FEDERAL MARITIME BOARD

No. S–51

AMERICAN PRESIDENT LINES, LTD.—APPLICATION FOR PERMISSION TO CALL AT ALL UNITED STATES PORTS NORTH OF CAPE HATTERAS IN THE ROUND-THE-WORLD SERVICE

Submitted October 25, 1955. Decided November 21, 1955.

American President Lines, Ltd., found not to be an existing operator on a westbound round-the-world service to and from North Atlantic ports other than New York and Boston.

United States-flag service on both the outbound and inbound segments of proposed westbound round-the-world service to and from North Atlantic ports other than New York and Boston found to be inadequately served.

In the accomplishment of the purposes and policies of the Merchant Marine Act, 1936, additional vessels are required to be operated on the westbound round-the-world service to and from North Atlantic ports other than New York and Boston.

Section 605 (c) of the Merchant Marine Act, 1936, found not to be a bar to granting of the application.

Warner Gardner and *John I. Heise, Jr.*, for applicant.

Thomas F. Lynch and *Wendell W. Lang* for Isthmian Steamship Company; *Gerald B. Brophy*, *Carl S. Rowe*, and *Donald L. Deming* for American Export Lines, Inc.; *Alan B. Aldwell* and *Willis R. Deming* for Matson Navigation Company; *Chas. R. Seal* for Virginia State Ports Authority; *Karl J. Grimm* for Baltimore Association of Commerce; *F. L. Ackerman* for Norfolk Port Authority; *James J. Fisher* for City of Providence, R. I.; *Thomas A. Monahan* for Rhode Island Development Council; and *J. S. Rosenthal* for Commissioners of Steamship Terminals, State of Connecticut, interveners.

Allen C. Dawson and *Richard J. Gage* as Public Counsel.

REPORT OF THE BOARD

BY THE BOARD:

This proceeding concerns an application dated August 13, 1954, of American President Lines, Ltd. (APL), for revision of its operating-

differential subsidy agreement to permit the vessels in its round-the-world service to call at all North Atlantic coast ports instead of New York and Boston alone.[1]

American Export Lines, Inc. (Export), Isthmian Steamship Company (Isthmian), Waterman Steamship Corporation (Waterman), and Matson Navigation Company (Matson) intervened in opposition to the application. Virginia State Ports Authority, Baltimore Association of Commerce, Norfolk Port Authority, Rhode Island Development Council, Commissioners of Steamship Terminals of the State of Connecticut, the City of Providence, and Providence Chamber of Commerce intervened in support of the application.

In conformity with section 605 (c) of the Merchant Marine Act, 1936 (the Act),[2] hearing was held before an examiner during the period November 17, 1954, to November 30, 1954. The examiner recommended that the application be granted in part only. Since the round-the-world service parallels four trade routes, the examiner divided that service into four segments, two outboard and two inbound, viz, (1) service outbound from the North Atlantic to Japan, the Philippines, and adjacent countries; (2) service outbound from the North Atlantic to Indonesia and Malaya; (3) service inbound from Indonesia-Egypt to the North Atlantic; and (4) service inbound from Italy-Mediterranean France to the North Atlantic. The services described in (1) and (3) above were found by the examiner to be inadequately served; as to these services he found that in the accomplishment of the purposes and policy of the Act additional vessels should be operated thereon. The services described in (2) and (4) above were found to be adequately served. The examiner further found that, as to all four services, it had not been shown that the effect of an operating-differential subsidy contract with APL for the operation of vessels in its round-the-world service from and to North Atlantic ports, other than New York and Boston, 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. Exceptions to the examiner's recommended decision have been filed by APL, Export, Isthmian, Virginia State Ports Authority, Norfolk Port Authority, Baltimore Association of Commerce, and Public Counsel, and oral argument on the exceptions has been heard. Ex-

[1] The round-the-world route description in the agreement presently reads as follows: "From New York via the Panama Canal, California, Hawaiian Islands, Japan, China, Hong Kong, Philippine Islands, Straits Settlements (Malaya, including Singapore), Ceylon, India and Pakistan, Suez Canal, Egypt, Italy, France in the Mediterranean, to New York, with the privilege of calling at Boston, Havana (Cuba), ports in the Dutch East Indies (Indonesia) and Gibraltar."

[2] Section 605 (c) is set out and discussed *infra*.

ceptions and requested findings not discussed in this report nor reflected in our findings have been given consideration and found not related to material issues or not justified.

We find the evidentiary facts to be the following:

The regular itinerary of APL's round-the-world vessels is New York, Havana (combination vessels only), Cristobal, Balboa, Los Angeles, San Francisco, Honolulu (combination vessels only), Yokohama, Kobe, Taiwan (monthly), Hong Kong, Manila, Singapore, Port Swettenham, Penang, Belawan (monthly), Colombo, Cochin, Bombay, Karachi, Suez, Port Said, Alexandria, Naples, Marseille, Genoa, Leghorn, New York, and Boston. Although its subsidy agreement is sufficiently broad to permit calls on the east coast of India, East Pakistan, and Adriatic Italy, the vessels generally omit those areas in the managerial discretion of the company.

On its round-the-world service APL utilizes two combination vessels, four C–3 freighters, and three AP–3 freighters, on an approximate fortnightly basis and 119-day turnaround. Although Boston is named in the subsidy agreement as a permissible port, the vessels have been calling there regularly. Under the proposal, all vessels will continue to call at New York and Boston, regular calls probably will be made by all vessels at Baltimore (definitely so when latex is on board), most of the freighters will serve Philadelphia and Hampton Roads, and a few combination vessels will call either at Philadelphia or Hampton Roads or both. Calls will be made at other North Atlantic ports as traffic offers. It is estimated by APL that, with the deviation necessary to call at the additional ports, plus the loading time at those ports, approximately three days will be added to the turnaround. It is expected, however, that the extra time can be made up and that the present schedule can be maintained.

In the summer of 1954, APL agreed with the Board to replace, in 1955, the three AP–3 freighters and one C–3 vessel with four Mariner-type vessels. Official notice is taken of a further agreement, announced on December 30, 1954, under which four new combination vessels will replace, in 1959, the remaining five vessels in the round-the-world service. It is expected that the new fleet will operate on a 112-day turnaround.

Section 605 (c) of the Act 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 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.

It is conceded by APL that, as to the North Atlantic ports other than New York and Boston, it has not been operating a service with its round-the-world vessels. Initially, therefore, the question is whether, under section 605 (c), "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."

United States-Flag Service

Interveners Export and Isthmian have services which compete in varying degrees with APL's round-the-world service, as follows:

(a) *Export.*—Under its operating-differential subsidy agreement, and as far as here pertinent, Export has a North Africa service, a west-coast-of-Italy service, a Black Sea service, an Alexandria, Egypt, express service, an India service, and a passenger service by the *Independence* and the *Constitution*, which handle a relatively small amount of high-value cargo. In one or more of the services the cargo vessels have the privilege of calling at all North Atlantic ports, Gibraltar, Mediterranean France, west coast of Italy, the Adriatic, Egypt, the Gulf of Suez, the Red Sea, the Gulf of Aden, Pakistan, India, and Ceylon. In addition, the vessels call at places other than those just named, but which are not served by APL's round-the-world vessels either by reason of the proscription of the subsidy agreement or in the managerial discretion of the company. Although Export "is not particularly concerned with APL's outbound service, as such, since Export does not operate in this trade," it nonetheless contends that the outbound United States-flag service is adequate.

(b) *Isthmian.*—An unsubsidized operator, Isthmian has three services competitive with APL's round-the-world service: (1) westbound round the world from North Atlantic ports, via the Panama Canal, to California, the Philippines, Indo-China, Thailand, Indonesia, Malaya, Ceylon, west coast of India, and Pakistan, with occasional calls at Alexandria, and thence to the North Atlantic via the Suez Canal; (2) eastbound round the world from North Atlantic ports, via Suez, to Pakistan, India, Malaya, Indonesia, the Philippines, Hawaii, and the Gulf and North Atlantic ports via Panama; and (3) North Atlantic ports, via Suez, to the Persian Gulf and the west coast of India, returning via Suez.

Other United States-flag lines servicing areas on APL's round-the-world service are as follows: (1) Intervener *Waterman*: North Atlantic and Gulf ports, via Panama, to Japan and the Philippines, returning to New York via Panama; (2) *United States Lines Co.* (*American Pioneer Line*); Atlantic ports, via aPnama, to the Philippines, Japan, Korea, Hong Kong, returning to New York and Boston via Panama; (3) *Isbrandtsen Company:* North Atlantic ports, via Suez, to the Mediterranean, Pakistan, India, Ceylon, Malaya, the Philippines, Hong Kong, Japan, and thence via Panama to New Haven, Conn., and New York; (4) *Prudential Steamship Corp.*: North Atlantic ports to the Mediterranean and return; (5) *Stevenson Line*: North Atlantic ports to the Mediterranean and return; and (6) *States Marine Lines*: North Atlantic ports to Japan and Korea, via Panama, and North Atlantic ports to the Mediterranean and return.

While it has been customary, in determinations as to adequacy of United States-flag service under section 605 (c) of the Act, to consider the trade as a whole outbound and inbound, and although the examiner divided the trade into four segments, we shall separately consider, for reasons set out elsewhere in this opinion, the outbound and inbound segments of this trade. Before portraying the United States-flag service on the segments, however, attention will be given to some general contentions advanced by APL.

Much is made of the fact that every United States-flag operator in any way competitive with APL's round-the-world service offers service at *all* North Atlantic ports and not at New York and Boston only. It is further pointed out that of the 15 foreign-flag lines competitive outbound, all (with one possible exception) serve the full range of North Atlantic ports, which also is true (with the exception of three passenger services from Italy) as to the 26 foreign-flag lines competitive inbound. Finally, it is stated that most of the trade routes set up by the Maritime Commission for service at North At-

lantic ports contemplate calls at *all* such ports.[3] On cross-examination, Export's vice president in charge of freight traffic declared that his company would not be prepared to operate its present services without the privilege of serving the entire North Atlantic range, and Isthmian's executive vice president stated that his company had served the entire range and that he would rather not operate without that privilege.

At least half of the export cargo handled by APL's round-the-world vessels originates in areas having alternative North Atlantic ports through which it can be shipped; such cargoes originate as far west as the Mississippi River and as far south as the Ohio River; and its imports are destined as far as the Mississippi in the west and border states such as Tennessee in the south. It is urged that if the round-the-world vessels were permitted to serve the other North Atlantic ports the export territory probably would expand to the south to coincide roughly with the import territory; and that APL is at a serious disadvantage and is offering an inadequate service because of the limitation to two ports.

Philadelphia, Baltimore, and Hampton Roads enjoy differentially lower class rates than New York to and from the Midwest, ranging from 2 to 55 cents per 100 pounds on the principal commodities moving in the round-the-world trade. Although APL admits that this differential will not control the movement of all commodities, it urges that in many cases the differential is an important if not controlling factor. It was stated, however, that the principal commodities susceptible to the differential, and in which there is a trend toward the lower rated ports, are those which encounter foreign competition.

Instances were cited by APL where large industries have moved their plants from eastern or New England areas to the South or have added new plants in the South, a trend which is said to be gaining in momentum. This, it is believed, will result in a withdrawal of traffic from New York and Boston and a shift of it to the other North Atlantic ports. APL further believes that the opening of the St. Lawrence Seaway in the near future also will drain cargo away from New York and Boston.

In recent years New York has been beset with maritime labor disturbances which have necessitated the use of other ports by water carriers. Those carriers with no port restrictions have a more flexible service and can use other ports when New York is tied up. It is APL's contention that shippers frequently find that an alternative

[3] The Maritime Administrator tentatively has declared *all* North Atlantic ports within the ambit of the westbound round-the-world service (see Federal Register of June 22, 1955, page 4373).

port forced upon them by labor troubles serves their purpose as well as or better than New York, which thereafter is not used after conditions return to normal.

The use of latex in the United States is increasing, and since that commodity is an important one for its round-the-world vessels, APL cannot use available installations at Baltimore and at New Bedford, Mass. This, it is said, may result in the loss of New York or Boston if the shipper wants to book two tanks, one of which must go to Baltimore. As appeared in great detail, however in *American President Lines, Ltd.—Subsidy, Route 17*, 4 F. M. B.-M. A. 488, APL's Atlantic/Straits vessels have facilities for latex and load it at various Indonesian-Malayan ports, these vessels having the full range of North Atlantic ports.

Military traffic from New York and Boston to areas served by APL's round-the-world vessels has decreased in the past few years in favor of other North Atlantic ports, resulting in a loss of cargoes offered to APL and often requiring it to accept poor-stowing commodities such as vehicles.

Eighty-nine percent of the total nontramp imports and 79 percent of the exports at the North Atlantic ports in 1923 moved through New York and Boston, but the volume through those ports has decreased steadily over the years until it amounted to only 56 and 9 percent, respectively, in 1953. In 1953, 843,353 tons of imports moved through other ports as compared with 1,594,529 tons through New York and Boston, and 1,279,422 tons of exports moved through the other ports as compared with 349,012 tons through New York and Boston. These figures include, of course, approximately 1 million tons of coal from Hampton Roads to Japan (a commodity which APL ordinarily does not carry), approximately 90,000 tons of captive ore handled by Isthmian, and 141,689 tons of sugar and molasses which (see later) APL probably would not carry even if the application were granted.

Of the total liner imports of 2,437,883 tons in 1953 from the involved areas to North Atlantic ports, 670,081 tons, or 28 percent, was sugar, chiefly from the Philippines. Sugar customarily moves on optional bills of lading covering North Atlantic ports other than New York and Boston, but APL cannot handle it on its round-the-world vessels under their present port restrictions; it would expect to do so if the application is approved, generally, however, when general cargo offerings are light. Of the 670,081 tons of sugar moving through North Atlantic ports in 1953, 77 percent was discharged at New York and two percent at Boston. APL's Atlantic/Straits vessels, in returning to the North Atlantic via Panama, are privileged to call at

the Philippines and there load sugar for ports other than New York and Boston. APL's witness admitted that sugar is not an attractive cargo, and Isthmian's witness stated that it is very difficult for a carrier to obtain Philippine cargo for the North Atlantic on vessels moving via Suez. Under all the circumstances, it is extremely doubtful that there would be an appreciable increase in the amount of sugar for APL's round-the-world vessels even if optional bills of lading were available.

It cannot be denied, of course, that APL probably would benefit by the privilege of serving all North Atlantic ports with its round-the-world vessels. Benefit to APL, however, is not in issue under section 605 (c) of the Act.

For the purposes of this decision the proposed APL service will be divided into two segments, outward and inward.

Outward Service. Table I shows the volume of commercial liner cargo moving from North Atlantic ports other than New York and Boston to Japan, Taiwan, Honk Kong, the Philippines, Indonesia, and Malaya in 1952, 1953, and the first half of 1954, with the percentages handled by United States-flag vessels.

Inward Service. Table II shows the volume of commercial liner cargo moving to North Atlantic ports other than New York and Boston from Indonesia, Malaya, west coast of India, West Pakistan, Egypt, Italy, and Mediterranean France in 1952, 1953, and the first half of 1954, with the percentages handled by United States-flag vessels.

In view of the irreconcilability of traffic data of record on carryings to Baltimore from the west coast of India for the first 6 months of 1954, we set out statistics of total inbound traffic excluding all inbound 1954 carryings to Baltimore, in table IIA, and excluding inbound 1954 carryings to Baltimore from the west coast of India, as table IIB.

DISCUSSION, CONCLUSIONS, AND FINDINGS

In view of applicant's admission, hereinbefore noted, that it is not an existing operator in the service encompassed by the application, we need not discuss this issue. Before discussing adequacy of service, however, it must be noted that table I includes and table II excludes cargoes of disputed applicability to this proceeding. These cargoes are as follows:

(a) Coal moving in bulk to Japan from Hampton Roads and Baltimore: From Hampton Roads the entire movement has been by foreign-flag vessels in recent years, practically all in Japanese bottoms.

TABLE I.—*Outward service*

	Japan		Taiwan		Hong Kong		Philippines		Indonesia		Malaya		Total		
	Tons	Percent U. S.	Tons	Percent U. S.	Tons	Percent U. S.	Tons	Percent U. S.	Tons	Percent U. S.	Tons	Percent U. S.	All tons	U. S. tons	Percent U. S.
1952															
Philadelphia	27,722	9	11,536	72	1,986	14	24,167	15	20,680	39	6,906	26	92,997	23,840	26
Baltimore	142,911	1	1,688	76	1,877	5	34,576	42	7,402	61	4,084	30	192,538	23,366	12
Hampton Roads	307,095	4	6,106	44	2,622	19	32,741	29	9,542	11	532	54	358,638	25,291	7
All ports [1]	477,735	3	19,330	64	6,485	13	92,008	30	37,624	36	11,522	29	644,173	72,497	11
1953															
Philadelphia	36,162	7	3,345	50	1,864	13	20,785	33	14,205	42	7,197	24	83,558	19,084	23
Baltimore	74,118	3	6,399	45	2,762	51	49,238	52	4,572	83	1,443	77	138,532	37,027	27
Hampton Roads	984,780	−1	2,966	85	3,223	15	38,955	31	8,385	23	1,060	60	1,039,369	21,635	2
All ports [1]	1,095,060	−1	12,710	55	7,849	27	109,314	41	27,162	43	9,700	36	1,261,795	78,033	6
1954 (6 months)															
Philadelphia	22,530	6	1,787	43	4,229	6	11,012	38	2,080	32	633	28	42,271	7,521	18
Baltimore	104,503	1	4,075	21	1,777	59	17,829	27	19,151	98	773	95	148,108	27,778	19
Hampton Roads	355,216	1	1,000	77	2,102	34	13,830	28	4,819	25	1,259	92	378,226	12,081	3
All ports [1]	482,249	1	7,076	34	8,429	43	47,142	33	29,315	71	3,500	60	578,056	50,249	9
Total															
Philadelphia	86,414	8	16,668	65	8,079	9	55,964	26	36,965	39	14,736	24	218,826	50,445	23
Baltimore	321,532	2	12,162	41	6,416	40	101,643	44	31,125	87	6,300	49	479,178	88,171	18
Hampton Roads	1,647,091	1	10,072	59	7,947	22	85,526	30	22,746	18	2,851	73	1,776,233	59,007	3
All ports [1]	2,055,389	1	39,116	55	22,763	22	248,464	35	94,101	49	24,722	36	2,494,555	200,779	8

[1] All North Atlantic ports except New York and Boston.

TABLE II.—*Inward service*

	Indonesia		Malaya		Ceylon		West coast India [2]		West Pakistan		Egypt		Italy		Mediterranean France		Total		
	Tons	Percent U. S.	Tons	Percent U. S.	Tons	Percent U. S.	Tons	Percent U. S.	Tons	Percent U. S.	Tons	Percent U. S.	Tons	Percent U. .S	Tons	Percent U. S.	All tons	U. S. tons	Percent U. S.
1952																			
Philadelphia	5,994	3	2,209	1	1,437	10	18,887	19	1,347	100	1,116	13	29,761	70	512	-------	61,263	26,486	43
Baltimore	20,030	40	27,426	58	2,051	17	47,852	30	19	100	616	-------	19,998	79	2,104	1	121,096	54,537	45
Hampton Roads	35	46	140	-------	846	43	1,707	64	-------	-------	288	37	6,256	66	99	-------	9,371	5,731	61
All ports [1]	29,487	29	35,825	54	4,404	20	68,446	28	1,366	100	3,046	31	56,675	73	2,715	1	191,730	92,012	48
1953																			
Philadelphia	303	54	4,446	18	377	9	4,010	86	1,987	48	1,372	14	45,631	61	8,125	5	66,251	34,045	51
Baltimore	25,060	22	26,295	40	1,616	24	29,654	18	4,291	38	720	-------	10,379	52	2,716	18	100,731	29,190	29
Hampton Roads	337	-------	608	-------	350	-------	2,117	60	298	27	245	16	2,592	55	1,567	-------	8,109	3,112	38
All ports [1]	29,422	23	31,639	36	2,343	18	35,781	28	6,576	40	2,770	9	58,602	59	12,403	7	179,536	67,217	37
1954 (6 months)																			
Philadelphia	12	83	947	2	337	12	3,110	70	1,874	91	307	11	7,951	39	1,264	18	15,790	7,328	46
Baltimore	8,013	30	11,711	32	776	29	(*)	-------	4,979	50	595	36	7,839	63	2,272	23	(*)	(*)	(*)
Hampton Roads	1,971	4	7,648	30	268	18	1,948	56	-------	-------	443	3	6,460	35	215	−1	18,953	5,780	30
All ports [1]	10,783	23	22,860	26	1,390	23	(*)	-------	6,853	61	2,312	39	34,408	30	3,811	20	(*)	(*)	(*)
Total																			
Philadelphia	6,309	5	7,602	11	2,151	10	26,007	36	5,208	77	2,795	14	83,343	63	9,901	6	143,304	67,859	47
Baltimore	53,103	30	65,432	46	4,443	22	(*)	-------	9,289	45	1,931	11	38,216	69	7,092	15	(*)	(*)	(*)
Hampton Roads	2,343	17	8,396	28	1,464	28	5,772	60	298	27	976	17	15,308	50	1,876	−1	36,433	14,634	40
All ports [1]	69,592	26	90,324	41	8,137	30	(*)	-------	14,795	55	8,128	25	149,585	58	18,929	9	(*)	(*)	(*)

[1] All North Atlantic ports except New York and Boston.
[2] Excludes ore carried by Isthmian.

*Cannot be reconciled from exhibits of record.

TABLE IIA

	Total tons	U. S. flag	Percent U. S.
Philadelphia	143, 304	67, 859	47
Baltimore	221, 827	83, 727	38
Hampton Roads	36, 433	14, 623	40
All	401, 564	166, 209	41

TABLE IIB

	Total tons	U. S. flag	Percent U. S.
Philadelphia	143, 304	67, 859	47
Baltimore	258, 012	98, 276	38 09
Hampton Roads	36, 433	14, 623	40
All	437, 749	180, 758	41. 29

In 1953, the only year of record, approximately 1,000,000 tons of coal were shipped from Hampton Roads to Japan, at rates indicated to be lower than those charged by United States-flag vessels and foreign-flag vessels other than Japanese. According to Census Bureau records, of which official notice is taken,[4] of the 142,911 tons of liner commercial cargo from Baltimore to Japan in 1952, approximately 129,000 tons were coal; of the 74,118 tons in 1953, approximately 16,000 tons were coal; and of the 104,503 tons in the first half of 1954, approximately 103,000 tons were coal.

(b) Cargo of Isthmian's parent company, United States Steel Corp.: For the past few years, a large volume of ore has been carried by Isthmian for its parent company from the west coast of India to Baltimore. The ore is lifted by Isthmian's Persian Gulf vessels at Bombay, where they arrive substantially empty and from whence they return to the United States via the Suez Canal. The ore formerly was loaded on the east coast of India, the changeover resulting from better rail transportation. Isthmian argues that the ore should be counted just the same as any other cargo, and that any carrier is free to compete for it. The record does not show large movements of ore via any other carrier, however. The volume of this particular ore amounted to 50,180 tons in 1952, 89,960 tons in 1953, and 57,257 tons in the first half of 1954, and has averaged from 5,000 to 6,000 tons per vessel.

Isthmian also carries general cargo for United States Steel Corp. and its affiliates, but its witness stated that other carriers participate

[4] See section 7 (d) of the Administrative Procedure Act and Rule 13 (g) of the Board's Rules of Practice and Procedure.

in the movement. Under these circumstances, this general cargo has been included in the statistics.

In *Bloomfield S. S. Co.—Subsidy, Routes 13 (1) and 21 (5)*, 4 F. M. B. 305, 318 (1953), we considered that all cargoes which common carriers on a particular route may reasonably expect to carry must be included in statistics adduced to test adequacy of United States-flag service on that route for the purposes of section 605 (c) of the Act. Applying that test to the coal and captive United States Steel cargo, we have included the former in table I and excluded the latter from table II. The coal, while presently carried by Japanese vessels, would be solicited by United States-flag vessels if those vessels were in distress for cargo; in fact, APL has carried coal on one round-the-world voyage. This cargo, while not ordinarily considered desirable, would be carried by APL if necessary to the success of the service. The captive ore, on the other hand, must be considered as proprietary; there is no indication of record that this cargo would ever be available to United States-flag vessels other than Isthmian. Isthmian's carriage of ore out of the west coast of India has been exclusive except for occasional movements by chartered foreign-flag vessel when Isthmian vessels were out of position. Although Isthmian and Export except to the examiner's exclusion of this cargo, as well as the inclusion of the coal to Japan, we see no basis for such exceptions. While it is true, as argued, that the ore, as well as the coal, is part of the foreign commerce of the United States, the ore, unlike the coal, is not cargo which might reasonably be expected to be carried on United States-flag vessels other than those of Isthmian.

Since APL has not excepted to the examiner's exclusion of Philippine cargo from inbound traffic statistics, their applicability to the question of adequacy of service is not in issue. We consider, however, that, although Philippine cargo moving via the Suez Canal should not be included in inbound traffic statistics, since it is competitive with like cargo moving via the Panama Canal, the question of permission to carry Philippine cargo to North Atlantic ports other than New York and Boston depends directly on our determinations on the inbound leg generally.

Adequacy of United States-Flag Service

Export, Isthmian, and APL have excepted to the examiner's division of APL's round-the-world service into four segments. On behalf of Export, it is argued that adequacy of service must be determined by the services of interveners, rather than by applicant's service. Further, it is argued, even assuming that applicant's is the service to

be considered in issues of adequacy, the round-the-world service may only be partitioned by inbound and outbound services. Isthmian, like Export, argues that it is intervener's service which must be considered rather than the service of applicant. Isthmian, however, quarrels with the division of the round-the-world service only to the extent that the examiner includes, in particular segments of the service, areas served by Isthmian with areas not served by it. APL, while upholding the examiner's view that it is applicant's service which must be considered, argues that it is the adequacy of APL's entire indivisible proposed service which is in issue.

We agree with the examiner that it is the applicant's service rather than interveners' services which are to be considered in determinations of adequacy. The phrasing of section 605 (c) of the Act clearly requires this construction. As hereinbefore indicated, however, we consider that adequacy of service should be weighed here on the basis of separate inbound and outbound services. As revealed by tables I and II, the export traffic in this service far exceeds the import traffic. In such circumstances this Board in the past has examined inbound and outbound traffic separately. *Bloomfield S. S. Co.—Subsidy, Route 13 (1) and 21 (5), supra; Grace Line Inc.—Subsidy, Route 4*, 3 F. M. B. 731 (1952); *U. S. Lines Co.—Subsidy, Route 8*, 3 F. M. B. 713 (1952). The examiner's division of the service into four segments was undoubtedly made in recognition of this principle as well as in recognition of the effect of the application on various established trade routes.

We consider, however, that inefficiency of operations which may here result from overly refined examination of adequacy or inadequacy of United States-flag services is inconsistent with the purposes and policy of the Act and militates in this case against consideration of adequacy of service on the basis of four segments.

Outbound Service

As indicated in table I, American-flag carriers participating in the trades encompassed by the outbound leg of APL's round-the-world service have carried no more than 27 percent of the total traffic originating in any United States North Atlantic port other than New York or Boston in the years 1952 or 1953 or in the first 6 months of 1954, the latest period of record. This clearly indicates to us inadequacy of United States-flag service. Interveners assert, however, that the low percentage indicated results from the inclusion of coal shipped in bulk from Hampton Roads to Japan, which, if excluded, would greatly increase the United States-flag percentage of traffic participa-

tion. As hereinabove indicated, we consider that such cargo may reasonably be expected to be carried by liners in this trade. Moreover, even if excluded from consideration, United States-flag participation in the remaining traffic then becomes less than 33 percent for the last full year of record, 1953, a clearly unsatisfactory percentage.

Inbound Service

As indicated in table II, some difficulty was experienced with the traffic data submitted in evidence of the carryings to Baltimore from the west coast of India for the first half of 1954. The irreconcilability of these particular statistics is of no moment, however, since the minor volume involved [5] could in no event perceptibly influence the proportion between United States-flag and foreign-flag carryings. While more than half of the cargo carried to Hampton Roads in 1952 and to Philadelphia in 1953 was carried in United States-flag vessels, only 41 percent of the exports to North Atlantic ports other than Boston and New York during the period January 1952 to July 1954 was carried in United States-flag vessels, whether the 1954 statistics to Baltimore are eliminated, as in table IIA, or whether the 1954 statistics to Baltimore from the west coast of India only are eliminated. We consider inadequacy of United States-flag service in this service to be sufficiently shown. While the goal of 50 percent United States-flag participation is not a rigid standard for application in section 605 (c) matters,[6] the statistics here adduced show a United States-flag participation sufficiently below that standard to clearly indicate, in the absence of cogent counterbalancing considerations, inadequacy of this inbound service.

While the application is clearly one with respect to operation in a service served by two or more United States citizens with United States-flag vessels, in view of our findings of inadequacy of United States-flag service in both the outbound and inbound segments of this service, it is unnecessary to determine whether the effect of granting the application 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. *Bloomfield S. S. Co.—Subsidy, Routes 13 (1) and 21 (5), supra.*

There remains for consideration the issue of whether, in the accomplishment of the purposes and policy of the Act, additional vessels

[5] Probably less than 500 tons is involved after deducting the proprietary cargo carried by Isthmian.

[6] See *Bloomfield S. S. Co.—Subsidy, Routes 13 (1) and 21 (5), supra.*

should be operated on the service in question. In this regard, we quote from the *Bloomfield* case, *supra*, where we stated at p. 324:

> Having thus found inadequacy of service on the routes, little need be said as to the other finding required under the first paragraph of section 605 (c) of the Act, i. e., "that in the accomplishment of the purposes and policy of this Act additional vessels should be operated thereon." The finding of inadequacy of United States-flag service is the primary reason for making this second finding required under the section.

We conclude that section 605 (c) of the Act does not interpose a bar to grant of the application.

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FEDERAL MARITIME BOARD

No. 767

AGREEMENT AND PRACTICES PERTAINING TO BROKERAGE
PACIFIC COAST EUROPEAN CONFERENCE (AGREEMENT NO. 5200)

IN THE MATTER OF AMENDMENT TO BROKERAGE RULE 21
PACIFIC COAST EUROPEAN CONFERENCE (AGREEMENT NO. 5200)

*Submitted April 13, 1955. Decided November 30, 1955**

Amended Rule 21 of Tariff No. 12 of the Pacific Coast European Conference found to be an unapproved agreement or unapproved modification of an agreement between carriers within the meaning of section 15 of the Shipping Act, 1916. The Board has no power to suspend an approved or an unapproved agreement between carriers.

J. Richard Townsend for Pacific Coast Customs and Freight Brokers Association and Los Angeles Customs and Freight Brokers Association, Inc.

Benj. M. Altschuler for Customs Brokers and Forwarders Association of America, Inc.

Alan F. Wohlstetter for Mitsui Steamship Company, Ltd.

Gerald H. Ullman for New York Foreign Freight Forwarders and Brokers Association, Inc.

Leonard G. James for Pacific Coast European Conference.

John Mason as Public Counsel.

REPORT OF THE BOARD ON MOTIONS
FOR INTERIM ORDER AND RELATED PETITIONS

BY THE BOARD:

The movants, Pacific Coast Customs and Freight Brokers Association and Los Angeles Customs and Freight Brokers Association, Inc.

*See modification, 5 F. M. B. 65.

("Pacific Brokers"), and Customs Brokers and Forwarders Association of America, Inc. ("Customs Brokers of America"), request an interim order directing respondent members of the Pacific Coast European Conference[1] ("the conference") (1) not to apply, during the pendency of the proceedings in Docket No. 767, amended Rule 21 of conference Tariff No. 12, and (2) to restore to the conference list of approved freight brokers the names of those removed by application of amended Rule 21.

Mitsui Steamship Company, Ltd. ("Mitsui"), the principal independent competitor in the U. S. Pacific coast-Europe trade, by petition seeks an order requiring the conference to cease and desist from acting pursuant to amended Rule 21, and asks for certification of this matter to the Department of Justice for collection of penalties provided in section 15 of the Shipping Act, 1916 ("the Act"),[2] and for prosecution under the antitrust laws.

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[1] Anglo Canadian Shipping Co., Ltd., Blue Star Line, Ltd., Canadian Transport Co., Ltd., Compagnie Generale Transatlantique (French Line), The East Asiatic Company, Ltd. (A/S Det Østasiatiske Kompagni), Fruit Express Line A/S, Furness, Withy & Co., Ltd. (Furness Line), Hamburg-Amerika Linie (Hamburg American Line), "Italia" Societa Per Azioni di Navigazione (Italian Line), (Knutsen Line)—Joint Service of Dampskibsaktieselskapet Jeanette Skinner, Skibsaktieselskapet Pacific, Skibsaktieselskapet Marie Bakke, Dampskibsaktieselskapet Golden Gate, Dampskibsaktieselskapet Lisbeth, Nippon Yusen Kaisha, Norddeutscher Lloyd (North German Lloyd), N. V. Nederlandsch-Amerikaansche Stoomvaart-Maatschappij (Holland-America Line), Osaka Shosen Kaisha, Ltd., Fred. Olsen & Co. (Fred. Olsen Line), Rederiaktiebolaget Nordstjernan (Johnson Line), Rederiet Ocean A/S (J. Lauritzen, Managing Owners) (Lauritzen Line), Royal Mail Lines, Ltd., Seaboard Shipping Company, Ltd., (States Marine Lines)—Joint Service of States Marine Corporation, States Marine Corporation of Delaware, Westfal-Larsen & Company, A/S (Interocean Line), Western Canada Steamship Company, Limited.

