maritime S. A. E., Fisser schiffahrt G. m. b. H., Britain S. S. Co., Ltd. (American Mideast Line-Joint Service); Bloomfield Steamship Co.; N. V. Stoomvaart Maatschappij "Nederland", Koninklijke Rotterdamsche Lloyd, N. V., N. V. Nederlandsch-Amerikaansche Stoomvaart-Maatschappij "Holland-Amerika Lijn", The Ocean Steam Ship Co., Ltd., The China Mutual Steam Navigation Co., Ltd., Nederlandsche Stoomvaart Maatschappij "Oceaan" N. V., (Blue Funnel Line-Java New York Line-Joint Service); Compagnie de Navigation Cyprien Fabre (Fabre Line); Compagnie Generale Transatlantique (French Line); Compania Maritima del Nervion; Dampskibsaktieselskabet Alaska, Aktieselskabet Atlas, Dampskibsaktieselskapet Idaho, Skipsaksjeselskapet Hilda Knudsen, Skipsaksjeselskapet Samuel Bakke (Concordia Line-Joint Service); Dampskibsselskabet Torm A/S (Torm Lines); Stockholms Rederiaktiebolag Svea, Rederiaktiebolaget Fredrika, Eckert Steamship Corp. (Eckert Line-Joint Service); Ellerman Lines, Limited, Ellerman & Bucknall Steamship Co., Limited, Hall Line, Limited, The City Line, Limited (Ellerman and Bucknall Associated Lines-Joint Service); Skibsaktieselskapet Varild, Skibsaktieselskapet Marina, Aktieselskabet Glittre, Dampskibsinteressentskabet Garonne, Skibsaktieselskapet Sangstad, Skibsaktieselskapet Solstad, Skibsaktieselskapet Siljestad, Dampskibsaktieselskabet International, Skibsaktieselskapet Goodwill, Skibsaktieselskapet Mandeville (Fern-Ville Mediterranean Lines-Joint Service); Hellenic Lines, Ltd.; Skibsaktieselskapet Arizona, Skibsaktieselskapet Astrea, Skibsaktieselskapet Aruba, Skibsaktieselskapet Noruega, Skibsaktieselskapet Abaco, A/S Atlantica (Høegh Lines-Joint Service); Israel America Line, Ltd.; M. Dizengoff & Co. (Shipping) 1949 Ltd.; Isthmian Steamship Co.; Khedivial Mail Line, S. A. E.; Stockard Steamship Corp., Atlantic Ocean Transport Corp., North American Terminal Corp. (Levant Line-Joint Service); Lykes Bros. Steamship Co.; Inc.; Navigazione Alta Italia-Societa per Azioni (Creole Line); Prudential Steamship Corp.; "Sidarma" Societa Italiana di Armamento (Sidarma Line); States Marine Corp., States Marine Corp. of Delaware (States Marine Lines-Joint Service); Waterman Steamship Corp.

ORDER

At a Session of the FEDERAL MARITIME BOARD held at its office in Washington, D. C., on the 18th day of August A. D. 1955

No. 768

ALLEGED PRACTICES OF COMPAGNIE DE NAVIGATION CYPRIEN FABRE (FABRE LINE) AND OF GULF/MEDITERRANEAN PORTS CONFERENCE

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 Compagnie de Navigation Cyprien Fabre (Fabre Line) file in the office of the Secretary, Federal Maritime Board, statements setting forth—

1. Amount and commodity involved in each shipment carried in berth service from Gulf ports to ports in Spain, Mediterranean France, and Italy;
2. The rate charged as to each shipment;
3. The names of shipper and consignee, and "notify party", if any, in connection with each shipment;
4. Method of payment of ocean freight, as between prepaid or collect, in connection with each shipment;
5. The time of payment of ocean freight, and the name of the person or firm paying such freight, in connection with each shipment;
6. The terms governing the extension of credit, where credit is extended in connection with the payment of ocean freight, in connection with each shipment;
7. A certification under oath by a responsible official of Compagnie de Navigation Cyprien Fabre (Fabre Line) that the information submitted in response to items (1) through (6) above is true and correct, and that no rebates, concessions or departures from the stated rates have been or will be effected except as expressly set forth in such statements; and

It is further ordered, That such statements be filed quarterly, the first group to be filed on the first day of October 1955, and covering

all sailings between June 1, 1955, and September 1, 1955, and three more to be filed on January 1, 1956, April 1, 1956, and July 1, 1956, respectively, for the periods September 1, 1955, to December 1, 1955, December 1, 1955, to March 1, 1956, and March 1, 1956, to June 1, 1956, respectively; and

It is further ordered, That within 10 days after clearance from the last port of loading in the United States, Compagnie de Navigation Cyprien Fabre (Fabre Line) file in the office of the Secretary, Federal Maritime Board, a schedule of the rates held out to the public in connection with each sailing; and

It is further ordered, That this record be held open until further order of the Board, pending filing and analysis of the above reports.

BY THE BOARD.

(SEAL)

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

FEDERAL MARITIME BOARD
MARITIME ADMINISTRATION

No. S-66

Capital Necessarily Employed—General Order 71

Submitted July 11, 1951. Decided September 17, 1952

Walter E. Maloney for American Merchant Marine Institute; *Carlton C. Lewis, Donald D. Geary,* and *Robert E. Kline, Jr.*, for Farrell Lines, Inc.; *Kenneth Gardner* for American Export Lines, Inc.; *Radner, Zito, Kominers & Fort* for New York and Cuba Mail Steamship Co.

Francis T. Greene, General Counsel, Maritime Administration, and chairman of special staff committee, for the Board and Administrator.

Report of the Board and Maritime Administrator

I. Introduction

By the Board and Maritime Administrator:

This is a report upon the reconsideration of the definition of "Capital Necessarily Employed" as promulgated by the former United States Maritime Commission ("the Commission"), and upon the date when such definition should and legally can become effective with respect to operators holding operating-differential subsidy contracts under the Merchant Marine Act, 1936, as amended ("the Act"). A staff committee submitted its recommendations, as hereinafter set forth, and thereafter oral argument was heard on July 11, 1951. With these recommendations we generally agree.

The essence of the problem is whether, as a matter of law and policy, we should amend the definition of "Capital Necessarily Employed" in General Order 71, and take comparable steps with respect to the "Extended Operating-Differential Subsidy Agreements" heretofore executed and/or amend the effective date thereof so as to make the definition uniformly effective as to all subsidized operators as of their resumption of postwar subsidized operations.

The definition of "Capital Necessarily Employed" embodied in General Order 71, promulgated December 21, 1949, is now applicable from and after "the termination of the recapture period which was current on December 31, 1946." The respective recapture periods terminated for the several operators on various dates between December 31, 1947, and December 31, 1950. The fact that the Commission did not make this definition uniformly applicable to the commencement of postwar subsidized operations on January 1, 1947, was criticized in the Comptroller General's Audit Report for the fiscal years 1948 and 1949 (House Doc. No. 465, 81st Cong., 2d Sess., p. 14) and in the Sixth Intermediate Report of the House Committee on Expenditures in the Executive Departments (H. R. Rep. No. 2104, 81st Cong., 2d Sess., p. 11), on the ground that "* * * the effective date of the revised definition creates inequities and unjustifiably increases the financial burden on the Government." This review has been made pursuant to the House Committee's Recommendation No. 2 to the Commission, at p. 31 of H. R. Rep. No. 2104.

A. *Relevant Statutory Provisions*

Under the recapture provisions of section 606 (5) of the Act, each operating-differential subsidy contract must provide that at the end of any ten-year recapture period the operator shall pay back one-half of the net profits on subsidized vessels in excess of—

10 per centum per annum upon the contractor's capital investment necessarily employed in the operation of the subsidized vessels, services, routes, and lines.

Under section 607 (d)—

The Commission shall adopt and prescribe rules and regulations for the administration of the reserve funds contemplated by this section and shall include therein a definition of the term * * * "capital necessarily employed in the business," as such terms are employed in this section.

In addition to determining the amount of subsidy recapture, "capital necessarily employed" affects the payment of dividends under section 607 (a), mandatory deposits in the Capital Reserve Funds under section 607 (b), as well as mandatory deposits and retentions in the Special Reserve Fund under section 607 (c). The definition of the term therefore controls not only the amount of recapture; it has also a profound effect upon the entire fabric of the financial policies, actions, and condition of the subsidized lines.

B. *Summary of Action Under Section 607 (d) by the Commission*

1. *General Order 31.*—This order, promulgated June 11, 1940, prescribed a definition roughly equivalent to net worth; that is, the excess

of assets over liabilities. It included as capital the balances in the Capital Reserve Fund required by section 607 (b) to finance the purchase of new and replacement vessels, and in the Special Reserve Fund required by section 607 (c) to cover current and future losses and to assure payment of subsidy recapture. This definition was substantially the same as the one contained in the operating-differential subsidy contracts entered into shortly after the Act became effective. When this definition was written into the contracts in 1937 and 1938, the subsidized lines, in general, had no more than capital barely adequate for the needs of their subsidized operations. See Table XVIII–E, S. Rep. No. 2494, 81st Cong., 2d Sess., p. 273; H. R. Rep. No. 2168, 75th Cong., 3d Sess., p. 8.

2. *Proposed Supplement 2 to General Order 31.*—As early as 1941, the situation arising out of the large earnings of the subsidized operators in 1939, 1940, and 1941 led the then Director of Finance to recommend modification in order that the pyramiding of earnings, particularly in the Special Reserve Funds, should not have the effect of nullifying the recapture liability of the operators by the inclusion in "capital necessarily employed" of assets for which there was no foreseeable need. The Commission agreed in principle that General Order 31 should be modified (and so instructed the Division of Finance), but the outbreak of the war and the suspension of subsidized operations led to postponement of working out a solution until after hostilities ceased. From 1946 until November 30, 1948, the staff, after numerous conferences with the industry, developed a revised definition as Proposed Supplement 2 to General Order 31. This proposal was not concurred in by the industry, and, as stated below, was not adopted. Supplement 2 (see Appendix A for comparative analysis of Supplement 2 to General Order 31, General Order 71, and a proposed definition dated January 14, 1949) provided in essence for the inclusion of all balances in the Capital Reserve Fund on account of outstanding mortgage indebtedness on subsidized vessels. Although balances in the Special Reserve Fund were not generally included, Supplement 2 to General Order 31 permitted their inclusion to the extent that they might be transferred to the Capital Reserve Fund for the purpose of paying off mortgages on subsidized vessels or to meet commitments for new vessels. These items were, of course, in addition to undisputed items such as ship equities, reserves for depreciation, the amount of required 25 percent down payments for vessel acquisitions, limited working capital, etc. The Supplement 2 definition was to have become effective as to all operators as soon as they should resume subsidized service.