[2] Section 15 provides:

"That every common carrier by water, or other person subject to this Act, shall file immediately with the board a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this Act, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term 'agreement' in this section includes understandings, conferences, and other arrangements.

"The board may by order disapprove, cancel, or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be in violation of this Act, and shall approve all other agreements, modifications, or cancellations.

"Agreements existing at the time of the organization of the board shall be lawful until disapproved by the board. It shall be unlawful to carry out any agreement or any portion thereof disapproved by the board.

"All agreements, modifications, or cancellations made after the organization of the board shall be lawful only when and as long as approved by the board, and before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation.

New York Foreign Freight Forwarders and Brokers Association, Inc. ("New York Brokers"), petitions for similar action, and, additionally, alleges a violation of section 20 of the Act. The petitions are based on the record of hearings before the examiner in Docket No. 767, and, although not filed in that proceeding, are, nevertheless, considered by us as part thereof.

The conference operates under F. M. B. Agreement 5200 ("the basic agreement"), approved on May 26, 1937, which authorizes the conference to act in concert in relation to activities specified in Article 1 of said basic agreement as follows:

1. This agreement covers the establishment, regulation and maintenance of agreed rates and charges for or in connection with the transportation of all cargo in vessels owned, controlled, chartered and/or operated by the parties hereto in the trade covered by this agreement, and brokerage, tariffs and other matters directly relating thereto, members being bound to the maintenance as between themselves of uniform freight rates and practices as agreed upon from time to time.

Pursuant thereto, the conference adopted Rule 21, the first paragraph of which reads as follows:

21. *Freight brokerage.*—Member Lines are permitted to pay brokerage ONLY to firms whose names appear on the Conference's Approved Freight Brokers List.

This rule was amended on October 5, 1954, by issuance of Second Revised Page N to conference Tariff No. 12, effective retroactively to September 29, 1954. So far as is here pertinent, it provides as follows:

Member Lines MUST refuse to pay brokerage to any Broker who solicits for, or receives brokerage from, a nonconference line competitor and such Broker will be excluded from the Conference's List of Approved Freight Brokers.

Admittedly, neither Rule 21 nor the amendment thereto was filed with us for approval, and no specific approval thereof has been granted.

Proceedings in Docket No. 767 were initiated by our order of October 19, 1954, which directed the conference to show cause why the basic agreement should not be disapproved, and to withdraw amended Rule 21 pending determination of its lawfulness under sections 15, 16, and 17 of the Act. This order was superseded and cancelled by our

"Every agreement, modification, or cancellation lawful under this section shall be excepted from the provision of the Act approved July second, eighteen hundred and ninety, entitled 'An Act to protect trade and commerce against unlawful restraints and monopolies', and amendments and acts supplementary thereto, and the provisions of sections seventy-three to seventy-seven, both inclusive, of the Act approved August twenty-seventh, eighteen hundred and ninety-four, entitled 'An Act to reduce taxation, to provide revenue for the Government, and for other purposes', and amendments and acts supplementary thereto.

"Whoever violates any provision of this section shall be liable to a penalty of $1,000 for each day such violation continues, to be recovered by the United States in a civil action."

order of October 2, 1954, which required the conference to show cause why amended Rule 21 should not be modified or cancelled, or, failing such modification or cancellation by the conference, why the Board should not disapprove, or cancel it approval of, the basic agreement. The superseding order did not require the conference to withdraw amended Rule 21.

Hearings were held in San Francisco before an examiner during the period January 25 to February 3, 1955. Parties intervening during or prior to the hearing were Isbrandtsen Company, Inc., another independent competitor of the conference, New York Brokers, Pacific Brokers, Customs Brokers of America, American Union Transport, Inc., and Mitsui. The motions and petitions under consideration were filed subsequent to completion of the hearings but prior to the examiner's recommended decision.

Thereafter, and pursuant to our order of March 25, 1955, Pacific Brokers, Customs Brokers of America, and Mitsui submitted affidavits of fact in support of allegations that irreparable injury would flow from the continued operation of amended Rule 21. Subsequently, oral argument was heard on:

1. Whether amended Rule 21 is an approved agreement within the meaning of section 15 of the Act; and

2. Whether, assuming amended Rule 21 to be lawful as an approved section-15 agreement, we are authorized to suspend or direct the conference not to apply the amendment prior to final adjudication in Docket No. 767.

CONTENTIONS OF THE PARTIES

Pacific Brokers and Customs Brokers of America contend that amended Rule 21, unapproved under section 15 of the Act, is therefore unlawful as an agreement between carriers which requires approval under that section; that the Board has jurisdiction after termination of hearings before an examiner, but prior to issuance of a recommended decision, to issue an interim order under sections 22 and 23 of the Act; and that an interim order should issue to prevent serious injury to innocent parties, to prevent detriment to the commerce of the United States, and to prevent the conference from applying a rule which may be unlawful under sections 15, 16, and 17 of the Act. New York Brokers joined in the motion of Pacific Brokers.

Public Counsel contends that prior Board approval of the basic agreement does not eliminate the requirement for section-15 approval of amended Rule 21; that the amended rule is unlawful as an unapproved agreement between carriers which controls or regulates compe-

tition; and that the Board is without jurisdiction to grant the relief requested but, that, through its continuing jurisdiction over conference agreements, the Board may order the conference not to apply amended Rule 21 during the pendency of proceedings in Docket No. 767, under penalty of modification or cancellation of the basic agreement.

The views expressed in the related petitions are similar to those advanced in support of the motions for interim order. Mitsui contends that application of amended Rule 21 is unlawful without prior Board approval under section 15 of the Act. New York Brokers, in addition, (1) maintain that adoption of amended Rule 21 with knowledge that a similar rule had been rejected by the Board's Regulation Office, "was in deliberate and flagrant violation of the Shipping Act, 1916, and the jurisdiction of the Federal Maritime Board", and (2) request that we assess and recover penalties from the member conference lines in the event that we find amended Rule 21 to be an unapproved agreement within the meaning of section 15.

The conference contends (1) that amended Rule 21 is an approved agreement between carriers within the meaning of section 15 of the Act since the basic agreement authorizes the making of rules and regulations concerning brokerage; and (2) that we have no power to suspend amended Rule 21 or to order the conference to cease and desist from applying the rule until after a full hearing and, then, only upon finding a violation of one or more of the provisions of the Act.

Issues

The primary issue for consideration is whether amended Rule 21 is an approved agreement within the meaning of section 15 of the Act by virtue of a prior Board approval of the basic agreement which authorized the making of rules and regulations concerning brokerage. To this end our attention is directed to the decision of our predecessors in *Section 15 Inquiry*, 1 U. S. S. B. 121 (1927), a formal investigation for the purpose of ascertaining the meaning of the word "every," as used in the phrase "every agreement with another * * * carrier," appearing in section 15. In that proceeding the Shipping Board described those agreements which require approval under section 15 in the following language:

> In the nature of transportation by water, it is manifest that conference agreements within the purview of section 15 are those whereby the carriers propose to be governed in their conference activities as to matters specified in the first paragraph of that section. Agreements arrived at by conference carriers providing for fixing or regulating transportation rates or fares, and the other matters specified,* and agreements modifying or cancelling such agreements are within the meaning of section 15. By that section, the burden of filing copies or memoranda of all such agreements is put upon the carriers, and performance under

*See end of quotation.

them is unlawful until they have received board approval. *Such agreements are to be distinguished from the routine of conference activities.* [Emphasis supplied.]

*"Giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; alloting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement."

The Shipping Board distinguished between agreements which, while unapproved, fall within the prohibition of the Act, and those routine agreements which are unobjectionable, whether or not specifically approved under section 15. Under that decision the standards for distinguishing between types of agreements are those specified in section 15. The decision requires that every agreement between carriers, whether oral or embodied in a basic conference agreement, tariff, or other document be filed for Board approval unless the agreement is, when measured by the standards of section 15, a routine one authorized by an approved basic conference agreement. Since section 15 subjects carriers who are parties to an unapproved agreement to the risk of a declaration of unlawfulness of such an agreement and a penalty of $1,000 per carrier for each day of its application, the Shipping Board in *Section 15 Inquiry*, *supra*, contemplated that the risk of invoking penalties would effectively insure the filing of all carrier agreements which might be viewed as nonroutine.

A judicial standard for determining agreements which require approval under section 15 of the Act, as distinguished from routine conference activities flowing from approved agreements, was laid down in *Isbrandtsen Co., Inc.* v. *United States et al.*, 211 F. 2d 51 (D. C. Cir., 1954). There, the petitioner sought review of a Board order which denied requests to suspend a proposed dual-rate, exclusive-patronage system pending hearing on the lawfulness of the system. The Board, in that case, in support of the order, argued that approval given by the Board to a basic conference agreement [3] conferred a scope of authority within which the conference carriers might lawfully act in concert without specific Board approval of each action, and that the institution of the dual-rate system was such a lawful, routine action. The Court of Appeals rejected the argument, set aside the order in question, and enjoined the institution of the system pending hearing on its lawfulness under the Act, employing, at page 56 of the opinion, the following significant language:

"Agreements" referred to in the Shipping Act are defined to include "understandings, conferences, and other arrangements." Clearly, a scheme of dual

[3] The basic agreement of the Japan-Atlantic and Gulf Freight Conference did not contain language specifically authorizing the use of dual rates.

rates like that involved here is an "agreement" in this sense. It can hardly be classified as an interstitial sort of adjustment since it introduces an entirely new scheme of rate combination and discrimination not embodied in the basic agreement. But even if it were not a new agreement, it would certainly be classed as a "modification" of the existing basic agreement. In either case, § 15 requires that such agreements or modifications "shall be lawful only *when* and as long as *approved*" by the Board. Until such approval is obtained, the Shipping Act makes it illegal to institute the dual rate system.

The Board order considered by the Court of Appeals had been, as noted by the Court, issued without hearing. The order, in reciting *inter alia*, "It not appearing that the initiation of the proposed contract/noncontract rate system * * * will be in violation of the Shipping Act, 1916," necessarily constituted a finding, without hearing, that the agreement to institute a dual-rate system was not an unapproved section 15 agreement. The Court then, in holding that the Board erred in refusing to "suspend" [4] the operation of the system and in not remanding that issue to the Board for hearing, necessarily considered the Board authorized to determine, as a matter of law, from the construction of documents in relation to each other and according to the standards specified in section 15, whether an agreement between carriers has been necessarily authorized by an approved basic conference agreement. See also *River Plate and Brazil Confer.* v. *Pressed Steel Car Co.*, 124 F. Supp. 88, 91 (S. D. N. Y. 1954), aff'd 227 F. 2d 60, where the *Isbrandtsen* case was stated to have been decided as a matter of law.[5]

Construing amended Rule 21 together with article 1 of the basic agreement in accordance with the standards laid down in section 15 of the Act, we find, as a matter of law, that amended Rule 21 is an agreement between carriers which requires separate approval under section 15. Surely amended Rule 21 introduces a new scheme of regulation and control of competition and provides for an exclusive work-

[4] "Suspend" is misapplied here in view of the ultimate decision of the Court of Appeals holding the agreement to be an unapproved section-15 agreement.

[5] The Court of Appeals, in the *Isbrandtsen* case, reviewed the administrative order under 5 U. S. C. 1032. Under that section the Court of Appeals has "exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of * * * such final orders of the United States Maritime Commission or the Federal Maritime Board or the Maritime Administration entered under authority of the Shipping Act, 1916, as amended, and the Intercoastal Shipping Act, 1933, as amended, as are now subject to judicial review pursuant to the provisions of section 830 of Title 46." Under 5 U. S. C. 1037 (b), where the agency has held no hearing prior to the taking of the action of which review is sought, the Court of Appeals must determine whether a hearing is required by law. The Court may only pass on the issues if no hearing is required by law and where it appears from the pleadings and affidavits filed by the parties that *no genuine issue of material fact is presented.* In the *Isbrandtsen* case, issues as to the merits of a proposed exclusive-patronage, dual-rate system were left for Board determination; the order sought to be reviewed was *set aside* insofar as that order allowed the system to go into effect as an agreement between carriers which had received prior approval under section 15.

ing arrangement not embodied in the basic agreement. Although article 1 of the basic agreement authorizes the conference to make rules and regulations concerning brokerage and matters directly relating thereto, the authority granted in article 1 does not extend, without additional approval, to the creation of new relationships which invade the areas of concerted action specified in section 15 in a manner other than as a pure regulation of intraconference competition.

Whether the regulation of competition inherent in amended Rule 21 is unfair, unreasonable, or unjustly discriminatory, we do not and need not here determine. We declare, however, that amended Rule 21, whether or not unlawful under sections of the Act other than section 15, is an unapproved agreement or modification of an agreement within the meaning of section 15 which may not be effectuated without our prior approval.

The conference asserted in oral argument that findings of section 15 violation must be based on a full hearing, citing *Los Angeles By-Products Co.* v. *Barber S. S. Lines, Inc.*, 2 U. S. M. C. 106, 114 (1939). We do not understand that report to be in any manner at variance with our finding here. The determination of questions of law necessarily does not require an evidentiary hearing. As in the present case, oral argument on such questions affords a full opportunity to be heard, within the meaning of section 23 of the Act. We consider, then, that where we become aware of an agreement among conference carriers which is considered by those carriers to be authorized but which may be an unapproved agreement within the meaning of section 15, assuming no issues of fact or administrative discretion, we are authorized under section 22[6] to order the carriers to show cause, within a specified time, why the agreement should not be declared to be unlawful as an unapproved agreement within the meaning of the Act. The sanctions which we may then impose are, first, a declaration of unlawfulness of the agreement under section 15; second, the institution of a civil action for the collection of the statutory penalties.

Activities of this general character, prior to the decision of the Court of Appeals in *Isbrandtsen* v. *United States*, *supra*, were considered to be routine agreements not requiring separate approval under section 15 of the Act. While the *Isbrandtsen* case does not establish a clear and complete guide for distinguishing routine from nonroutine conference arrangements, we consider, as hereinabove in-

[6] *U. S. Nav. Co.* v. *Cunard S. S. Co.*, 284 U. S. 474, 486 (1932): "If there be a failure to file an agreement as required by § 15, the board, as in the case of other violations of the act, is fully authorized by § 22, *supra*, to afford relief upon complaint or upon its own motion."

dicated, that within the principles laid down in that case, amended Rule 21 is a nonroutine arrangement. However, in view of the reliance of this and other conferences on our established administrative practice of not requiring specific approval of routine arrangements, and in the exercise of the administrative discretion vested in us, we will not take any action aimed at collection of the penalties provided in section 15.

We will view any failure of the conference to restore to the list of approved brokers those persons whose names have been removed as a result of the operation of amended Rule 21 to be an unlawful application of an unapproved agreement.

Counsel for the conference has pointed out that the conference had an identical brokerage rule in effect during the period 1931 to 1941 and urges that the firmly established administrative practice of regarding such rules as routine conference activities requires us to consider amended Rule 21 as a routine agreement. While we consider the nature of amended Rule 21 to be clear as a matter of law, as hereinbefore discussed, we also consider that a more definitive guide for distinguishing agreements which require specific approval from those which constitute routine, preauthorizeed agreements is highly desirable. We will, therefore, initiate a rule-making proceeding for the guidance of conferences, for the purpose of defining both specifically and generally those agreements between carriers which must receive our approval under section 15 of the Act before effectuation.

The question of our authority to suspend amended Rule 21 during the pendency of proceedings in Docket No. 767 requires little discussion. Briefly, we consider this Board to be without authority, express or implied, to suspend or stay approved or unapproved agreements between carriers. Where we deem it to be sufficiently urgent, we may, as we have in the past,[1] enlist the aid of a court of equity to stay a given activity. Before such court, each party will receive due protection. If a stay is issued, the court may require the posting of a bond or may make other provision for the benefit of all parties to the litigation to protect each against economic loss. In the present case we are not authorized to order the conference to cease and desist from applying amended Rule 21 either prior or subsequent to a determination of the status of the rule under section 15 of the Act.

The arguments advanced as authority for the exercise of stay or suspension jurisdiction are not convincing. While it is urged that we

[1] *West India Fruit & Steamship Co.* v. *Seatrain Lines*, 170 F. 2d 775 (2 Cir. 1948).

have been granted that power in section 25 of the Act,[8] section 25, viewed in proper perspective, relates only to rehearings or redeterminations of matters previously commenced, completed, and reported under the authority of sections 22, 23, and 24. Its provisions are primarily procedural, are in supplement of, rather than at variance with, those sections, and do not authorize a complete and independent channel of relief. The section forms the basis for Rule 16 of the Board's Rules of Practice and Procedure,[9] which specifies the maner in which redeterminations shall be made.

The decisions cited by movants offer no support for the proposition advanced. In the principal decision relied on, *Power Comm'n* v. *Pipeline Co.*, 315 U. S. 575 (1942), the Supreme Court upheld that Commission's authority to decide a matter after submission of evidence but prior to completion of full hearings. The decision does not support the view that we may suspend or stay the operation of an approved agreement prior to completion of full hearings. The Federal Power Commission had ultimate jurisdiction in the matter before it whether exercised before or after completion of the hearing process. Here we have not been granted the power to suspend or stay; delegated powers are circumscribed by the express provisions of the enabling statute. *Stark* v. *Wickard*, 321 U. S. 288 (1944). Those agencies which exercise suspension or restraining authority do so under express authority granted. The Act contains no such delegation of authority.

In summary, (1) we find amended Rule 21 to be an unapproved agreement between carriers within the meaning of section 15 of the Act, and (2) we declare that this Board has no power to suspend an approved or an unapproved agreement between carriers. The motions for interim order and related petitions are granted insofar as they seek a declaration as to the lawfulness of amended Rule 21 under section 15. The motions and related petitions are otherwise denied.

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[8] Section 25 provides:

"That the board may reverse, suspend, or modify, upon such notice and in such manner as it deems proper, any order made by it. Upon application of any party to a decision or order it may grant a rehearing of the same or any matter determined therein, but no such application for or allowance of a rehearing shall, except by special order of the board, operate as a stay of such order."

[9] Rule 16 (a) provides:

"*Reopening by Board and modification or setting aside of report or order.* Upon petition or its own motion, the Board may at any time after reasonable notice, reopen any proceeding under these rules for rehearing, reargument, or reconsideration and, after opportunity for hearing, may alter, modify, or set aside in whole or in part its report of findings or order therein if it finds such action is required by changed conditions in fact or law or by the public interest."

ORDER

At a Session of the Federal Maritime Board, held at its office in Washington, D. C., on the 20th day of December A. D. 1955

No. 767

AGREEMENT AND PRACTICES PERTAINING TO BROKERAGE PACIFIC COAST EUROPEAN CONFERENCE (AGREEMENT NO. 5200)

IN THE MATTER OF AMENDMENT TO BROKERAGE RULE 21 PACIFIC COAST EUROPEAN CONFERENCE (AGREEMENT NO. 5200)

These matters being at issue on motions for interim order and related petitions on file, and having been duly heard and submitted by the parties, and full consideration of the matters and things involved having been given, and the Board on the 30th day of November 1955 having made and entered of record a report stating its conclusions and decision on said motions and petitions, which report is hereby referred to and made a part hereof:

It is declared, That the October 5, 1954, amendment to Rule 21 of Pacific Coast European Conference Tariff No. 12 has not been approved by this Board or its predecessors under section 15 of the Shipping Act, 1916, as amended; and

It is declared, That it is a violation of section 15 of the Shipping Act, 1916, as amended, for the Pacific Coast European Conference and its members as named in the Appendix to effectuate said amendment, while unapproved, by

(1) striking from and/or failing to restore to the list of brokers approved by the Pacific Coast European Conference those brokers who have solicited cargo for a competitor of the Pacific Coast European Conference; and/or

(2) including in and/or failing to withdraw from Pacific Coast European Conference Tariff No. 12 the said unapproved amendment to Rule 21 of said tariff; and

It is ordered, That the further relief sought in the motions and related petitions be, and it is hereby, denied.

By the Board.

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

Anglo Canadian Shipping Co., Ltd.; Blue Star Line, Ltd.; Canadian Transport Co., Ltd.; Compagnie Generale Transatlantique (French Line); The East Asiatic Company, Ltd. (A/S Det Østasiatiske Kompagni); Fruit Express Line A/S; Furness, Withy & Co., Ltd. (Furness Line); Hamburg-Amerika Linie (Hamburg American Line); "Italia" Societa Per Azioni di Navigazione (Italian Line); Dampskibsaktieselskapet Jeanette Skinner, Skibsaktieselskapet Pacific, Skibsaktieselskapet Marie Bakke, Dampskibsaktieselskapet Golden Gate, Dampskibsaktieselskapet Lisbeth (Knutsen Line—Joint Service); Nippon Yusen Kaisha; Norddeutscher Lloyd (North German Lloyd; N. V. Nederlandsch-Amerikaansche Stoomvaart-Maatschappij (Holland-America Line); Osaka Shosen Kaisha, Ltd.; Fred. Olsen & Co. (Fred Olsen Line); Rederiaktiebolaget Nordstjernan (Johnson Line); Rederiet Ocean A/S (J. Lauritzen, Managing Owners) (Lauritzen Line); Royal Mail Line, Ltd.; Seaboard Shipping Company, Ltd.; States Marine Corporation, States Marine Corporation of Delaware (States Marine Lines—Joint Service); Westfal-Larsen & Company A/S (Interocean Line); Western Canada Steamship Company, Limited; regular members of the Pacific Coast European Conference and American President Lines, Ltd., an associate member of said conference.

FEDERAL MARITIME BOARD

No. 730

IN THE MATTER OF THE STATEMENT OF JAPAN-ATLANTIC AND GULF FREIGHT CONFERENCE FILED UNDER GENERAL ORDER 76

Submitted June 21, 1955. Decided December 12, 1955

Proposed exclusive-patronage contract/noncontract system of the Japan-Atlantic and Gulf Freight Conference approved under section 15 of the Shipping Act, 1916.

The exclusive-patronage contract/noncontract system of the Japan-Atlantic and Gulf Freight Conference not found to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be in violation of the Shipping Act, 1916.

Approval granted under section 15 of the Shipping Act, 1916, contingent upon modification of the proposed exclusive-patronage contract to reflect the views of the Board.

Herman Goldman, *Elkan Turk*, *Seymour H. Kligler*, and *Elkan Turk, Jr.*, for respondent.

John J. O'Connor and *John J. O'Connor, Jr.*, for Isbrandtsen Company, Inc., and *Edward P. Hodges*, *James E. Kilday*, *William J. Hickey*, and *Frank J. Oberg* for the Department of Justice, petitioners.

Chas. B. Bowling, *Chas. D. Turner*, *Charles W. Bucy*, *Harry Ross, Jr.*, and *Henry A. Cockrum* for Secretary of Agriculture of the United States, intervener.

Max E. Halpern, *John Mason*, *Edward Aptaker*, and *Richard W. Kurrus* as Public Counsel.

REPORT OF THE BOARD

BY THE BOARD:

This proceeding arose out of a statement filed on December 24, 1952, by the Japan-Atlantic and Gulf Freight Conference ("the conference") pursuant to section 236.3 of General Order 76,[1] proposing

[1] 17 F. R. 10175, 46 C. F. R. 236.3 (Nov. 10, 1952).

to initiate an exclusive-patronage contract/noncontract freight rate system ("dual-rate system") in the trade from Japan, Korea, and Okinawa to U. S. Gulf ports and Atlantic coast ports of North America, the system to become effective on the 30th day following the filing. Protests against the proposed system have been filed by Isbrandtsen Company, Inc. ("Isbrandtsen"), an independent steamship company operating in the Japan-Atlantic trade, and by the United States Department of Justice ("Justice").

Under the proposed dual-rate system, contract rates set at a level below noncontract rates would be charged on all commodities moving in the trade to those shippers promising to ship exclusively via conference vessels during the period of the contract. A second and higher level of rates would be charged nonsigning shippers. The differential or spread between the levels of contract and noncontract rates was fixed in the statement at 9½ percent of the contract rates applicable to the respective tariff items, rounded off to the nearest quarter of a dollar.

As required by General Order 76, the conference statement set forth (a) the amount of differential or spread between the proposed contract and noncontract rates, (b) the effective date of the proposed system, (c) the reasons for the use of dual rates in the trade involved, (d) the basis for the differential or spread, and (e) copies of the form of contract proposed to be used.

In its protests of January 12, 1953, to the conference statement, Isbrandtsen requested that we (1) grant a hearing on the lawfulness of the proposed dual-rate system under sections 14, 15, 16, and 17 of the Shipping Act, 1916 ("the Act"); (2) direct the conference not to effectuate the proposed dual-rate system pending completion of the hearing; and alternatively, (3) reject the conference statement, without a hearing, for noncompliance with General Order 76. In its supplemental and amendatory comments of January 19, 1953, Isbrandtsen argued that (1) it would be unlawful, under section 15 of the Act, for the conference to initiate a dual-rate system without prior Board approval, and (2) the Board is without authority to approve the dual-rate system proposed by the conference since the system would be unjustly discriminatory and unfair as between carriers, shippers, exporters, and importers, would operate to the detriment of the commerce of the United States, and would be in violation of the Act. The protest of Justice was substantially similar to the Isbrandtsen protest, as amended.

On January 21, 1953, we granted a hearing on the protests but denied the requests to suspend the operation of the dual-rate system, stating that (1) the conference statement appeared to comply with the requisites of General Order 76; (2) the proposed differential between contract and noncontract rates did not appear to be arbitrary, unreasonable, or unjustly discriminatory; (3) it did not appear that the initiation of the proposed dual-rate system would be unjustly discriminatory or unfair or detrimental to the commerce of the United States or in violation of the Act; and (4) it did not appear that the initiation of the system would cause irreparable injury to Isbrandtsen.

On January 22, 1953, Isbrandtsen filed in the U. S. Court of Appeals for the District of Columbia Circuit a petition for review of our January 21 order. That court, on the same day, granted a temporary stay of the order until such time as Isbrandtsen's application for an interlocutory injunction could be heard. On March 23 an interlocutory injunction was granted, staying so much of our January 21 order as purported to approve institution of the dual-rate system. Petitions for certiorari, filed by us and by the conference, were denied by the Supreme Court.[2]

On January 21, 1954, the Court of Appeals set aside so much of the January 21, 1953, order as purported to approve the proposed dual-rate system, holding that section 15 of the Act requires our approval before a dual-rate system may be effectuated, and enjoined the conference from effectuating the system prior to such approval.[3]

On August 17, 1953, we granted the petition of the Department of Agriculture for leave to intervene. A hearing was conducted before an examiner during the period October 5 through December 23, 1953.

In his recommended decision dated September 13, 1954, the examiner found that (1) the conference statement complied with the requirements of General Order 76; (2) the differential between contract and noncontract rates would not be arbitrary, unreasonable, or unjustly discriminatory; (3) the initiation of the proposed dual-rate system would not be unjustly discriminatory, unduly prejudicial or unfair, or detrimental to the commerce of the United States; and (4) the proposed dual-rate system would not cause irreparable injury to Isbrandtsen. On motion of Isbrandtsen, Justice, and Public Counsel, we, by order dated October 6, 1954, remanded the record to the examiner with instructions to prepare supplemental findings of fact as to the basis for the spread between contract and noncontract rates and as to the reasonableness of the exclusive-patronage contracts proposed

[2] *Federal Maritime Board* v. *United States et al.*, 345 U. S. 975 (1953).
[3] *Isbrandtsen Co.* v. *United States*, 211 F. 2d 51 (1954).

for use in the trade, and with instructions to show the ruling upon the findings of fact and conclusions of law proposed by the parties.

On January 17, 1955, the examiner served his supplemental findings on those matters specified in the order of remand. Exceptions to the recommended decision, as supplemented, were filed by all parties to the proceeding and oral argument on the exceptions has been heard. Exceptions and proposed findings not discussed in this report nor reflected in our findings have been considered and found not justified by the facts or not related to material issues in this proceeding. Recommended findings and conclusions of the examiner are not adopted herein unless so specified.

We find the following to be the basic evidentiary facts:

BASIC FACTS

The conference is a voluntary association of 17 steamship lines [4] operating under authority of F. M. B. Agreement No. 3103, as amended, between Japan, Korea, and Okinawa and the Gulf and Atlantic coasts of North America.

Members of the conference and its predecessor organization, the Japan-Atlantic Coast Freight Conference, have operated as common carriers in the trade from Japan to the Atlantic coast of North America under successive agreements, the first of which was an agreement between two Japanese and one United States-flag line, executed on November 14, 1922, and finally approved by our predecessor, the Shipping Board, on February 16, 1926, as Agreement No. 73–1. A succeeding agreement, No. 129, was amended to include Gulf ports as discharging ports. All subsequent agreements have included both Gulf and Atlantic ports.

The current agreement, F. M. B. No. 3103, approved in unamended form on June 25, 1934, was executed by 8 lines, 1 American, 5 Japanese, and 2 others, all parties to the agreement [5] at the time of hearing herein.

Private steamship operations in the conference trade ceased on or about December 8, 1941, due to the outbreak of war between Japan

[4] The present membership of the conference is as follows:
Mitsui Steamship Co., Ltd.; Kawasaki Kisen Kaisha; Kokusai Line; Nippon Yusen Kaisha; Osaka Shosen Kaisha, Ltd.; Shinnihon Steamship Co., Ltd.; Barber-Wilhelmsen Lines;* American President Lines, Ltd.; A. P. Moller, Maersk Line;* Yamashita Kisen Kaisha; Waterman Steamship Corp.; Lykes Bros. Steamship Co., Inc.; United States Lines Co. (American Pioneer Line); States Marine Corp. and States Marine Corp. of Delaware; Ivaran Lines—Far East Service;* De La Rama Lines;* Daido Kaiun Kaisha.
*Represents a joint service the membership of each of which consists of two or more ship owning corporations (R. 33, Exhibits 22, 60, 70, and 71).

[5] Dollar S. S. Lines, Inc., Ltd., has been succeeded by American President Lines, Ltd. The present member Nippon Yusen Kaisha was in 1934 represented by itself and its Kobe branch.

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and the United States; private steamship lines resumed operations on or about March 2, 1946, carrying cargoes for Supreme Commander for the Allied Powers ("SCAP") under rates set by War Shipping Administration. Licenses were issued by SCAP to private steamship companies commencing on November 1, 1947. Private exporting by Japanese merchants was not resumed until the latter part of 1948 or early 1949. The conference continued to exist, at least nominally, during World War II, with American President Lines, Ltd., Barber-Wilhelmsen Line, and A. P. Moller, Maersk Line, as members. The conference was formally reestablished in Japan on December 13, 1948. Of the 10 lines constituting the conference membership in 1948, 3 were conference members in 1934 when the present agreement was approved, in unamended form, by our predecessor, the Shipping Board.

While Agreement No. 3103, as amended ("the basic agreement"), permits the establishment, regulation, and maintenance of agreed rates, it contains no language specifically authorizing the use of the dual-rate system. From 1928 through 1941, however, the conference employed a dual-rate system for various commodities. The system in 1928 covered only three commodities but was extended in 1934 in Tariff No. 10 to cover all important commodities moving in the trade. In prewar tariffs the differential was set on a dollar rather than percentage basis and varied from commodity to commodity and from tariff to tariff. Expressed in percentages, the prewar differentials between contract and noncontract rates ranged from 12 percent to 66⅔ percent of the contract rates.

Prior to World War II, due at least in part to the existence of the dual-rate system, the conference had no direct liner competition and little tramp competition. Commodities normally moving in this trade are not conducive to tramp movement.

Since the resumption of private steamship operation after World War II, Isbrandtsen has been the sole nonconference line to maintain a berth service in the Japan-Atlantic trade. From 1947 to early 1949, Isbrandtsen operated from Japan to Atlantic coast ports of the United States via the Suez Canal. Since early 1949 Isbrandtsen has operated an approximately fortnightly service from Japan to U. S. Atlantic coast ports via the Panama Canal as part of its eastbound round-the-world service.[6] Although Isbrandtsen chartered three foreign-

[6] Isbrandtsen's vessels in the round-the-world service proceed from U. S. North Atlantic ports to Mediterranean ports and through the Suez Canal to Bombay, Colombo, Singapore, Manila, Hong Kong, Keelung, Kobe, Nagoya, Shimizu, Yokohama, San Francisco, Los Angeles, and return via the Panama Canal to U. S. North Atlantic ports.

flag vessels for single sailings in this trade in 1950 and 1951, it has otherwise exclusively employed its 11 United States-flag vessels in this trade. In other trades, Isbrandtsen employs both United States-flag and foreign-flag vessels. None of Isbrandtsen's vessels are equipped with refrigerated space or special silkrooms, as are many of the conference vessels.

Conference membership is open to any common carrier regularly operating or intending regularly to operate in the trade. Although invited to join, Isbrandtsen has remained outside the conference as a matter of policy.

Most of the conference vessels commence loading inbound cargo for the United States at the Philippines, proceed to Hong Kong, and complete loading in Japan. Most of the conference vessels discharge at Pacific, Gulf, and Atlantic ports of the United States.[7] The amount of cargo moving from Japan to Gulf ports of the United States has been small in comparison with the amount of such cargo moving to ports on the Atlantic coast of the United States. While Isbrandtsen sometimes loads inbound cargo for the United States in India, Ceylon, and Singapore, such carryings are minor. Its principal inbound United States carryings, aside from cargo from Japan in this trade and in the Japan-U. S. Pacific coast trade, have been cargoes lifted in the Philippines. Cargo from Hong Kong and Japan is carried largely on a measurement basis[8] and moves under higher freight rates than the primarily weight and bulk cargo originating in the Philippines. Ideally, on a vessel of 10,000-dwt. capacity, owners prefer to carry about 3,000 tons of weight cargo and to devote the remainder of the vessel's dwt. capacity, exclusive of capacity required for fuel, water, and stores, to the higher paying measurement cargo. In allocating space as between Japanese and Philippine cargo, the higher-rated Japanese cargo is given priority.

The comparative sailings and carryings of Isbrandtsen and the conference lines in the Japan-Atlantic and Gulf trade from 1949 through July 1953 are indicated in the following table:

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[7] Lykes serves U. S. Gulf ports only; from 1949 to the close of hearings in this proceeding, States Marine vessels returned to the United States in ballast. American President Lines operates from Japan to Atlantic coast ports of the United States via the Suez Canal as a part of its westbound round-the-world service.

[8] Japanese measurement cargo stows about 3 measurement tons to 1 deadweight ton.

TABLE I

Calendar year	Number of sailings			Cargo carried (revenue tons)			Average carryings per sailings		Percentage of total liner cargo	
	Isbrandtsen	Conference	Total	Isbrandtsen	Conference	Total	Isbrandtsen	Conference	Isbrandtsen	Conference
1949	6	103	109	18,099	135,635	153,734	3,016	1,317	12	88
1950	21	137	158	120,381	229,829	350,210	5,780	1,678	34	66
1951	21	174	195	93,450	219,343	312,793	4,450	1,261	30	70
1952	24	221	245	98,834	281,308	380,142	4,118	1,273	26	74
1953, 6 months	12	153	165	37,308	189,503	226,811	3,109	1,239	16	84

The comparative sailings and carryings of Isbrandtsen and the conference lines from the Philippines to Atlantic and Gulf ports are indicated in the following table:

TABLE II

Calendar year	Number of sailings			Cargo carried (revenue tons)			Average carryings per sailings		Percentage of total liner cargo	
	Isbrandtsen	Conference	Total	Isbrandtsen	Conference	Total	Isbrandtsen	Conference	Isbrandtsen	Conference
1949	9	79	88	8,977	262,435	271,412	997	3,322	3	97
1950	20	107	127	4,548	491,405	495,953	227	4,593	1	99
1951	16	126	142	11,416	485,271	496,687	714	3,851	2	98
1952	20	193	213	20,148	907,065	927,203	1,007	4,700	2	98
1953	12	127	139	21,564	573,774	595,338	1,797	4,518	4	96

The total carryings in revenue tons of Isbrandtsen from Hong Kong to Atlantic ports in any calendar year from 1949 through the first 6 months of 1953 have been less than 1 percent of the total carryings of conference vessels operating in that trade. The combined total carryings from Hong Kong by the conference and Isbrandtsen, however, are insignificant when compared with carryings from Japan and the Philippines.

The trade from Japan to the Atlantic coast of the United States is presently overtonnaged. Total sailings in the trade rose from 109 in 1949 to more than 300 in 1953 (table 1—projected for 1953). The reentry of Japanese lines in the trade, 4 in 1951 and 4 in 1952, on permission of SCAP, greatly contributed to the excess of tonnage. The effect of this can be seen readily from the fact that those lines in the years 1951, 1952, and the first 6 months of 1953, carried approximately 15 percent, 49 percent, and 66 percent, respectively, of the trade's total liner cargo.

United States-flag lines, including Isbrandtsen, but excluding American President Lines and Lykes, carried 53 percent of the total

liner cargo in the Japan-Atlantic trade in 1950, 46 percent in 1951, 34 percent in 1952, and 21 percent in the first 6 months of 1953.

Partly as a result of the overtonnaging in this trade, the vessels of both Isbrandtsen and the conference have had substantial free and usable space after completion of loading in Japan.

At its meeting of October 29, 1952, the conference discussed "strong rumors and indications that some member lines were not adhering to tariff rates and regulations," and resolved to bring the rumored malpractices to the attention of the Japanese Ministry of Transport. In the subsequent letter written to the Ministry, the conference recited the rumored conditions and indicated that the continuance of such a state of affairs "will probably result in a complete breakdown of the conference structures now in existence." In response to the conference letter, the Ministry of Transportation issued a warning to each of the conference member lines.

All postwar conference tariffs have provided for both contract and noncontract rates, but only the contract rates have been effective. Prior to November 15, 1952, the effective date of the current Tariff No. 30,[9] the differential between contract and noncontract rates was $4 for all commodities. The differential in Tariff No. 30 is 9½ percent of the contract rates, rounded off to the nearest quarter of a dollar. The level of rates in conference postwar tariffs gradually increased between 1947 and November 15, 1952, when a general reduction in rates was effected.

On most commodities, Isbrandtsen's rates, between 1947 and March 12, 1953, were maintained, on the average, at a level approximately 10 percent below the corresponding conference tariff rates, although individual rates on specific commodities in relation to conference rates have varied considerably, percentagewise, from time to time. The general understanding of shippers and carriers in the trade is that Isbrandtsen underquotes conference rates by 10 percent. From time to time, Isbrandtsen's Tokyo agents have issued, without express consent of Isbrandtsen, so-called abbreviated freight tariffs which compare conference and Isbrandtsen rates on major commodities. On most items of these abbreviated tariffs, Isbrandtsen rates are 10 percent lower than conference rates. As a matter of policy, Isbrandtsen quotes rates lower than those of its competitors, but never knowingly quotes a noncompensatory rate.

Conference rates prior to the outbreak of the rate war in March 1953 were stable, i. e., constant for relatively long periods of time, as

[9] Tariff No. 30 presently is in effect on those items which have not been opened by the conference.

were Isbrandtsen's rates for corresponding periods of time. This stability is attributable in large part, however, to the reluctance of the conference to reduce its rates to Isbrandtsen's rate level. Conference increases in rates were followed by Isbrandtsen increases, and when, in November 1952, the conference announced a 10-percent reduction in rates in Tariff No. 30, Isbrandtsen announced that its new rate would be 10 percent less than the conference contract rate.

Conference rates must, under the basic agreement, be filed with the Regulation Office of the Board and are there open to public inspection. Isbrandtsen is not required to file its inbound rates. Both the conference and Isbrandtsen, however, learn of the other's rates in the normal course of operation in the trade.

Most shippers in this trade are primarily interested in low, uniform, and stable freight rates. There is a tendency on the part of Japanese shippers to favor Japanese lines, but the tendency is limited to a large extent by the desire for lower freight rates, as evidenced by the volume of Isbrandtsen's carryings in this trade. Various shippers have considered the general level of conference rates to have been too high prior to March 12, 1953.

Additionally, shippers testified to a lack of success until subsequent to March 1953 in their efforts to convince the conference to reduce the level of rates on various commodities. They have testified, however, to better relations with the conference since the recent formation of shipper and exporter associations, and expressed hope that the conference will give more consideration to shippers' desires in the future.

Changes in uniform conference rates may be made only upon the affirmative vote of two-thirds of the membership entitled to vote.[10] The conference chairman may obtain telephonic votes on rate matters in lieu of a conference meeting, and take rate action on the affirmative vote of two-thirds of the members. Although this procedure gives the conference greater ratemaking flexibility, the conference is still at a competitive disadvantage, as compared with an individual carrier, in making rapid rate changes.

At a special meeting of March 9, 1953, the conference discussed steps which might be taken to meet Isbrandtsen's competition, and resolved to call a special meeting to pass on a proposal to grant a 20-percent discount on all tariff rate items as a method of meeting nonconference competition and minimizing rumored rebating among the member lines. At a special meeting of March 12, 1955, however, the proposal was rejected and, instead, the conference voted to open conference tariff rates on ten of the major commodities moving in the

[10] States Marine Corp. is not entitled to vote.

trade. At various subsequent times the conference has voted to open rates on most of the commodities that move in substantial volume in the trade, with the exception of refrigerated cargo. No advance notice of the initial or subsequent opening of rates was given to interested shippers, and no minimum rates were established on any of the open-rated commodities. The decision to open rates was made "in view of the action taken previously by the Trans-Pacific Freight Conference of Japan." [11] The conference secretary testified that the conference would have lost cargo for points in inland United States to the Trans-Pacific Freight Conference of Japan had this action not been taken. Like the rejected proposal to reduce rates by 20 percent, the opening of rates was directed at nonconference competition and the rumored rebating by member lines. In addition, it was hoped that the rate war would lead to Isbrandtsen's joining the conference or to the institution of the dual-rate system or other system.

After March 12, 1953, the level of rates charged dropped, first, to about 80 percent, and later to about 30 percent to 40 percent of the pre-March 12 level. On a fairly large number of items, some lines have charged rates as low as $6–$6.50 per ton, while handling costs alone in this trade are approximately $8.50 per ton.

Isbrandtsen attempted to keep on a competitive basis in the rate war until mid-May 1953, when minimum rates were set. Prior to that time Isbrandsten's rates equaled the lowest charged in the trade.

The minimum rates, first $15, later $12, to the U. S. Atlantic coast adversely affected Isbrandtsen's competitive position in the trade. Effective July 15, 1953, Isbrandtsen set its rates at 50 percent of the level of conference Tariff No. 30. Since that date, Isbrandtsen has carried little cargo in the trade. On July 17, Isbrandtsen announced its desire to apply reasonable rates which might be set by the conference. Since Isbrandtsen reserved the right to adjust its rates where required, however, the conference considered that the Isbrandtsen announcement contained insufficient assurance of stability of rates on which to base conference action. In any event, an Isbrandtsen witness testified that the company did not intend the announcement to be an offer to the conference and did not contemplate any agreement, oral or written, with other lines.

Many Japanese shippers have requested the conference to close rates and to end the rate war. The resultant instability has affected the smooth flow of commerce between Japan and the United States; has raised a threat that customs duties in the United States might be increased; has affected the value of inventories of Japanese goods in

[11] Conference minutes for March 12, 1953.

the United States; and has caused requests for postponement of shipments by f. o. b.[12] buyers in the United States, since such buyers assume the risk of fluctuating freight rates. Prices for the sale of Japanese goods are often fixed by the importers in the United States as much as 6 months in advance of their arrival.

The conference has shown interest in reinstituting a dual-rate system since early 1949 and had twice, prior to the present filing, voted to institute the system, first, on August 30, 1950, and, secondly, on October 29, 1952. On the former occasion, the institution of a dual-rate system was delayed on advice of counsel. On the latter occasion, necessity for compliance with our General Order 76 caused further delay in effectuating the system. On November 17, 1952, the conference resolved to instruct its counsel to file a statement pursuant to General Order 76, advising of the conference's intention to reinstitute dual rates on the 30th day after such filing, the differential between contract and noncontract rates on commodities covered to be 9½ percent of the contract rates.

Many of the conference lines favored a differential of 12½ percent to 15 percent as reasonable and more satisfactory than 9½ percent, but considered the conference limited, under Japanese law, to 9½ percent. The membership considered 9½ percent to be reasonable as (1) not so great as to destroy shippers' freedom of choice between conference and nonconference vessels; (2) in substantial accord with the amount of commercial discount customary in Japan and thus reasonable to Japanese shippers; (3) equaling the amount of spread in use by other conferences operating to and from Japan; and (4) roughly paralleling the amount by which Isbrandtsen generally undercuts conference rates. In this respect it was considered that shippers could benefit under a dual-rate system by equal distribution of cargoes to conference and nonconference vessels, since the higher conference noncontract rates would be more than offset by the probable 10-percent differential between conference contract rates and Isbrandtsen's rates. No survey was undertaken by the conference, however, to ascertain the number of shippers who could so divide cargoes between Isbrandtsen and the conference, or the volume of cargo which might move under dual-rate contracts. The conference is able, however, roughly to estimate the amount of cargo which member lines would obtain under dual rates, because of its support of various exporter organizations and through its knowledge of the trade.

Shipper witnesses in this proceeding have indicated that a 9½ per-

[12] Although prior to World War II most commodities in this trade moved under c. i. f. terms, most commodities have since been sold on an f. o. b. or f. a. s. basis.

cent differential would be reasonable or within a zone of reasonableness. One shipper, however, indicated that the spread should vary with the relationship between the cost of a commodity and its transportation costs. Where the manufacturer's cost is lower than the freight costs, it was stated, the differential should be low to avoid coercion on the shipper. The shipper indicated, however, that in view of the commodities on which a higher spread reasonably could be applied, and in view of the impracticability of ascertaining the relationship of manufacturer's cost to freight cost for each commodity in each instance, the overall spread of 9½ percent between contract and non-contract rates would be fair, reasonable, profitable, and acceptable to shippers. Another shipper withdrew his opposition contingent upon the premise of better future cooperation by the conference in negotiating freight rates with shippers and in discussing terms and conditions of the dual-rate contracts.

The conference is subject to the regulatory jurisdiction of the Japanese Government as well as to that of the United States Government. While the Fair Trade Commission, the agency responsible for final determinations under the Japanese Marine Transportation Law,[18] does not give prior approval to dual-rate contracts, that agency advised the conference that a 9½-percent differential was the highest that it had yet allowed.

It is reasonable to anticipate a total cargo movement of 500,000 revenue tons per year in this trade in view of the trend towards increased movement since World War II. Of this tonnage, it is anticipated that the conference, under dual rates, would carry about 90 percent or less of the total cargo, and Isbrandtsen 10 percent or more, a substantial reduction from its carriage in 1952 of 26 percent of the cargo in the trade. Assuming that Isbrandtsen would carry, under single closed rates, 20 percent of an annual 500,000 revenue tons, irrespective of whatever rates may eventually be established by the conference if those rates exceed out-of-pocket expenses, the conference lines, in employing the proposed dual-rate system, would have to carry an additional 38,000 revenue tons in order to grant a discount of 9½ percent and still earn the same gross revenues they would have earned carrying 80 percent of the total liner cargo movement without discount. Since, as stated, the conference could be expected to carry 90 percent of the total liner cargo, or about 50,000 additional revenue

[18] Law No. 187, June 1, 1949. Articles 28 and 30 of that law prohibit: (a) deferred rebates, (b) fighting ships, (c) retaliation against a shipper, (d) unjustly discriminatory contracts based on volume of freight, (e) undue or unreasonable preference or prejudice, and (f) combinations that exclude any party from admission.

tons, it is clear that the use of the system would result in a reduction in the average fixed unit costs of conference vessels.

Isbrandtsen's carryings, if a dual-rate system were put into effect in this trade, would be limited by the lack of reefer space and special silkrooms on Isbrandtsen vessels and by the limited frequency and range of service of those vessels. Shippers of dry cargo destined for Gulf ports, shippers of reefer cargo, and shippers requiring more than two sailings per month would, practically, have no choice between the conference and Isbrandtsen's service as presently constituted.

Under the dual-rate system there would be no difference in the cost or value of service rendered to two shippers, one of which is a contract signatory and the other of which is not, although the cargoes of each might be identical and identically destined. The contract shipper, however, by enabling the conference lines to estimate the amount of cargo available for carriage, and accordingly, to plan vessel sailings and space in a more economical fashion, aids those carriers in reducing unit costs of carriage, and thus, to improve their services to shippers.

The proposed form of dual-rate contract would be entered into between individual shippers and the several members of the conference for an indefinite period, subject to cancellation by either party on 3 months' notice. The shipper, under Article 1, would be obliged to forward by conference vessels all shipments made directly or indirectly by him, "whether such shipments are made c. i. f., c. and f., f. o. b., ex-godown or by any other terms." This provision is modified by Article 6, which specifies that if a shipper submits written proof *satisfactory to the* conference secretary that a foreign buyer, on an f. o. b. or f. a. s. shipment, has designated a nonconference vessel for a shipment, then such shipment is exempt from the terms of the agreement. Such foreign buyer would be thereafter denied contract rates until such time as the buyer should execute a dual-rate contract. Until the first shipment via nonconference vessel, however, the foreign buyer on f. o. b. or f. a. s. shipments may receive the benefit of contract rates without signing a contract.

In the event of breach of the agreement by the shipper by shipment via nonconference vessel, the shipper contracts to pay, as liquidated damages, 50 percent of the freight which would have been paid at conference contract rates had the shipment moved via a conference line. In turn, the conference members agree to maintain a shipping service adequate to meet the reasonable requirements of the trade. Each carrier, under Article 11, is responsible for its own part of the agreement only. Although the carriers do not agree to respond in damages in the event of any inadequacy of service, they do agree, in Article 4,

that a shipper may secure space elsewhere if, after application to the conference secretary, he is not notified within 3 days, Sundays and holidays excepted, of the availability of space on conference vessels within the ensuing 15-day period.

Article 11 provides that new lines admitted to conference membership shall automatically become entitled to participation in the contract. Under Article 12, shippers are required to submit an approximation of the annual tonnage which would move under the contract. Rate increases would not be effective until the expiration of the calendar month in which notice of increase is given and of the two following calendar months. The entire agreement is subject to all rules, regulations, terms, and conditions of the conference tariff current at the time of shipment.

Most shippers appearing in this proceeding were not familiar with the terms of the proposed contract. One shipper was under the impression that the terms had not yet been definitely arrived at and, like the rates, were to be the subject of discussions between the shippers and the conference. Subsequently, a large shipper organization submitted proposed contract amendments to the conference, including recommendations that (1) the volume of obligated cargo should be not less than 85 percent of the shipper's total cargo moving in the trade; (2) an f. o. b. or f. a. s. shipment cannot move under contract rates unless the Japanese shipper is authorized to route the shipment or unless the f. o. b., f. a. s. buyer is signatory to a dual-rate contract; (3) rate increases should not be effected until the termination of the calendar month in which notice of increase is given and of the three succeeding calendar months; (4) if the carriers do not furnish service on request, the shipper may (a) ship via nonconference line if not notified by the secretary of space aboard a conference vessel within the period of time *designated by the shipper*, and (b) recover from the conference, as liquidated damages, the excess of freight, above conference rates, actually paid for shipment; (5) liquidated damages for breach of agreement by the shipper should be 20 percent of the freight which the shipper would have paid had the shipment moved via conference vessel; and (6) the carriers and the shippers should appoint a special committee, composed of representatives of each, for the purpose of discussing amendments to the agreement and reasonable levels of freight rates.

DISCUSSION AND ULTIMATE FINDINGS

Parties to this proceeding have questioned our authority under section 15 of the Act to approve any dual-rate system, and urge that such

systems are in themselves unlawful, without regard to specific facts which may be adduced.

The protests and comments directed by petitioners to the conference's statement filed pursuant to General Order 76 put in issue the lawfulness of the dual-rate system itself in addition to raising issues of fact.

It is urged by petitioners that the system is necessarily unlawful under section 14 of the Act, and that we are without statutory authority to approve the dual-rate system under section 15. More particularly stated, petitioners' arguments are as follows:

(1) Paragraph 3 of section 14 makes unlawful any retaliation against shippers by resort to discriminating or unfair methods because such shipper has patronized any other carrier. Since any discrimination is prohibited by the section and not only those discriminations which are unjust, unreasonable, or unfair, since the charging of different rates for the same service is prima facie discriminatory, and since the system is a device for compelling exclusive patronage, the dual-rate system is necessarily violative of section 14.

(2) Section 15 forbids approval of agreements which are in violation of the Act. Since, it is argued, dual-rate systems are violative of section 14, approval may not be given under section 15 to an agreement to institute a dual-rate system. Further, it is said, dual-rate systems are necessarily unjustly discriminatory within the meaning of section 15 in that prohibitions against "unjust discrimination," or similar words, historically forbid any difference in transportation costs not based on transportation conditions such as cost or value of services. For this reason, it is said that the phrase "unjust discrimination" forbids differences in rates based on competitive considerations alone.

Previous judicial and administrative decisions

These contentions, frequently addressed to us and to our predecessors, as well as to the courts, have never been adopted by judicial or administrative bodies, as revealed by the reexamination of the decisions of those bodies, which follows.

Dual rates were first considered by our predecessor, the Shipping Board, in *Eden Mining Co.* v. *Bluefields Fruit & S. S. Co.*, 1 U. S. S. B. 41 (1922). In that proceeding, commenced on complaint of a non-contract shipper, the Shipping Board found the dual-rate practices of a single carrier to be in violation of sections 16 and 17 of the Act. The system there considered was analogized with the facts in *Menacho* v. *Ward*, 27 Fed. 529 (S. D. N. Y. 1886), where a carrier was restrained from charging higher rates to shippers who had patronized another carrier. The *Menacho* case did not involve a contract system,

and it was the retaliation inherent in charging higher rates rather than the difference in rates to shippers which was condemned. In the *Eden* case, no retaliation was found, but on the facts the Shipping Board found violations of sections 16 and 17 because of the difference in rates charged for identical service. Since the Board refused to find violations of paragraphs 3 and 4 of section 14, it is apparent that it did not consider the dual-rate system unlawful per se under section 14. Indeed, the Board specifically stated, at page 45:

> It should be here remarked, however, that we do not decide whether under that act (Shipping Act. 1916) the according of lower rates to those shippers who contract to confine their shipments to a certain carrier or carriers are lawful when based upon regularity of consignments, number of shipments, or quantity of merchanidse furnished for transportation, as in the instant case no such question is presented for determination.

Thereafter, the Shipping Board commenced an investigation of the dual-rate exclusive-patronage contract system, as practiced in shipping conferences operating on trade routes having termini in the United States. That investigation, *Ex Parte 5 Contract Rate Investigation*, was discontinued as a formal proceeding upon objection of respondent carriers.[14] The proceeding was thereafter dismissed by resolution of the Shipping Board,[15] without approving or disapproving of the practice as a whole or of specific applications thereof. No report in this matter was ever adopted or issued by the Shipping Board.[16]

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[14] Statement made by Bureau of Regulation at opening of hearing 2:30 p. m., November 10, 1926:

"Out of consideration of the point of view expressed by the attorneys of the respondents this morning it is ruled that no orders will be entered in or as a result of this hearing having in view declaring any contracts the respondents or any of them may have made with shippers as illegal.

"This statement is not to be understood as conceding in any degree that the procedure we have here followed was not within the powers of the Board. Statements now made need not be under oath but the hearing will be continued for the purpose of receiving information from the respondents relative to the subject of the resolutions on which this hearing is based."

[15] The Shipping Board at a meeting on February 23, 1927, adopted the following resolution:

"Whereas by resolutions of June 16, 1926, and July 13, 1926, the Board, under authority of Section 22 of the Shipping Act, 1916, entered upon a proceeding of investigation and inquiry in connection with the practice of carriers of charging 'contract' and 'non-contract' rates; and

"Whereas at the outset of the hearing the Board on its own motion discontinued it as a formal hearing in the case, thenceforth proceeding informally, but without prejudice;

"Resolved that the proceeding be, and the same is hereby dismissed."

[16] In combined Docket Nos. 725 and 751, counsel for Isbrandtsen attacked the Shipping Board's resolution of February 23, 1927 (footnote 15, *supra*), as "suppressed Docket," considers Public Counsel's discussion of the case as misleading, and apparently considers a draft report in the matter which was neither agreed on nor adopted by the Shipping Board as an official report, as indicated by his statement which follows:

"Why did someone not dare to publish this extraordinary Report *in Exparte 5*? What follows demonstrates.

The system was first brought to the attention of the courts in *United States Nav. Co.* v. *Cunard S. S. Co.*, 39 F. 2d 204 (S. D. N. Y. 1929), aff'd, 50 F. 2d 83 (2d Cir. 1931), aff'd 284 U. S. 474 (1932). There a complaint alleged that the dual-rate practices of defendant steamship lines were in violation of the Sherman Anti-Trust Act (15 U. S. C. A. 1–7, 15) and the Clayton Act (38 Stat. 730), and sought an injunction against such practices. It is significant that although differentials of 100 percent between contract and noncontract rates were alleged and the precedent of the *Eden* case, *supra*, was cited in support of arguments that agreements to charge dual rates could not legally be approved by the Shipping Board, the District Court, nevertheless, granted a motion to dismiss on the ground that the matter involved questions within the exclusive primary jurisdiction of the Shipping Board. Complainants did not thereafter file a complaint with the Shipping Board.

The dual-rate system was next considered by the Shipping Board in *Rawleigh* v. *Stoomvaart et al.*, 1 U. S. S. B. 285 (1933). There, where the issues were confined to the lawfulness of the contract-rate practice *per se*, the Shipping Board held that dual-rate practices *qua* practices do not contravene any of the regulatory provisions of the Act. The *Eden* case was distinguished on the grounds that (1) the

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"This suppressed Docket, was unearthed for us, from the Archives. It reads like a melodrama."

After recital of the commencement of the investigation and its dismissal as a formal proceeding, counsel commented in the following manner on the unadopted draft report and the Shipping Board's dismissal of the matter without prejudice.

"Thus, the Board let go of the bear it had by the tail. It was, in fact, dragged away by the brute force of overwhelming, baseless arguments, advanced by Conference spokesmen.

"The same sort of 'brush-off' has continued right down to date * * *."

"This atmosphere of obstruction surrounding the attempt of the Maritime Authorities to do their sworn duty, and enforce the law, has pervaded their offices ever since. No Board Members have yet summoned up enough courage, on their very own, to repulse this pressure and dissipate the deliberately beclouded atmosphere."

In the interest of accuracy, we report the facts. As stated, the only "Report in this matter was a Shipping Board resolution, set out in footnote 15, *supra*. The draft report referred to by counsel for Isbrandtsen as a report of the Board was, as stated, unapproved and unadopted. Councel refers to both the resolution of February 23, 1927, and the draft report as official reports of the Shipping Board without explanation of their great differences and without discussion of the fact that the draft report had no status as a report of Board action.

Counsel implied that the file in *Ex Parte 5* was unearthed through his diligence, despite efforts to suppress the file. Actually, Public Counsel learned of the report and at once made the results of his research available, in brief in Docket No. 730, to other interested parties. Further and persistent efforts by Public Counsel and other Board employees resulted in the location of the file in *Ex parte 5*, which had been misfiled by this agency prior to shipment to the National Archives. The entire file, including opinions of the agency general counsel, interoffice correspondence, and draft reports not approved by the Shipping Board members, was made available to counsel for Isbrandtsen. While some such material is not a matter of public record, the entire file was placed at the disposal of counsel for Isbrandtsen in order to offset any disadvantage to which he may have been put by virtue of the misfiling of *Ex Parte 5* by this agency.

system considered in that case was practiced by a single carrier and denied the shipper a choice of carriers; (2) the contracts bound shippers to the carrier on both northbound and southbound shipments, although lower rates were afforded on southbound shipments only; and (3) the carrier gave no assurance against increase of rates without notice.

In the *Rawleigh* decision the Shipping Board enunciated several basic considerations which are critical to any discussion of the lawfulness of the dual-rate system. It was stated, first, that although that system in itself is lawful, the spread between contract and non-contract rates can be such in amount as to constitute unlawfulness. Second, the Shipping Board stated that the system must be considered to have been approved in principle by the House of Representatives Committee on Merchant Marine and Fisheries of the 62d and 63d Congresses ("Alexander Committee"),[17] in its report ("Alexander Report") and recommendations [18] which formed the foundation for ultimate passage of the Act. Third, the Shipping Board considered that "the absence of materially different service before and since the inauguration of the practice" did not render the system unlawful, and *that the necessity for protecting established services* justified, in that case, the adoption of the dual-rate system.

The Secretary of Commerce in *Intercoastal Investigation, 1935*, 1 U. S. S. B. B. 400 (1935), in finding several dual-rate systems to be unlawful under sections 16 and 18 of the Act, stated, at page 452, that dual-rate contracts "do not constitute a transportation condition as to warrant a difference in transportation rates." That language, clearly indicating illegality of the system *per se*, is considerably weakened, however, by the following discussion at page 454 of the report:

> It is clear that when intercoastal carriers were not required to file the rates charged shippers, but only their maximum rates, and carriers freely engaged in rate wars, the contract rate system served a useful purpose, but conditions have been changed by the Intercoastal Shipping Act, 1933, which requires that unless specifically authorized by the department, rates may not be changed on less than 30 days' notice to the public, and also authorizes the department either upon complaint or upon its own initiative to suspend proposed changes in the rates and enter upon hearings concerning the lawfulness thereof.

An order issued in *Intercoastal Investigation, 1935, supra*, condemning the contract-rate system employed by the Gulf Intercoastal Conference, was vacated and a new proceeding was commenced to determine the validity of a contract system in use in the Gulf-Pacific coast trade. In his report in that proceeding, *Gulf Intercoastal Con-*

[17] Hon. Joshua W. Alexander, of Missouri, chairman.
[18] H. Doc. 805, 63d Cong., 2d sess., 1914.

tract Rates, 1 U. S. S. B. B. 524 (1936), the Secretary of Commerce found the contract system in question not justified by transportation conditions in the trade, and unduly and unreasonably preferential and prejudicial in violation of section 16 of the Act. The Secretary's finding of unlawfulness, *under the facts before him*, turned on his conclusion that there was no need for the use of the system in domestic commerce where rates are subject to Government control and, hence, no justification for the discrimination inherent in the system.[19] Significantly, the report stated, at page 529:

> In the *Rawleigh* case the evidence showed that the purpose and ultimate effect of the contract rate system as employed in that trade was to enable the carriers to approximate the volume of cargo that would move over their lines and to insure stability of rates and regularity of service. Operators of vessels in our foreign commerce may at any time and without warning be subjected to severe competition by tramp vessels of any nation. Unlike the intercoastal trade, there exists no statutory requirement that changes in rates be published thirty days in advance, nor is the department given any power to suspend such changes.

The report thereafter resolved the apparent conflict within *Intercoastal Investigation, 1935*, *supra*, and rejected the concept of *per se* illegality of the dual-rate system, in stating, at page 530:

> Whether any such [dual rate] system (in foreign commerce) is lawful is a question which must be determined *by the facts in each case.* [Emphasis supplied.]

Respondents thereafter commenced an action in the United States District Court for the the District of Columbia to set aside the order of the Secretary of Commerce requiring cancellation of the dual-rate schedules considered in *Gulf Intercoastal Contract Rates*, *supra*. The bill was dismissed and the Secretary's action upheld by that court in a decision reported as *Swayne & Hoyt* v. *United States*, 18 F. Supp. 25 (D. D. C. 1936), aff'd 300 U. S. 297 (1937). The Supreme Court not only held that the Secretary's order was based on substantial evidence, but also agreed with the Secretary's construction of the Act, stating, at page 304:

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[19] Counsel for Isbrandtsen argues that language in our report on motion in Docket No. 759, *Anglo Canadian Ship. Co., Ltd.* v. *Mitsui S. S. Co., Ltd.*, 4 F. M. B. 535 (1954), discredits the decision in *Gulf Intercoastal Rates, supra.* In the *Mitsui* case, prior to reversing an early decision in *Intercoastal Investigation, 1935, supra,* insofar as that decision found the practice of underquoting rates of competitors by fixed and lower differential to be in violation of the Act, we stated:

"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."

In that case, we were required to consider the *per se* legality of a rate practice. The differing facts surrounding intercoastal and offshore shipping were immaterial to the legal construction of a statutory provision regulating both types of transportation. In *Gulf Intercoastal Rates, supra,* however, the Secretary of Commerce, determined *as a fact* that regulation of the intercoastal trade under the Intercoastal Shipping Act, 1933, dispelled the need for a dual-rate system in that trade.

In determining whether the present discrimination was undue or unreasonable the Secretary was called upon to ascertain whether its effect was to exclude other carriers from the traffic, and if so, whether, as appellants urge, it operated to secure stability of rates with consequent stability of service, and, so far as either effect was found to ensue, to weigh the disadvantages of the former against the advantages of the latter. This was clearly recognized in the report upon which the present order is based. It states that the danger of cutthroat competition was lessened by § 3 of the Intercoastal Shipping Act of 1933, and that the contract system tends to create a monopoly. In view of the assurance of reasonable rate stability afforded by the Act of 1933, the Secretary concluded that this was the real purpose of the contract rate.

In the same vein the Court stated, at page 305:

We think there was evidence from which the Secretary could reasonably conclude that there was little *need* for a contract rate system to assure stability of service. [Emphasis added.]

In *Phelps Bros. & Co., Inc.* v. *Cosulich—Societa, etc.*, 1 U. S. M. C. 634 (1937), the Maritime Commission found that the dual-rate system of a conference was not unjustly discriminatory or unfair as between carriers if membership in the conference was open to independent carriers. The Commission further found that the system did not result in undue prejudice to shippers since neither injury to shippers nor unreasonableness of the noncontract rates had been shown.

In 1939 the Maritime Commission considered the validity of the system in *Contract Routing Restrictions*, 2 U. S. M. C. 220 (1939). There, in an investigation commenced by the Maritime Commission, the system as employed by four outbound North Atlantic conferences was disapproved under section 15 of the Act as unjustly discriminatory and unfair between ports and between shippers, and as detrimental to the commerce of the United States. The Commission followed the standards enunciated by the Supreme Court in *Swayne & Hoyt* v. *United States*, *supra*. That the Commission considered *need* for the system to be a critical factor to such determination is evident from the following language at page 226:

There is nothing of record which would lead us to believe that the routing restriction in the contracts is vital to the maintenance of stability of service and rates.