These provisions for including cash in the Capital Reserve Fund to the extent of ship mortgages and ship commitments constituted at least partial recognition of the abnormal capital asset position of the shipping industry immediately following World War II. The crux of the problem with which we are faced lies in the fact that, as of January 1, 1947, the operators were abnormally "long" of cash (due primarily to 1940–41 earnings, the requisitioning of ships, and the receipt of insurance covering vessels lost during the war). On the other hand, they were abnormally "short" of ships (due to war losses and requisitioning juxtaposed with the postwar increase in shipping requirements). Thus, as of January 1, 1947, the twelve subsidized operators owned a total of only 155 ships, including those in nonsubsidized services, and held about $65,000,000 in their Capital Reserve Funds.

During the ensuing three years it appears that these lines acquired approximately 100 ships, the equity of which represented about $100,000,000 of capital translated into physical assets during this period. (See Appendix B.) The operators urge that the balances in their Capital Reserve Funds as of January 1, 1947, or at least the major portion thereof, which were in fact used to increase physical capital assets to be used in subsidized operations as soon as they could be acquired, were, both in fact and law, "necessarily employed in the business" on January 1, 1947, while temporarily awaiting such use.

The most significant aspect of Supplement 2 to General Order 31 is the fact that it would have included cash balances in the Capital Reserve Funds on account of the total mortgage indebtedness of approximately $78,000,000 as of January 1, 1947 (see Appendix B), the proposed effective date of this definition. Similarly, under Supplement 2, increases in ensuing years in mortgage indebtedness for subsidized vessels would also have been included in capital necessarily employed to the extent of deposits in the Capital Reserve Funds.

On November 30, 1948, the Commission, apparently because of the operators' objections to any substantial departure from the old "net worth" definition, disapproved the Supplement 2 definition and directed submittal of a new proposed definition. This new definition was submitted on January 14, 1949. On January 28, 1949, the Commission considered the January 14, 1949, variation of the Supplement 2 definition, took no action on it, and referred the whole problem to one of its members for the purpose of drafting a new definition.

3. *The General Order 71 Definition.*—The proposed definition so developed (the progenitor of General Order 71) was submitted to the industry for comment in the fall of 1949. This definition did not specify an effective date but left a blank space for insertion of the

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date. The industry urged, among other things, that the effective date should be fixed at January 1, 1950.

The principal effect of the proposed definition (see Appendix A) was to exclude all assets except ship equities, net working capital equal to voyage expenses, net equity in other physical assets employed on subsidized service, funded depreciation on subsidized vessels, and an amount equal to the 25 percent down payment on new subsidized vessels under executed purchase contracts. The amount in the Special Reserve Fund equal to 5 percent of "capital necessarily employed" (the retention of which is mandatory under section 607 (c)) could also be included. No provision was made for the inclusion of Capital Reserve Funds obligated under ship mortgages or otherwise awaiting expenditure for new or replacement vessels.

Although staff negotiations with the industry had been proceeding on the assumption that any revision of General Order 31 was to be effective as of the postwar resumption of subsidized operations, the industry objected to the staff suggestion that the proposed definition should be made applicable as of the date when subsidized operations were resumed. The operators emphasized that the definition failed to take into account the abnormal situation prevailing at the end of the war when subsidized operations were resumed, in that the operators then held more cash than would normally be required, which, during 1947 and the next year or so, was in fact converted into ships for the subsidized services. The delay in the expenditure of these funds for physical assets did not result wholly from delay by the operators but was due at least in part to the exigencies of the transition to peacetime operations, the burden on the Commission of administering the Ship Sales Act program, and the normal time required to process purchase applications under that Act, including preparation of legal documents and the repair and reconversion of the vessels for delivery prior to operation.

It is quite clear that during the 1949 discussions the operators would have consented to an effective date of January 1, 1947, provided the definition gave credit for the amount of money on hand on that date, which, as soon as reasonably possible, was converted into vessels for operation in the subsidized services. The industry then suggested (October 17, 1949)—

> If it becomes necessary to make the new definition retroactive, then the funds actually used for fleet replacement or acquisition of vessels for operation on subsidized routes between January 1, 1947, and December 31, 1949, should be included as capital necessarily employed from the first of January 1947 onward.

The industry on this point emphasized that inclusion was sought only for funds actually used (not funds that might have been used or

could have been used) in the purchase of physical assets during 1947, 1948, and 1949. On December 21, 1949, the Commission adopted the Commissioner's proposed definition as General Order 71, the effectiveness of which as to each operator was to commence at "the termination of the recapture period which was current on December 31, 1946." This definition has remained in effect to the present time.

The feature of General Order 71 which provided for the postponement of the effective date to the end of each operator's recapture period current in 1946 represented a partial recognition of the "long cash—short ships" problem, for in most cases this permitted the "net worth" definition of General Order 31 to apply during the period of much of the ship acquisitions. Accordingly, in the resumption addenda executed by the Commission with seven lines (herein called contracting lines), there was included Article II–29 to provide for the deferred effective dates of the General Order 71 definition in line with that order, reading as follows:

(b) "capital necessarily employed in the business" and "capital investment necessarily employed in the operation of the subsidized vessel(s), service(s), route(s), and line(s)" shall, with respect to all annual or other accounting periods which terminated concurrently with or prior to the termination of the recapture period which was current on December 31, 1946, be determined as provided in the applicable rules and regulations as adopted and prescribed by the Commission in its General Order No. 31, as amended, *exclusive, however, of the provisions of* General Order 71; [Italics added].

The material dates affecting these seven contracting lines are as follows:

Operator [1]	Date of resumption	Actual date of execution of addenda	Effective date of G. O. 71
Grace	Jan. 1, 1947	Dec. 29, 1949	Jan. 1, 1948
American Mail	do	Jan. 3, 1950	Jan. 1, 1951
Farrell	do	Jan. 5, 1950	Jan. 1, 1950
Lykes	do	Dec. 29, 1949	Jan. 1, 1948
Seas	do	Jan. 6, 1950	Oct. 15, 1948
Mississippi	do	Apr. 5, 1950	Jan. 1, 1948
U. S. Lines: North Atlantic and American Pioneer Line	Jan. 1, 1948	May 1, 1950	Do.[2]

[1] There are two additional contracts, namely, with United States Lines Co. covering the S. S. *America* and with Pacific Argentine Brazil Line, but these do not present an issue in the present case as they are new contracts made after January 1, 1947. Moore-McCormack also executed a resumption addendum, effective as of January 1, 1947, on March 8, 1951. In accordance with its prior agreement with the Commission, this addendum, as explained below, excludes application of the General Order 71 definition to the earlier recapture period. American Export Lines and New York and Cuba Mail Steamship Co. have executed resumption addenda on June 6 and August 16, 1951, respectively. Oceanic executed resumption addendum on September 28, 1951, and American President Lines on October 5, 1951. However, since these four lines had no prior contract rights to nonapplication of General Order 71, their addenda provide: "* * * the Operator agrees to accept any changes by the United States in the definition of the term 'Capital Necessarily Employed in the Business' as set forth in General Order 71 of the Commission, including without limitation of the foregoing, changes with respect to the effective date of said definition."

[2] United States Lines has two operating subsidy contracts. The 1946 recapture period for the North Atlantic line terminated Dec. 31, 1947, and for the American Pioneer Line Dec. 31, 1949. In addition, a new contract covering the *America*, effective as of August 2, 1948, to which General Order 71 was applicable *ab initio*, was entered into on Jan. 13, 1951.

C. *Criticisms of Commission Action in Deferring Effectiveness of General Order 71 Until Commencement of New Recapture Period*

H. R. Rep. No. 2104, 81st Cong., 2d Sess. (p. 11), dated May 18, 1950, states:

* * * The new definition was to have been effective after the war. However, it was made effective at the expiration of each operator's 10-year term. This has the effect of giving operators whose 10-year term runs beyond January 1, 1947, the advantage of figuring into their "capital necessarily employed" the special reserve funds enhanced greatly by the profits of the war years. Such an application of the revised definition is more costly to the Government than would have been the case had the revised definition been made applicable as of the date of reinstatement of the operating subsidy program, January 1, 1947. Your subcommittee believes the Commission unnecessarily delayed revising the definition, and further we believe the effective date of the revised definition as determined by the Commission creates inequities and unjustifiably increases the financial burden on the Government.

The General Accounting Office has informally advised the Maritime Administration that—

We believe the revised definition should be made effective for all operators as of January 1, 1947, as the Commission had originally determined.

It should be noted that no question has been raised as to the *legality* of the Commission's action. The criticism is addressed only to its soundness as a matter of policy. (Hearings on Audit Report Before Subcommittee of the House Committee on Expenditures in the Executive Departments, 81st Cong., 2d Sess., p. 219.)

Solution of the underlying problems under review involved research into basic legal and policy issues as well as into the circumstances surrounding the Commission's action.

II. SUMMARY OF STAFF ACTION AND RECOMMENDATIONS

As a result of the reports of the House Committee and General Accounting Office, *supra*, the matter was referred to the staff committee already mentioned. A series of meetings with industry followed. During the course of these meetings industry repeated its opposition not only to any "roll-back" of General Order 71 but also to the retroactive application of any amended definition, even though the amendment might give effect to ship investments during the postwar period. Thereafter the committee formally suggested to industry an amendment to the definition so as to include in "Capital Necessarily Employed" amounts actually disbursed from the Capital Reserve Fund between January 1, 1947, and December 31, 1949, for the acquisition or improvement of vessels for subsidized operation.

The committee asked whether the operators with executed resumption addenda would "voluntarily agree to the amendment of Article II–29 of their respective resumption addenda * * *" so as to permit the application of such an amendment to the General Order 71 definition. On March 12, 1951, the industry replied that the contracting operators, relying on their legal rights, "have unanimously decided * * * that they will not voluntarily agree to the amendment of their respective resumption addenda" as had been suggested.

On June 1, 1951, the staff committee submitted to us its recommendation as follows:

1. That General Order 71 set forth in Section 291.5 of Part 291—Definition of Capital Necessarily Employed in the Business—Subchapter C—Regulations Affecting Subsidized Vessels and Operators—Chapter II, Title 46 Code of Federal Regulations, be amended as follows:

(a) By striking the period at the end of paragraph (8), *"Certain Deposits in the Captial Reserve Fund"*, and adding the following:

"; and Provided further, that, for the period between December 31, 1946, and the termination of the recapture period which was current on December 31, 1946, only, there shall be included in "capital necessarily employed in the business" amounts (excluding mortgage payments) actually disbursed from the Capital Reserve Fund, or from other funds to the extent that the Administrator determines that such disbursements from other funds would have been payable or reimbursable from the Capital Reserve Fund upon proper application, between January 1, 1947, and December 31, 1949, for the purchase or reconstruction (including capitalizable expenditures for reconditioning, betterment, and improvement) of a vessel or vessels required to be operated in the subsidized services, routes, or lines under the provisions of the respective operating-differential subsidy agreements and all addenda thereto, to the extent that such amounts are not otherwise so includable under the provisions of this Order, and Provided further, that in not event shall there be so included any funds, prior to the date of the availability thereof in the Capital Reserve Fund for such use."

(b) By striking paragraph (g) in its entirety and substituting therefor the following:

"(g) *Effective date.*—The effective date of this section 291.5, as amended, shall be as follows:

"(1) The day next following the termination of the recapture period which was current on December 31, 1946, with resepct to an operating-differential subsidy resumption addendum executed prior to May 1, 1951,

"(2) January 1, 1947, with respect to an operating-differential subsidy resumption addendum executed after April 30, 1951, and

"(3) the effective date of the contract, with respect to an operating-differential subsidy contract executed after December 31, 1946."

2 That, as to the four contracting operators which are not in a 100 percent recapture position (American Mail, Farrell, Grace, and U. S. Lines), the Office of Subsidy and Government Aid be directed to negotiate forthwith with each of these companies individually, with a view to obtaining its acceptance to a rollback of General Order 71 as proposed to be amended under 1 (a) above.

3. That the Administrator direct an immediate review of General Order 71 by the staff, with recommendations for any desirable revisions to be submitted within 90 days, such revisions to become effective January 1, 1952.

III. DISCUSSION OF RECOMMENDATIONS

A. *The Contract Rights of Operators Who Had Executed Resumption Addenda or With Whom the Commission Had Made Agreements* [1]

Under the Act, the provisions of an operating-differential subsidy contract are not subject to unilateral modification by either party except as the contract expressly provides for unilateral action by one or the other party with respect to particular matters. The 20-year subsidy contracts authorized by section 603 (a) of the Act are contracts in the ordinary legal sense. The mutual obligations of both the Government and the operators are contained in sections 603 (b), 606, and 607. Section 607 provides remedies for default on, or cancellation of, subsidy contracts by the Government. To use the language of a House Committee report, subsidy contracts are

> * * * designed to protect investors in shipping companies against changes in policy by the Government resulting in possible cancellations of the contracts or withdrawals of the subsidies where there has been no default on the part of the contractor. (H. R. Rep. No. 2168, 75th Cong., 3d Sess., p. 23.)

In the light of the language of the sections cited above and the legislative history of the Act, it is clear that subsidy contracts have, and were intended by Congress to have, all the attributes of any commercial contract. See H. R. Rep. No. 1277, 74th Cong., 1st Sess., p. 22. A retroactive application unilaterally by the Board of the General Order 71 definition to the contracting operators in violation of Article II–29 of their resumption addenda would constitute not only a breach of contract by the Government, but also action in violation of the express Congressional intent that holders of operating subsidy contracts should thereby obtain "a fair measure of stability" in the governmental policy as embodied in such contracts. See H. R.

[1] In addition to the seven contracting lines listed at the end of paragraph B–3 above, who had executed with the Commission the resumption addendum, including Article II–29 quoted above, Moore-McCormack Lines, Inc., by letter of February 10, 1950, was advised of the Commission's action with respect to its resumption of subsidized operation. This letter provided for inclusion in the resumption agreement of Article II–29, which excludes application of the General Order 71 definition until the termination of the recapture period which was current on December 31, 1946. Moore-McCormack formally accepted the Commission's offer of February 10 by endorsing its acceptance thereon under date of February 27, 1950.

This written offer and acceptance, in our opinion, constituted an informal but none the less binding contract by the Commission to give, and by Moore-McCormack to accept, among other provisions, Article II–29. Moore-McCormack therefore stood on the same legal footing as the other seven "contracting lines." Accordingly, on the company's insistence and in recognition of this pre-existing contract right, the Board included Article II–29 in the resumption addendum with Moore-McCormack executed on March 8, 1951.

Rep. No. 2168, 75th Cong., 3d Sess., p. 8; S. Rep. 1618, 75th Cong., 3d Sess., p. 3.[2]

Accordingly, we find that we are not free to impose either the original or an amended General Order 71 definition upon the contracting lines prior to the end of their recapture periods which were current on December 31, 1946.

B. *The Situation of the Noncontracting Operators*

As to the four noncontracting operators, we are free to exercise policy judgment untrammeled by contractual commitments. Under the authority conferred by section 607 (d), there is both the power and the duty to amend the definition of "Capital Necessarily Employed" to whatever extent may be necessary to promote the policies and purposes of the Act.

It should be noted that when all the operators resumed subsidized operations in 1947 they did so subject to the Commission's discretion as to the making of the various statutory findings prerequisite to payment of subsidy. There were then no contractual commitments on either side as to the applicability or nonapplicability of any new General Order 71 definition of "Capital Necessarily Employed" in respect of any recapture period.

1. *The present General Order 71 definition.*—The present definition, if retroactively applied to January 1, 1947, would not give proper effect to the then need of the operators for cash with which to finance the replacement and purchase of ships and other capital assets for use in subsidized services. However, prospectively applied, the present definition is not subject to this objection because the operator can secure the inclusion of funds necessary for the purchase and construction of ships either by paying cash for them or, in the case of new construction deemed by the Board to be necessary or desirable for the subsidized service, by making the earmarked deposits for a construction program in accordance with section 291.5 (c) (8) of General Order 71.

2. *A new definition and a recognition of postwar abnormalities.*—A definition of "Capital Necessarily Employed", if it is to be retroactively applied, must take account of the previously existing situation and should include cash needed for planned replacement, modernization, and new vessel acquisitions. Looked at from hindsight, the best standard of need is furnished by what the operators actually did with this cash during the immediately ensuing years. A definition proper for retroactive application should provide that funds in the Capital

[2] The Senate Committee states *"a subsidy contract based on the act is complete in itself and once consummated after negotiation at arm's length should not be amplified by additional strings and conditions not contemplated in the basic subsidy law."* [Italics added.]

Reserve Fund on January 1, 1947, which were actually used between 1947–49 for fleet replacement or acquisition of vessels for operation on subsidized routes should be included as "Capital Necessarily Employed" during the unexpired term of the recapture period current on December 31, 1946. An equitable retroactive application of a definition could have been accomplished in several ways. A principal problem would have been the spread of time allowed for conversion of capital funds to physical assets. The time spread could reasonably have been one, two, or even three years. Where to draw the cutoff line is, of course, a question of administrative judgment. Bearing in mind that the purpose of the 1938 amendment changing the 5-year recapture period to a 10-year period was in order to provide a measure of financial stability over the 10-year average business cycle in the shipping industry (S. Rep. No. 1618, 75th Cong., 3d Sess., p. 14; H. R. Rep. No. 2168, 75th Cong., 3d Sess., p. 22), the inclusion could be extended only until the end of the recapture period current on December 31, 1946. This, however, would have the disadvantage of creating inequalities between operators depending upon the happenstance of when their respective recapture periods terminated. Such inequalities are inherent in the effective date provision of the present General Order 71. A modification of that order permitting the inclusion in "Capital Necessarily Employed" of funds actually used for fleet replacement between January 1, 1947, and December 31, 1949, accords with the period of major ship acquisition. It is also the period which the industry, as stated above, considered fair and representative. The modified order which the committee has recommended, and which we now generally approve, therefore draws the line at December 31, 1949. For the noncontracting operators to which the modified order is applicable, it permits the inclusion in "Capital Necessarily Employed" of amounts actually disbursed from the Capital Reserve Fund or other funds for the purchase or reconstruction (including reconditioning, betterment, and improvement) of subsidized vessels to the extent that the amount of such disbursements are not otherwise included in capital. Of course, no deposit in the Reserve Fund can be included in "Capital Necessarily Employed" by virtue of this amendment, prior to the date that such deposit first became available for such use. Furthermore, as stated above, the amendment by its terms would permit such inclusion only for the remainder of the recapture period which was current at the end of 1946.

By avoiding the broad inclusions of the General Order 31 definitions on the one hand, and, on the other, the exclusions of the present General Order 71, which, if retroactively applied, would be drastic to

the opposite extreme, reasonable recognition is given to the postwar shortage of ships for subsidized services and the real need of the operators at that time to hold cash with which to replace lost ships and acquire additional ships for the needs of our foreign commerce.