Postwar administrative reports on dual-rate practices continued to hold that system not unlawful *per se*. Such a determination was first made in this period in *Pacific Coast European Conference*, 3 U. S. M. C. 11 (1948). There the Commission measured the advantages and disadvantages of the dual-rate system in the trade under consideration in the light of need for the system, stating in conclusion, at page 17:

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The contract rate system is a *necessary practice* in this trade to secure the continuance of the conference; the frequency, dependability and stability of service; and the uniformity and stability of freight rates. [Emphasis supplied.]

In 1948, in the United States District Court for the Southern Distract of New York, Isbrandtsen sought to restrain the eastbound and westbound North Atlantic conferences from instituting a dual-rate system, and to set aside orders of the Maritime Commission which approved the basic agreements of those conferences, insofar as approval of the agreements authorized institution of dual-rate systems. The injunction was granted, conditioned on Isbrandtsen's diligent presentation before the Commission of a complaint challenging the validity of the agreements. *Isbrandtsen Co.* v. *United States*, 81 F. Supp. 544 (S. D. N. Y. 1948), appeal dismissed sub nom. *A/S J. Ludwig Mowinckels Rederi et al.* v. *Isbrandtsen Co., Inc., et al.*, 336 U. S. 941 (1949). In spite of the granting of the injunction, however, the Court's language, at page 546, is significant in view of arguments directed to the Court by Isbrandtsen, urging that the system is illegal *per se*:

It may be that the "exclusive patronage" provisions are prohibited by 46 U. S. C. A. § 812* and that the Commission is powerless to approve such provisions under 46 U. S. C. A. § 814. Very considerable doubt upon such a holding is thrown by Swayne & Hoyt, Ltd. v. U. S., 1937, 300 U. S. 297, 306, 307 and note 3, 57 S. Ct. 478, 81 L. Ed. 659, and by the legislative history of the statute, H. R. Doc. No. 805, 63d Cong., 2d sess., 1914, 287–292.

*Section 14 of the Shipping Act, 46 U. S. C. A. § 812, prohibits deferred rebates and retaliation by discriminating or unfair methods against a shipper because such shipper has patronized any other carrier.

Isbrandtsen thereafter filed a complaint with the Maritime Commission, seeking a declaration of unlawfulness under sections 14 and 15 of the Act of so much of the respondent's basic agreements as purported to authorize institution of dual-rate systems. The complaint was heard by this Board, as successor to the Maritime Commission, and the decision thereon reported in *Isbrandtsen Co.* v. *N. Atlantic Continental Frt. Conf. et al.*, 3 F. M. B. 235 (1950). The Board dismissed the complaint, finding (1) that the dual-rate system is not illegal *per se* under section 14 (3) or other sections of the Act, and (2) that the particular dual-rate systems sought to be employed were not unfair or unjustly discriminatory, in violation of the Act, or detrimental to the commerce of the United States.

Isbrandtsen's appeal from the Board's order was sustained in *Isbrandtsen Co.* v. *United States*, 96 F. Supp. 883 (S. D. N. Y. 1951), affirmed by an equally divided court sub nom. *A/S J. Ludwig Mowinckels Rederi et al.* v. *Isbrandtsen Co., Inc., et al.*, 342 U. S. 950 (1952). It should be noted, however, that Isbrandtsen, as well as

intervener U. S. Department of Agriculture, urged that the dual-rate system is inherently discriminatory and retaliatory in violation of section 14 (3) of the Act, and for that reason, among others, could not be approved by the Maritime Commission (Board) under section 15. The District Court refused to find the system unlawful *per se* in spite of the specific request. The Court issued a permanent injunction, however, on the ground that the Board had erred in approving a system of dual rates as not unjustly discriminatory and unfair in the face of an implicit finding that the differential or spread between contract and noncontract rates had been arbitrarily arrived at.

On July 31, 1952, the Board served notice of its intention of adopting a procedural rule governing the initiation or modification of dual-rate systems by conferences.[20] On September 4, 1952, the North Atlantic Continental Freight Conference advised the Board of its intention of instituting a dual-rate system, effective October 1, 1952.[21]

The Board thereafter commenced an investigation to determine whether the differential between contract and noncontract rates was unjustly discriminatory and in violation of the Act. That investigation was discontinued by order of the Board following its report in *Contract Rates—North Atlantic Con'l Frt. Conf.*, 4 F. M. B. 355 (1954), in which the differential between contract and noncontract rates was found on the facts to be not arbitrary or unreasonable, nor unjustly discriminatory, nor in violation of the Act. The decision did not constitute approval of the dual-rate system in the trade in question, since other questions were reserved for later determination. Subsequent to commencement of the investigation of the North Atlantic Continental Freight Conference's proposed dual rates, the Board promulgated General Order 76. The order required submission of a statement, in applications for institution of dual-rate systems, informing the Board of the amount of the spread, the effective date, and reasons for the use of the system in the particular trade involved, as well as transmitting copies of the contract. Accordingly, in the *North Atlantic* case the Board specifically required compliance with General Order 76, notwithstanding the decision, and reserved questions of *per se* unlawfulness of the system for determination in Docket No. 725, *Secretary of Agriculture* v. *North Atlantic Continental Freight Conference et al.*

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[20] The rule-making proceeding resulted in promulgation of General Order 76.

[21] Although the North Atlantic Continental Freight Conference initially refused to hold the institution of the system in abeyance pending determination of the reasonableness of the differential or spread between contract and noncontract rates, it later withheld the operation of the system at the request of the Board. See *Contract Rates—North Atlantic Con'l Frt. Conf.*, 4 F. M. B. 98 (1952).

In *United States* v. *Far East Conf.*, 94 F. Supp. 900 (D. N. J. 1951), the Attorney General brought an action to enjoin defendants from using a dual-rate system. A motion to dismiss on the ground that the Federal Maritime Board had exclusive primary jurisdiction was denied by the District Court. The Supreme Court reversed the District Court (342 U. S. 570 (1952)) although it had been argued by the Attorney General that the Board is without power to approve the dual-rate system.

On December 24, 1952, the present conference filed a statement under General Order 76 proposing to institute a dual-rate system. In protests against the proposed system, Isbrandtsen and Justice requested a hearing as well as suspension of the system pending completion of these hearings. The Board, by order dated January 21, 1953, granted hearing on the protests but refused to suspend the institution of the system, stating that it did not appear that the differential between contract and noncontract rates was arbitrary, unreasonable, or unjustly discriminatory, or that the initiation of the system would be unjustly discriminatory or unfair or detrimental to the commerce of the United States or would cause irreparable harm to Isbrandtsen.

On petition of Isbrandtsen, the United States Court of Appeals for the District of Columbia granted a temporary stay of the Board's order of January 21, 1953, and later issued a temporary injunction against so much of the order as purported to approve institution of the dual-rate system. The Court thereafter set aside that much of the Board's order and enjoined the conference from effectuating the system prior to specific Board approval, holding that an agreement to institute a dual-rate system is beyond the scope of authority of a provision in a basic conference agreement authorizing fixing of rates, and may not be effectuated prior to specific Board approval under section 15 of the Act. *Isbrandtsen Co.* v. *United States*, 211 F. 2d 51 (D. C. Cir. 1954), cert. denied 347 U. S. 990 (1954). This proceeding was then instituted for the purpose of considering the merits of the conference's application.

It has been the view of our predecessors that, while the charging of different rates for similar cargoes identically destined is *prima facie* discriminatory, a difference in rates may be justified where made necessary by competitive conditions existing in the trade in which the carriers are engaged. It is significant that neither the courts nor our predecessors have ever honored contentions that the system is illegal *per se*. They have uniformly refused to find that (a) the system is necessarily retaliatory within the meaning of section 14 (3) of the

Act; (b) assuming retaliation, *any* discrimination is forbidden by section 14 (3); (c) the words "unjustly discriminatory" as employed in section 15 are words of art forbidding any discrimination and therefore prohibit Board approval of dual-rate systems under section 15; or (d) the words "unjustly discriminatory" in section 17 and/or "undue or unreasonable preference or advantage" in section 16 prohibit any difference in ocean transportation charges not based on cost or value of service and therefore preclude Board approval of dual-rate systems under section 15.

Alexander Report

Of particular persuasion to the conclusion that the dual-rate system is *not* illegal *per se* is a remark of the Supreme Court in *Swayne & Hoyt* v. *United States*, *supra*, stating that the Alexander Committee did not condemn the dual-rate system.[22] That committee recognized, from the extensive investigation undertaken, the underlying instability of unregulated foreign commerce and the natural gravitation toward complete monopoly through elimination of weaker lines in recurring rate wars, agreements between carriers, or consolidation of service under common ownership.[23]

Recognizing that monopoly was unavoidable in any event, the committee rejected the possibility of permitting unrestricted competition and chose the conference system as the least objectionable type of shipping monopoly, where subject to effective Government supervision and if purged of its most objectionable features. Those objectionable features prior to 1916 were, first, the secrecy surrounding agreements between carriers and, second, certain unfair competitive methods then employed by the unregulated conferences. The committee recommended that the first objection be met by requiring all conference agreements, understandings, or arrangements to be filed with and approved by a Government regulatory body.[24] The second objection was met by a recommendation for legislation prohibiting *specified* unfair practices, including fighting ships, deferred rebates, and retaliation against shippers.[25] The recommended prohibitions were adopted by Congress in section 14 of the Act.

Although the committee recognized the dual-rate system as an existing means of meeting nonconference competition,[26] the use of that system was not included among the unfair competitive methods itemized at page 417 of the report and condemned in the committee's

[22] Footnote 3.
[23] 4 Alexander Report 416.
[24] 4 Alexander Report 419, 420.
[25] 4 Alexander Report 421.
[26] 4 Alexander Report 290.

legislative recommendation. On the contrary, in its summary of disadvantages of shipping conferences and agreements as reported by witnesses before the committee, the Alexander report distinguished the contract system from the deferred rebate system in the following manner: [27]

VIII. *That deferred rebate systems are objectionable and should be prohibited for the following reasons:*

(1) By deferring the payment of the rebate until 3 or 6 months following the period to which the rebate applies ship owners effectively tie the merchants to a group of lines for successive periods. *In this connection it is argued that the ordinary contract system does not place the shipper in the position of continual dependence that results from the deferred rebate system.* [Emphasis supplied.]

While the foregoing distinction represents the testimony of witnesses before the committee, the committee's later specific prohibition against deferred rebates and the absence of a specific prohibition against the use of "ordinary contract system" in the committee's recommendations, indicate an adoption by the committee of the witnesses' testimony in these respects.

In support of the view that Congress intended, in the Act, to prohibit only those practices specifically condemned, we offer the following testimony of Dr. Emory Johnson [28] in hearings on H. R. 14337:

The theory in accordance with which the bill has been framed is that the law for the regulation of carriers by water shall state with precision what is required of carriers as regards their agreements, rates, and practices * * *.

The experience which the Interstate Commerce Commission has had in the regulation of carriers by rail shows the importance of including in an act, such as the one under consideration, a specific and detailed enumeration of the prohibitions and requirements imposed upon the carriers, and of the powers that may be exercised by the board intrusted with the administration of the act. A law less definite than the one proposed would almost certainly lead to controversy and litigation * * *.

It is no answer to state that the dual-rate system was not in existence at the time of issuance of the Alexander Report. The references in the Report to the contract system fully meet this argument.

We see little merit in petitioners' arguments that the judicial history of "unjust discrimination," as revealed by decisions under section 2 of the Interstate Commerce Act ("ICA") [29] and under section 90 of

[27] 4 Alexander Report 307.

[28] Dr. Emory R. Johnson, professor of transportation and commerce, University of Pennsylvania, participated in drafting H. R. 14337.

[29] Section 2 provides:

"If any common carrier subject to the provisions of this part shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this part, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service

the English Railway Clauses Consolidation Act of 1845, from which section 2 of the ICA was derived, makes unlawful any difference in rates charged to shippers for identical cargoes shipped over the same line for the same distance and under the same circumstances of carriage. If, as argued by petitioners, sections 14, 15, and 17 of the Act were indeed derived from comparable sections of the ICA in the same manner as section 16 was patterned after section 3 (1) of the ICA and section 2 of the English Railway and Canal Traffic Act of 1854, we would be influenced by that argument. The Supreme Court in *U. S. Nav. Co.* v. *Cunard*, *supra*, indicated, at page 481, that—

* * * the settled construction of the * * * (ICA) must be applied to the * * * (Shipping Act. 1916) unless, in particular instances, there be *something peculiar in the question under consideration, or dissimilarity in the terms of the act relating thereto, requiring a different conclusion.* [Emphasis supplied.]

Section 2 of the ICA, however, has no counterpart in the Act. Section 4 of H. R. 14337 contained language [30] strikingly similar to section 2 of the ICA, but that language was deleted from the later and ultimately enacted bill, H. R. 15455. In the hearing on H. R. 14337, in which this deletion was considered, a witness recommended: [31]

We feel *the first part of section 4* would be very difficult to act under and to advise upon, and that section 5 embodies some matters that it is unnecessary, and therefore undesirable, at this stage of the development of the American merchant marine, to incorporate in the act. Instead of those sections we propose to redraft section 5 so as to include in it the substance of the matter of sections 4 and 5 *to the extent necessary to prevent injustice*, if you conclude that you must have regulation. As the revised paragraph is short, perhaps I had better read it:

"SEC. 5. That whenever, after full hearing upon a sworn complaint, the board shall be of opinion that any rates or charges demanded, charged, or collected

in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful."

[30] Section 4, First, of H. R. 14337:

"SEC. 4. That it shall be unlawful for any common carrier by water, or other person subject to this act, either directly or indirectly—

"First. To charge, demand, collect, or receive from any person or persons by any special rate, rebate, drawback, or other device a greater or less compensation for any service rendered or to be rendered in the transportation of passengers or property subject to the provisions of this act than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like service in the transportation of a like kind of traffic under substantially similar circumstances and conditions: *Provided,* That nothing in this act shall prevent the carriage, storage, or handling of property free or at reduced rates for the United States, State, or municipal governments, or for charitable purposes, or to or from fairs and expositions for exhibition thereat, or the giving of reduced rates to ministers of religion, or to municipal governments for the transportation of indigent persons, or to inmates of the National homes or State homes for disabled volunteer soldiers, and of soldiers' and sailors' homes, including those about to enter and those returning home after discharge, under arrangements with the board of managers of said homes."

[31] Hearings on H. R. 14337, 64th Cong., 1st sess., at page 136.

by any common carrier by water in foreign commerce are unjustly discriminatory between shippers or ports, or unjustly prejudicial to exporters of the United States as compared with their foreign competitors, the board is hereby empowered to alter the rates or charges demanded to the extent necessary to correct such unjust discrimination or prejudice, and to make an order that such carrier shall cease and desist from such unjust discrimination or prejudice." [Emphasis supplied.]

The words "to the extent necessary to eliminate injustice" clearly reveal the intent of the redrafters of section 5 to eliminate an absolute prohibition against discriminations in favor of a prohibition against only those discriminations which are unjust.

The witness' recommendations were, in part, adopted in H. R. 15455. While a revised section 5 was in substance followed in the first paragraph of section 18 of the bill (section 17 of the Act), section 4 of H. R. 14337 was not eliminated. That section was substantially adopted, with the notable exception of the first paragraph, objected to by the witness, in section 17 of H. R. 15455 (section 16 of the Act.[32]

Section 18 of H. R. 15455, based on the revised section 5 hereinabove set out, was conspicuously silent on the subject of special rates, into which category dual rates necessarily fall, and bore little resemblance to section 2 of the ICA. We therefore consider decisions under section 2 of the ICA to be of no persuasion here.

As stated herein and in our Report on Motion in *Anglo Canadian*, *supra*, section 16 of the Act was patterned after section 3 (1) [33] of the ICA and section 2 of the [English] Railway and Canal Traffic Act of 1854, both of which earlier provisions forbade granting to shippers any undue or unreasonable preference or advantage.

In decisions under section 3 (1) and 4 of the ICA, carrier competition has been considered a factor to be weighed in justification of a *prima facie* discrimination or preference. *Eastern-Central Motor Assn.* v. *U. S.*, 321 U. S. 194 (1944); *Texas & Pacific Ry. Co.* v. *U. S.*, 289 U. S. 627 (1933); *Int. Com. Com.* v. *Alabama Midland R'y.*, 168 U. S. 144 (1897).

In the *Eastern-Central* case the Supreme Court reviewed a determination by the Interstate Commerce Commission ("ICC"), upheld by a

[32] Dr. Emory R. Johnson, who had assisted in drafting the bill, described section 4, First, of H. R. 14337, at p. 27 of the House of Representatives hearings on that bill, as containing an "absolute prohibition" against "a rebate or a drawback on a rate."

[33] Section 3 (1) provides:

"It shall be unlawful for any common carrier subject to the provisions of this part to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever * * *."

District Court, that a minimum weight requirement for volume discount, not based on truckload capacity, was both unreasonable and unjustly discriminatory although the requirement was adopted by a motor carrier in order to make its rates competitive with railroad rates. In reversing the lower court's decision, the Supreme Court took the view that both competition and cost of operation are factors which must be taken into consideration in determining whether a discrimination or preference is unlawful. The case is particularly significant because of its recognition of two considerations. First, it recognized that principles evolved in the regulation of railroads in competition only with other railroads have a limited applicability to circumstances where different modes of transportation are in competition with each other. Second, it recognized the inseparability of the ICC's dual function of regulator and coordinator.

The problems presented to the Supreme Court in the *Eastern-Central* case are highly analogous to the instant problem. While rate making has been closely tied to cost factors generally, those cost factors are substantially alike to all domestic carriers within an industry. Where cost factors differed between rail carriers and motor carriers, and a motor carrier based its rates on competitive considerations, the Supreme Court refused to base its decision as to the reasonableness of those rates on cost factors alone. In water transportation in foreign commerce, cost factors likewise vary between carriers of different national registry. Obviously the differences in costs of operation require carriers to take competition, as well as costs of operation, into consideration in fixing rates.

We consider dual-rate contracts to be, in nature, highly analogous to volume discounts; although a shipper does not promise to ship a specific amount of cargo, the expression of his obligation in terms of percentages gives the conference lines as great an assurance of a basic core of cargo on which to rely in planning future vessel requirements as that which would result from a promise to ship a specific amount of cargo within a given period. The parties contract with awareness of the past and probable future needs of the shippers, and those needs are identical, whether or not specified. Further, the volume-discount nature of the dual-rate contract is free from the discrimination in volume contracts contemplated in section 14, Fourth, of the Act since the identical discount is available to all shippers, large or small. It was this type of contract which our predecessor, in *Eden Mining*, *supra*, took pains to distinguish in condemning a particular dual-rate system.

But even if we should assume that dual-rate contracts are not as-

sured-volume discounts, and if we should assume that such contracts would be violative of the principles of the ICA, we nevertheless must consider decisions under section 2 of the ICA inapplicable here. Problems relating to foreign commerce, as hereinbefore discussed in connection with *Gulf Intercoastal Rates* and *Swayne & Hoyt*, create a peculiar difference in the questions to be considered, within the meaning of *U. S. Nav. Co.* v. *Cunard*, *supra*, for regulation of rates in domestic commerce, or the ability to regulate such rates, dispels the need for offsetting competitive rate-making measures.

By the Transportation Act of 1920, the ICC was granted the power "so to fix minimum rates as to keep in competitive balance the various types of carriers and to prevent ruinous rate wars between them." *New York* v. *United States*, 331 U. S. 284, 346 (1947). No power to fix rates in foreign commerce was granted to this Board. Further, unlike domestic transportation, where a certificate of convenience and necessity must be obtained by a new carrier prior to entry into a service, ocean carriers are entirely free to enter any field of competition. These peculiar differences between domestic and foreign transportation render inapplicable certain principles enunciated under the ICA in connection with domestic transportation, particularly where concerned with problems relating to one mode of transportation alone.

Section 14 (3)

Petitioners further argue that the Board has no authority to approve a dual-rate system under section 15 of the Act, since such systems are necessarily unlawful under section 14 (3). They argue, first, that the dual-rate system is necessarily retaliatory against nonsigning shippers, and, second, that the absence of the modifying word "unjustly" preceding the word "discriminatory" makes unlawful *any* retaliation by discriminatory methods and not merely those methods which are "unjustly discriminatory." As to the first argument, we cannot improve on an answer previously made to this contention in *Isbrandtsen Co.* v. *N. Atlantic Continental Frt. Conf. et al.*, *supra*, where it was said at page 242:

> To retaliate is defined in Webster's New International Dictionary, 1945 Unabridged Edition, as "to return like for like" or "evil for evil." Retaliation perhaps connotes the idea of vengeance. * * * We cannot view the adoption of the dual rate system or the charging of a higher rate to a shipper who voluntarily declines to give his exclusive patronage as a "retaliation." The higher rate cannot be said to be charged as a retaliation for "patronizing any other carrier." It is charged because the shipper does not sign the contract, regardless of whether or not he patronizes any other carrier. A nonsigning shipper who does not patronize a nonconference carrier is treated as harshly as a nonsigning shipper who ships partially or exclusively with such a carrier.

The second argument is equally untenable.[34] As stated in *United States* v. *Wells-Fargo Express Co.*, 161 Fed. 606, 610 (1908), "It is difficult to conceive of the terms 'discrimination,' 'prejudice,' or 'disadvantage' as not associated with what is unjust, unreasonable, and undue."

From the administrative precedents and judicial decisions hereinbefore discussed, and from the legislative history of the Act, we necessarily conclude that the dual-rate system is not in itself unlawful. The lawfulness or unlawfulness of a particular dual-rate system depends directly on the facts adduced in a hearing on the merits of the use of that system in the particular trade, and is judged by the standards announced by the Supreme Court in *Swayne & Hoyt* v. *United States*, *supra*, repeated here for emphasis:

> In determining whether the present discrimination was undue or unreasonable the Secretary was called upon to ascertain whether its effect was to exclude other carriers from the traffic, and if so, whether * * * it operated to secure stability of rates with consequent stability of service, and so far as either effect was found to ensue, to weigh the disadvantages of the former against the advantages of the latter.

We construe this language, as have our predecessors, as requiring us to consider the reasonableness of the *prima facie* discrimination[35] against shippers inherent in dual-rate systems in the light of the necessity for that discrimination in order to effectuate the congressional plan for shipping in the foreign commerce of the United States. As previously indicated herein, Congress chose the controlled monopoly of the conference system over the alternative of the uncontrolled monopoly naturally resulting from unregulated cutthroat competition among ocean carriers.[36] In *Swayne & Hoyt* v. *United States*, *supra*, the Supreme Court recognized *necessity* for the use of a "dual rate system" in order to assure the continued benefits of a regulated conference system as a standard for determining the reasonableness or justice of the *prima facie* discrimination resulting therefrom, in stating at page 305:

> We think there was evidence from which the Secretary could reasonably conclude that there was little *need* for a contract rate system to assure stability of service. [Emphasis supplied.]

It is inconceivable that Congress, in selecting a regulated conference system in preference to unregulated cutthroat competition, would have outlawed a system which in many cases is the sole method by

[34] Assuming, as argued by Isbrandtsen, that the phrase "unjust discrimination" appearing in sections 15 and 17 of the Act renders dual-rate systems illegal *per se*, this argument is totally unnecessary.

[35] *Swayne & Hoyt* v. *United States*, *supra*, at page 303.

[36] See discussion in 4 Alexander Report 417–421.

which a conference may retain a sufficient amount of cargo to assure its continued existence. To state that Congress implicitly condemned the dual-rate system is to credit Congress with legalizing a conference system without means of self-protection against rate-cutting independent competitors and with little hope of survival. Obviously Congress did not intend to allow ocean shipping to gravitate into the unregulated monopolistic state sought through the Act to be avoided. Such an incongruous result is clearly possible, however, if we assume that conferences may not in any circumstances employ dual rates as protection against nonconference competition.

We conclude that the dual-rate system is, in itself, lawful, and does not require our disapproval unless, under the facts adduced in a particular case, the system would be unjustly discriminatory and unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, would operate to the detriment of the commerce of the United States, or would be in violation of the Act.

In the matter specifically before us, the conference's General Order 76 filing raises two issues of fact, viz: (1) Is the initiation of a dual-rate system necessary or required, as a competitive measure, to insure or restore stability of rates and service to shippers in the trade; and (2), assuming an affirmative determination of the first question, is the differential or spread reasonable, judged by its probable effect on shippers [37] and on the competitive position of the independent carrier, Isbrandtsen?

We consider the inauguration of a dual-rate system to be a necessary competitive measure to offset the effect of nonconference competition in this trade. Non-Japanese conference carriers who, in 1949, carried 88 percent of the total liner cargo moving in the trade, have seen their participation in the total traffic reduced to 25 percent in 1952 because of the severe rate-cutting competition of Isbrandtsen and because of the resumed operations of Japanese carriers. In the same year, Isbrandtsen and Japanese-flag lines carried 26 percent and 49 percent, respectively, of the total liner cargo in the trade. In that year, the last full year under closed rate conditions and the first year of full renewal participation by Japanese-flag carriers, seven [38] conference non-Japanese lines collectively carried less cargo on 132 sailings than did Isbrandtsen on 24 sailings, despite the fact that Isbrandtsen did not serve the entire range of ports of discharge in this trade and did

[37] The term "shippers," for the purpose of this report, includes exporters, importers, or others who may control shipments in this trade.

[38] Excluding the westbound service of APL and the Gulf coast service of Lykes.

not offer reefer space or special silk lockers, as did many of the conference vessels.[39]

Institution of a dual-rate system would have little effect on the overtonnaged condition of the trade. Conversely, a reduction in the amount of conference sailings or other solution to the overtonnaging problem would not mitigate the conference's need to meet the competition of Isbrandtsen in order to obtain for its members a greater participation in the cargo moving in the trade. Indications that Isbrandtsen, prior to opening of rates by the conference, had planned to increase its service to 3 sailings or perhaps 4 sailings per month, leads to the inevitable conclusion that under closed single rates Isbrandtsen's participation in the trade would be still further increased, most probably at the expense of the non-Japanese conference lines who do not enjoy as an offsetting factor the nationalistic preference of Japanese shippers.

The dual-rate system, by creating a basic core of cargo on which the conference can rely for the period of the contracts, will eliminate, for that period, the pressure on conference lines to reduce rates to meet Isbrandtsen's lower rate competition, and will thereby create greater stability of rates and service, facilitate forward trading by shippers, and decrease the threat of rate wars.

Generally, we consider the 9½-percent spread between contract and noncontract rates to be reasonable, with minor exceptions as hereinafter noted. The spread is, as to those commodities capable of being carried by both Isbrandtsen and conference vessels, large enough to furnish protection to the conference lines against inducements to shippers offered by Isbrandtsen, and small enough to enable Isbrandtsen to remain competitive with the conference. While we find it probable that Isbrandtsen will retain 10 percent or more of the cargo moving in the trade as against the 26 percent carried by it in 1952, yet when compared with the lesser average percentage which will be enjoyed by the conference lines, Isbrandtsen's 10 percent would be at least an equitable share of the trade. The increased share of cargo which will be received by the conference will more than offset any loss of revenue attributable to the 9½-percent discount and will result in reducing fixed unit transportation costs. The cost reduction in turn may result in benefit to both contract and noncontract shippers by enabling the conference lines to reduce freight rates to all shippers.

While dissatisfaction has been voiced by several shippers as to some effects of the spread, shippers generally viewed the spread as not

[39] In this regard, we note that Isbrandtsen's lack of reefer space or silk lockers is voluntary and that Isbrandtsen has published rates for the carriage of silk and silk products in this trade.

unreasonable. Although a shipper has urged that the spread is too high on commodities of low value in that the 9½-percent differential on those commodities may represent a shipper's margin of profit, of those commodities, only Christmas tree ornaments, porcelain, and some bamboo ware were identified, and no alternative spread was suggested. Further, as stated, the shipper indicated that a lower spread on such commodities, while desirable, is totally impractical and does not render an over-all spread of 9½ percent unfair or unreasonable.

The fact that Isbrandtsen vessels in this trade discharge only at U. S. North Atlantic ports and do not also call at U. S. Gulf ports is not of itself overly coercive of and unfair to those shippers who require service to both coasts. First, such shippers could reduce over-all shipping costs, in the absence of a preponderantly greater volume of cargo to the Gulf, by shipping via Isbrandtsen vessels to North Atlantic ports and via conference vessels, at noncontract rates, to Gulf ports. While it is true that in such circumstances the nonsigning shipper might be at a competitive disadvantage on Gulf shipments, assuming that ocean transportation costs are a significant part of the landed value of the items shipped, yet, on the cargo moving to North Atlantic ports the contract shipper would be at a greater competitive disadvantage as compared with a nonsigning shipper who enjoys the customary lower rates of the independent carrier. To realize that the preponderant volume [40] of cargo in the conference trade moves to North Atlantic ports rather than to Gulf ports is to recognize the insignificance of any coercion that might be effected on nonsigning shippers by the dual-rate system here proposed. Further, there can be no doubt that the Atlantic and Gulf coasts are competitive for the trade of overland points. *Inland Waterways Corp.* v. *Certain Freight Companies*, 1 U. S. M. C. 653 (1937); *In the Matter of Agreement No. 6510*, 1 U. S. M. C. 775 (1938), 2 U. S. M. C. 22 (1939); Johnson & Huebner, *Principles of Ocean Transportation* (1919), pages 126, 127.

We find no coercion on those shippers who require more frequent service than Isbrandtsen's fortnightly sailings in view of Isbrandtsen's announcement, prior to the rate war, of a proposed substantial increase in frequency of its service.

We find no need, however, for any spread on reefer cargo since, as stated, Isbrandtsen vessels are not equipped with refrigerated space and are not, therefore, competitive with conference vessels for reefer cargo.

As hereinabove indicated, we do not consider the spread or the system to be unjustly discriminatory or unfair as between carriers.

[40] An illustrative period of record indicates that Atlantic carryings outnumber Gulf carryings by an approximate 10-to-1 ratio.

Isbrandtsen argues that the system and the 9½-percent spread between contract and noncontract rates are not measures necessary to meet Isbrandtsen's competition, and thus are unreasonable. This is true, it is urged, because the conference is able through periodic uniform rate reductions to eliminate Isbrandtsen as a competitor without the necessity for institution of dual rates. We are unimpressed with this argument; even assuming that the conference's more cumbersome rate-making processes are adaptable to such a method of competition, success in eliminating Isbrandtsen through this type of rate warfare would be accomplished at the price of simultaneous elimination of those American-flag lines, present or potential, whose operating costs parallel those of Isbrandtsen. Such a result would be repugnant to the ultimate purposes stated in the title of the Act, which include "the purpose of encouraging, developing, and creating a naval auxiliary and naval reserve and a merchant marine to meet the requirements of the commerce of the United States with * * * foreign countries." The dual-rate system here, on the other hand, is consistent with that purpose. The spread between contract and noncontract rates in the proposed system, based in part on the percentage by which Isbrandtsen most frequently underquotes conference tariff rates, will reasonably enable the conference to meet Isbrandtsen's competition *without*, as in the method of uniform conference rate reduction preferred by Isbrandtsen, eliminating a *single* American carrier from the trade.

The dual-rate system here proposed will not result in detriment to commerce of the United States. The system will decrease the probability of rate wars and their disastrous consequences in this trade, and will benefit shippers by tending to insure a greater measure of stability of rates than has heretofore existed in the postwar period. While Isbrandtsen's share of the traffic may, as stated, be reduced, we do not anticipate that such increase in conference-controlled traffic will result in the traditional evils associated with monopoly. The continued participation of Isbrandtsen in the trade, as well as the existence of strong shipper organizations, stand as strong deterrents against exorbitant freight rates and other objectionable monopolistic practices. In any event, this Board has full power over those rates of conference carriers in foreign commerce which are detrimental to the commerce of the United States.

Various of the provisions of the contract form proposed for use in this trade require particular examination, for, as hereinbefore indicated shipper witnesses in this proceeding were unfamiliar with the contract and had not been consulted by the conference in its preparation.

We consider articles 1 and 6 of the form contract to be unacceptable as presently drafted despite the conference explanation that article 6 constitutes a modification of article 1 and is controlling over the earlier provision. The two articles under any construction are objectionable, because, as drafted, the receiver under the f. o. b., f. a. s. shipments may obtain contract rates as long as he patronizes exclusively conference vessels, but once he ships nonconference he may not thereafter receive contract rates. This provision is objectionable because such a receiver obtains the benefits of contract rates without signing a shipper contract whereas all other nonsigners are charged the full noncontract tariff rates; unlike treatment therefore is being accorded nonsigners. Such f. o. b. receiver should receive contract rates only if he is a contract signatory.

We approve the contract form insofar as it purports to cover c. i. f. and c. & f. sales. Except as stated below, we disapprove the contract form insofar as it purports to cover f. o. b. or f. a. s. sales. Irrespective of the terms of the sales agreement, in any instance where the contract signer appears as shipper in the bill of lading, such fact alone automatically requires that the shipment move on conference vessels. In the situation where the contract signer appears as shipper in the bill of lading, it is no mere matter of form to say he is the shipper in fact. In c. & f. or c. i. f. sales the problem does not arise because there the contract signer is in fact the shipper, but in f. o. b. or f. a. s. sales we deem it undesirable to have the answer to this problem turn on the complicated questions of law as to risk of loss or when title passes in determining when a given shipment is or is not covered by the shipper's agreement. We deem it highly desirable that simple tests and standards be applicable. To this end we consider that the contract should indicate that the person indicated as shipper in the ocean bill of lading shall be deemed to be the shipper. We do not intend, however, to preclude shipment by an exporter as agent for the buyer, where the exporter only renders assistance at the buyer's request and expense in obtaining the documents required for purposes of exportation.