3. *No legal objection to retroactive feature of proposed amendment to General Order 71.*—Industry objects to the proposed new definition of "Capital Necessarily Employed" as submitted by the committee on the ground that it constitutes "rule making" within the limitation of section 4 (c) of the Administrative Procedure Act, and because of its retroactive feature is prohibited by this section even if its application is limited to the noncontracting operators. In our view, this objection of industry is not supported either by the section of the Administrative Procedure Act relied on or by general law, particularly since the proposed rule will not be applied to operators with definite contract rights. The section of the Administrative Procedure Act relied on in opposition to the proposed rule is by the opening language of section 4 of that act expressly inapplicable—

> to the extent that there is involved * * * any matter relating to * * * grants, benefits, or contracts.

In our opinion, subsidy contracts are clearly within this exception. We believe the exception is intended to cover the Government fully in its proprietary capacity. The Attorney General's Manual on the Administrative Procedure Act expressly states on page 27 that—

> Rule making with respect to *subsidy programs* is exempted from section 4. [Italics added.]

Aside from the Administrative Procedure Act, it is settled that there is no prohibition against the promulgation of retrospective rules provided they are within the promulgating authority of the Federal agency concerned. See *Addison* v. *Holly Hill Co.*, 322 U. S. 607, 620–622. As already stated, section 607 (d) of the Act expressly requires the promulgation of a definition of "Capital Necessarily Employed." The new rule recognizes the contract rights of those eight contacting operators who, prior to May 1, 1951, executed resumption addenda, and is applicable only to those four noncontracting operators whose resumption addenda, dated subsequent to May 1, 1951, expressly gave the Board a free hand in the matter of promulgating a new definition of "Capital Necessarily Employed," including a new effective date.

4. *Policy consideration—uniformity of treatment.*—We are conscious of the desirability of equal treatment of both contracting and noncontracting operators. That we are barred by contractual obligations from applying uniformly a definition which we believe to be

sound does not justify, in our opinion, the granting to the noncontracting operators a definition which we would not have favored were we in the original proceeding. Considerations favoring a sound rule outweigh the considerations of uniformity when uniformity carries with it the extension of a rule which, in our opinion, does not represent a reasonable solution of the problems faced in 1946.

IV. DECISION

After considering all the aspects of this problem and the views of both the staff and the industry, our over-all decision is that the present General Order 71 definition may not be retroactively applied to any of the contracting operators, but that an amended definition should be applied to the noncontracting operators.

While the substance of the present definition may not be unsound for *prospective* application because the temporary abnormal situation of "long cash, short ships," it is this situation which, in our judgment, makes unwise retroactive application. For the reasons already indicated, our general conclusions are summarized as follows:

(a) Article II–29 of the resumption addendum gives valid and binding contract rights to those operators who executed it, or with whom the Commission agreed to execute it (the contracting operators).

(b) As a matter of policy, the General Order 71 definition "as is" should not now be rolled back to January 1, 1947, nor retroactively applied to the noncontracting operators for the remainder of their recapture periods which were current on December 31, 1946.

(c) An amended definition which meets the objections already indicated to retroactive application of the present General Order 71 definition should be applied to the noncontracting operators as of January 1, 1947.

The Maritime Administrator, who, as Chairman of the Board, participates in this report, has this day adopted a new order designated as General Order 71, Amendment 1, to carry out the foregoing decision, which is in the form recommended by the committee, with minor clarifying amendments.

The committee recommendation for further negotiations with the contracting operators with the view of obtaining their acceptance to a rollback of General Order 71 (with proposed amendments) to January 1, 1947, is, in our judgment, inappropriate, and in this detail we disagree with the recommendation. As already pointed out, all the contracting operators have been urged to agree voluntarily to such a rollback and have declined, relying on their contractual rights. We think as to them the issue is closed and should not be reopened.

The staff considers that the present definition can be improved upon in various aspects, and the third recommendation of the committee is that the staff prepare, within 90 days after the date of the report, a proposed revised definition of "Capital Necessarily Employed", such revision to become effective on January 1, 1952. We concur in the substance of this recommendation. The Administrator will issue appropriate instructions as to time limit and effective date.

APPENDIX A

DEPARTMENT OF COMMERCE
MARITIME ADMINISTRATION

Table of comparative analysis of elements in the determination of "capital necessarily employed" under (1) proposed supplement No. 2 to General Order No. 31, (2) proposed definition submitted by a special committee to former Maritime Commission with a memorandum dated Jan. 14, 1949, and (3) General Order No. 71, all subject to qualifying footnotes

[Allowable as Capital Necessarily Employed]

(See notes A to H inclusive, immediately following the table)

			Under proposed supplement No. 2 to G. O. No. 31	Under proposed definition presented Jan. 14, 1949	Under G. O. No. 71
		Allowable (where indicated) to extent balance in capital reserve fund is not allocable for other purposes			
Balance in capital reserve fund	XXX	1.) Accrued reserve for depreciation on subsidized vessels	Yes	No	No.
Add: Accrued requirements for deposit.	XXX	2.) Funded depreciation (including all accrued depreciation whether or not deposited in capital reserve fund) on subsidized vessels, subject to reduction by certain withdrawals.	No	No	Yes.
		3.) Balance on account of principal amount of outstanding mortgage indebtedness on subsidized vessels.	Yes	Yes	No.
		4.) Amount required to make or complete down payment of 25 percent on additional subsidized vessels under executed purchase contracts.	Yes	Yes	Yes.
		5.) Amount transferred to contractual construction fund from capital reserve fund to provide for down payment of 25 percent on additional subsidized vessels under program approved by administration (subject to retroactive adjustment in event program is subsequently canceled).	Yes	Yes	Yes.
Total	XXX				
Special reserve fund	XXX				
Add: Accrued requirements for deposit.	XXX				
	XXX				
Less: Recapture liability	XXX				
Net balance	XXX	Balance in special reserve fund, after deducting recapture liability	No	No	Yes (A).
Floating equipment	XXX	Net equity in subsidized vessels (meaning acquisition cost, less depreciation and outstanding mortgage indebtedness (H)).	Yes	Yes	Yes.

Vessels under construction	XXX	Progress payments on vessels under construction for subsidized services	Yes	Yes	Yes.
Other shipping property and equipment.	XXX	Proportion of net equity of operator in shipping property and equipment determined by Administration to be essential to operation of subsidized services.	Yes	Yes	Yes.
Investments in affiliated companies	XXX	Proportion of net equity of affiliated companies in shipping property and equipment determined by Administration to be essential to subsidized services (not in excess of allocable proportion of investment of operator).	Yes	Yes	Yes.
Inventories (of vessel spares)	XXX	Value of inventories of spares for subsidized vessels	Yes	Yes	Yes (B).
		Working capital "ceiling" applicable if less than total of "other net assets"			
Other net assets	XXX	1.) Amount equivalent to prepaid insurance	Yes (C)	(G)	Yes (E).
		2.) Amount equivalent to overhead and vessel operating expenses such as wages, subsistence, stores, supplies, equipment, fuel, maintenance, and repairs.	Yes (D)	(G)	Yes (F).
		3.) Amount equivalent to voyage expenses such as agency fees and commissions, wharfage, dockage, port expenses, stevedoring and other cargo expenses, brokerage, and canal tolls.	No	(G)	Yes (F).
Total net worth	XXX				

(A) Limited to 5 percent of "capital necessarily employed" as determined under all other provisions of General Order 71.

(B) Under the provisions of General Order 71, the aggregate amount of spare parts and office furniture and fixtures is limited to 2½ percent of the aggregate acquisition cost of the subsidized vessels.

(C) Insurance for 1 year.

(D) Vessel operating expenses for a period of 90 days.

(E) Insurance for a period of 90 days.

(F) Vessel and voyage expenses on the basis of average round voyage in each service.

(G) The proposed definition of Jan. 14, 1949, provided for the inclusion as "capital necessarily employed" of the working assets of the operator, whether in the form of physical assets (other than those separately specified) or in the form of working funds to the extent that the Commission found such assets to be needed for the operation of the subsidized services, in which connection for the purpose of applying the general test of fairness and reasonableness it was suggested that the Commission consider such factors as prepayments of cargo and passenger revenue, the estimated cost of vessel operations or shore operations incident to the subsidized services, requirements for interest payment on mortgage indebtedness, administrative and other necessary overhead expenses.

(H) Under the provisions of General Order No. 71 the contractor's equity in vessel subject to adjustments under section 9 of the 1946 Act is determined on the basis of the original acquisition cost for the period prior to the date of the adjustment agreement; for the period thereafter the contractor's equity in such vessel is determined on the basis of the statutory sales price. This does not conform with the provisions of General Order No. 24, as amended, which provides that the statutory sales price shall be effective Mar. 8, 1946, for the purposes of determining capital necessarily employed in the business. Had Supplement No. 2 to G. O. No. 31 or the proposed definition been adopted the provisions of G. O. No. 24, as amended, would govern in such instances.