The significance of articles 1 and 6 is readily apparent when it is realized that over 70 percent of the liner cargo in this trade moves under f. o. b. (or f. a. s.) terms. In this regard it will be recognized readily that participation by Isbrandtsen in this trade greater than that anticipated by the parties must be forecast, in view of the freedom of the Japanese exporter to sell and ship under f. o. b. terms.

Article 3 incorporates all rules, regulations, terms, and conditions in the conference tariff, although such provisions have not been submitted to us along with the conference General Order 76 statement.

We will forbid the incorporation of any such provisions which, without our approval, (a) may operate directly or indirectly to change the amount of the spread, or (b) may impose on contract shippers additional requirements not imposed on noncontract shippers.

In article 5, 50 percent of the amount of freight which the shipper would have paid if a given shipment moved via conference vessel is recoverable by the conference as liquidated damages in the event of shipper breach by patronizing a nonconference carrier. While there is no corresponding provision for liquidated damages to be paid in the event of carrier failure to provide adequate service, in our opinion no such provision is necessary. The failure to specify the amount of damages in such circumstances is, in our view, nothing more than a recognition by the parties that damages may readily be ascertained, in the event of conference breach, on submission of the matter to arbitration in accordance with article 10.

While a prominent shipper group recommended that liquidated damages in the event of shipper breach be limited to 20 percent of the freight which would have been earned, we have no basis for finding that a 50-percent payment would be a penalty rather than an assessment of liquidated damages, since we have not been sufficiently apprised here of the relationship between dead freight and tariff rates.

In summary:

Applying the test of *Swayne & Hoyt* v. *United States*, *supra*, and balancing the foreseeable advantages of the proposed dual-rate system against the foreseeable disadvantages, we find that the *prima facie* discrimination against shippers and the increased tendency toward monopoly of service are outweighed by the benefits to be derived from the system. Those advantages we fined to be (a) greater stability and uniformity of rates than has existed since the outbreak of the rate war, and the resultant benefit to shippers and receivers in this trade; and (b) the ability of the conference carriers through reduced unit transportation costs to provide lower rates to all shippers and/or to put improved, more efficient tonnage on berth. While the possible reduced utilization of Isbrandtsen's services by shippers is, to some extent, disadvantageous to the efforts of shippers to have rates maintained at a reasonably low level, yet the continued existence of Isbrandtsen as an effective competitor and the existence of strong shipper groups insure conference consideration of shipper needs and desires. In this regard, it must be noted that Isbrandtsen's participation in this trade, prior to the outbreak of the rate war, had little practical effect on the level of rates since conference rate increases were consistently followed by Isbrandtsen rate increases. This phenomenon

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is largely explained by the fact that the conference, however keenly aware of Isbrandtsen's rate competition, avoided rate reductions until March 1953 in the hopes that a rate war, by uniform rate reductions or by open rates, could be avoided by institution of a dual-rate system. Put otherwise, the conference, by failing to reduce rates uniformly, elected to realize high revenues from a lesser amount of cargo over lower revenues from a greater amount. The economic pressure to reduce rates, however, remained.

Aside from their opposition to the proposal to initiate dual rates, interveners have argued that the relationship between the conference and the Trans-Pacific Freight Conference of Japan has amounted to effectuation of an unapproved agreement between carriers in violation of section 15 of the Act. While it is true that identical actions have been taken at similar times, that the conferences meet at the same address, and that the membership for the greater part is common, we have been presented with no evidence tending to show the existence of any agreement, express or implied, which, while unapproved, falls within the prohibitions of section 15.

The conference has not considered its General Order 76 filing as a filing for approval under section 15. The statement was filed, however, prior to the decision of the Court of Appeals for the District of Columbia Circuit in *Isbrandtsen Co.* v. *United States*, *supra*, where that Court held that the agreement of this conference to initiate a dual-rate system had never received our approval or the approval of our predecessors. For this reason we must consider *nunc pro tunc* the statement to be a filing for approval under section 15. To hold otherwise would be to treat this entire proceeding as a nullity.

CONCLUSIONS AND DECISION

(a) The application of the conference to initiate a dual-rate system on nonrefrigerated cargo to move in the trade from Japan, Korea, and Okinawa to U. S. North Atlantic coast and Gulf ports is approved, since we have not found the proposed system to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or likely to operate to the detriment of the commerce of the United States, or to be in violation of the Act. The approval granted is contingent on conference amendment of the proposed agreement with shippers to conform with our opinion herein.

(b) The conference proposal to charge dual rates on refrigerated cargo moving in the trade from Japan, Korea, and Okinawa to U. S.

Gulf coast and Atlantic coast ports is disapproved as unjustly discriminatory and unfair as between shippers.

(c) No agreement between this conference and the Trans-Pacific Freight Conference of Japan in violation of section 15 of the Act has been established.

Our approval of the conference's application to institute a dual-rate system in this trade is effective January 1, 1956.

Order

At a Session of the FEDERAL MARITIME BOARD, held at its offices in Washington, D. C., on the 10th day of January A. D. 1956

No. 730

IN THE MATTER OF THE STATEMENT OF JAPAN-ATLANTIC AND GULF FREIGHT CONFERENCE FILED UNDER GENERAL ORDER 76

Whereas, This matter has been at issue, has been duly heard and submitted by the parties, and full investigation of the matter has been had, and the Board, on December 12, 1955, has made and entered of record a report stating its conclusions and decision thereon, which report is hereby referred to and made a part hereof; and

Whereas, The Board by order served on December 21, 1955, approved under the provisions of section 15 of the Shipping Act, 1916, as amended, the agreement embodied in and constituted by the aforesaid statement filed by the Japan-Atlantic and Gulf Freight Conference, with exceptions as specified in said order; and

It appearing, That the exceptions to the aforesaid approval granted in said order require clarification, and for good cause appearing;

It is ordered, That the order of the Board heretofore served herein on December 21, 1955, be, and it is hereby, superseded and canceled; and

It is further ordered, That the agreement embodied in and constituted by the aforesaid statement filed by the Japan-Atlantic and Gulf Freight Conference as aforesaid, be, and the same is hereby, in all respects approved under the provisions of section 15 of the Shipping Act, 1916, as amended, excepting that said contract system shall not apply to shipments which are made on an f. o. b., f. a. s., or ex-godown basis unless the person, whether seller or buyer, named as shipper in the ocean bill of lading, is a contract signatory, or to the transportation of cargoes in refrigerated compartments; and to that end

It is further ordered, That as a part of the said contract system, the shipper's contract to be employed by said Japan-Atlantic and

Gulf Freight Conference shall be in the form of Exhibit J attached to and constituting a part of the aforesaid statement, modified as follows:

A. Article 1 thereof shall be modified to read as follows:

(1) The Shipper [contract signatory] agrees to forward or to cause to be forwarded by vessels of the Carriers all shipments, other than cargoes to be transported in refrigerated compartments (reefer cargo), made directly or indirectly by him, his agents, subsidiaries, associated or parent companies, from Japan, Korea and Okinawa to United States Gulf ports and Atlantic coast ports of North America, whether such shipments are made C. I. F., or C. & F., if the Shipper is the Seller or are made F. O. B., F. A. S., or ex godown if the Shipper is the Receiver; provided, that for all purposes of this agreement, the person indicated as shipper in any ocean bill of lading shall be deemed to be the shipper of the goods described in the bill of lading.

B. Article 3 shall be stricken therefrom.

C. Article 6 shall be stricken therefrom.

D. The remaining paragraphs shall be numbered consecutively.

This order shall be effective on the date of issuance.

By the Board.

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

FEDERAL MARITIME BOARD

No. 743

IN THE MATTER OF THE STATEMENT OF TRANS-PACIFIC FREIGHT CONFERENCE OF JAPAN FILED UNDER GENERAL ORDER 76

Submitted May 12, 1955. Decided December 19, 1955

Approval of the agreement between members of the Trans-Pacific Freight Conference of Japan to initiate an exclusive-patronage contract/noncontract freight rate system denied under section 15 of the Shipping Act, 1916, as amended, as unjustly discriminatory and unfair as between shippers.

Insufficient competitive need has been shown by the Trans-Pacific Freight Conference of Japan to justify the *prima facie* discrimination against shippers inherent in employment of an exclusive-patronage contract/noncontract freight rate system.

William Logan, Jr., *William E. Logan*, *A. V. Cherbonnier*, *Edward R. Downing*, *George Yamaoka*, and *Helen F. Tuohy* for the Trans-Pacific Freight Conference of Japan.

John J. O'Connor, *Joseph A. Klausner*, and *John J. O'Connor, Jr.*, for Isbrandtsen Company, Inc.

Henry A. Cockrum, *Chas. B. Bowling*, *Charles W. Bucy*, and *Chas. D. Turner* for Secretary of Agriculture of the United States.

Frank J. Oberg, *Stanley N. Barnes*, *James E. Kilday*, and *William J. Hickey* for Department of Justice.

Richard W. Kurrus, *Max E. Halpern*, *John Mason*, *Edward Aptaker*, and *Allen C. Dawson* as Public Counsel.

REPORT OF THE BOARD

BY THE BOARD:

This proceeding arose out of a statement of the Trans-Pacific Freight Conference of Japan ("the conference") filed pursuant to section 236.3 of General Order 76,[1] and the protests thereto filed by Isbrandtsen Company, Inc. ("Isbrandtsen"), the United States Department of Justice ("Justice"), and the United States Department

[1] 17 F. R. 10175, 46 C. F. R. 236.3 (November 10, 1952).

of Agriculture ("Agriculture"). In that statement, filed on September 10, 1953, the conference proposed to initiate an exclusive-patronage contract/noncontract freight rate system (dual-rate system) in the trade from ports in Japan, Korea, and Okinawa to Hawaii and to ports on the Pacific coast of North America, to become effective on the 30th day following the filing.

Under the proposed system, contract rates set at a level below noncontract rates would be charged on all commodities to those shippers promising to ship exclusively via conference vessels for the period of the contract. The second and higher level of rates would be charged nonsigning shippers. The differential or spread between the levels of contract and noncontract rates was fixed in the proposal at 9½ percent of the contract rates applicable to the respective tariff items, rounded off to the nearest quarter of a dollar.

As required by General Order 76, the conference statement set forth (a) the amount of spread between contract and noncontract rates, (b) the effective date of the proposed system, (c) the reasons for the use of dual rates in the trade involved, (d) the basis for the spread between contract and noncontract rates, and (e) copies of the form of contract for use in the trade.

In their protests to the conference statement, petitioners, or some of them, requested that we (1) grant a hearing on the lawfulness of the proposed dual-rate system under sections 14, 15, 16, and 17 of the Shipping Act, 1916 ("the Act"); (2) direct the conference not to effectuate the proposed dual-rate system pending completion of that hearing; and (3) disapprove the proposed dual-rate system. In amplification of the request for disapproval, it is collectively or severally urged that (a) the statement fails to meet the requirements of General Order 76 by virtue of its failure to furnish adequate information as to the reasons for the use of the dual-rate system in the trade involved, or as to the basis for the spread between contract and noncontract rates; (b) dual-rate systems are necessarily unlawful under section 14 (3) as retaliation against shippers for patronizing other carriers; and (c) the proposed contract rates are unduly and unreasonably preferential of shippers in violation of section 16 and are unjustly discriminatory between shippers in violation of section 17. Because of these potential violations of the Act, it is urged, we are without power to approve the dual-rate system under section 15.

On October 7, 1953, we ordered a hearing held on the protests, and ordered the conference to hold the proposed dual-rate system in abeyance until further order of the Board. Hearing was held between January 4 and March 3, 1954. Thereafter, the hearing exami-

ner in his recommended decision of October 1, 1954, found that the use of the dual-rate system in this trade would not be justified under General Order 76 or section 15 of the Act, and recommended that approval of that system be denied.

Exceptions to the recommended decision and replies thereto have been filed, and oral argument on the exceptions has been heard. Exceptions and recommended findings not discussed in this report nor reflected in our findings or conclusions have been given consideration and found not justified.

The protests and comments directed by petitioners to the conference's statement filed pursuant to General Order 76, raising issues of fact, put in issue the lawfulness of the dual-rate system itself. In a recent report, however, *Contract Rates—Japan/Atlantic-Gulf Freight Conf.*, 4 F. M. B. 706 ("*Japan/Atlantic* case"), we rejected nearly identical arguments as to the lawfulness of the dual-rate system and held that we may, under section 15 of the Act, approve a particular dual-rate system if, under the facts adduced, that system would not be unjustly discriminatory or unfair, detrimental to the commerce of the United States, or in violation of the Act. We consider our discussion in that report of the legality, *per se*, of the dual-rate system to be a full and sufficient answer to the arguments advanced here in support of the proposition that this Board may never approve a dual-rate system. Whether we may approve the dual-rate system here proposed is a question of fact to be determined from the evidence adduced as to conditions in this trade. On the basis of such evidence, we find the facts to be the following.

The conference is a voluntary association of 23 steamship lines[2] operating from Japan, Korea, and Okinawa to Hawaii, the U. S. Pacific coast, and the Canadian Pacific coast under the authority of F. M. B. Agreement No. 150, as amended, approved in unamended form by our predecessor, the Shipping Board, on April 22, 1931.[3] Conference membership is open to any common carrier regularly

[2] American Hawaiian Steamship Company, American Mail Line Ltd., American President Lines, Ltd., Barber-Wilhelmsen Line,* Daido Kaiun Kaisha, Ltd., De La Rama Lines,* Ivaran Lines-Far East Service,* Kawasaki, Ltd., Knutsen Line,* Kokusai Line,* Mitsui Steamship Co., Ltd., A. P. Moller-Maersk Line,* Nippon Yusen Kaisha, Osaka Shosen Kaisha, Ltd., Pacific Far East Line, Inc., Pacific Orient Express Line,* Pacific Transport Lines, Inc., Shinnihon Steamship Co., Ltd., States Marine Lines,* States Steamship Company, United States Lines Co., Waterman Steamship Corporation, Yamashita Steamship Co., Ltd.

A 24th line, Canadian Pacific Railway Company, resigned from the conference effective May 27, 1954.

*Operating under a joint service agreement on behalf of two or more steamship corporations.

[3] The conference is subject to regulation by the Government of Japan as well as by the United States.

operating or giving substantial and reliable intention to operate in the trade.[4]

F. M. B. Agreement No. 150 does not now contain and has not in any past period contained specific language relating to the use of a dual-rate system. That system, however, has been practiced by the conference in the past. The present conference, established in 1930, but preceded by an earlier association of carriers organized about 1907, practiced single rates until 1926. At that time, faced with substantial nonconference competition and low freight rates, the earlier organization instituted a dual-rate system on a few commodities at certain of the ports served. Dual rates were gradually extended to other commodities until, by 1931, all important commodities carried by the conference were covered under dual rates. The prewar differential between contract and noncontract rates was established on a dollar basis, varying between 20 percent and 50 percent of noncontract rates. Freight rates became more remunerative by about 1937, and nonconference competition gradually disappeared as the former independents joined the conference.

The conference was inoperative during World War II. Private operations in the trade recommenced late in 1947 on specific permissions granted by Supreme Commander for the Allied Powers (SCAP). Permission was not granted to Japanese lines to re-enter the trade, however, until late in 1951.

Isbrandtsen is the only nonconference line which has maintained a berth service in the trade since World War II,[5] as a part of its eastbound round-the-world service. That service, commenced in 1949 and presently operated on a fortnightly basis, proceeds from U. S. North Atlantic ports to Mediterranean ports and through the Suez Canal to Bombay, Colombo, Singapore, Manila, Hong Kong, Keelung, Kobe, Nagoya, Shimizu, Yokohama, San Francisco, Los Angeles, and returning via the Panama Canal to U. S. North Atlantic

[4] Article 13 of F. M. B. Agreement No. 150, as amended, provides:

"*Membership.*—Any common carrier regularly operating or giving substantial and reliable evidence of intention to operate regularly in the trades covered by this agreement may become a member of this conference upon the approval by the parties hereto as provided in Article 19 and by affixing its signature to this agreement or a counterpart thereof. No admission to membership shall be effective until air-mail or cable advice thereof has been sent to the Governmental agency charged with the administration of Section 15 of the United States Shipping Act, 1916, as amended. Every application for admission to membership shall be acted upon promptly. No carrier shall be denied admission except for just and reasonable cause, and advice of any denial of admission to membership, together with a statement of the reason or reasons therefor, shall be furnished promptly to the Governmental agency charged with the administration of Section 15 of the United States Shipping Act, 1916, as amended."

[5] T. J. Stevenson had 2 or 3 sailings in 1950 or 1951.

ports. In this service Isbrandtsen operates an average of 10 vessels, none of which has refrigerated space.

Sporadic tramp movements have appeared in the trade since World War II, but generally there are few commodities which are susceptible to movement by tramp vessel.

Most of the conference vessels commence loading inbound cargo for the United States at the Philippines, proceed then to Hong Kong, and complete loading in Japan. Fifteen of the conference lines also serve Gulf or Atlantic ports of the United States, and are members of the Japan-Atlantic and Gulf Freight Conference. Several of the conference lines also load at Indonesian ports before loading at Japan. Some conference vessels also serve ports in Central and South America, and occasionally ports in Africa and Europe, after unloading cargo on the Pacific coast of North America. Several of the conference lines, however, operate only between the Far East and the Pacific coast of North America. Isbrandtsen serves only San Francisco and Los Angeles on the Pacific coast. The conference lines provide an over-all service to the entire range of Pacific coast ports in the United States and the southern part of Canada.

The trade from Japan to the Pacific coast of the United States is presently overtonnaged. A heavily contributing factor to this overtonnaging has been the re-entry of the Japanese lines in the trade. Four Japanese lines joined the conference in 1951, and by August 1952 the number of Japanese lines in the conference had swelled to eight.

The movement between Japan and the United States had been, prior to the re-entry of the Japanese lines, and continued thereafter to be, primarily outbound, particularly since cessation of private trade between Japan and Communist China had caused a much larger movement of cargo from the United States to Japan than had existed during prewar years. The resultant overtonnaging has been a matter of serious concern to the conference.

The first postwar tariff published by the conference, Tariff No. 18, became effective on December 1, 1946. Tariff No. 19 became effective on July 10, 1948. Tariff No. 20 became effective on February 15, 1951. The most recent tariff, Tariff No. 30, became effective on November 15, 1952, and still controls rates on those items not opened as a result of a rate war, hereinafter more fully discussed, which broke out on March 12, 1953. Each of these tariffs contained both contract and noncontract rates, but only the noncontract rates have been effective. The differential between contract and noncontract rates in Tariffs Nos. 18, 19, and 20 was $4 on all commodities. The differential in Tariff

No. 30 is 9½ percent of the contract rates rounded off to the nearest quarter of a dollar.

Nonadherence by conference lines to the published tariff rates, by rebating and other malpractices, was rumored in late 1952. The conference minutes of October 29, 1952, reveal the following resolution placed before the conference members:

> That the Executive Committee draft a letter addressed to the Ministry of Transport notifying them of the above situation which is openly admitted by various shippers and in that it is causing not only great concern but instability in the trade covered by this Conference. That a continuation of this situation, unless quickly rectified, will undoubtedly lead to the Conference finding it necessary to consider the adoption of "open" rates on all commodities or eventual resignation of some Member Lines from the Conference, either of which will lead to more instability and in consequence deplorable effect on the trade between Japan and the United States.

On November 5, 1952, the secretary of the conference, on behalf of the conference and on behalf of the Japan-Atlantic and Gulf Freight Conference,[6] filed the following complaint with the Japanese Ministry of Transportation:

> It is with deep regret that the undermentioned two Conferences respectfully bring to your attention the serious state of affairs now prevalent due to some of the Member Lines' using unfair practices to secure cargo, which are contrary to the Conference Agreements and which have led to instability in the trade with North America.
>
> If this state of affairs continues, a Member Lines (sic) has indicated it will take individual action to counteract these practices, which will without a doubt, force other Member Lines to follow suit thereby causing further instability in the trade. This will probably result in a complete breakdown of the tariff structures now in existence.

The Ministry in reply expressed concern and issued a "warning," urging the member lines of the two conferences to "pay more attention to their own practices."

Isbrandtsen has followed a practice of basing its rate schedules on those contained in published conference tariffs, using the same item numbers and the same tariff rules and regulations. Prior to the rate war which commenced on March 12, 1953, Isbrandtsen rates were almost uniformly lower than conference rates, and generally 10 percent under the applicable conference rate. A comparison of 347 commodity rates appearing in conference Tariff 20 and Isbrandtsen Schedule of Rates No. 3, as of November 1, 1952, reveals that rates on 88.5 percent of the commodities appearing in the Isbrandtsen schedule were about 10 percent lower than the conference published rates.

[6] Fifteen of the conference members are also members of the Japan-Atlantic and Gulf Freight Conference. Mr. Royal Wintemute, the present conference secretary, is also secretary for the latter conference.

Isbrandtsen's Tokyo agents, without authority from Isbrandtsen, have issued abbreviated freight tariffs showing conference and Isbrandtsen rates. On most items of these abbreviated tariffs Isbrandtsen rates were in most cases exactly 10 percent less than the conference rates. It has been Isbrandtsen's policy, however, never knowingly to quote a noncompensatory rate. The effect of Isbrandtsen's competition was discussed in conference meetings on numerous occasions prior to the entry of that carrier into this trade, and concern over the actual and potential carryings of Isbrandtsen, as well as the possibility of increased sailings by that line, was expressed.

The comparative sailings and carryings of Isbrandtsen and of the conference lines of cargo moving in the entire trade served by the conference from January 1, 1949, through December 1953 were as follows:

TABLE I [1]

Calendar year	Number of sailings			Cargo carried (revenue tons)			Average carrying/sailing	
	Isbrandtsen	Conference	Total	Isbrandtsen	Conference	Total	Isbrandtsen	Conference
1949	6	279	285	1,070	119,579	120,649	178	429
1950	20	320	340	15,886	215,756	231,642	794	674
1951	22	353	375	31,195	245,407	276,602	1,413	695
1952	24	421	445	32,873	282,176	315,049	1,369	670
1953	25	528	553	19,065	388,460	407,525	762	735

Calendar year	Percent of total sailings		Percent of cargo carried	
	Isbrandtsen	Conference	Isbrandtsen	Conference
1949	2.1	97.9	0.9	99.1
1950	6.0	94.0	6.8	93.2
1951	5.9	94.1	11.2	88.8
1952	5.4	94.6	10.4	89.6
1953	4.5	94.5	4.6	95.4

[1] There is a slight variance in some of the figures as furnished by the parties but not enough to make any appreciable difference in the comparisons made.

The greater amount of conference-carried cargo is lifted by about half of the conference members. Although failure to maintain services for given periods should result, under article 26 of the basic agreement, in loss of voting rights or in termination of conference membership, that article has not been enforced by the conference.

The conference expressed interest in reestablishing a dual-rate system as early as September 1948, prior to Isbrandtsen's entry into the trade. On August 30, 1950, the conference voted to put a dual-rate system into effect but agreed to hold the operation of the system in

abeyance pending completion of an investigation by the Board [7] of the system as proposed by the conference and by the Japan-Atlantic Coast Freight Conference, predecessor of the Japan-Atlantic and Gulf Freight Conference. On September 10, 1952, the conference voted to give us 60 days' notice of intention to initiate a dual-rate system. Prior to the proposed effective date for establishment of the dual-rate system, however, we issued our General Order 76,[8] setting forth, *inter alia*, rules applicable to initiation of dual-rate systems in shipping conferences under our jurisdiction. As hereinabove mentioned, the conference filed its statement under section 236.3 of General Order 76 on September 10, 1953, with results leading to the commencement of this proceeding.

As stated, conference Tariff No. 30, effective November 14, 1952, provided for contract and noncontract rates, setting the contract rates generally at a level 10 percent below the then existing single rates and setting the noncontract rates at a level 9½ percent higher than the proposed contract rates. Notice of the initiation of the dual-rate system was published in Japanese newspapers on November 1-8, 1952. Isbrandtsen reacted by publishing a notice that, as of November 10, 1952, its new rates would be 10 percent less than the conference contract rates. Shortly thereafter the late Mr. Hans Isbrandtsen, then president of Isbrandtsen, was credited in a published interview with having contemplated increasing the company's service from fortnightly sailings to sailings every 10 days or every week.

In early 1953 the United States Court of Appeals, District of Columbia Circuit,[9] enjoined institution of a dual-rate system in the Japan-Atlantic trade. The present conference thereafter abandoned hope of early institution of the dual-rate system and searched for an alternative method of meeting nonconference competition. The minutes of the March 9, 1953, conference meeting reported: "Considerable discussion ensued and it was pointed out that in addition to the nonconference competition any action taken should also, at the same time, be made effective against reported rebating on the part of some Member Lines." At that meeting the conference rejected a motion to suspend all tariff rates, but at a special meeting on March 12, 1953, voted to open conference tariff rates [10] on ten of the major commodities moving in the trade. No advance notice of the initial opening

[7] The investigation, Docket No. 703, was discontinued by our order of August 10, 1955.
[8] See footnote 1, *supra*.
[9] *Isbrandtsen Co.* v. *United States*, 211 F. 2d 51 (D. C. Cir. 1954).
[10] When tariff rates have been declared open on a given commodity, each conference line is free to fix its rate for that commodity, independently of whatever rate may be charged by other conference lines.

of rates or subsequent opening of additional rates was given to interested shippers, and no minimum rates were established.

Isbrandtsen attempted to keep on a competitive basis with the conference after the outbreak of the rate war but was unable to do so. Whereas the average conference freight rate on November 15, 1952, had been approximately $30, the average rate for 1953 fell to $19.99 during the period March 12 to August 31. The 1953 average included rates charged during the period prior to March 12, and included rates on those commodities which remained closed, such as the high-rated refrigerated cargoes. While no percentage of carryings of open-rated cargoes, in comparison with cargoes [11] on which closed rates were in effect, was offered, it is clear that open-rated cargoes were carried at substantially less than the $19.99 average. Many rates charged were less than out-of-pocket handling costs, which averaged between $8.50 and $9.00 per ton. Rates on commodities declared open dropped to a level less than 30 percent of the pre-March 12 rates.

On May 6, 1953, Isbrandtsen announced certain rate increases over the low rate-war level of rates, including a minimum of $10 or $12 per revenue ton to the United States Pacific coast, and on July 6, 1953, published notice in Japan that, effective July 5, 1953, its freight rates on cargo moving from Japan to the United States would be 50 percent of the conference rates [12] in effect on March 1, 1953, with a minimum of $9 per revenue ton to Pacific coast ports. The conference lines did not close their rates at a competitive level, although urged to do so by various Japanese shipper groups.

All the lines received less revenue from the carriage of cargo in the conference trade after March 12, 1953, than they did before. United States-flag conference lines apparently have not suffered any considerable cargo losses because of the rate war. At least one United States-flag conference line has carried more cargo during the rate war than before. Increased carryings of some conference lines during the rate war may have been due to the fact that shippers have shipped more cargo after rates were opened, and also may have been due to sharply reduced carryings by Isbrandtsen. The maintenance of proportionate cargo carryings by United States-flag lines during the rate war may be accounted for, at least in part, by the fact that there are four subsidized United States-flag lines operating in this trade.

Approximately 70 percent to 80 percent of the cargo in this trade moves on an f. o. b. basis.

[11] Rates on approximately 50 tariff items were opened.

[12] The notice also set rates to the United States Gulf and Atlantic coasts at 50 percent of the pre-rate-war rates of the Japan-Atlantic and Gulf Freight Conference.

The rate war has been vigorously opposed by Japanese shippers and exporters. The varying rates charged have made it difficult to know rates charged to competitors and have reduced the value of inventories of Japanese goods shipped to the United States prior to the rate war. Shippers have indicated that they desire stable uniform and low freights but that, insofar as a choice is necessary, they prefer stable and uniform rates, at a reasonable level, to low but unstable rates. They have criticized pre-rate-war rates as too high, and a major exporter association has urged that rates, when again closed, should not exceed 70 percent of the conference pre-rate-war rates. Generally, shippers prefer to eliminate variations in rates from competition for the sale of commodities. To this end and to this extent they prefer an effective conference system and the dual-rate system. Further, shipper witnesses have indicated that insofar as stability and uniformity of rates are severable, uniformity of rates is more desirable than stability.

Between July 30, 1952, and October 29, 1952, the conference engaged in extensive research and study preparatory to setting a differential between proposed contract and noncontract rates, during the course of which the views of many shippers, shipper groups, and consignees were obtained. Those interviewed generally favored a dual-rate system. If such a system were to be employed they would favor a differential of about 9½ percent, since that differential was already in effect in other contract rate trades and since that amount approximated the general commercial discounts in use in Japan.

Shipper witnesses appearing in this proceeding have indicated their general satisfaction with the reasonableness of a 9½ percent differential between contract and noncontract rates as not so high as to make shipping by conference vessels economically mandatory. In addition, conference and shipper witnesses asserted that the dual-rate system would, by stabilizing rates, facilitate forward trading, would enable the conference to plan for the future and put improved tonnage into the trade, would decrease the threat of rate wars, and would insure frequent and adequate shipping service. The conference witnesses assert that the conference's attempt to initiate the dual-rate system is not designed to eliminate Isbrandtsen from the trade but to regain cargo lost to Isbrandtsen and to tramp vessels, and to set a limit on the participation of Isbrandtsen and potential additional nonconference competitors in this trade.

The executive committee in reporting the results of its research and study, pointed out also that a differential of 9½ percent was the highest yet allowed by the Japanese Fair Trade Commission, the gov-

ernmental agency responsible for final determinations under the Marine Transportation Law.[13]

Upon submission of the proposed differential between contract and noncontract rates for the approval of the Japanese Fair Trade Commission, the conference received a favorable reply, quoted in pertinent part as follows:

> As yet there is no decision made by this Commission in an actual case as to what constitutes violations of the * * * (prohibitions contained in Articles 28 and 30 of the Marine Transportation Law and Article 19 of the Anti-Monopoly Law [14]). It may be noted, however, that no action has been taken against such conferences as have complied with the several principles enumerated (in another case) as follows:
>
> a. The contract between a carrier and its contracting shippers shall be upon the basis and provisions that the differential in rates charged to the contract shippers and noncontract shippers does not exceed 9½ percent.
>
> b. The contract should clearly provide that on f. o. b. shipments whereby the foreign buyer designates the vessel on which his goods are to be shipped are exempted from the contract and that the contract shipper is free to make such shipments by noncontract vessels without being subject to any penalty for such action.
>
> c. When the contracting shipper applies for space, said shipper may secure space elsewhere without prejudice, provided he first notifies the local chairman of the conference of his requirement of space and provided that the local chairman does not notify him within 7 days, excluding Sundays and holidays, of the availability of space within the ensuing 30 days period.
>
> d. The amount of "liquidated damages" which the contract shipper pays to the conference in case his shipment in violation of the contract shall be 50 percent of the amount of the freight which the shipper would have paid on such shipment had such shipment been made in a vessel of the contract carrier.
>
> e. The contract may be terminated by either party by 3 months written notice.
>
> * * * * * * *
>
> The holdings of the Commission that the differential of 9½ percent is reasonable and not unfair or unjustly discriminatory are based upon present conditions as well as all other provisions of a particular contract and being subject to reasonable modification in the future to make them more reasonable under different conditions the above Notice should not be regarded in any sense as the final conclusion of the Commission.

As shown in table I, *supra*, Isbrandtsen's peak participation in this trade occurred in 1951, when it carried 11.2 percent of the total cargo, an increase over the 6.8 percent carryings in 1950. While that percentage declined slightly in 1952 to 10.4 percent, the percentage dropped to 4.6 percent in 1953, the first year of the rate war. Is-

[13] Law No. 187, June 1, 1949. Articles 28 and 30 of that law prohibit: (a) deferred rebates, (b) fighting ships, (c) retaliation against a shipper, (d) unjustly discriminatory contracts based on volume of freight, (e) undue or unreasonable preference or prejudice, and (f) combinations that exclude any party from admission.

[14] Article 19 of the Anti-Monopoly Law forbids unfair competitive methods.

brandtsen's potential participation in the trade is limited by the facts that (a) its fortnightly service is insufficient to satisfy the needs of many shippers in the trade, (b) its vessels are not equipped with refrigerated space, and (c) its vessels do not serve the entire range of ports of discharge served by the conference collectively. For these reasons, Isbrandtsen estimates the percentage of liner cargo which it would retain after institution of a dual-rate system at 2 or 3 percent, an insufficient percentage, according to an Isbrandtsen witness, to permit continued profitable operation in the trade. In this regard, however, no data was produced by Isbrandtsen to show the additional cost of carrying cargo on this leg of its round-the-world service, or the amount of cargo necessary to make calls at U. S. Pacific ports profitable. Further, it is clear that profitable operation in this trade depends to a large extent on other inbound cargo.

The total amount of liner cargo moving in the trade for the year 1953, as shown in table I, approximated 400,000 revenue tons, and witnesses have reasonably anticipated that future years may produce an even greater amount of total cargo. Based on a 400,000-ton liner movement, plus an annual estimated 20,000 revenue-ton tramp movement, the conference secretary estimated that the conference percentage participation in the total movement in the trade under a dual-rate system would range from 95 percent to 97 percent. The increased carryings would include cargo of shippers who formerly employed Isbrandtsen's services.

Assuming, as is reasonable, that Isbrandtsen would carry approximately 10 percent of a 400,000-ton total movement, under closed rate conditions, the conference lines, under a dual-rate system, would have to carry an additional 39,420 revenue tons of cargo in order to grant a discount of 9½ percent of the contract rates and still earn the same gross revenues that they would have earned carrying 90 percent of the total liner cargo movement without any discount. Under these conditions, the conference therefore would be required to carry virtually all of the cargo moving in the trade to achieve any immediate reduction in average fixed costs.

Assuming conference carriage of 95 percent of a 400,000-ton annual movement, a differential of 5.2 percent of the contract rates would be the highest percentage which could be charged in order to realize the same revenues which would accrue to the conference when carrying 90 percent of the cargo without a discount. If the total cargo lifted by Isbrandtsen in 1952, its best year tonnagewise, were divided among the conference lines on the basis of conference sailings in that year, the average increase per member would approximate 78 tons per sail-

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ing. If the conference goal of 95 percent of the total cargo in the trade were realized, the average increase per member would amount to about 40 tons per sailing. The conference secretary testified, however, that the assurance, under the dual-rate system, of stable rates and of a basic core of cargo available to the conference would be of greater value to the conference than a cost saving.

A conference witness testified to the existence of a large number of small shippers whose requirements could be met by a fortnightly service. These shippers, it was stated, controlled about 10 percent of the cargo in the trade. The witness stated that while the cargoes of such shippers presently move on four or five vessels per month, such cargoes could be consolidated to move on a fortnightly basis. He further stated that some of those shippers would give serious consideration to rearranging their shipping problems in order to take advantage of lower rates. It was pointed out that some shippers could make a profit by shipping more than 50 percent of their cargoes via Isbrandtsen, assuming Isbrandtsen's rates to be 10 percent less than the conference contract rate, and the balance of their cargoes via conference vessels under noncontract rates.

Shipper witnesses indicated that exclusive employment of Isbrandtsen's fortnightly service would not be adequate to meet their shipping requirements in the conference trade, both because of the limited number of Isbrandtsen's sailings and because of the limited range of ports of discharge. One shipper witness stated that, for competitive reasons, it would be impractical to divide shipments of plywood between Isbrandtsen and the conference and that all shipments should move via one or the other. He added, however, that small shippers of plywood would probably continue to utilize Isbrandtsen's services, or, in the event of Isbrandtsen's withdrawal from the trade, would ship via tramp vessels.

Several conference witnesses, as well as an Isbrandtsen witness, testified that the trade enjoyed stability of rates, with minor variations, from the recommencement of operations after World War II until March 12, 1953, when rates on 10 commodities were opened. The conference's expert witness on economics of transportation was uncertain, however, whether stability of rates existed in 1951, and found a suspicion of instability in 1952. Conference rates, except for the 10 percent reduction effected in November 1952, rose steadily during the post World War II period until rates were opened in March 1953.

The level of rates under the proposed dual-rate system is as yet unsettled. It is probable, however, that the conference would close

rates of 70 percent or 75 percent of the pre-rate-war level. Such a level, as stated, is desired by exporter associations. At least one conference member was of the view that, prior to the outbreak of the rate war, conference rates were too high and make the conference vulnerable to outside competition, as revealed by a letter from that line reproduced in part as follows:

> We are simply holding up an umbrella under which Messrs. Isbrandtsen have been thoroughly enjoying themselves. It is amusing to read anticontract diatribes against "the same cargoes moving at different rates" in the mouths of people whose prosperity is bound up in the fact that they can profitably afford to offer shippers 5 to 25 percent less than our tariff rates provided they get the big cargoes our policy has done everything possible to ensure for them. Our "Conferences" at the moment are, of course, nothing of the kind. They are Rate Agreements at an unduly high level which protect a rate-cutting intruder rather than protect Members against intrusion.
>
> An overtonnaged berth, with rates undeniably above world levels, is dangerously vulnerable. We can speak confidently for our Principals in favoring a Contract system in principle, but such cannot prudently or properly be introduced when 20 percent of the shipments are moving by an entrenched fortnightly outside service.
>
> The board policy should surely be:
>
> (a) *to revise rates realistically* so that opportunist and superfluous tonnage will move elsewhere and we can
>
> (b) *regain control of the trades* and then, and not till then
>
> (c) introduce a Contract system.

Under the terms of Article 1 of the proposed exclusive-patronage contract, the shipper agrees to forward all shipments made directly or indirectly by him in the conference trade by vessels of the conference lines, "whether such shipments are made C. I. F., C. & F., F. O. B., ex-godown or by any other terms."

In the event of shipment via nonconference vessel in violation of Article 1, Article 5 requires the shipper to pay "to the Carrier," as liquidated damages, 50 percent of the amount of the contract freight rate which the shipper would have paid had he shipped via conference vessel. The carriers agree in Article 4 to provide service adequate to meet the reasonable requirements of the commerce of Japan moving in the trade. The conference secretary considered that a failure to provide service within 37 days after demand would amount to inadequate service but would not be a breach of contract since the shipper would then be free to ship via nonconference vessel. The secretary in this regard stated that the conference carriers are, under the contract, under no obligation to furnish space. Accordingly, the conference does not agree to pay liquidated damages in the event of a failure to provide adequate service, although a provision of that kind was suggested by a shipper group.

The provision, in Article 11, that each conference carrier would be responsible for only its own part of the agreement was not clarified by the conference. It was stated, however, that the obligation to provide reasonable service is one not owed by the conference as a body but by the individual members, severally.

DISCUSSION AND ULTIMATE FINDINGS

General Order 76 raises two basic questions of fact in this proceeding, viz: (1) Is the initiation of a dual-rate system necessary or required, as a competitive measure, to insure or restore stability of rates and service to shippers in the trade, and (2) assuming an affirmative determination to the first question, is the differential or spread between the proposed contract and noncontract rates reasonable, judged by its probable effect on shippers and on the competitive position of the independent carrier, Isbrandtsen? The foregoing issues parallel issues arising under section 15 of the Act except insofar as unjust discrimination within the meaning of sections 15 and 17, undue or unreasonable preference within the meaning of section 16, detriment to the commerce of the United States, or violation of a section of the Act other than sections 15, 16, or 17 might result from factors other than the amount or percentage of the differential.

The critical question here is not the reasonableness of the differential but whether the reasons advanced for the proposal to institute a dual-rate system are sufficient to overcome the *prima facie* discrimination inherent in its use. Principally, the conference urges that the institution of the system is necessary to end the present rate war, to restore stability of rates and service in the trade, and to enable the conference to meet the competition of the independent, Isbrandtsen. The foregoing arguments are identical in effect, since it is urged that the present rate war has been precipitated by the competitive methods of Isbrandtsen and can only be terminated by the institution of a dual-rate system; that Isbrandtsen's competition created instability in the trade prior to the rate war; and that stability is necessary to improvement of vessels and service. Although rates were stable until March 12, 1953, when the conference opened rates on 10 major commodities, it is the conference's position that stability existed only because the conference did not attempt to meet Isbrandtsen's lower rates and that, in spite of the surface stability, shippers since early 1952 have been apprehensive of sudden changes of rates because of Isbrandtsen's competition with the conference, and because of rumors of malpractices on the part of conference member lines.

It is true unquestionably that the initiation of a dual-rate system would create greater stability of rates than presently exists. Whether it would create stability appreciably greater than that which existed prior to the rate war, however, is more doubtful. While the conference opened rates in March 1953 for the stated dual purpose of meeting nonconference competition and counteracting the reported rebating on the part of some member lines, we do not consider that the competition of Isbrandtsen, whose carryings in this trade never substantially exceeded 10 percent and averaged less than 10 percent, was the principal cause of the conference's decision to open rates. On the contrary, we find that that decision resulted principally from the malpractices which the conference believed to exist. This view is bolstered by the fact that the conference found it necessary to state, in its letter to the Japanese Ministry of Transportation, that continued employment by certain member lines of unfair practices to secure cargo would lead to a rate war. The conference further indicated that the "unfair practices * * * have led to instability in the trade with North America."

The malpractices, if existing, were the direct result of the overtonnaging of the trade. While a dual rate system would probably result in an increase in average carryings per sailing, such an increase, even assuming the elimination of Isbrandtsen as a competitor, would be insignificant in relation to the number of conference vessels in the trade. Institution of the system, then, would result in injury to Isbrandtsen without appreciable benefit to the conference, since the overtonnaging problem would be little, if at all, relieved by the slight increase in average carryings. With overtonnaging remaining, no greater stability would be experienced under dual rates than that which could have been enjoyed, at any period during the rate war, under a closed single scale of rates. We conclude, therefore, that the dual-rate system is not necessary here to meet Isbrandtsen's competition.

There can be no doubt that Isbrandtsen's participation in the trade would be greatly reduced should a dual-rate system be inaugurated. As stated, the conference secretary estimated that conference vessels would, under dual rates, carry from 95 percent to 97 percent of the total movement; Isbrandtsen's estimate of 97 percent or 98 percent is in substantial accord with that of the conference. Under either estimate, we consider that the conference would have a virtual monopoly of the trade, accomplished without appreciable concomitant benefit to its members and without benefit to shippers other than those benefits which could be enjoyed under closed single rates.

The record contains no basis beyond the conflicting assertions of the parties for precise determination of whether Isbrandtsen would or would not eventually be eliminated from the conference trade as a result of diminished carryings in the event of institution of a dual-rate system. No data was produced by Isbrandtsen to show the additional cost of carrying cargo on this leg of its round-the-world service, or the amount of cargo necessary to make calls at U. S. Pacific coast ports profitable at given rates. Further, profitable operation in this trade depends to a large extent on the amounts of inbound cargo obtainable at other ports and in other services. But whether or not the independent would eventually be eliminated, as appears possible, the certain minimization of his participation in the trade would not accomplish the stated purpose of creating greater stability. Further, little, if any, additional revenue would be realized in carrying nearly all of the cargo in the trade at a 9½ percent discount, over the revenues which could be realized when carrying 90 percent of the cargo without a discount. It is true, as stated by conference witnesses, that the dual-rate system would probably enable the conference to plan for the future and to put improved tonnage into the trade, by creating a percentage of cargo on which the conference might rely, and would insure frequent and adequate shipping service. We do not agree that the system here would measurably decrease the threat of rate wars in view of the conference's statement of intention to open rates in the event that rumored rebating among conference lines should not be rectified quickly. The elimination of Isbrandtsen from the trade could correct the overtonnaging problem only to the extent that its former carryings, divided among the conference lines, would increase the carryings of those lines. Since all of the cargo carried by Isbrandtsen in 1952 would, if so divided, result in only an additional 78 revenue tons per conference vessel per sailing, it is apparent that the basic reasons giving rise to the possibility of a rate war, recognized by the conference in its 1952 letter to the Japanese Ministry of Transportation, would remain, whether or not Isbrandtsen should be eliminated as a competitor.

We find the reasons advanced by the conference for the use of the dual-rate system to be insufficient to justify the *prima facie* discrimination against shippers inherent in its use, or to create a necessity to meet nonconference competition in this manner.

Weighing the advantages which would be derived from the use of the dual-rate system here against the disadvantages which would result, we find insufficient need for the institution of the system as a method of meeting competition or of correcting ills resulting from

overtonnaging in this trade. The conference application to initiate a dual-rate system in the trade from ports in Japan, Korea, and Okinawa to Hawaii and to ports on the Pacific coast of North America is therefore disapproved as unjustly discriminatory and unfair as between shippers.

Public Counsel has argued that approval of a dual-rate system for use either in this trade or in the Japan-Atlantic trade, without approval of the system in both trades, would be impractical because of the close relationship between the two trades. We reject the argument, as did the examiner, since, as stated earlier in this report, approval of a particular dual-rate system depends on the facts adduced as to conditions in that particular trade. Conditions existing in the Japan-Atlantic trade can not be determinative of the issues in this proceeding.

The conference filed 46 exceptions to the examiner's recommended decision. While most of the exceptions are covered in our preceding findings and discussion, are related to findings of the examiner which differ from those made by us, or are not related to issues considered by us to be material, we will discuss conference exceptions 4, 5, 7, 16, 22, 25, 27, and 35.

Exceptions 4, 5, and 7 are taken to the examiner's findings that conference rates and Isbrandtsen's rates were stable until the opening of rates in March 1952, and that the trade was stable until the latter part of 1952. The conference argues that the level of rates and the trade generally were unstable in 1951 and 1952.

The principal difficulty in discussions of "stability of rates" or "stability in the trade," however, lies in definition of the terms. "Stability of rates" appears to have many different meanings to the parties here, principal of which are the following: First, it is frequently employed, particularly by Isbrandtsen, as signifying a level of rates which remains unchanged for periods of approximately six months, more or less; and, second, it is employed, principally by the conference, as descriptive of rates which remain constant for appreciable periods only because of the resistance of the majority of conference lines to strong economic pressures to reduce or open rates to meet nonconference or conference rate competition. The conference also uses the term on occasion in the sense first hereinabove described.

We employ the term "stability of rates," as we did in the *Japan/Atlantic* case, in the sense first described, and when so defined, the examiner's statements are unquestionably true.

By "stability of the trade," we believe that the examiner, as well as the parties, referred to conditions whereunder reasonably constant

volumes of cargo move under reasonably constant rates with reasonably proportionate allocation of cargoes to individual lines. The term, in addition, contemplates shipper confidence in the continued existence of such conditions. We agree with the examiner that stability in the trade existed until interrupted in late 1952 by strong rumors of rebating by conference lines.

In Exception 16, the conference charges the examiner with error in finding that the proposed dual-rate system is intended to prevent nonconference lines from entering the conference trade and to keep conference lines in the conference as well as to meet existing nonconference competition. In view of the fact, however, as stated elsewhere in the conference's exceptions, that the conference discussed employing a dual-rate system prior to Isbrandtsen's entry into this trade, the examiner's conclusion appears to us to be inescapable.

In Exceptions 22 and 25, the conference excepts to the examiner's findings that independent competition in this trade has had a beneficial effect on keeping conference rates at a reasonable level. Those findings, it is urged, are inconsistent with evidence establishing that Isbrandtsen followed each conference rate increase with an increase of its own. It is true that, as in the *Japan/Atlantic* case, *Isbrandtsen's* competition has had no noticeable effect on the level of conference rates; unlike that case, however, we see no evidence that the conference was under economic pressure to reduce rates to or below the level of Isbrandtsen's rates, the obvious distinction lying in the vastly greater amount of cargo lifted by the independent in the Japan-Atlantic trade. In any event, we cannot say that the presence of an independent in the trade does not aid in keeping conference rates at a somewhat reasonable level.

In Exception 27, the conference considers erroneous the examiner's failure to determine any issues raised in the proceeding other than the validity of the reasons advanced in justification of the use of the proposed dual-rate system. The argument seems no more meritorious to us, at this time, than it did when we denied the conference's motion to remand the recommended decision to the examiner for further findings of fact and conclusions of law. The examiner's ruling on the reasons advanced by the conference obviously rendered other issues immaterial, since the determination of other issues could not then affect the result recommended.

Exception 35 relates to the examiner's failure to find that the use of the dual-rate system will not lead to an unwarranted monopoly. This is true, it is stated, because of the open-membership policy of the conference, the number of conference members, the existence of shipper organizations, and the regulatory authority of the Japanese and

United States authorities. While we have not here determined that a monopoly would result or that Isbrandtsen would be driven from the trade in the event of approval of the dual-rate system, the exception, in principle, deserves comment. As indicated by the conference, in the event that Isbrandtsen's carryings should be so reduced as to threaten the company's elimination from this trade, Isbrandtsen could, in any event, join the conference and participate in conference carryings. Isbrandtsen, however, apparently considers independent operation and rate-cutting practices to be more profitable and desirable than operation as a conference member; neither this Board nor the conference has the power to require Isbrandtsen to become a conference member.

Whether Isbrandtsen should join the conference or should be eliminated from the trade, however, the conference would still have a monopoly of the trade. While we do not consider this possibility to be in itself objectionable, we consider that a monopoly which would be created as a result of the institution of a dual-rate system is not permissible unless the potential disadvantages of that monopoly and the *prima facie* discrimination against shippers inherent in the use of dual rates are outweighed by the need for such a system and the benefits to shippers and the trade to be derived from the system. Such an interpretation is entirely consistent with the test laid down in *Swayne & Hoyt* v. *United States*, 300 U. S. 297, 304 (1937). To hold that a dual-rate system may never be instituted where its use would result in monopoly would defeat the congressional purpose in passing the Act and in exempting agreements among carriers from the operation of the antitrust laws. Under such a view, a conference could not employ dual rates in protection against severe rate-cutting competition where an independent might be eliminated from the trade even though a denial of permission to institute dual rates would inevitably result in elimination of one or more conference members from the trade. We consider, therefore, that the critical feature of this case is not the possibility of monopoly but the nonexistence of a competitive need in this trade for a dual-rate system to meet nonconference competition. Permission to intiate the system in this trade is hereby denied.

An appropriate order will be entered.

Chairman MORSE, dissenting:

I cannot concur in the result reached here by the majority. In my view, a critical need for a dual-rate system has been shown in this proceeding. It is my further view that the examiner's recommended

decision and the majority report apply incorrect criteria, as have other reports of this Board and its predecessors, for determining whether or not a given dual-rate system is lawful or otherwise approvable.

The existence of a violent rate war in this trade, made necessary by, or resulting from, the rate reduction tactics of the independent, Isbrandtsen, and the increased carryings of Isbrandtsen along with the reduction in conference carryings, clearly spell a need for protection of the conference in order that American-flag carriers and shippers and receivers in this trade may ultimately receive the benefits intended for them by the Act.

Since its entry into the trade Isbrandtsen has followed a consistent practice of underquoting conference rates by about 10 percent. Whenever conference rates have risen Isbrandtsen has followed with a rate raise of its own, calculated to maintain the 10-percent differential. Prior to 1950 or 1951, when the trade became overtonnaged, Isbrandtsen's undercutting practices were not keenly felt by the conference carriers. In 1951 and the following years, however, Isbrandtsen's steadily increasing share of cargo was a great cause for conference concern, particularly in view of overtonnaging of the trade and ever-increasing intraconference competition for the remaining cargo.

With overtonnaging, the trade became a shipper's rather than a carrier's market, and because of the differential between conference and Isbrandtsen rates, the conference lines suffered in competition with Isbrandtsen for cargoes. The inevitable ultimate result of overtonnaging and the rate competition was either elimination of the weaker conference lines or opening of conference rates in order that individual conference lines might meet Isbrandtsen on its own grounds. The latter course was followed, and the resultant rate war has destroyed the rate stability which is so important in fostering the foreign commerce of the United States. These same causes and effects follow a consistent historical pattern. The ill effects to our foreign commerce resulting from this pattern were commented upon by the congressional committee reporting on the bill which became the Act.

Turning to the particular carryings in this trade, the effect of Isbrandtsen's rate cutting on an overtonnaged trade is apparent. Whereas, in 1950, Isbrandtsen carried 6.8 percent of the cargo in the trade on 6 percent of the sailings, in 1951 and 1952 it carried, respectively, 11.2 percent and 10.4 percent of the cargo on 5.9 percent and 5.4 percent of the total sailings. Obviously, when cargo is in relatively short supply, the rate cutter profits. The theory under which he may do so is simple. First, ocean transportation costs are fixed.

Unlike the railway carrier, the ocean carrier is unable to add or eliminate cargo carrying units in adjustment to the variations of cargo offerings. Since the ship is a single carrying unit, the carrier's costs, exclusive of cargo handling costs, are fixed. Costs per unit of cargo carried vary in inverse proportion to cargo carried. Accordingly, the rate cutter, particularly in times of relative cargo shortage and intense carrier competition, is able profitably to fill his vessel although he might not be able to realize a profit with less than a shipload. When, and as long as, other carriers meet his rate competition, the rate cutter has lost his former advantage, and unless the services offered by his vessels are superior, which does not appear here, his probabilities of attracting full shiploads of cargo disappear; his cargo unit costs increase and render his rate unprofitable. He must, therefore, maintain his rates at a level lower than those of other carriers in the trade even though that level would be unprofitable if established for all carriers in the trade.

The tremendous economic pressure of Isbrandtsen's cut-rate competition was heightened by a 1952 announcement of the late Mr. Hans Isbrandtsen that his company's sailings in this trade would be increased from two per month to three or four per month. The certainty of increased Isbrandtsen sailings, if single closed conference rates should be reestablished, further emphasizes the need for a dual-rate system in this trade. Yet the majority found no need for the system, principally because of the percentage of Isbrandtsen carryings to the total movement in the trade. A further reason advanced by the majority, namely, that the institution of the system would not generate enough new cargo for the conference to justify a 9½-percent rate reduction from noncontract tariff, will be discussed later in this report. Aside from this latter reason, the majority's findings can only be distinguished from the findings in the *Japan/Atlantic* case on the basis of the amount of cargo carried by the independent. It is their view, then, that the independent's carrying of 26 percent of the traffic justifies the system, whereas if he carries 10 percent or 11 percent of the traffic the system is not justified. Under this view, there is necessarily an arbitrary line drawn within which a dual-rate system is justified. Presumably until this line is crossed a dual-rate system cannot be approved, however unmistakable are the indications of further instability and its effect on shippers, receivers, and all carriers in the trade. I cannot endorse this view, which is necessarily inconsistent with the congressional purpose in enacting the Act.

Prior to passage of the Act, rate wars, deferred rebates, the use of fighting ships, and other monopolistic devices were in wide use in foreign commerce and resulted in perpetuation of the strongest lines at

the price of elimination of the weaker. The Act was enacted to remedy conditions unfavorable to the commerce of the United States and unfavorable to the development of an American merchant marine adequate to safeguard the welfare of the commerce of the United States. The Act was passed after exhaustive study and investigation had been conducted by the House Merchant Marine and Fisheries Committee during the 62d and 63d sessions of Congress (1913–14). The report of the committee, known as the Alexander Report, reflects the committee's exhaustive study and contains specific recommendations, most of which were incorporated in the Act.

Among other things, the Act recognizes that conditions existing in the foreign trade are unlike the conditions existing in the domestic trade; that in foreign commerce unrestricted competition is harmful, not beneficial; that combinations of carriers are to be encouraged; and that combinations of carriers in foreign trade are beneficial to the foreign commerce of the United States when subject to the reasonable supervision of this Board.

Certain passages from the report and recommendations are highly significant to the present problem. Foremost in significance is the following from 4 Alexander Report, pages 415–7:

> In formulating its recommendations it became apparent to the Committee, in view of all the facts presented, that *only two courses of action were open for adoption.* Either the agreements and understandings, now so universally used, may be prohibited with a view to attempting the restoration of unrestricted competition, or the same may be recognized along lines which would eliminate existing disadvantages and abuses. It is claimed that the adoption of the first course—the prohibition of cooperative arrangements between practically all the lines in nearly all the divisions of our foreign trade—would not only involve a wholesale disturbance of existing conditions in the shipping business but would deprive American exporters and importers of the advantages claimed as resulting from agreements and conferences if honestly and fairly conducted, such as greater regularity and frequency of service, stability and uniformity of rates, economy in the cost of service, better distribution of sailings, maintenance of American and European rates to foreign markets on a parity, and equal treatment of shippers through the elimination of secret arrangements and underhanded methods of discrimination. * * *
>
> These advantages, the Committee believes, can be secured only by permitting the several lines in any given trade to cooperate through some form of rate and pooling arrangement under Government supervision and control. It is the view of the Committee that open competition cannot be assured for any length of time by ordering existing agreements terminated. The entire history of steamship agreements shows that in ocean commerce there is no happy medium between war and peace when several lines engage in the same trade. Most of the numerous agreements and conference arrangements discussed in the foregoing report were the outcome of rate wars, and represent a truce between the contending lines. To terminate existing agreements would necessarily bring about one of two results: the lines would either engage in

rate wars which would mean the elimination of the weak and the survival of the strong, or, to avoid a costly struggle, they would consolidate through common ownership. Neither result can be prevented by legislation, and either would mean a monopoly fully as effective, and it is believed more so, than can exist by virtue of an agreement. Moreover, steamship agreements and conferences are not confined to the lines engaging in the foreign trade of the United States. They are as universally used in the foreign trade of other countries as in our own. The merchants of these countries now enjoy the foregoing advantages of cooperative arrangements, and *to restore open and cutthroat competition among the lines serving the United States would place American exporters at a disadvantage in many markets as compared with their foreign competitors.* [Emphasis supplied.]

After discussing the unfairness of certain specific methods employed by the then existing conferences, the Report stated at page 418:

The Committee believes that the disadvantages and abuses connected with steamship agreements and conferences as now conducted are inherent, and can only be eliminated by effective government control; and it is such control that the Committee recommends as the means of preserving *to American exporters and importers* the advantages enumerated, and of preventing the abuses complained of. [Emphasis supplied.]

The foregoing extracts from the Alexander Report reflect the unequivocal congressional choice of controlled monopoly over survival-of-the-fittest, rate-war competition in foreign competition, and indicate a necessary congressional approval of such conference competitive measures as are required to prevent rate cutters from disrupting the smooth flow of commerce in a particular trade, subject, however, to the limitations of the Act and subject to regulation by this Board in conformity with the Act. As stated in this Board's report in the *Japan/Atlantic* case, the Alexander Committee specified those competitive measures forbidden to conferences, as for example, fighting ships and deferred rebates, and approved of competitive measures, such as the dual-rate system, not recommended for statutory prohibition.

With this background in mind, it is to be noted that section 15 of the Act provides for the filing with this Board of:

* * * a true copy * * * of every agreement with another such carrier * * * fixing or regulating transportation rates or fares; * * * *controlling, regulating, preventing,* or *destroying competition;* * * * or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term "agreement" in this section includes understandings, conferences, and other arrangements. [Emphasis supplied.]

Section 15 further provides that:

The board *may* by order disapprove, cancel, or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it,

that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be in violation of this Act, and *shall* approve all other agreements, modifications, or cancellations. [Emphasis supplied.]

Two important features of this section should be noted: First, the Congress recognized that agreements could be approved by this Board even though they have the effect of "destroying competition;" second, the Board by order *may* disapprove, cancel, or modify an agreement provided the Board finds it to be "unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be in violation of this Act," and imposes the mandate that the Board *shall* approve all agreements where it is unable to make those specified findings.

In *Swayne & Hoyt* v. *United States*, *supra*, at page 304, the Supreme Court recognized that a conference activity could stifle nonconference competition, and stated the true test to be:

In determining whether the present discrimination was undue or unreasonable the Secretary was called upon to ascertain whether its effect was to exclude other carriers from the traffic, and if so, whether, as appellants urge, it operated to secure stability of rates with consequent stability of service, and, so far as either effect was found to ensue, to weigh the disadvantages of the former against the advantages of the latter.

Accordingly, and even if we should find that the adoption of a dual-rate contract system would have the effect of driving Isbrandtsen out of this trade—and the forecasts of record minimize such a possibility—we should approve that action unless we are able to find that such disadvantage outweighs the benefits to be gained by rate stability and stability of service.

In considering an application to institute a dual-rate system in any trade, we must at the outset recognize the immediate purpose of the system, simply stated, to be the elimination of nonconference competition, as such, as a significant force in that trade,[15] and the ultimate intended effect to be reestablishment or maintenance of stability of rates and service in the trade. I consider it a truism to state here that if the immediate purpose of the dual-rate system is not accomplished, the ultimate intended effect may not be wholly achieved.

In conformity with the words of the Supreme Court, hereinabove quoted from *Swayne & Hoyt* v. *United States*, we need only, in pass-

[15] The alternatives to the nonconference lines are to join the conference, continue to operate nonconference, or withdraw from the trade.

ing on a dual-rate application, consider (a) whether there is effective nonconference competition in the trade, present or threatened, and (b) whether elimination of that competition as a significant force in the trade will create, maintain, or restore stability of rates and service in or to the trade. I cannot consider, as did the majority, that in addition to a need for the system in the trade, the conference must show that the system will attract sufficient additional cargo to offset the revenue loss to the lines resulting from carriage at a discount under contract rates as compared with carriage under single closed noncontract rates. First, the Supreme Court in *Swayne & Hoyt* v. *United State*, *supra*, gave no indication that such a test was necessary or desirable. Second, such a test must necessarily be based wholly on pure speculation as to the relative amounts of cargo which will be carried, after initiation of a dual-rate system, by conference and nonconference carriers. Third, aside from the first two considerations, such criteria are applicable only to domestic transportation, wherein cost of service is of concern to a rate-fixing regulatory body. Since this Board has no power to fix rates in foreign commerce, such costs concern us only if the rates charged for transportation of cargo are so disproportionate to the costs of earning freight on that cargo as to be detrimental to the commerce of the United States or to be unjustly discriminatory against particular shippers.

To test the validity of a dual-rate system by its effect on independent operators is to permit the tail to wag the dog and to apply a standard not contemplated by Congress. The nonconference operator's handicaps in the face of a dual-rate system, as well as his advantages under a single scale of conference rates, are self-assumed. This Board and its predecessors have insisted that conference membership be open to all carriers engaging or giving reliable intention of engaging in the conference trade. Isbrandtsen's avoidance of conference membership in this and other trades is therefore deliberate and is presumably motivated solely by hopes of greater financial gain from cut-rate practices than would be possible from cooperation with other carriers in those trades, as contemplated in the Act. For, as hereinabove indicated, the Alexander Report in its recommendations hoped that the recommended legislation would terminate, rather than foster, "open and cutthroat competition."[16] Yet, if conferences are flatly denied the use of a dual-rate system, aptly described by a witness in another proceeding as "the cornerstone of the conference system," or are denied the use of the system if its result would be to force a nonconference rate cutter out of the trade or into the conference, rate-

[16] 4 Alexander Report 417.

cutting practices are protected in perpetuity or at least until such time when the rate cutter leaves the trade voluntarily or under the economic stress of a rate war.

Oddly enough, Isbrandtsen, an unsubsidized, high-operational-cost independent, could not hope to remain competitive with foreign conference lines under open-rate warfare, yet, by its rate practices, it has deliberately courted a rate war and all of the disastrous effects of such a war on carriers and shippers alike. Such an independent exists and thrives in a trade as long as conference lines maintain closed rates. It is ironic that, without a dual-rate system, the conference system, which is the independent's greatest asset, and the high-cost independent himself may both eventually be destroyed by the independent's rate-cutting competition.

The fears which are frequently expressed that elimination of independent competition itself will inevitably result in excessively high conference freight rates are, in my opinion, baseless. Whether or not there is an independent carrier in a given trade, conference rates are limited by the ability of the shipper to sell his commodities. Where conference rates on a commodity are well above world levels, the commodity will usually be severely handicapped, for sales purposes, in comparison with similar cargoes shipped to the same markets from other and competitive areas. When his goods are thus handicapped, the merchant must discontinue shipping those goods or induce a nonconference operator, berth or tramp, to enter the trade. In either eventuality, the commodities handicapped by the exorbitant rate will be lost to conference vessels unless the conference rate is lowered. Most important, however, as stated in the recent *Japan/Atlantic* decision, this Board can and will disapprove those agreed conference rates which are found to be detrimental to the commerce of the United States.

The fears expressed of monopolies have no foundation here. Conferences are direct opposites of monopolies. In my opinion, the majority are overly concerned with protecting a "rugged individualist" and in an area where history discloses that rugged individualism has been less than beneficial to the foreign trade of the United States. While conferences are not perfect, nevertheless they are an example of democracy in action with the rights of the individual subordinated to the vote of the majority. To the extent that the activities of conferences may have been disadvantageous to shippers, part of the responsibility rests on this Board for failing to more carefully scrutinize conference activities. As to the rugged individualist, he chooses to be a nonconformist solely for self-interest.

The danger of a rate war exists when two things coincide, namely, presence of a strong nonconference operator in the trade and overtonnaging. Both conditions existed in this trade. A rate war resulted and everyone suffered—conference carriers, nonconference carriers, and the foreign commerce of the United States. Those same two conditions could again coincide tomorrow; we have a strong nonconference operator in the trade and it is only the recent bulge in the movement of transpacific cargo which temporarily defers the existence of the second element. Because of the aggressive growth of Japanese-flag shipping, it is inconceivable that the second element will be long deferred. A dual-rate contract system is unnecessary in all trades. The nature and volume of cargo, the number of carriers in the trade, and other factors may make the use of that system unnecessary in many trades. In this trade, however, the system is required, and the record fully supports such a finding of necessity. The decision of the majority perpetuates conditions which will inevitably again result in a rate war with resultant detriment to the foreign commerce of the United States. I, for one, will not support that result.

ORDER

At a Session of the FEDERAL MARITIME BOARD, held at its office in Washington, D. C., on the 19th day of December A. D. 1955

No. 743

IN THE MATTER OF THE STATEMENT OF TRANS-PACIFIC FREIGHT CONFERENCE OF JAPAN FILED UNDER GENERAL ORDER 76

This proceeding having been instituted by the Board on its own motion, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Board on the date hereof having made and entered of record a report containing its conclusions and decision thereon, which report is hereby referred to and made a part hereof:

It is ordered, That the agreement embodied in and constituted by the aforesaid statement filed by the Trans-Pacific Freight Conference of Japan be, and it is hereby, denied approval under the provisions of section 15 of the Shipping Act, 1916; and

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

By the Board.