APPENDIX B

DEPARTMENT OF COMMERCE—MARITIME ADMINISTRATION

Office of the Comptroller

Obligations for the purchase of vessels and payments from capital reserve funds Jan. 1, 1947, to Dec. 31, 1949

Name of company	Obligations as of Dec. 31, 1946	Capital reserve funds—payments				Obligations as of Dec. 31, 1949
		Calendar year 1947	Calendar year 1948	Calendar year 1949	Total	
American Export Lines, Inc.		$1,100,387.00	$5,428,312.13	$3,496,110.40	$10,024,809.53	$1,732,680.00
American Mail Line Ltd.	$1,537,170.00	2,022,153.00	815,093.81	1,511,738.95	4,348,985.76	5,341,869.00
American President Lines, Ltd.	11,006,075.71	640,939.00	2,491,827.00	7,698,105.81	10,830,871.81	9,486,341.51
Farrell Lines Inc.	7,378,020.00	1,356,237.65	3,328,728.83	3,519,657.90	8,204,624.38	9,236,916.00
Grace Line Inc.	4,765,603.00	569,228.81	325,005.81	944,629.37	1,838,863.99	4,155,560.85
Lykes Bros. Steamship Co., Inc.	10,575,772.10	1,559,951.55	7,782,404.33	2,286,581.07	11,628,936.95	
Mississippi Shipping Co.	7,382,264.00	3,108,379.02	1,087,950.71	2,033,024.00	6,229,353.73	10,622,625.83
Moore-McCormack Lines, Inc.	9,235,871.00	2,371,770.61	11,208,298.06	10,963,095.00	24,543,163.67	
New York & Cuba Mail Steamship Co.	2,329,539.00	355,365.00	545,063.24	539,946.00	1,440,374.24	814,137.34
The Oceanic Steamship Co.		933,812.00	46,460.00	175,810.00	1,156,082.00	2,545,840.00
Seas Shipping Co.	1,507,215.00	4,858,691.57	5,504,758.68	100,753.88	10,464,204.13	3,540,100.00
United States Lines Co.	22,578,751.65	3,526,024.20	4,053,544.35	2,054,269.38	9,633,837.93	29,805,992.42
Total	78,296,281.46	22,402,939.41	42,617,446.95	35,323,721.76	100,344,108.12	77,282,062.95

TITLE 46—SHIPPING

CHAPTER II—FEDERAL MARITIME BOARD
MARITIME ADMINISTRATION
DEPARTMENT OF COMMERCE

SUBCHAPTER C—REGULATIONS AFFECTING SUBSIDIZED VESSELS AND OPERATORS

Part 291—Definition of Capital Necessarily Employed in the Business

[General Order 71, Amendment 1]

General Order 71 (Section 291.5 *Definition of Capital Necessarily Employed in the Business*), published in the Federal Register issue of December 31, 1949 (14 F. R. 7936, 46 C. F. R. 291.5), be and the same hereby is amended as follows:

1. By striking the period at the end of subparagraph (8), *Certain Deposits in the Capital Reserve Fund* of paragraph (c) *Miscellaneous Items* and adding the following:

" ; and provided further, that, for the period between December 31, 1946, and the termination of the recapture period which was current on December 31, 1946, only, there shall be included in 'capital necessarily employed in the business' amounts (excluding mortage payments) actually disbursed from the Capital Reserve Fund, or from other funds to the extent that the Administrator determines that such disbursements from other funds would have been payable or reimbursable from the Capital Reserve Fund upon proper application, between January 1, 1947, and December 31, 1949, for the purchase or reconstruction (including capitalizable expenditures for reconditioning, betterment, and improvement) of a vessel or vessels required to be operated in the subsidized services, routes, or lines under the provisions of the respective operating-differential subsidy agreements and all addenda thereto, to the extent that such amounts are not otherwise so includable under the provisions of this Order and Provided further, that in no event shall there be so included any funds, prior to the date of the availability thereof for such use."

2. By striking paragraph (g) *Effective Date* in its entirety and substituting therefor the following:

"(g) *Effective Date.*—The effective date of this section 291.5, as amended, shall be as follows:

"(1) the day next following the termination of the recapture period which was current on December 31, 1946, with respect to an operating-differential subsidy resumption addendum executed prior to May 1, 1951,

"(2) January 1, 1947, with respect to an operating-differential subsidy resumption addendum executed after April 30, 1951, and

"(3) the effective date of the contract, with respect to an operating-differential subsidy contract executed after December 31, 1946."

Authority: Sec. 607 (d), 49 Stat. 2005, as amended; 46 U. S. C. 1177.

Dated September 17, 1952.

(Sgd.) E. L. COCHRANE,
Maritime Administrator.

FEDERAL MARITIME BOARD

No. 723

CITY OF PORTLAND, OREGON, ACTING THROUGH ITS THE COMMISSION OF PUBLIC DOCKS, AND THE PORT OF SEATTLE

v.

PACIFIC WESTBOUND CONFERENCE, AMERICAN-HAWAIIAN STEAMSHIP COMPANY ET AL.

Submitted June 14, 1955. Decided October 4, 1955

Article 4 of F. M. B. Agreement No. 57, Rule 2 of Pacific Westbound Conference Local Freight Tariff No. 1–V, and specific port equalization practices thereunder found to be unjustly discriminatory and unfair to the ports of Seattle and Portland within the meaning of section 15 of the Shipping Act, 1916, and to be detrimental to the commerce of the United States as contrary to the principles expressed in section 8 of the Merchant Marine Act, 1920.

Article 4 of F. M. B. Agreement No. 57 and Rule 2 of the Pacific Westbound Conference Local Freight Tariff No. 1–V disapproved insofar as they authorize practices found to be unjustly discriminatory between ports, and ordered to be amended.

Thomas J. White and *Edward G. Dobrin* for complainants.

John Hays for respondent Pacific Far East Line, Inc.

Joseph J. Geary, *Allan E. Charles*, and *Tom Killefer* for other respondents.

Frank S. Clay for Portland Freight Traffic Association, *J. D. Paul* for Seattle Traffic Association, and *Ernest Falk* for Northwest Horticultural Council, interveners.

REPORT OF THE BOARD

BY THE BOARD:

This proceeding arises out of the complaint of the City of Portland, Oregon, and the Port of Seattle, filed July 22, 1952, and amendment thereto filed November 30, 1953, wherein complainants allege that respondent Pacific Westbound Conference ("the conference")

and members thereof have violated sections 15, 16, and 17 of the Shipping Act, 1916, as amended ("the Act"), and have violated the principles and policy of section 8 of the Merchant Marine Act of 1920 ("the 1920 Act"), by virtue of the application of Rule 2 of the conference Local Freight Tariff No. 1-V[1] ("Rule 2"). A petition to amend the complaint by an allegation of violation of operating-differential subsidy contracts by respondent conference members American President Lines, Ltd. ("APL"), Pacific Far East Line, Inc. ("PFEL"), and Pacific Transport Lines, Inc. ("PTL"), was denied by the examiner as failing to present a controversy under the Act.

Rule 2, as originally adopted by the conference, allowed an individual conference line to meet the competition of other member lines through equalizing the cost to a shipper of shipping through any Pacific coast port. The difference between the shipper's cost of delivery to ship's tackle at the nearest port and his cost of delivery to ship's tackle at another port, served by the equalizing line, could, under the rule, be absorbed by that line. Rule 2 was amended,[2] effective November 1, 1952, to require equalizing conference lines to submit to the conference for approval all copies of paid inland transportation bills in order to prevent overequalization on any shipment.

Complainants allege that the practices under Rule 2 result in unjust discrimination against complainants, and object to Rule 2 on the grounds that the equalization practice thereunder is unlawful since:

(a) It permits the conference lines to attract traffic to California ports from producing areas not geographically or naturally tributary to these ports;

(b) A large volume of traffic which would logically and normally move through complainants' ports is diverted to California

[1] "*Rule No. 2. Direct Loading, Transhipment or Equalization.*—Subject to Rules 3, 4, and 5, rates are based on direct loading at loading ports or docks but the individual Member Line Carrier may meet the competition of other Member Lines loading direct at Terminal Ports or Docks, either by transhipment or by equalization from point of origin.

"Except as may otherwise be agreed, nothing herein shall be construed to mean that a Carrier may meet the competition of other Member Lines by equalizing between Terminal Docks within a Terminal Port.

"Equalization is the absorption by the Carrier of the difference between Shipper's cost of delivery to ship's tackle at Terminal Dock at nearest Conference Terminal Port and the cost of delivery to ship's tackle at Terminal Dock and Port of equalizing line. Conference Terminal Ports and Docks are those named in Rule No. 3."

[2] Rule 2, as amended by conference action taken in General Meeting 92 (October 14-16, 1852), provides:

"Equalization shall only be applicable on the basis of carload or truckload rates, irrespective of quantity involved.

"Shippers must furnish carriers with copy of paid transportation bill (or certified copy of paid transportation bill) covering movement from point of origin.

"Prior to payment, all equalization bills must be submitted to the conference for approval and for confirmation of applicable interior rates and/or the amount of equalization."

688-650 O - 63 - 46

ports, resulting in the loss to complainants of revenue which should accrue to them;

(c) An equalization of natural disadvantage results through an adjustment of respondents' rates;

(d) By diverting traffic originating in the Pacific Northwest producing areas to the California ports, complainants are deprived of steamship service and frequent sailings by those lines serving complainants;

(e) It permits unfair and unlawful competition among the conference carriers;

(f) It places an undue burden on commodities not subject to equalization, and further results in unnecessary and uneconomic dissipation of carrier revenues;

(g) It results in nullification and disruption of inland rates and ambiguity in the conference tariff; and

(h) It permits shippers to obtain allowances or rebates in excess of actual inland transportation costs.

The conference urged that its equalization practice is not unlawful, defending the practice on the grounds that it—

(a) affects only a small amount of cargo,

(b) is of benefit to carriers in that it attracts traffic which would not otherwise move via that carrier, results in operating economies by eliminating ports of call, and enables them to meet emergencies and operating difficulties, and

(c) is of value to shippers by affording a wider range of loading and discharging, greater refrigerated space, and more frequent sailings, as well as by permitting consolidation of shipments on one vessel and one ocean bill of lading.

Hearings were conducted during the period October 4, 1954, through October 8, 1954, prior to which Portland Freight Traffic Association and Seattle Traffic Association intervened in support of the complaint, and Northwest Horticultural Council intervened in opposition. Thereafter, the examiner issued a recommended decision finding and concluding that the equalization system as a whole does not violate sections 15, 16, and 17 of the Act or the principles and policy of section 8 of the 1920 Act. The finding was made "without prejudice to the correction of specific faults" in relation to specific absorptions considered by the examiner to be excessive or improper.

Exceptions to the recommended decision were filed by the complaining ports and by PFEL, and oral argument on the exceptions has been heard.

The primary evidentiary facts are the following:

1. *The parties.*—Complainants are municipal corporations representing the port interests of Portland, Oregon, and Seattle, Wash., respectively. Both Portland and Seattle have excellent and extensive terminal facilities, including dry and cold storage, with a book value of several million dollars. They are served by various railroads and barge lines and numerous motor truck and ocean steamship lines. In 1953, 431 vessels sailed from Puget Sound to the Orient. The Puget Sound ports are over 1,000 miles closer to the Orient than San Francisco. Ocean rates from all terminal ports are uniform.[3]

The conference, which operates under F. M. B. Agreement No. 57 ("the basic agreement"), originally approved by the Shipping Board under section 15 of the Act, on June 26, 1923,[4] is an association of the individual respondent members engaged in common carrier transportation from United States Pacific coast ports to Japan, Hong Kong, the Phillippine Islands, and other Oriental ports. The conference is divided into Northern and Southern Districts, with offices in Seattle and San Francisco, respectively.