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

FEDERAL MARITIME BOARD

No. S-38

ISBRANDTSEN COMPANY, INC.

v.

AMERICAN EXPORT LINES, INC.

Submitted December 14, 1955. Decided February 29, 1956

Section 810 of the Merchant Marine, 1936, as amended, extends protection to only those citizens of the United States whose common carrier operations on each and every trade route on which service is provided are conducted exclusively with American-flag vessels.

In view of its admission of common carrier operation with foreign-flag vessels on trade routes other than Trade Route No. 18, Isbrandtsen Company, Inc., not found to be a citizen of the United States for whom the protection of section 810 of the Merchant Marine Act, 1936, as amended, was intended.

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

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

Max E. Halpern, *John Mason*, *Richard W. Kurrus*, and *Leroy F. Fuller* as Public Counsel.

REPORT OF THE BOARD

BY THE BOARD:

This proceeding was originally instituted on complaint filed by Isbrandtsen Company, Inc. ("Isbrandtsen"), alleging that American Export Lines, Inc. ("Export"), entered into agreements with other carriers in 1952 and 1953 for the exclusive transportation of cotton from Alexandria, Egypt, to ports in India and Pakistan, which contracts were and are unjustly discriminatory and unfair to Isbrandtsen, in violation of sections II-3, II-18 (b), and II-18 (c) of Export's

operating-differential subsidy agreement, and of section 810 [1] of the Merchant Marine Act, 1936, as amended ("the 1936 Act").

After hearing before an examiner, the filing of briefs, the issuance of a recommended decision, and oral argument held on May 3, 1954, the Board and Maritime Administrator ("Administrator") in their report of May 13, 1954 (4 F. M. B.-M. A. 442), found that Isbrandtsen is a citizen of the United States within the meaning of section 2 of the Shipping Act, 1916, and that Export's participation in the cotton freight agreements was not in violation of section 810 of the 1936 Act, or of sections II-3, II-8 (b), or II-8 (c) of its subsidy agreement. The Board and Administrator could not find, however, that Isbrandtsen is operating as a common carrier even on Trade Route No. 18 exclusively with United States-flag vessels. By order of the Board, concurred in and adopted by the Administrator, the proceeding was discontinued.

On July 21, on petition of Isbrandtsen, the Board, with the concurrence of the Administrator, reopened and remanded the proceeding to the examiner for the purpose of receiving further evidence on whether or not Isbrandtsen "operates" as a common carrier by water exclusively employing vessels registered under the laws of the United States on any established trade route from and to a United States port or ports. The proceeding was further reopened for the purpose of reargument and reconsideration of

(1) the question of jurisdiction as between the Board and Administrator;

(2) the question of the meaning of the phrase "any other citizen of the United States who operates a common carrier by water exclusively employing vessels registered under the laws of the United States on any established trade route from and to a United States port or ports", in section 810 of the 1936 Act; and

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[1] Section 810 provides:

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

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

(3) the question whether section 810 of the 1936 Act confers upon complainant any right to initiate a proceeding before the Board for any alleged violation of the section.

After further hearing on December 8 and 9, 1954, the examiner found that:

(1) Isbrandtsen operates as a common carrier by water, exclusively employing vessels registered under the laws of the United States, on Trade Routes Nos. 7, 8, 9, and 18 from and to a United States port or ports; and

(2) twelve foreign-flag vessels operated by Isbrandtsen between September 25, 1952, and March 1, 1954, on Trade Route No. 18 were tramp ships and were not employed in its common-carrier service.

Exceptions to the examiner's further findings have been filed by Export and by Public Counsel, and oral argument has been heard. We agree with the examiner that Isbrandtsen operates as a common carrier by water, exclusively employing vessels of United States registry, on essential Trade Route No. 18, and that 12 foreign-flag vessels on Trade Route No. 18 were not employed in common-carrier service. Exceptions and recommended findings not discussed in this report nor reflected in our findings or conclusions have been given consideration and found not justified.

We find the following to be the facts in addition to, in repetition of, or in lieu of those facts found in the earlier report of the Board and Administrator.

Isbrandtsen maintains a United States-flag round-the-world common-carrier service running eastbound from United States North Atlantic ports through the Mediterranean Sea and the Indian Ocean and thence across the Pacific and back to United States North Atlantic ports. Isbrandtsen offers to transport cargo on these vessels from Alexandria, Egypt, to ports in India and Pakistan, which termini are located on Trade Route No. 18.

Isbrandtsen has operated foreign-flag vessels as common carriers on trade routes other than Trade Route No. 18 during the period encompassed in the complaint. Isbrandtsen operated 12 chartered foreign-flag vessels on Trade Route No. 18 between September 1952 and July 1954. The vessels, their sailing dates, ports of loading, destination, and cargo carried thereon are as follows:

Name and registry of ship	Loading port	Sailing date	Cargo (tons)	Port of destination
Swanbrook—British	Baltimore	Jan. 13, 1953	5,601 bulk coal	Karachi.
	Philadelphia	Jan. 18, 1953	459 military	Do.
Marie Skou—Danish	Montreal	Apr. 22, 1953	7,500 bulk grain	Do.
	New York	May 2, 1953	853 military	Do.
King James—British	Houston	Oct. 24, 1953	8,505 bulk grain	Do.
	Mobile	Oct. 29, 1953	805 military	Do.
North Britain—British	Mobile	Dec. 10, 1953	8,001 bulk grain	Do.
			450 military	Do.
Anastassies Pateras—Greek	do	Mar. 1, 1954	1,500 bulk grain	Do.
			1,959 military	Do.
Eptanissos—Greek	Philadelphia	Sept. 25, 1952	6,500 bulk coal	Do.
Turmoil—Liberian	Baltimore	Nov. 19, 1952	7,883 bulk coal	Do.
	Montreal		652 military	Do.
John Lyrus—British	New York	July 24, 1953	3,937 bulk grain	Do.
			9 locomotives	Do.
			530 military	Do.
Blue Master—Norwegian	Galveston	Dec. 14, 1953	7,750 bulk grain	Bombay and Karachi.
	Mobile	Dec. 20, 1953	1,682 military	Do.
Norse Captain—Norwegian	Mobile	Sept. 24, 1953	1,552 military	Bombay.
Kyma—Greek	Houston	Oct. 18, 1953	8,593 bulk grain	Do.
Hellas—Greek	do	Nov. 30, 1953	8,100 bulk grain	Bombay and Madras.
			825 military	Do.
			267 machinery	Do.

All 12 vessels carried military cargo for the Pakistan Embassay or the India Supply Mission. One, the *Norse Captain*, carried only military cargo; all others carried both military and bulk cargoes. The *Hellas* carried, in addition, a shipment of machinery consigned by and to Merritt, Chapman & Scott Corporation of India. All cargo except bulk coal carried on the vessels moved under the ocean bill of lading form in regular use on Isbrandtsen's liner vessels. The coal cargoes moved under the terms of special coal form bills of lading.

The military cargoes carried for the Pakistan Embassy and the India Suply Mission were supplies and equipment purchased from the United States Government. The military cargo was classified secret by the Governments of India and Pakistan. The cargoes included explosives. Some cargoes required special fittings. Contracts for shipment were entered into between Isbrandtsen and the government concerned, by which Isbrandtsen agreed to carry over a period of time definite quantities of military cargo at specified rates, as the cargo became available for shipment. Letters confirming four of the contracts for the military lifts were submitted as exhibits in this proceeding. Two of those letters confirmed, *inter alia*, a requirement for direct sailings from last United States port to Karachi, Pakistan, while the other two letters confirmed an agreement to discharge at Bombay, India, prior to calling at Pakistani ports. The direct sailings to Karachi were required in order to avoid showing cargo manifests at intermediate ports. Cargo lots specified in a single agreement were carried on more than one vessel. The military cargo, like the bulk cargoes, moved on Isbrandtsen's regular bill of lading. On the military cargo aboard a given vessel, several bills of lading may have

been issued. The contracts for the military goods were closed with the understanding that Isbrandtsen would procure bulk cargoes to make up full shiploads.

While it was stated that the bulk cargoes were carried under charters, no charter was offered in evidence. The vessels on which the combined military and bulk cargoes moved were selected by Isbrandtsen. Isbrandtsen's commercial department was the shipper on bills of lading issued for bulk coal shipments, and the coal was sold at an indeterminate time to the Government of Pakistan. On bulk grain shipments, the Government of Pakistan or the Government of India was, in each instance, both shipper and consignee. The machinery shipment to India, consigned by and to Merritt, Chapman & Scott Corporation of India, was arranged at the suggestion of the India Supply Mission and would not otherwise have been solicited or carried since neither this sailing nor any other of the 12 foreign-flag sailings on Trade Route No. 18 was advertised. On none of the 12 sailings did Isbrandtsen solicit cargo from the public generally.

Along with its liner operations, Isbrandtsen has long engaged in tramp operations in foreign commerce. It ordinarily solicits as vigorously for its tramp or charter service as it does for its liner service. While in the past Isbrandtsen has advertised its tramp service, it has not done so during the period within which the 12 foreign-flag vessels operated on Trade Route No. 18. On its tramp vessels, Isbrandtsen has carried cargo identified by mark or count as well as bulk cargo. On its liner vessels Isbrandtsen carries limited quantities of bulk cargo, ranging from 1,500 to 3,500 tons, along with general cargo.

Isbrandtsen's solicitors, in calling on potential shippers, inquire about any business which might be available, whether tramp or liner. Once cargoes have been obtained, it is the carrier's privilege to determine whether those cargoes will move via tramp or liner vessels, since the shipper does not usually express a preference. Since cargoes moving on the tramp vessels are normally shipped on the same bill of lading form in use on the liner vessels,[2] Isbrandtsen is, in any event, subjected to a common-carrier liability on such movements unless the bills of lading are issued pursuant to a charter party which does not incorporate the bills of lading or does not itself impose common-carrier liability.

For a number of years Isbrandtsen has carried cargoes for the Governments of Pakistan and India on liner vessels. While, as hereinabove stated, information concerning the military cargoes here involved has been classified secret by the governments, enough details

[2] As hereinbefore noted, coal moves under a special bill of lading.

exist concerning the nature and the movement of such cargoes to enable us to find it highly improbable that they could have moved on Isbrandtsen liners. The facts that the cargoes included explosives in larger quantities than are customarily carried on liners, that some of the cargoes required special fittings or installations, and that, on at least some of the shipments, the government shipper required that the carrying vessel move direct from port of loading to port of discharge, sufficiently preclude the possibility that the cargoes could have moved on liners. The bulk cargoes, it is clear, moved in much greater quantities than are carried on Isbrandtsen liners.

Export negotiated with the Pakistan Embassy subsequent to September 1952 for military cargoes. Export obtained none of this cargo, although it has carried nonmilitary cargo for the Embassy. During the negotiations, Embassy officials showed a willingness, assuming that cargo should be booked with Export for shipment to Karachi, to authorize Export calls at intermediate ports. It is probable that some of the cargoes solicited by Export were carried by Isbrandtsen on one or more of the 12 foreign-flag vessels under consideration.

CONTENTIONS OF THE PARTIES

Export contends that Isbrandtsen has no standing to complain under section 810 of the 1936 Act, regardless of whether or not the 12 foreign-flag vessels operated by Isbrandtsen on Trade Route No. 18 have been operated as common carriers; moreover, Export urges that those vessels were common carriers. Under Export's view, the reference, in section 810, to any citizen of the United States "who operates a common carrier by water" is a limitation on the class of persons entitled to the benefit of the section; any person not operating a common carrier is not entitled to complain. Export considers, however, that the language does not also limit the scope of the operations which may be considered in determining whether a complainant is otherwise entitled to the benefits of the section. The purpose of the section, it is said, is to protect those who are entirely American operators and to deny protection to those who operate in part with American-flag vessels and in part with foreign-flag vessels. Accordingly, Export argues, once it is determined that a complainant is a common carrier, it is necessary only to consider whether the complainant employs vessels registered under the laws of a foreign country "on any established trade route from and to a United States port or ports" and not whether such operations with foreign-flag vessels are in common carriage; it is sufficient to deny relief under section 810 to any complainant if that complainant has utilized foreign-flag vessels on

any trade route, no matter where, and not merely that complainant has employed such vessels on the trade route on which unjustly discriminatory or unfair practices are alleged to have occurred.

While, as stated, Export considers the status of the 12 foreign-flag vessels which have been operated by Isbrandtsen on Trade Route No. 18 to be entirely moot, it nevertheless strongly urges that those vessels have been operated in common carriage since they fall within the established judicial definitions of common carriers at common law. First, it is said, Isbrandtsen in its tramp vessels "professes to serve indifferently all who choose to employ him * * *"; [3] second, Isbrandtsen's tramp or charter service has been advertised and the general public has been solicited; and third, although the vessels did not operate on regular routes or fixed schedules, the law does not consider such operation to be a necessary attribute of a common carrier.

Finally, it is Export's position that since both the Board and the Administrator participated in the earlier report, there can be no issue now as to jurisdiction to hear and decide Isbrandtsen's complaint.

Isbrandtsen contends that a common carrier may complain, under section 810 of the 1936 Act, of unfair practices if the common-carrier vessels he employs on the trade route on which the unfair practices are alleged to have been employed are exclusively American, without consideration of operations on other trade routes and regardless of the nationality of the vessels which are employed on the trade route in question as private carriers.

Isbrandtsen urges that the question of precise jurisdiction as between Board and Administrator was not decided by the earlier report since it held only that the Board and the Administrator between them have the requisite jurisdiction. In either event, Isbrandtsen argues, it has been prejudiced by the Chairman-Administrator's absence from the oral argument on exceptions.

While Isbrandtsen admits the employment of a foreign-flag vessel or vessels on trade routes other than Trade Route No. 18, it vigorously denies that the 12 foreign-flag sailings on Trade Route No. 18 have been common-carrier sailings, maintaining principally that Isbrandtsen did not hold out those vessels as available to carry the goods of all persons indifferently and did not advertise the sailings. Isbrandtsen concludes that the vessels were tramp vessels as distinguished from common carriers.

Public Counsel concurs in the Isbrandtsen interpretation of section 810 of the 1936 Act and agrees that the 12 foreign-flag vessels in

[3] Dobie, Bailments and Carriers, p. 301 (1914).

question were not operated as common carriers. Public Counsel is of the view that the Board, in consonance with the principles set out in *U. S. Nav. Co.* v. *Cunard S. S. Co.*, 284 U. S. 474 (1932), has primary jurisdiction to hear and decide complaints under section 810 in spite of the absence of a specific provision to that effect in the section. Public Counsel further states that this particular proceeding is properly within the joint jurisdiction of the Board and the Administrator.

DISCUSSION AND ULTIMATE CONCLUSIONS

Varying constructions of section 810 are conceivable from a literal reading of the section, most of which would, when coupled with Isbrandtsen's admission of foreign-flag common-carrier operations on a trade route or routes other than Trade Route No. 18, preclude Isbrandtsen from bringing the present complaint as an aggrieved party under the section. The limitation urged by Export, for example, would, as hereinbefore stated, bar Isbrandtsen from complaining if any foreign-flag carriers, common or private, were employed by Isbrandtsen on any of the many essential trade routes from or to United States ports.

Two basic questions of interpretation of the statutory language must be resolved: first, to be entitled to the protection of the section, must all of complainant's common-carrier vessels on every established trade route on which he is operating as a common carrier be registered under the laws of the United States, and, second, to be entitled to the protection of the section, must all of complainant's vessels, employed on any or every trade as either private or common carriers, be vessels registered under the flag of the United States?

Critical to resolution of the first question is the import to be given to the word "any" appearing in the phase "* * * on any established trade route from and to a United States port or ports." Since, on its face, the word could have either an inclusive or an exclusive connotation, resort to the legislative history of the section is necessary.

As stated in our earlier report, Senator O'Mahoney, on the floor of the Senate, offered the amendment which became section 810 of the 1936 Act. In the amendment, as offered, the word "an" preceded the words "established trade route * * *"rather than the word "any" which appears in the section as enacted. Since the history of the section contains no explanation for the substitution of words, the interchange may import an intent to either clarify or to change the

effect of the original language. Of some assistance in interpreting the language is the following statement made by Senator O'Mahoney on proposing the amendment: "It is my purpose in introducing this amendment to make it clear to the Commission that it is the intention of Congress not to pay subsidies of any kind to any American line which is willing to enter into any combination with other lines, including those operating under foreign flags, *to crush American competition.*" [4] [Emphasis supplied.]

The words "American competition" indicate the congressional concern for vessels of United States registry which may be affected by certain unjustly discriminatory or unfair practices. Yet, under the original language, where the word "an" preceded the phrase "established trade route," the use of the indefinite article would extend the protection of section 810 of the 1936 Act to those common carriers who operate American-flag vessels on an established trade route other than, and not competitive with, the trade route on which unjust or unfair practices are alleged to have been practiced, although those carriers may operate only foreign-flag vessels on the latter trade route.

Obviously, such a possibility is inconsistent with the expressed congressional intent to protect "American competition" and militates against construing "any" as synonymous with "an." The word "any," however, when construed as an inclusive term, is consistent with that intent and results in a construction in accord with the policy of the United States, as expressed in section 101 of the 1936 Act, to foster the development and to encourage the maintenance of an American owned and operated merchant marine. We consider then that section 810 extends protection to only those common carriers who employ American-flag vessels exclusively on each of the trade routes served by those carriers.

As to the second question, the phrase "exclusively employing vessels registered under the laws of the United States * * *" appears to us directly to modify the phrase "common carrier by water" rather than the word "citizens." The phrase "common carrier" obviously does not refer to a single vessel since a single vessel cannot exclusively employ other vessels. The phrase therefore must be read as "a common carrier service." Thus construed, the section limits its protection to those American citizens who operate common-carrier services in which American-flag vessels are exclusively employed, and does not deny protection to an American-flag common carrier who also employs or operates foreign-flag vessels in private carriage on any of the world's trade routes.

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[4] 80 Congressional Record 10076.

Contrary to Isbrandtsen's arguments, the question of jurisdiction as between Board and Administrator *was* decided in our earlier report, which states, at page 449, that:

> We do not approach the case from the point of view of Isbrandtsen's claim of alleged injury but review the evidence and arguments presented by the respective parties to determine *whether reason exists to modify or terminate* the present operating-differential subsidy agreement with Export. [Emphasis supplied.]

That language, when construed in the light of section 105 (1) of Reorganization Plan 21 of 1950, which delegates to the Board "the functions with respect to making, amending, and terminating subsidy contracts * * *", clearly indicates that the Board decided the matter and that the Administrator concurred as a matter of grace.

We cannot agree that Isbrandtsen has been prejudiced in any way by the absence of the Chairman-Administrator from the oral argument of May 3, 1954. Oral argument was heard by two Board members, a majority, and those Board members decided the matter *for the Board.* The Chairman's review of the record and participation in the decision, as Administrator, under section 214 of the 1936 Act, in connection with his authority to administer operating-differential subsidy agreements which have been made by the Board, does not affect the Board's actual exercise of jurisdiction or in any way adversely affect Isbrandtsen.

There remains for determination the question whether section 810 of the 1936 Act confers upon the complainant any right to initiate a proceeding before this Board. In spite of disagreement among the parties as to the manner in which section 810 shall otherwise be interpreted, the parties, for the most part, agree that the statute confers upon a qualified complainant the right to bring an administrative proceeding prior to commencing suit in a district court of the United States as provided in section 810. We agree that this Board has exclusive primary jurisdiction of complaints under section 810, in view of the many factual questions in such complaints which require the exercise of administrative expertise for resolution, and consider such jurisdiction to be within the rationale expressed by the Supreme Court in *U. S. Nav. Co.* v. *Cunard S.S. Co.*, *supra*, at page 485, as follows:

> Whether a given agreement among such carriers should be held to contravene the act may depend upon a consideration of economic relations, or facts peculiar to the business or its history, of competitive conditions in respect of the shipping of foreign countries, and of other relevant circumstances, generally unfamiliar to a judicial tribunal, but well understood by an administrative body especially trained and experienced in the intricate and technical facts and usages

of the shipping trade; and with which that body, consequently, is better able to deal.

Whether Isbrandtsen has standing to bring this particular proceeding, however, depends on resolution of the status of all of the foreign-flag vessels operated by Isbrandtsen between September 1952 and July 1954 on all of the trade routes on which Isbrandtsen operates a common-carrier service.

Since Isbrandtsen has freely admitted, however, the operation of foreign-flag vessels as common carriers on trade routes other than Trade Route No. 18, we find that it does not qualify as a citizen for whom the protection of section 810 of the 1936 Act was intended. While the question of the status of other Isbrandtsen foreign-flag vessels in general, and the 12 foreign-flag vessels operated on Trade Route No. 18 in particular, has been rendered moot by the admission, we will, nevertheless, consider those questions.

The 1936 Act does not define common-carrier status. While section 1 of the Shipping Act, 1916, specifically exempts tramps from regulation as common carriers by water in foreign commerce, the exemption is a clear recognition by Congress that, under the common-law definition of common carrier, tramps might otherwise be subject to the same regulation imposed on other water carriers. In the absence of a definition of the term in the 1936 Act, we will be guided by the common-law definition of common carrier, represented by the following language from *Propeller Niagara* v. *Cordes et al.*, 62 U. S. 7, 22 (December Term, 1858):

> A common carrier is one who undertakes for hire to transport the goods of those who may choose to employ him from place to place. He is, in general, bound to take the goods of all who offer, unless his complement for the trip is full, or the goods be of such a kind as to be liable to extraordinary danger, or such as he is unaccustomed to convey.

At the outset, we consider the tramp classification of the 12 vessels to be immaterial to their status as common or private carriers since the term "tramp" is antonymous of the term "liner" and not of the term "common carrier." The basic distinctions between tramp and line vessels are the liner's fixed routes and regularity of service, neither of which is important to definition of a common carrier. The similarities between liners and tramps are many; an Isbrandtsen witness stated that a tramp may carry cargoes of the type usually carried on line vessels, and may, as do liners, carry the cargoes of more than one shipper, load at more than one port, and discharge at more than one port. Further, as stated, Isbrandtsen has advertised its tramp service as well as its line vessels, carries cargoes on tramps under its usual liner bill of lading, and presumably assumes

a common-carrier liability on those vessels in the event of cargo loss or damage.

We are unable to determine on this record whether Isbrandtsen's ordinary tramp vessels are private or common carriers, for such a determination turns on questions of fact as to the function of the particular vessels and the manner in which they are regarded by the public, not on the classification given the vessels by the operator.

We can and do determine, however, the status of the 12 foreign-flag vessels operated on Trade Route No. 18 between September 1952 and July 1954. In urging that the vessels were private carriers, Isbrandtsen has stated, in its brief, that:

> Except in the one instance of the ship *Hellas* * * * all cargoes on all the 12 ships were carried under contracts * * * between Isbrandtsen and the two Governments of Pakistan and India * * *

Certainly under a charter party which gives to a charterer the *full capacity* of the ship, the owner is not a common carrier but a bailee to transport as a private carrier for hire. *The Fri*, 154 Fed. 333 (2d Cir. 1907); *The G. R. Crowe*, 294 Fed. 506 (2d Cir. 1923). The record, while incomplete as to the actual terms of carriage, clearly indicates that the 12 vessels or some of them carried cargoes of more than one shipper. The rule hereinabove set out, therefore, is inapplicable to the present proceeding, for the charters, if any, were not for the full reach and burden of the vessels concerned.

The determinative factor here, however, lies in the vessels' operations. Eleven of the vessels carried cargoes for the Governments of Pakistan and/or India only or cargoes to be sold to the Government of Pakistan, and none of the vessels was advertised or otherwise held out to the public as available for the carriage of cargo for all persons indifferently. While, as stated, the twelfth vessel, the *Hellas*, carried machinery for the Merritt, Chapman & Scott Corporation of India, in addition to military cargo and grain carried for the Government of India, we consider that the machinery was carried only as an accommodation extended to the shipper at the suggestion of the Government of India. We see no reason for believing that Isbrandtsen would have carried the cargoes of any other shipper even if space were available on the vessel.

We consider, therefore, that the 12 foreign-flag vessels hereinbefore discussed have been operated in private carriage, and that Isbrandtsen's common-carrier operations on Trade Route No. 18 have been exclusively American flag. In view of Isbrandtsen's operation of foreign-flag vessels on other trade routes, however, Isbrandtsen is not a citizen of the United States for whom the protection of section

810 of the 1936 Act was intended. In any event, as discussed in our earlier report, the prohibition of section 810 is aimed at preventing the exclusion of American-flag carriers from participation in conferences or agreements among carriers operating between foreign ports. No such exclusion has been shown in this proceeding.

We have been presented with no convincing reasons for reversing the determination in our earlier report that Export's participation in the cotton freight agreements did not violate section 810 of the 1936 Act or sections II–3 or II–18 (b) of its subsidy contract. At page 454 of the earlier report the following language appears:

> We have examined the cotton freight agreements of 1952 and 1953, offered in evidence, and are unable to agree that they have the effect of restricting or attempting to restrict the volume, scope, frequency, or coverage of Export's subsidized service on Trade Route No. 18 or that they may reasonably be expected to contravene the purposes or policy of the 1936 Act. We do not find that such agreements need approval under section II–18 (c) of the subsidy agreement or that the evidence shows any violation of that section.

While we concur in the foregoing language as it relates to the merits of the cotton freight agreements of 1952 and 1953, the Chairman in his capacity as Administrator disagrees with and hereby reverses the foregoing discussion relating to the necessity for approval of those agreements under section II–18 (c) of the subsidy contract; those agreements in question fall squarely within the class of agreements required by section II–18 (c) to be filed for approval. Since the agreements have not been found to be in contravention of the purposes, policy, or provisions of the 1936 Act, however, such approval under section II–18 (c) will be granted by the Administrator.

The proceeding will be discontinued and Isbrandtsen's complaint will be dismissed.

An appropriate order will be entered.

ORDER

At a Session of the FEDERAL MARITIME BOARD, held at its offices in Washington, D. C., on the 29th day of February A. D. 1956

No. S-38

ISBRANDTSEN COMPANY, INC.

v.

AMERICAN EXPORT LINES, INC.

This case being at issue upon complaint and answer on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Board on May 13, 1954 (4 F. M. B.—M. A. 442), having made and entered of record a report stating its conclusions and decision thereon, and the Board on the date hereof having made and entered of record a further report stating its conclusions and decision thereon, both of which reports are hereby referred to and made a part hereof except in so far as the report of May 13, 1954, may be inconsistent with the report entered on this date:

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

By the Board.

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

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FEDERAL MARITIME BOARD

No. M-64

PACIFIC FAR EAST LINE, INC.—APPLICATION TO BAREBOAT CHARTER SEVEN VICTORY VESSELS FOR OPERATION IN BULK TRADE ON TRADE ROUTE NO. 29

Submitted March 16, 1956. Decided March 20, 1956

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

George F. Galland and *Robert N. Kharasch* for States Marine Corporation of Delaware.

Richard W. Kurrus for American Tramp Shipowners Association, Inc.

Vern Countryman for American President Lines, Ltd.

Tom Killefer for States Steamship Company and Pacific Transport Lines, Inc.

Sterling F. Stoudenmire, Jr., for Waterman Steamship Corporation.

James L. Pimper and *Allen C. Dawson* as Public Counsel.

REPORT OF THE BOARD

BY THE BOARD:

This is a proceeding under Public Law 591 of the 81st Congress upon the application of Pacific Far East Line, Inc. ("PFEL"), filed on March 7, 1956, to bareboat charter seven Government-owned, war-built, dry-cargo Victory-type vessels for operation on Trade Route No. 29 [1] as bulk carriers for a minimum period of 90 days and a maximum period to be mutually arranged. Because of an emergency situation appearing to exist, hereinafter more fully discussed, the usual 15 days' notice of hearing was not given, notice for hearing on March 14, 1956, having been published in the Federal Register on March 10,

[1] Trade Route No. 29 as defined in 20 F. R. 6361, August 30, 1955:
"Between California ports and ports in the Far East (Japan, Formosa, Philippine Islands, and the continent of Asia from the Union of Soviet Socialist Republics to Siam, inclusive)."

1956. For the same reason, the Board rather than a hearing examiner heard the evidence on March 14, 15, and 16, and heard oral argument in lieu of briefs. Exceptions will not be filed to this report.

Although PFEL receives an operating-differential subsidy for its operations on Trade Route No. 29, under the terms of Contract No. FMB–22, no subsidy has been requested on the proposed charter operations.

American Tramp Shipowners Association, Inc. ("ATSA"), States Marine Corporation of Delaware ("States Marine"), States Steamship Co. ("States"), Pacific Transport Lines, Inc. ("PTL"), American President Lines, Ltd. ("APL"), and Waterman Steamship Corp. ("Waterman") intervened in partial or full opposition to grant of the application. All interveners except the first named are liner competitors of PFEL on Trade Route No. 29.

The application states that the proposed charters have been made necessary by a critical shortage of shipping space to accommodate the movement of iron ore from California to Japan. Currently, it is stated, a backlog of 120,000 tons of ore is stockpiled at Stockton, Calif., for lack of shipping space, and ore producers and shippers are 3 to 4 months behind on deliveries. Charter of vessels is considered necessary to prevent loss of the iron ore business to western producers and shippers, to rescue the blast furnace operations of the Japanese steel mills, and to prevent the Japanese steel producers from seeking ore in Asiatic countries whose political climates are alien to American political principles and philosophies. Stating that the theretofore sufficient iron ore space available on American-flag vessels had been rendered inadequate by demands on tonnage by programs for the export of surplus commodities, and indicating that privately owned American-flag vessels are not available at reasonable rates and under reasonable conditions, applicant seeks seven named vessels for a minimum of 90 days and a maximum to be mutually arranged.

Subsequent to filing of the application, we were advised by telegram from the Director, Port of Stockton, Calif., of an accident to the bulk loading facility at which the iron ore is stockpiled, occasioned by 20,000 tons of iron ore slipping off into the channel of the San Joaquin River and carrying away 300 feet of dock. The Port Director advised us of the threat of further damage to the facility and to the stockpiled ore, and requested immediate action to relieve the emergency situation. The bulk loading facility in question is operated by the Stockton Bulk Terminal Co., a private corporation, as agent for the Port of Stockton. Iron ore shippers utilizing the bulk loading facility are Overseas Central Enterprises

("Overseas") and Ocean Bulk Carriers, Inc., an exporting firm owned or controlled by C. T. Takahashi ("Takahashi").

Commencing March 8, 1955, PFEL and Overseas executed three contracts whereunder Overseas agreed to furnish, and PFEL unconditionally agreed to transport or cause to be transported, a total of 373,000 long tons of iron ore from Stockton to named Japanese ports. The earlier contracts have been performed. The last of the contracts, however, confirmed on July 7, 1955, called for carriage of 299,000 long tons, of which 203,000 long tons remain to be lifted; 80,000 tons of ore presently are stockpiled at Stockton, 20,000 tons are stockpiled at the mines in Nevada, and the remainder is as yet unmined. The terms of the unfulfilled contract are: transportation at an $8.75 f. i. o.[2] rate per ton, less a 2½-percent address commission;[3] loading laydays computed at the rate of 1,500 tons per weather working day, Sundays and holidays excepted; discharging laydays computed at the rate of 1,200 tons per weather working day, Sundays and holidays excepted; demurrage payable at the rate of $1,000 per day of delay, or pro rata part thereof; dispatch money payable at the rate of $500 per layday or pro rata part thereof saved to the vessel.

Overseas purchases the iron ore f. o. b. mine and appears as shipper on PFEL's ocean bills of lading. The ore is sold to Japanese open-hearth steel producers at a c. & f. price of $18.95 per dry metric ton. Since the price of the ore at the mine, plus rail and handling costs, total $10.30 per ton, and ocean transportation costs are, as stated, $8.75 per ton, Overseas suffers a loss of $0.10 per ton before payment of dispatch money, if any, and before payment of the 2½-percent address commission. Overseas' sole profits are derived from dispatch money and the address commission. Overseas has agreed to waive its contractual rights to an address commission and to dispatch money in the event this application is granted. PFEL has not agreed to waive its contractual right to demurrage.

Overseas' current contract with the Japanese steel mills calls for completion of delivery of 373,000 tons prior to March 31, 1956, the termination of the Japanese fiscal year. The mills have extended the contract completion date to April 30, in view of Overseas' difficulties in securing transportation for the 203,000 tons yet undelivered. The mills and Overseas are currently negotiating for a further extension of the performance date.

Since the Japanese mills purchase ore with funds allocated by the Government of Japan, they are unable to pay a greater price than

[2] Free, in and out, of expense to the vessel.

[3] "A commission paid by the vessel at the port of discharge to the ship's agents or to the charterers." De Kerchove, International Maritime Dictionary.

$18.95 per dry metric ton. In the negotiations for the next succeeding Japanese fiscal year commencing April 1, 1956, however, Overseas anticipates receiving a c. & f. sales price which may include an ocean freight rate of approximately $12 per dry metric ton.

In the event that Overseas is unable to deliver the remaining 203,000 tons of ore to the mills, it will suffer a penalty of $0.25 for each ton of ore undelivered by April 30, 1956. Overseas further anticipates that failure to perform the current contract will result in loss of future contracts with the Japanese mills, which will probably look to Canadian suppliers. Areas competitive with the United States for the Japanese iron ore market are the Philippines, Hong Kong, Malaya, Korea, India, and Canada. The Japanese producers pay less for ore produced in certain of these areas than they do for United States-produced ore. While Hainan, now Communist held, produces iron ore, has in fact shipped iron ore to Japan prior to World War II, and is currently considered by Overseas as a potential source of future Japanese ore requirements, Japanese producers have not advised Overseas that they intend future dealings with Hainan mines.