Intervener Northwest Horticultural Council is a trade association representing the principal Oregon and Washington tree-fruit producing industries, including the Hood River and Medford areas in Oregon and the Yakima and Wenatchee valleys in Washington.

2. *Territory tributary to complainants.*—Washington, Oregon, Idaho, and Montana comprise the territory in which the commodities in issue are produced. They are principally dairy products, apples, newsprint, and vegetables. This territory is naturally and geographically tributary to complaining ports because of financial and economic ties, and the fact that inland freight rates from this territory are favorable to such ports. For instance, the truck rate on apples from Wenatchee, Washington, to Seattle, 155 miles, is 35 cents per 100 pounds, whereas to San Francisco, 1001 miles, it is $1.20 per 100 pounds. From Boise, Idaho, to Portland, 492 miles, the truck rate on potatoes was 63 cents per 100 pounds (1952), and to San Francisco, 949 miles, it was 73 cents per 100 pounds.

3. *Apple exports.*—During 1949–53, Oregon and Washington produced almost four times the quantity of apples produced in California, accounting for 90 percent of apple exports to the Orient. Neverthe-

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[3] Through Seattle there were exported to Asia, Pacific, and Far East destinations, 455,324 tons of cargo in 1952 and only 226,852 tons in 1953; through Portland, 839,838 tons in 1952 and 787,296 tons in 1953.

[4] The agreement, as amended, provides for absorptions of rail or coastal steamer freights or other charges as follows:

"ARTICLE 4. There shall be no payment or refund in respect of freight or compensation received and no absorption at loading or discharging ports of rail or coastal steamer freights or other charges, directly or indirectly, by any of the parties hereto, except as may be agreed to by two-thirds of parties hereto at any regular meeting of the Conference."

less, California ports handled almost four times the number of boxes shipped through Northwest ports (to Hong Kong, Japan, and the Philippines) during that period. Apples were among the 10 leading exports from Seattle during 1950–52, but not in 1953, nor from Portland during 1950–53. During the apple shipping season of 1952–53 and 1953–54 (November through April) there were 69 sailings from Seattle and Portland to destinations served by conference lines by vessels with refrigerated space capable of accommodating 1,720,800 and 1,262,700 boxes of apples, respectively, but only 15,731 boxes were actually loaded on these vessels at Seattle and 48,229 at Portland. The movement of apples through Oregon, Washington, and California ports remained fairly constant and relatively high for the duration of the Government export payment program during the 1949–52 marketing seasons, but fell off precipitously at the end thereof, including the movement through California ports. Other reasons for the decline is the reduced supply of dollars in the Orient for purchases of fruit, the drifting away of Americans from the Far East, and the small crop of apples in the last two seasons.

There has been a substantial movement of apples through Seattle and Portland to the United Kingdom, Europe, and South America. Ships load first at Northwest ports and finish loading citrus fruits at California ports. In those trades, compartments are loaded full with apples and are not opened at subsequent loading ports. In contrast, apples are shipped to Oriental destinations from Northwest ports in less than compartment capacity quantities. On other than direct Pacific Northwest to Oriental and Far East ports voyages, therefore, compartments in which apples have been stowed are subject to reopening at subsequent loading ports.

4. *Operation of the equalization rule.*—Prior to November 1952, when the rule in question was amended to require shippers to furnish carriers with copy of paid freight bill covering movement from point of origin, and to require conference approval of all equalization payments, respondents equalized on a schedule of fixed differentials. These were based upon the differences in the rail rates from interior origins to the ports involved in the equalization. Shipments rarely moved by rail, however, moving largely, as they do now, via cheaper "exempt" trucks (as to agricultural products) with no published or regularly established rate. This practice would inevitably lead to overequalization or the giving of rebates to the shipper. For instance, the actual difference in the truck rates from Hood River, Oreg., to Portland and to San Francisco in March 1952 was 29 cents, but the equalization factor allowed was 34½ cents, resulting in a rebate of 5½ cents.

Since the amendment to the rule, however, the conference members have attempted to equalize on an actual cost basis. The conference receives information from the truck lines as to actual costs of inland transportation, receives from each line, with the exception of PFEL, paid bills supporting equalization payments, and passes on each payment with a view to approval of actual cost. In most cases, this procedure has resulted in equalization on an actual cost basis, although some variation from actual cost may exist.[5]

5. *Examples of absorption and diversion under the rule.*—The percentage of the ocean rate absorbed under equalization was 17 percent on apples from Washington to San Francisco via exempt truck, 47 percent on peas from Idaho via truck, 24.7 percent on explosives from Washington, and 53.3 percent on nitramon from Washington. An extreme example of equalization, by PFEL, was on a shipment of 530 tons of newsprint from Oregon City, Oreg., to San Francisco via truck, where the amount absorbed was 73.6 percent of the ocean rate, or $8,489.25 out of revenue of $10,346.28.[6]

Specific examples of diversion were cited by complainants. In July 1954 a shipment of knocked-down houses weighing 350 tons moved from Pier 30 in Seattle to San Francisco via rail, thence to Korea via PFEL. A witness for Portland also contended that shipments of onions to Manila, from points 30 and 44 miles from Portland, were being diverted to San Francisco, notwithstanding two of the regular lines out of Portland were interested in carrying the cargo. There was testimony, however, to the effect that there were no direct sailings from Portland to the Philippines, that Philippine buyers insists on direct sailings for perishable cargoes such as onions, and that direct sailings were available out of San Francisco.

6. *Amount of cargo equalized and absorptions thereon.*—During the period January 1, 1950, to April 18, 1954, PFEL equalized on 28,619.7 revenue tons originating in Oregon, Washington, Idaho, and Montana and moving via San Francisco, consisting largely of dairy products (13,487 tons), newsprint (6,432.7 tons), apples (4,629.3 tons), and explosives[7] (2,885.6 tons). The absorptions amounted to $309,257

[5] Exhibit 30 shows slight variations of absorptions approved by the conference during 1954 as paid by various conference lines on the same commodity, originating from the same area.

[6] In support of their motion to bring in alleged violations of subsidy contracts, complainants point to the fact that in the year 1952, PFEL absorbed only $18,957 through equalization, but in the year 1953 (after its subsidy contract became effective), it absorbed $176,311 on equalized cargo.

[7] PFEL's witness testified that transportation of explosives (dynamite from Du Pont, Wash., to Manila) is highly specialized since (1) it requires a direct sailing from port of loading to port of discharge; (2) only one conference line (foreign) has a direct sailing from Puget Sound, once a month; and (3) it is loaded at a special anchorage outside of the territorial limits of Seattle, and therefore, that port cannot handle it in any event.

or 23 percent of the ocean revenue on such commodities, or 18.2 percent, excluding newsprint, which PFEL contends was equalized on a temporary and interim movement.[8] During approximately the same periods, except for 5 months in 1952, the other respondents equalized on 18,267 weight tons originating in the Pacific Northwest and moving via California ports, consisting almost wholly of apples and vegetables. Also, in this period, 4,669 weight tons of fruit originating in California, mostly citrus, moved on equalization rates through Pacific Northwest ports. Respondents also equalize between California ports and between Pacific Northwest ports. PFEL asks the Board to take official notice of the fact that all of the traffic reported as moving under equalization from the Northwest through California ports over a period of four years is not more than five shiploads. This takes no account of the 4,669 tons gained by complainants through northbound equalization.

Cargo carried under equalization is a small percentage of the total commercial tonnage carried by respondents. APL equalized on approximately 2 percent of its total cargo carried in this trade during the year ending June 30, 1954, on which the absorptions amounted approximately to 11 percent of the gross revenue from such cargo. PTL's percentage of equalized cargo was about 5 percent of all commercial cargo carried during the last 12 months (on not more than 500 tons from the Northwest), on which the absorption was not more than 1 percent of gross revenue. In 1953 equalized cargo carried by PFEL amounted to approximately 1 percent of the ocean revenue on all cargo, including military cargo. All conference members in the Southern District practice equalization, although the principal practitioners of equalization on cargo originating in the Pacific Northwest are American-flag subsidized operators who serve the San Francisco area and are unable, under the terms of their operating-differential subsidy contracts, to provide general service from Pacific Northwest ports. A witness for the Java Pacific & Hoegh Line expressed the opinion that, in view of the limited extent of the equalization practice, elimination of the practice would not increase sailings out of Northwest ports. The leading cargoes of the Northwest, such as grain and lumber, are not affected by equalization.

7. *Value of equalization practice to carriers.*—All conference members profit from carriage of equalized cargo to the extent that such carriage produces revenue in excess of out-of-pocket costs. Further, credible testimony was offered to the effect that the ability to equalize

[8] PFEL's witness testified that equalization on newsprint is not representative of future handling (which will be cheaper and more efficient) since it is now moving in vans for coastwise transportation directly over the Portland docks.

on a percentage of cargo as small as 2 percent influences the movement of up to an additional 5 to 10 percent due to the desires of California exporters to consolidate on one vessel various cargoes of fruit and produce originating in diverse areas. In the case of conference lines not subject to trading area restrictions,[9] the ability to equalize permits such consolidation without requiring an unprofitable call at another port. In the case of the subsidized American-flag line, equalization permits the line to carry, for consolidation of shipment purposes, cargoes originating in areas which the line is not permitted to serve and prevents loss of the entire shipment to a line able to serve both areas.[10]

Equalization also permits the subsidized lines to lift, in San Francisco, cargoes which originated in the Northwest, even where consolidation of shipments is not involved. Lines privileged to call at both California and Northwest ports are, in addition, enabled, through equalization, to divert cargoes to another port in the event of cargo arrival delays, operating delays, or unanticipated schedule changes.

8. *Attraction of export traffic to San Francisco.*—The business of exporting apples to the Orient was originated and developed, beginning in 1913, by San Francisco brokers and exporters. The Hood River Association, in 1936, attempted to sell direct to Oriental buyers, but without success, because the business was controlled by San Francisco brokers. This association, which represents 75 percent of the growers in Hood River Valley and originates about 50 percent of export shipments to the Orient, sells its apples through a San Francisco broker. San Francisco is the hub of exporting activity on the Pacific coast, due largely to its frequent sailings covering a wide range of discharge ports, and to the practice of the Oriental buyer of opening up a single letter of credit with a San Francisco exporter covering several commodities, including Northwest apples, California fruits, and other foodstuffs, which can be consolidated for shipment on one bill of lading from San Francisco.

9. *Service at San Francisco and at Portland-Seattle.*—There were 73 sailings of refrigerated vessels from the Pacific coast to the Far

[9] Neither APL, PFEL, nor PTL are permitted, under the terms of their respective subsidy contract, to provide service on Trade Route 30 (Washington and Oregon ports to the Far East).

[10] The following colloquy took place, on oral argument before the Board, between Board Member Guill and Mr. Hays, counsel for PFEL:

Mr. GUILL. Did you make those absorptions before you became subsidized?

Mr. HAYS. I don't believe so, because before we were subsidized, we were calling at Portland and Seattle. That is one thing I was going to say here; that equalization, I do not believe was as prevalent before the subsidized lines were granted their subsidies as it was afterwards."

East between September 17, 1954, and January 15, 1955. Sixty-six were from California ports, 51 of which sailed direct from San Francisco as last port of loading. There were only 25 sailings of refrigerated vessels from Portland and Seattle, 11 of which loaded last at a Northwest port. Fourteen loaded 12 to 17 days later at California ports. Sailings from California ports generally covered a wider range of discharge ports.

Nonrefrigerated service from Northwest ports is more frequent. We take official notice, from the Board's records, of the fact that sailings from the Pacific Northwest follow three general patterns: (1) ships load in the Pacific Northwest, then complete loading at California ports and go direct to the Philippines; (2) ships load at California ports, complete loading at Pacific Northwest ports, and proceed to the Philippines via Japan; and (3) ships load in the Pacific Northwest only and proceed to the Philippines via Japan. In all three cases, the scheduled transit time from Pacific Northwest ports to the Philippines is approximately the same. Outbound sailings calling at Pacific Northwest ports en route to the Philippines average about four per week, and these are divided about equally between United States-flag and foreign-flag ships. Sailing schedules of both foreign- and United States-flag operators show the scheduled time from last Pacific Northwest port to the first Philippine port as ranging from 24–28 days. Exhibits introduced in evidence by the complainants show the total sailings to the Orient from Puget Sound in 1953 number 431, including tramp and military tonnage. Equivalent sailings from the Columbia River equal 335, exclusive of military tonnage.

10. *Circumstances affecting transportation and marketing of apples and other foodstuffs.*—Northwest apple growers meet competition from apples produced in British Columbia, Japan, Korea, and Australia. Competition is more on a quality than a price basis, which requires small shipments properly refrigerated and delivered on a fast schedule. Shipment in large lots would result in excessive spoilage losses, and would glut the market because of inadequate storage and marketing facilities in the Orient. A representative of the Apple Growers Association testified that the need for frequent shipments of apples by association members requires a range of 6 to 10 sailings per week during apple shipping seasons, that the Northwest ports do not provide that frequency of service, and that more than 6 to 8 weekly sailings of vessels with reefer space are available from San Francisco.[11] In many instances the apple buyer designates direct

[11] An exhibit introduced by respondents indicates, however, that commercial sailings of vessels with reefer space from San Francisco average less than five per week.

sailing from San Francisco because he wants his goods delivered on a certain date to meet market conditions, as, for instance, certain Oriental festivals. Similar considerations apply to the exportation of other foodstuffs such as vegetables, which are shipped under ventilation, and dairy products. Canned milk produced in the Northwest is exported through Portland except when the shipments "have" to be sent through San Francisco, as the witness put it. Witnesses stressed the necessity of steady, evenly divided arrivals on many ships to meet the conditions peculiar to the Oriental market.

Exporters expressed objection to loading fruit first at Northwest ports on ships that complete loading at San Francisco, because of the delay incurred and the necessity of reopening the refrigerated compartments. The delay of 12 to 17 days in loading at Northwest ports subjects exporters to the risk of fluctuation in the market. It was further stated that reopening of hatches at San Francisco to load other refrigerated cargo causes fluctuations of hold temperatures and rehandling of the goods, considered to be harmful to apples. Little evidence was offered, however, in explanation of the necessity for rehandling the apples or in explanation of the distinction between rehandling on indirect sailings and the rehandling incidental to prior truck movements on direct sailings from San Francisco. Similarly, no evidence was offered as to the actual or possible variations of temperature in refrigerated compartments which might occur during loading at San Francisco; the effect of the probable temperature variations on apples loaded at a prior port; the distinction between the temperature variations in refrigerated compartments on indirect sailings; and the temperature variations inherent in loading from nonrefrigerated trucks to refrigerated compartments on direct sailings.

11. *Effect of elimination of equalization rule.*—Witnesses for PFEL and the conference were of the opinion that elimination of the equalization rule would result in the reduction of exports of commodities presently equalized, the partial loss to American shippers of foreign markets, a slight increase of service in the Northwest ports, an increase in tramp carryings with corresponding decrease in conference carryings, and some increase in exporting of products, particularly onions and apples, from areas other than the Northwest producing areas. Witnesses for the complaining ports were of the opinion that elimination of the rule would increase service from those ports, with substantial benefit to the economy of the port cities, and would free from jeopardy the heavy investment of the ports in installations and equipment.

DISCUSSION

Basically, the complaint alleges that the conference's equalization practice and Rule 2 are unjustly discriminatory against and prejudicial to the ports of Seattle and Portland, under sections 16 and 17 of the Act, and violate section 15 of the Act. Prejudice to localities, within the meaning of section 16,[12] and discrimination against ports, within the meaning of sections 15 and 17, if existing, result from "* * * the drawing away of traffic inherently and geographically belonging to * * *"[13] the Northwest ports. Whether the drawing away of traffic results in unjust or unfair discrimination or undue or unreasonable preference, however, is a question of fact for determination in each instance. *Beaumont Port Commission* v. *Seatrain Lines, Inc.*, 3 F. M. B. 556 (1951); *City of Mobile* v. *Baltimore Insular Line, Inc.*, 2 U. S. M. C. 474 (1941).

In a further allegation, complainants allege that Rule 2 and the practices thereunder, in addition to being unjustly discriminatory between ports, are detrimental to the commerce of the United States in violation of section 15 of the Act. Complainants further seek an order requiring the conference to amend Rule 2. While it is only the effectuation of unapproved agreements between carriers or other persons subject to the Act which violates section 15 of the Act, and since it has been alleged that Rule 2 represents an unapproved agreement between carriers, we consider this deficiency in the complaint to be insignificant. In view of the request for amendment of Rule 2, we consider the allegation of violation of section 15 of the Act to constitute a request for partial disapproval of the conference agreement and Rule 2 insofar as either authorizes practices which are unjustly discriminatory, unfair, detrimental to the commerce of the United States, or unlawful under the Act.

In support of their allegations of discrimination and preference, the complaining ports have adduced evidence showing or tending to show that (a) competition exists between Pacific Northwest ports and the port of San Francisco for the same commodities; (b) diversions of traffic are effected by conference carriers through absorptions of inland transportation charges on shipments from San Francisco on

[12] Although the U. S. District Court for the Northern District of California indicated in *State of California* v. *United States*, 46 F. Supp. 474 (1942), that the word "localities" appearing in section 16, First, of the Act refers to shippers only, it has been the uniform interpretation of this Board and its predecessors that the word "localities" refers to ports. *Beaumont Port Commission* v. *Seatrain Lines, Inc.*, 2 U. S. M. C. 500 (1941); *City of Mobile* v. *Baltimore Insular Line, Inc.*, 2 U. S. M. C. 474 (1941); *Beaumont Port Commission* v. *Seatrain Lines, Inc.*, 3 F. M. B. 556 (1951); *Port Differential Investigation*, 1 U. S. S. B. 61 (1925); *Everett Ch. of Com. et al.* v. *Luckenbach S. S. Co. et al.*, 1 U. S. S. B. 149 (1929).

[13] *Beaumont Port Commission* v. *Seatrain Lines, Inc.*, 3 F. M. B. 556, 565 (1951).

cargo originating in Northwest producing areas; (c) cargoes on which absorptions of inland freight charges are made originate in areas naturally and geographically tributary to Northwest points because of inland transportation rates favorable to those ports as well as through closer proximity; and (d) the conference equalization rule has proximately caused a substantial loss of cargo to Northwest ports.

The conference and PFEL have shown various circumstances and transportation conditions which, they assert, warrant the establishment and continued existence of rules and practices relative to port equalization. Briefly, the evidence shows or tends to show that the basic reasons for the existence and growth of the practice of port equalization by conference lines are (a) the development of export trade to the Orient by San Francisco exporters and resultant commercial practices, such as consolidation of shipments on one vessel and the establishing by buyers of a single letter of credit; (b) the prohibition against service of Pacific Northwest ports by subsidized lines PFEL, APL, and PTL; and (c) the greater frequency of refrigerated and nonrefrigerated sailings from San Francisco than from Northwest ports.

Equalization on specific commodities

Shippers of apples have urged, and we find, that cancellation of the privilege of equalization on Oregon and Washington apples shipped from San Francisco would result in a substantial reduction in the volume of apples shipped from the Pacific coast to the Orient. While we accord little weight to the testimony that direct sailings are required for shipments of apples, other than to recognize the risk of fluctuation of price on longer voyages, we nevertheless find that insufficient sailings, direct or indirect, are available from the Northwest ports to satisfy the stated requirements of shippers of apples and other deciduous fruits. We conclude, therefore, that the practice of equalizing inland transportation costs on such cargoes is not unjustly discriminatory as between ports, detrimental to the commerce of the United States, or in violation of the Act. We will require, however, that equalization on shipments of apples and other deciduous fruits be subject to continuing review. When reasonably adequate service is provided from the Northwest, the reason for this equalization rule will no longer exist.

The ports have indicated that lines regularly serving Portland are willing and able to accommodate shipments of Oregon-produced onions, irregularly shipped to the Philippines, which have moved under equalization from territory tributary to Portland through San Francisco. Witnesses for the conference have stated, however, that such

cargoes require direct sailings, that no direct sailings to the Philippines are available form Northwest ports, and that direct sailings are available from San Francisco. No credible reason has been offered as to the necessity for direct sailings, as a regular practice, or the necessity for diverting such shipments from Portland on other than an emergency basis. Similarly, no justification has been shown for the diversion of shipments of other types of produce grown in Northwest areas. We conclude, therefore, that absorption of inland transportation costs on shipments of produce from areas geographically tributary to the ports of Seattle and Portland is unjustly discriminatory against, and unfair to, those ports within the meaning of section 15 of the Act.

PFEL, as stated, equalizes to a greater extent than other respondent conference members. In justification for absorption of inland transportation costs on shipments of explosives originating in Du Pont, Wash., PFEL has shown that explosives for the Philippines require direct sailings, that such sailings are available in sufficient frequency from San Francisco, and that there is but one direct conference sailing per month from Northwest ports, although a greater frequency is required to meet shipper needs. PFEL admits, however, that nonconference vessels are able to provide the necessary service from the Northwest. Finally, PFEL has shown that the loading berth at Blake Island, Wash., from which this cargo would have moved if unequalized, is physically located in an adjoining county and beyond the jurisdiction of the city of Seattle. We are unimpressed with this latter argument. The nature of the cargo requires that loading take place in an area sufficiently far from populous areas to remove the danger to the public inherent in such cargo. The fact remains that Blake Island is in the Puget Sound area and is the explosive loading area for vessels calling at Seattle. Further, since it is admitted by PFEL that there is no inadequacy of service to accommodate this cargo but merely an insufficient number of conference sailings, we conclude that the conference has not justified the prima facie discrimination against the Seattle area which is inherent in the practice of equalizing inland transportation costs of moving this cargo to San Francisco. Accordingly, we find that the practice of equalizing inland transportation costs on shipments of explosives, and so much of Article 4 of the basic agreements and Rule 2 which authorize that practice, are unjustly discriminatory and unfair as between ports, within the meaning of section 15 of the Act.

As hereinabove shown, the greatest absorptions, percentagewise, have been made on shipments of newsprint originating in Oregon City and St. Helen's, Oreg., amounting to, in one instance, 73 percent of the ocean freight, or $8,849.25 out of a total revenue of $10,346.28.

PFEL points out, in justification, that such absorptions are not representative of equalization as it was practiced on a single recent shipment and as it will be practiced in the future. Shipments via truck will be eliminated, it was stated, in favor of shipments via van loaded aboard a coastwise steamer, at great reduction in amounts of absorption. An intention to employ more economical methods of equalization in the future, however does not justify equalization in the past or necessarily in the future. The ports here have adequate nonrefrigerated sailings to the Far East and have been deprived of cargo which would normally move through the ports but for the equalization practice. No evidence has been adduced showing or tending to show an inadequacy of service from Portland or Seattle, or other reason for equalization on this commodity. In this regard, we deem it significant that equalization as practiced by other conference carriers does not extend to absorptions of domestic transportation costs on this commodity. We find, therefore, that PFEL's absorption practices *re* newsprint, and so much of Article 4 of the basic agreement and Rule 2 which authorize those practices, are unjustly discriminatory and unfair as between carriers, within the meaning of section 15 of the Act.

The conference has shown that dairy products are shipped frequently in small lots, and that such products normally move through Northwest ports but move through San Francisco under equalization where insufficient service is available from the Northwest. In view of these facts, we find that the practice of equalizing inland transportation costs on shipments of dairy products is not unjustly discriminatory or unfair as between ports, detrimental to the commerce of the United States, or unlawful under the Act. As in the practice of equalizing inland transportation costs on apple shipments, however, we will require a continuing review of absorptions on dairy products until such time as sufficient service is available in the Northwest for all such shipments. Further, we will permit equalization on these dairy products only when service is unavailable in the ports through which such products would normally move but for the conference's equalization practice, and we will require the conference rules to reflect our views in this matter.

Article 4 presently forbids absorptions of rail or steamer freights or other charges except as may be agreed to by two-thirds of the conference members. The provision contains no self-imposed limitations on amounts of absorptions or on the areas in which equalization may be practiced, nor does Rule 2, adopted under the authority of Article 4, contain any such limitations. While we approved a similar provision in *Agreement No. 7790*, 2 U. S. M. C. 775 (1946), as not shown

to be unlawful, discriminatory, or detrimental to the commerce of the United States, our present findings of unjust discrimination in conference equalization practices make mandatory a disapproval of Article 4 of the agreement and Rule 2 insofar as found to authorize such unjustly discriminatory practices. We will require the conference, therefore, to cease and desist from effectuating Article 4 of the basic agreement or Rule 2 by any of the practices which have been condemned herein, and to submit an amended provision for our approval. We will require that amendment to reflect the understanding of the parties and to limit the percentage of absorptions of rail, truck, or coastal steamer freights which will be made and the areas to which the practice may extend. The amendment to Rule 2 or Article 4 should provide that equalization may be practiced out of a port, on cargoes tributary to another port, only where adequate service is unavailable from the latter port. The amendment should further provide for the continued practice of approval, by the conference, of amounts of absorptions.

Nothing in this opinion, however, is intended to preclude a carrier from absorbing the difference between cost of inland transportation to the port through which cargo would normally move and a similar cost to a succeeding or preceding port of call where emergency situations require, provided that the carrier normally calls at both of those ports.

Since no complaint has been made against equalization on cargoes originating in California producing areas and shipped through Northwest ports, we make no finding as to the propriety of such practices. Since the conference serves both areas, however, the amended conference equalization rule must necessarily apply with equal force and with like interpretation to both areas.

The conference and PFEL have argued that elimination or amendment of the equalization rule will result in loss of Oriental markets to exporters for products from Pacific Northwest areas and will not result in additional sailings from Pacific Northwest ports. We recognize this argument only as to those commodities as to which we have herein permitted the practice of equalization to continue. Further, we cannot agree that amendment of the equalization rule will not increase the amount of traffic from the Northwest, in view of PFEL'S estimate that cargo amounting to approximately five shiploads has moved under equalization from the Northwest through California ports over a period of four years, in view of conference testimony that a substantial amount of nonequalized cargo has been influenced by the movement of equalized cargo, and in view of the fact that the

conference itself, serving as it does, both areas, has control of the number of sailings out of Northwest ports.

In view of our findings of unjust discrimination arising out of specific equalization practices, it necessarily follows that those practices are detrimental to the commerce of the United States and violate the principles and policies of section 8 of the 1920 Act.[14] That section requires, all other factors being substantially equal, that a given geographical area and its ports should receive the benefits of or be subject to the burdens naturally incident to its proximity or lack of proximity to another geographical area. To the extent, therefore, that the ports of a given geographical area give or can give adequate transportation services, we look with disfavor on equalization rules or practices which divert traffic away from the natural direction of the flow of traffic.

We see no merit to complainants' argument that the examiner erred in denying their petition for leave to amend the complaint by allegations of violation of operating-differential subsidy contracts by various respondents. As stated by the examiner, an alleged violation of a subsidy contract presents no controversy under the Act, and complainants have no standing to file a formal complaint as to such violation or to demand a public hearing thereon under the Merchant Marine Act, 1936. Irregularities in this regard, if existing, appear here to be matters for consideration and determination by the Maritime Administrator and not by the Board.

It is a strange coincidence that equalization appears to have been practiced almost exclusively by American-flag subsidized operators. The fact is significant that neither nonsubsidized American-flag operators nor foreign-flag operators practice absorption from the Northwest in any substantial amount, and that equalization, as a whole, has increased since the execution of subsidy contracts with lines permitted to serve the San Francisco area but prohibited from serving Northwest ports.

Complainants' argument that the examiner erred in failing to find that the port equalization practice is violative of sections 15, 16, and 17 of the Act, has been rendered moot, in major part, by the result here. The relief afforded complainants as to those practices condemned by us under section 15 of the Act makes unnecessary any determinations as to violations of sections 16 and 17 of the Act, in the absence of a demand for reparation. As to those practices found by us to be justified, as hereinbefore shown, the evidence does not support complainants' contentions.

[14] Section 8 charges the Board with the duty to promote and encourage the use by vessels of ports adequate to care for the freight which would naturally pass through such ports.

SUMMARY

In summary, we find the equalization rule and practices of the conference to be unjustly discriminatory and unfair between ports, within the meaning of section 15 of the Act, and detrimental to the commerce of the United States as contrary to the principles of section 8 of the 1920 Act. We disapprove of so much of Article 4 of the basic agreement and Rule 2 which permit the practice herein condemned, and we will require amendment of Article 4 in a manner consistent with this decision.

ORDER

At a Session of the FEDERAL MARITIME BOARD, held at its office in Washington, D. C., on the 4th day of October A. D. 1955

No. 723

CITY OF PORTLAND, OREGON, ACTING THROUGH ITS THE COMMISSION OF PUBLIC DOCKS, AND THE PORT OF SEATTLE

v.

PACIFIC WESTBOUND CONFERENCE, AMERICAN-HAWAIIAN STEAMSHIP COMPANY 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 involved having been had, and the Board, on the date hereof, having made and entered of record a report stating its conclusions and decision thereon, which report is hereby referred to and made a part hereof:

It is ordered, That Article 4 of F. M. B. Agreement No. 57 and Rule 2 of Pacific Westbound Conference Local Freight Tariff No. 1–V be, and they are hereby, disapproved insofar as they authorize practices herein found to be unjustly discriminatory and unfair as between ports; and

It is further ordered, That respondents are required to amend Article 4 and Rule 2 of F. M. B. Agreement No. 57 in a manner consistent herewith.

By the Board.

[SEAL]

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