In addition to its unconditional commitment with Overseas, PFEL entered into an agreement with Takahashi on August 15, 1955, to transport 325,000 long tons of iron ore from Stockton to Japan prior to the end of April 1956 at a specified monthly rate. The apparently unconditional commitment was orally modified by the parties to constitute only a right of first refusal on the ore. To date, PFEL has carried 14,000 tons of the ore while Waterman, PTL, and foreign-flag carriers have carried a greater amount. Between 150,000 and 175,000 tons of Takahashi ore remain undelivered. As in the case of Overseas, Takahashi receives a 2½-percent address commission on ocean freight, understood by the parties to be $8.75 per long ton.

At the time of execution of the July 7, 1955, contract between Overseas and PFEL, both parties understood that PFEL would be unable to carry the entire ore commitment on its liner vessels, it being Overseas' understanding that PFEL would act as a central agency through which the cargo would be transported. Overseas anticipated that PFEL would move part of the ore on its own vessels and would subcontract the ore to other liners or charter additional vessels. The shipper did not anticipate, however, that PFEL would lose money on the contract. PFEL did not anticipate difficulty in moving the cargo or in inducing liner vessels to carry the cargo.

PFEL liners calling at Stockton and available to carry iron ore[4] average about four per month, with actual ore carryings per vessel in 1955, prior to July 7, averaging 10,600 tons per month.[5]

While the July 7 agreement did not contemplate an even monthly distribution of cargo, a flexible working schedule was drawn up for the movement. PFEL could not have satisfied its obligation by performing the entire contract in the last month, since the Japanese mills require periodic delivery. The average total carryings which would have been necessary to lift the 332,000-ton balance existing after execution of the agreement is approximately 33,200 tons per month. In comparison, the total commercial cargo carried on PFEL liners to Japan and Okinawa in 1953 and 1954 are 210,757 long tons and 254,555 long tons, respectively. Monthly carryings on PFEL liners prior to July 7, 1955, averaged about 10,600 long tons per month.

At the time of execution of the July 7 contract, PFEL expected the ore to be carried partially in its own vessels, partially in vessels of other American-flag liners, and partially in chartered vessels, if necessary. Mr. Gmelch, PFEL traffic manager, testified, however, that no attempt was made to charter vessels until early in December since, until that time, PFEL was able to keep up to date with the ores that moved into Stockton. At no time of record in this proceeding, however, has PFEL transported or caused to be transported an aggregate monthly total of iron ore approaching the 33,200-ton average required, mathematically, to enable it to remain current with the movement. No evidence of the July charter market was introduced in the proceeding.

On July 15, 1955, attorneys for PFEL and APL submitted to our Regulation Office, for the information of that office, an agreement between those companies, executed on July 11, 1955, whereunder the parties agreed to form a new and separate corporation to be named American Bulk Cargoes, Inc., for the purpose of transporting bulk cargoes. Although the agreement in terms contemplated a filing for approval under section 15 of the Shipping Act, 1916, and under article

[4] George G. Gmelch, PFEL traffic manager, testified that as a matter of company policy no ore had been carried on "Mariner" vessels, probably because the deep draft of those vessels rendered discharging at shallow-water Japanese ore ports impossible. Exhibit 19 reveals, however, that three "Mariners" called at two of the six ore ports specified in the July 7, 1955, PFEL-Overseas contract. The evidence does not reveal whether any of the vessels touched ground in those ports.

[5] Carryings for the balance of 1955 and for 1956 through March 5 averaged 14,680 tons and 15,772 tons per month, respectively.

II–16 of the APL and PFEL operating-differential subsidy agreements, the letter of transmittal stated the belief of the parties that section 15 is inapplicable to the agreement. By letter of August 29, 1955, attorneys for the parties submitted a revised agreement for approval under section 15 and article II–16. The revised agreement recites that the bulk company to be formed will not compete for cargoes desired by APL and PFEL. This agreement, F. M. B. No. 8042, has not yet been approved by the Board under section 15 or by the Maritime Administrator under article II–16.

On July 7, 1955, the date on which PFEL and Overseas confirmed their agreement to arrange transportation of 299,000 tons of iron ore, Mr. Cuffe, PFEL president, testified before the House of Representatives Committee on Merchant Marine and Fisheries as to the proposed new bulk cargo transportation corporation, as follows:

> American President Lines are very much interested and have talked about having some joint setup whereby we can take all these hulks and handle them on American ships. I imagine that on the coast alone with the amount of business that is running and I know in the iron ore that should be good for 25 or 20 extra ships.[6]
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> Our thought, and it has not been carried further than that, with all of these vessels in the laid-up fleet, is possibly some arrangement could be made with Maritime to break out 50 of them, say, and have them available. I think in a short time as many as 50 could be utilized in the bulk trades, the idea there being that if the market went completely flat and you did not need any bulk vessels, you would tie this one up for a short period until the market came oack again.[7]

The plan to charter Government vessels for operation as bulk carriers was never consummated, aside from lack of section-15 approval, because of the breakdown of labor negotiations contemplating reduced wage and manning scales on those vessels. Mr. Gmelch testified that plans for operation of the proposed American Bulk Cargoes, Inc., was "very definitely" related to the agreement with Takahashi for right-of-first refusal on 325,000 tons of iron ore. PFEL has never asked for nor received assurances that Goverment ships would be made available to it for the operations of American Bulk Cargoes, Inc., or otherwise.

Mr. Gmelch testified that on March 9, 1956, he first heard of the possibility that PFEL might try to charter Government vessels to carry the Overseas and the Takahashi iron ore. He stated that at

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[6] *Hearings before the House Merchant Marine and Fisheries Committee on Labor-Management Problems of the American Merchant Marine,* H. R. 5734, 84th Cong., 1st sess., p. 344 (1955).

[7] *Ibid.,* p. 349.

the time of the July 7, 1955, commitment with Overseas he did not foresee the necessity for such charters, and that PFEL had not anticipated any difficulty in moving iron ore on other liners in the trade.

In August 1955, States Marine offered to carry 100,000 tons of PFEL-controlled iron ore on which the company was overcommitted. States Marine's proposal was contingent upon PFEL relinquishing that amount of cargo from its contract in order that States Marine might be more readily able to fit the cargo into its requirements. PFEL responded by indicating a willingness to allocate the cargo to States Marine without releasing the cargo from either of its contracts. A States Marine renewal of its original offer was rejected by PFEL, and the same counter-offer made. Mr. Gmelch testified that PFEL was reluctant to relinquish 100,000 tons of the contract since it did not, at that time, anticipate difficulty in moving the ore.

Overseas likes to maintain a stockpile of approximately 20,000 tons at Stockton. During the summer of 1955, however, many of the rail cars relied on by the ore producers to convey iron ore from Nevada to Stockton were devoted to transporting a bumper sugar beet harvest. The resultant decrease in allocation of cars from about 20 to about 5 or 6 per day caused a critical shortage of ore at Stockton. The shortage of rail cars continued until some time in September or October. Mr. Gmelch testified that at times between July and the termination of the rail car shortage no ore was available to PFEL vessels calling at Stockton, although he did not identify the sailings affected by the shortage. Since October, however, a stockpile has been maintained sufficiently large to supply PFEL with a minimum of 3,500 tons per sailing. In November 1955 the stockpile at Stockton began to build up beyond PFEL's capacity to carry with its liner vessels.

As stated, PFEL sought in December to charter vessels to enable it to meet its commitment to Overseas. It contacted various charter brokers in the United States and in London, offering a rate of $8.75 per long ton, f. i. o., loading 1,500 tons per day, discharging 1,200 tons per day, $1,000 per day demurrage, and $500 per day dispatch for American-flag vessels; proposals were requested. The voyage charters were sought on a 2 or 3 consecutive voyage basis. Mr. Gmelch testified that no counteroffers were received. PFEL would not have accepted American-flag tonnage on a consecutive voyage basis at a rate in the neighborhood of $12 or $13, nor would it have accepted a Liberty vessel at a $60,000 monthly time-charter rate. While in December 1955 PFEL chartered the *Santa Venetia*, a Liberty vessel, from Coastwise Line, Inc., at the rate of $59,000 per month, time-charter terms, for one round transpacific voyage, the *Santa Venetia* carried military

cargo as well as iron ore. Mr. Gmelch testified that PFEL attempted to charter private tonnage at higher than $8.75 per ton, but he would not reveal the level of its offer or the rate which it would have been willing to pay. In the past 6 or 7 weeks PFEL has rejected offers of Liberty vessels at time-charter rates of between $60,000 and $70,000 per month.

In December 1955, Overseas, with PFEL's permission, commenced looking for shipping space on vessels other than those of PFEL, canvassing liners and charter brokers in the course of those efforts. The Overseas witness testified to a lack of success in obtaining a vessel, but did not indicate the range of charter-hire rates which Overseas would have been willing to pay. He stated, however, that he had made no firm offer within the 90 days prior to this proceeding to pay a rate higher than $8.75 per ton.

An $8.75 f. i. o. per ton rate is roughly equivalent to a monthly time-charter rate of $30,000, assuming a 60-day voyage turnaround. On the same basis, a $12 f. i. o. rate is roughly equivalent to a $45,000 monthly time-charter rate. The cost of operation of an American-flag Liberty vessel, including depreciation and interest on capital, is approximately $49,000 per month. Carriage of full cargoes of iron ore on a privately owned American-flag Liberty vessel at an $8.75 f. i. o. rate per ton would therefore result in an operational loss of nearly $20,000 per month.

Mr. Stuart, president of the ATSA, testified that the current per ton f. i. o. rate is in the neighborhod of $14 to $16, the equivalent of a $55,000–$65,000 per month time charter, assuming reasonable notice to the tramp operator and assuming a charter for consecutive voyages or equivalent. Reasonable notice constitutes making a fixture at least 6 to 8 weeks in advance of delivery. Charter rates vary with the length of employment contracted for as well as with the length of time between fixture and delivery. In the past 3 or 4 months, time-charter fixtures have been made at rates ranging from $53,000 to $70,000, depending upon the notice given and the contemplated length of vessel employment. Mr. Stuart, an owner of two American-flag Liberty vessels, had, a week prior to these hearings, time chartered his vessels for a 5-to-6-month grain movement at $58,500 per month.

Mr. Stuart indicated that in today's market a charterer must seek vessels in advance. Mr. Gmelch indicated that although in January PFEL had refused American-flag Libertys at between $65,000 and $70,000 per month, time-charter rates for March and April delivery, PFEL could not, at the time of the hearing, obtain Libertys at any price for March and April delivery. The conclusion from the fore-

going testimony that from 6 to 8 week's notice prior to desired delivery is necessary is confirmed by the fact that the Military Sea Transportation Service, on shorter notice, to date has been unable to obtain sufficient tonnage to lift Korea-destined coal.

Although during the latter half of 1955 and the first 2 months of 1956 PFEL has moved iron ore from Stockton at the average rates of 14,680 and 15,772 tons per month, respectively, the stockpile continued to increase until March 7, 1956, at which time a section of the river bank, upon which ore had been stored, gave way under the accumulated weight, spilling 20,000 tons of the 120,000-ton stockpile [8] into the San Joaquin River and causing over $500,000 in damage to the dock and to the bulk-loading facility generally. Unless the remaining ore can be expeditiously moved and the river bank shored up or otherwise reinforced, further extensive damage to the facility is threatened. Additional expense is being incurred daily in demurrage charges accruing on backlogged ore-loaded rail cars. The record does not reveal whether the ore was stockpiled in violation of Port of Stockton storage regulations or whether such regulations exist.

On March 1, 1955, as hereinbefore stated, Overseas was about 203,000 long tons of ore behind its delivery schedule under its Japanese contracts. Of this amount, delivery of about 100,000 tons was delayed by the shortage of rail cars in the summer and early fall of 1955; about 100,000 tons was delayed by PFEL's failure to furnish shipping space, as agreed.

In its application PFEL stated that the vessels applied for would be used to handle bulk petroleum coke and other commodities in bulk, in addition to the iron ore. At the hearing, however, the application was modified in the following manner:

(a) PFEL would carry the iron ore for which it is legally and morally committed, amounting to 203,000 long tons for Overseas and between 150,000 and 175,000 long tons for Takahashi;

(b) PFEL would carry 20,000 tons of coal for Military Sea Transportation Service ("MSTS") if no private vessels were available and if requested to do so by the Board; and

(c) PFEL would carry 20,000 tons of petroleum coke presently offered, and such additional coke offerings as can not be handled by private carriers.

The MSTS coal was offered for movement prior to April 15, 1956. We are advised, however, that MSTS has extended the time limit for offers on the remaining coal. Mr. Gmelch of PFEL testified that

[8] Of the remaining 100,000 tons, 80,000 are owned by Overseas and 20,000 are owned by Takahashi.

a petroleum coke shipper had been unable to move 20,000 tons of that commodity to Japan and had asked PFEL to lift it. The evidence reveals that the market rate for petroleum coke (like iron ore, an open-rated commodity under the Pacific Westbound Conference tariff) is between $12 and $14 per ton f. i. o. Mr. Gmelch did not know whether in fact the coke had been offered to all other steamship operators on the route or whether other lines had offered to carry the coke at a rate slightly higher than $12 per ton f. i. o. He considered that PFEL would not attempt to carry petroleum coke on vessels chartered under Public Law 591 unless PFEL determined that available private space was not being offered at reasonable rates.

The particular seven AP–2 or AP–3 Victory-type vessels desired by PFEL are currently in a ready or semiready status prior to an allocation to MSTS for delivery in the latter part of June. PFEL anticipates being able to show a profit on carriage of full cargoes of iron ore at $8.75 per ton on these vessels without also carrying petroleum coke and/or coal.

DISCUSSION AND CONCLUSIONS

Under Public Law 591 we are required, prior to chartering Government-owned vessels for use in private operations, to find that the service in which those vessels are 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 have no difficulty in finding that service on essential Trade Route No. 29, between California and Japan, is in the public interest in view of the importance of that service to the foreign commerce of the United States and to Japan. Although the Board has indicated in *Grace Line Inc. — Charter of War-Built Vessels*, 3 F. M. B. 703 (1951), that a service in which a single commodity of a single shipper is shipped from one port to substantially one port is not, unless exceptional circumstances are shown, necessarily in the public interest, we think that such circumstances have clearly been established here. The movement of a large quantity of iron ore from the Port of Stockton is vital to prevent further injury to an already seriously damaged facility of an important port. Until the stockpiled ore is removed, repairs to the facility cannot be effected. Further, congestion and stockpiling at the producing mines and the inability of ore shippers to meet contractual commitments in Japan threaten a future loss of sales in Japan and consequent loss of a valuable commodity to all

carriers in the trade. Whether the damage to the port facility may have been caused or contributed to by a failure to observe safe storage practices in the Port of Stockton, by a failure to provide wharf demurrage or similar charges to aid in preventing overstorage at the facility, by a failure on the part of the ore shipper to regulate the amount of ore shipped from the mine to the port, or by PFEL's failure to meet its contractual transportation commitments, our duty to alleviate this grave danger to the Stockton facility remains, wherever responsibility for the existence of the danger may lie.

Similarly, a present and immediate inadequacy of service for iron ore from Stockton to Japan has been established. The fact of present inadequacy is unaffected by PFEL's failure, in August 1955, to avail itself of the opportunity to allocate 100,000 long tons of iron ore to States Marine and thus to insure movement of the preponderant volume of this cargo on liner vessels within the contract period. Although the present emergency and inadequacy of service might thus have been avoided, our determination rests on the present availability of liner space. Other liners in this trade have stated a willingness to carry parcels of the cargo at varying rates, but none has indicated an availability of space for early loading at Stockton or of sufficient space to accommodate the quantity involved. Accordingly, we find an inadequacy of service to meet the present emergency. Our findings of inadequacy necessarily is coextensive only with the critical conditions in the Port of Stockton and in the iron ore industry. No inadequacy of service has been shown for the movement of petroleum coke or coal. As to the former, little and inconclusive evidence was offered, and, in view of the extension of time by MSTS for receipt of offers to carry coal, no inadequacy of service has been shown as to that cargo.

There is a present and immediate unavailability of private vessels for charter for use in the service. As is amply evident, from this record and otherwise, fixtures for private vessels cannot be made without affording to owners the opportunity advantageously to position those vessels for delivery. For this purpose, from 6 to 8 weeks' notice is required. Notice of this kind is not now possible. We consider that private vessels could have been obtained by PFEL at times subsequent to July 1955 had realistic attempts in that direction been made. PFEL's unwillingness, however, to offer or to pay charter-hire rates under which owners of American-flag Liberty vessels could recoup costs of operation is tantamount to an unwillingness to seek private vessels for charter in this trade. Certainly an offer to time

charter at a monthly rate $20,000 below cost of operation would discourage counter offers.

PFEL's failure to offer break-even charter rates to owners of American-flag tramp vessels while at the same time paying $59,000 per month for a Coastwise Line vessel, PFEL's commitment to transport ore far beyond its known ability to carry on its own vessels, PFEL's refusal to relinquish 100,000 tons of the commitment to States Marine, the plans to charter Government vessels for a bulk cargo shipping company to be formed, and the admission that the plans for the new company had a definite relationship to the contract for first refusal on Takahashi ore, all point unmistakably to a complete reliance on procurement of Government-owned vessels for carriage of iron ore and other bulk cargoes, if available, despite PFEL's protest to the contrary. But whatever PFEL's intentions in executing the Overseas and Takahashi contracts, and because of PFEL's below-cost charter offers, there is an unavailability of privately owned American-flag vessels for timely charter to meet the present crisis.

We accordingly find and certify to the Secretary of Commerce:

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

2. That such service is, for the immediate future, inadequately served in the manner herein stated; and

3. That privately owned American-flag vessels are not presently available for charter from private operators for use in such service.

In the exercise of our discretion to recommend to the Secretary of Commerce restrictions on and conditions to charter which we deem necessary or appropriate to protect the public interest and to protect privately owned vessels against competition from Government-owned vessels, we recommend:

1. That bareboat charters of the seven named vessels be executed at a basic charter-hire rate of 15 percent of either the unadjusted statutory sales price or the floor price of the vessels, whichever is higher;

2. That additional charter hire be set at 90 percent of total net voyage profits without any overhead allocation and without the allowance of 10 percent on capital necessarily employed;

3. That operation of the chartered vessels be rigidly limited to the outbound carriage of iron ore from Stockton, Calif., to ore ports in Japan, and that the vessels be required to return to Stockton in ballast;

4. That PFEL be required, during the period of the charters, to carry a minimum of 3,500 long tons of iron ore per voyage per liner vessel calling at Japan and that, for this purpose, PFEL's Mariner-

type vessels be included among such liner vessels, unless current cargo commitments and/or the physical impossibility of loading, transporting, and/or discharging iron ore from Mariner-type vessels be proven to the complete satisfaction of the Maritime Administrator;

5. That PFEL bear all breakout, readying, and lay-up costs incurred on the seven chartered vessels; and

6. That the charters provide for June 20, 1956, redelivery at a west coast United States port to be named by the Maritime Administrator. Accordingly, PFEL is prohibited from commencing a voyage which may extend beyond such date.

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by section 25 providing "that the Board may reverse, suspend, or modify, upon such notice and in such manner as it deems proper, any order made by it." Id. (104).

The provisions of section 23 of the Shipping Act requiring complaint or formal Board proceedings and a full hearing apply to order relating to violations of the Act referred to in section 22, and not to orders approving agreements between carriers referred to in section 15. If the withdrawal of approval of an agreement between carriers is a "sanction" under section 9 of the Administrative Procedure Act, the imposition of the sanction is clearly "authorized by law." Id. (104).

The possibility that the differential in a dual-rate system initiated under an approved conference agreement will result in unjust discrimination, is of such importance that the status quo of conference carriers with respect to such rates should not be changed pending completion of the Board's investigation into the matter. For the carriers to put the system into effect prior to completion of the inquiry would operate to the detriment of the commerce of the United States. Id. (105).

Congress by section 15 of the Shipping Act authorized ocean carriers to combine their efforts and regulate their rates, and the carriers were given exemption from the penalties of the antitrust laws if their agreements met with Board approval. In foreign as in domestic commerce agreements between carriers resulting in elimination of competition are not permitted without government regulation. The Board has complete power to approve and disapprove new or existing conference agreements so that the Board may see to it that these agreements and the conference actions from time to time under them are not unjustly discriminatory or unfair and do not operate to the detriment of the commerce of the United States or violate the law. Contract Rates—North Atlantic Continental Freight Conference, 355 (368).

While only the effectuation of unapproved agreements between carriers or other persons subject to the Act violates section 15, a complaint of violation in the effectuation of an approved agreement is not significantly deficient where complainant also alleged that a port equalization rule represented an unapproved agreement, and in view of complainant's request for an order requiring an amendment to the port equalization rule, the allegation of violation of section 15 constitutes a request for partial disapproval of the agreement and the rule made thereunder. City of Portland *v.* Pacific Westbound Conference, 664 (674).

The Shipping Board in section 15 Inquiry, 1 U.S.S.B. 121, required that every agreement between carriers, whether oral or embodied in a basic conference agreement, tariff, or other document be filed for approval unless the agreement is, when measured by the standards of section 15, a routine one authorized by an approved basic conference agreement. A judicial standard for determining agreements which require approval under section 15, as distinguished from routine conference activities, was laid down in Isbrandtsen Co., Inc. *v.* United States, 211 F. 2d 51. The Court, in holding that the Board erred in refusing to "suspend" the operation of a dual-rate system and in not remanding that issue to the Board, necessarily considered the Board authorized to determine, as a matter of law, from the construction of documents in relation to each other and according to the standards specified in section 15, whether an agreement between carriers has been necessarily authorized by an approved conference agreement. Pacific Coast Europen Conference—Payment of Brokerage, 696 (701, 702).

The determination of questions of law necessarily does not require an evidentiary hearing. Oral argument on such questions affords a full opportunity to be heard, within the meaning of section 23 of the Shipping Act. Where the Board becomes aware of an agreement among conference carriers which is considered by those carriers to be authorized but which may be an unapproved agreement within the meaning of section 15 of the Act, assuming no issues of fact or administrative discretion, the Board is authorized under section 22 to order the carriers to show cause, within a specified time, why the agreement should not be declared to be unlawful as an unapproved agreement within the meaning of the Act. The sanctions which the Board may then impose are, first, a declaration of unlawfulness of the agreement under section 15; second, the institution of a civil action for the collection of the statutory penalties. Id. (703).

The Board has no power to suspend an approved or an unapproved agreement between carriers, although where it is deemed sufficiently urgent, it may enlist the aid of a court of equity to stay a given activity. The power given in section 25 of the Shipping Act to reverse, suspend or modify any order, relates only to rehearings or redeterminations of matters previously commenced, completed, and reported under authority of sections 22, 23, and 24. Its provisions are primarily procedural, are in supplement of, rather that at variance with those sections, and do not authorize a complete and independent channel of relief. Id. (704, 705).

The Board may not suspend or stay the operation of an approved agreement prior to completion of full hearings. Delegated powers are circumscribed by the express provisions of the enabling statute. Those agencies which exercise suspension or restraining authority do so under express authority granted, and the Shipping Act contains no such delegation of authority. Id. (705).

Relationship between two conferences does not amount to effectuation of an unapproved agreement between carriers in violation of section 15 of the Shipping Act of 1916, though identical actions have been taken at similar times, the conferences meet at the same address, and the membership for the greater part is common, where no evidence has been presented tending to show the existence of any agreement, express or implied, which, while unapproved, falls within the prohibitions of the section. Contract Rates—Japan/Atlantic-Gulf Freight Conference, 706 (742).

—Conference membership

Ability and intention in good faith to institute and maintain a regular service is the rule governing admission to conference membership. If members decline to admit an additional common carrier they must present very clear justification within such rule, or within such reasonable requirements as their conference agreements may include. American-Hawaiian S.S. Co. *v.* Intercontinental Marine Lines, Inc., 160 (163).

Where applicant for membership in conference is prepared to make necessary deposit, its cash resources though small will be augmented by its stockholders as reasonably required, it has necessary managerial ability, and its intention to institute and maintain regular service is in good faith, it must be admitted to conference membership. Moreover, lack of ownership or long-term charter supply of tonnage is not a ground for withholding membership. Id. (163, 164).

That carrier is a newly organized foreign corporation is clearly not a bar to conference membership for age is not essential and many of the members of conference involved are foreign corporations. Nor can membership be denied

because some of carrier's stockholders are contract shippers with the conference since there is no bar in the conference agreement against members carrying their own or their stockholders' cargo. Likewise, where good faith is shown, carrier cannot be denied membership because it was launching service with chartered vessels when the market made tonnage available at low rate. Id. (164).

As to charges of rebating on various commodities on which violations of the 1916 Act have not been sufficiently established, the Board cannot say that the conference, in expelling the carrier, acted on proof insufficient under the terms of the agreement. The evidence required by the conference for finding a violation of the agreement 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 voting members. The Board's dismissal of the charges of violation of section 16-Second is based on the substantial evidence rule under the APA. No such requirement is imposed on the conference by law or otherwise. Practices of Fabre Line and Gulf/Mediterranean Conference, 611 (642).

Action of a conference in expelling one of its members was not unfair or otherwise unlawful where the agreement authorized expulsion of a member for any violation of the letter or spirit of the agreement and the member had acted in violation of the letter of the agreement by paying brokerage greater than 1¼ percent, absorbing discharging costs on shipments of woodpulp, and shipping cotton freight collect in lire. Id. (642).

—Rates

The establishment of uniform dual rates by concerted conference action of carriers is clearly an "agreement" requiring section 15 approval if the basic conference agreement already approved does not expressly authorize carriers to establish such rates. However, where an approved agreement authorizes uniform rates, tariff activities thereunder have long been considered to be routine operations and statements thereof are not accepted for formal filing by the Board but may be received as information. Conferences and others similarly situated are entitled to rely on settled administrative practice in this regard. Contract Rates—North Atlantic Continental Freight Conference, 98 (104, 105).

AGREEMENTS WITH SHIPPERS. See Contract Rates.

ANTITRUST LAWS. See Agreements under Section 15; Contract Rates.

BROKERAGE. See also Forwarders and Forwarding; Findings in Former Cases; Rebates.

"Heavy lift" and "long length" charges, which are added to basic conference tariff charges on local traffic, are part of the total freight charges on which brokerage may not be prohibited or reduced below 1¼ percent by tariffs. This is not contrary to customary practice for conference members pay brokerage without question on overland traffic, including "heavy lift" and "long length" items. Joint Committee of Foreign Freight Forwarders Assn. *v.* Pacific Westbound Conference, 166 (170, 171).

Conference rules requiring, inter alia, that brokerage shall be paid only to forwarder designated by shipper and registered under Commission's General Order 72, and that invoice for brokerage contain certificate signed by shipper and forwarder authorizing forwarder to book the cargo and make arrangements with the customs service and certifying that no part of brokerage paid shall revert to shipper, appear to be regulations which conference may make to assure that brokerage will not be paid under circumstances which would violate the Shipping Act, and only to forwarders who have earned brokerage. Id. (172).

Where approved conference agreement authorizes regulations pertaining to brokerage, and conference adopts a rule requiring members to refuse to pay brokerage to any broker who deals with a nonconference line competitor, such rule, as a matter of law, is an agreement between carriers requiring separate approval under section 15 of the Shipping Act. The authority granted in the basic agreement does not extend, without additional approval, to the creation of new relationships which invade the areas of concerted action specified in the section in a manner other than as a pure regulation of intraconference competition. Whether or not the rule is unlawful under other sections of the Act, it is an unapproved agreement which may not be effectuated without prior approval. Pacific Coast European Conference—Payment of Brokerage, 696 (702, 703).

BROKERS. See Brokerage.

BURDEN OF PROOF. See Evidence; Practice and Procedure; Rebates; Reparation.

CAPITAL NECESSARILY EMPLOYED.

Under recapture provisions of section 606(5) of the Act, each operating differential subsidy contract must provide that at the end of any ten-year 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." Under section 607(d) the agency is required to define "capital necessarily employed." "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 607(c). Thus the definition controls not only the amount of recapture; it has also a profound effect upon the entire fabric of the financial policies, actions, and conditions of the subsidized lines. Capital Necessarily Employed—General Order 71, 646 (647).

Board cannot impose original or amended General Order 71 definition of "Capital necessarily employed" upon contracting lines prior to the end of their recapture periods which were current on December 31, 1946. In the light of the language of sections 603 (a) and (b), 606 and 607 and in the light of the legislative history of the Merchant Marine Act, subsidy contracts have all the attributes of any commercial contract, so that a retroactive application of the General Order 71 definition to contracting operators, in violation of Article II-29 of their resumption addenda, would be a breach of contract by the government and in violation of express Congressional intent that operating subsidy contractors should have a fair measure of stability in governmental policy as embodied in their contracts. Id. (654, 655).

As to noncontracting operators, the agency is 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. Id. (655).

Present General Order 71 definition of capital necessarily employed 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 service. However, prospectively applied, the definition is not subject to this objection because the operator can secure the inclusion of funds necessary for the purchase and con-

struction of ships either by paying cash, or in the case of new construction deemed by the Board to be necessary or desirable, by making the earmarked deposits for a construction program in accordance with section 291.5(c)(8) of GO 71. Id. (655).

Section 4(c) of the Administrative Procedure Act does not apply to subsidy contracts. The opening language of the section makes it expressly inapplicable to matters relating to grants, benefits, or contracts, and the Attorney General's Manual on the Act states that rule making with respect to subsidy programs is exempted from section 4. Thus the Board may newly define "capital necessarily employed" though it is rule making and would be retroactively applicable. Furthermore, it is settled law that retrospective rules may be promulgated provided they are within the promulgating authority of the agency involved. Section 607(d) of the Merchant Marine Act of 1936 expressly requires promulgation of a definition of "capital necessarily employed" and such definition may be applied retrospectively to subsidy contractors whose resumption addenda gave the Board a free hand in the matter, including a new effective date. Id. (657).

The fact that the agency is barred by contractual obligations from applying uniformly a definition of capital necessarily employed which is believed to be sound, does not justify granting to the noncontracting operators a definition which the agency would not have favored originally. Considerations favoring a sound rule outweigh considerations of uniformity when uniformity carries with it the extension of a rule which does not represent a reasonable solution of the problems faced in 1946. Id. (657, 658).

Article II–29 of the resumption addenda gives valid and binding contract rights to those operators who executed it, or with whom the Commission agreed to execute it. As a matter of policy, the General Order 71 definition "as is" should not 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. An amended definition of capital necessarily employed which meets objections to retroactive application of present General Order 71 definition should be applied to the noncontracting operators as of January 1, 1947. Id. (658).

CAPITAL RESERVE FUNDS. See Capital Necessarily Employed.

CARRIAGE OF GOODS BY SEA ACT. See Jurisdiction.

CHARTER OF WAR-BUILT VESSELS—P.L. 591, 81st CONGRESS.

—In General

Upon annual review of bareboat charters the Board found that conditions exist justifying continuance of certain of such charters. Annual Review of Bareboat Charters of War-Built Vessels, 1952, 114.

Congress in 1947 and 1948, by Public Law 12, 80th Congress, 1st Sess., and Public Law 866, 80th Congress, 2d Sess., enacted special legislation authorizing the private operation of government vessels for the rehabilitation of the Alaska service under special conditions, which for all practical purposes involved no cost of hire to the operator. This authority has expired, and although Congress recognized that the continuation of the Alaska service might require government-chartered vessels, an operator in the service, like any other applicant for the bareboat charter of government war-built vessels must meet the applicable requirements of Public Law 591. Annual Review of Bareboat Charters of War-Built Vessels, 1952, 133 (134).

Bareboat charters of government-owned, war-built, dry-cargo vessels were continued upon annual review thereof required by Public Law 591. With respect to the refrigerated vessels involved the charters were continued subject to later review after the Department of Defense reviewed requirements of its shipper agencies with respect to the number of sailings needed to furnish perishable supplies to the military. Annual Review of Bareboat Charters under Merchant Ship Sales Act, 1954, 481 (482).

—Charter conditions

Charter of "La Guardia" for use in service between California and Hawaii was recommended for 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. Hawaiian S. S. Co., Ltd., 574 (579).

Rate of charter recommended at 15% per annum, of which 8½% unconditionally and 6½% if earned, all breakout, lay-up and repair costs for the account of the charterer. Coastwise Line, 597 (602).

Basic rates would be recommended at 15% of either unadjusted statutory sales price or floor price, whichever higher; additional charter hire set at 90% of profits, without overhead allocation and without allowance of 10% on capital necessarily employed. Pacific Far East Line, Inc., 785 (796).

Where exceptional circumstances were shown for the necessity of transportation of iron ore from Califorina to Japan in emergency due to the collapse of a dock in a California port, Board would recommend that charters be limited to the outbound carriage of that commodity from that port with a minimum of 3,500 tons, vessels required to return in ballast, all breakout, readying and lay-up costs to be borne by charterer. Id. (796, 797).

—Charter hire

If the issue of the reasonableness or unreasonableness of charter rates is to be shown by applicant's own operating results, the evidence should include results from at least all of applicant's vessels of the same type in the service involved. Coastwise Line, 173 (175).

Applicant for charter of government-owned vessels has not sustained its burden of proving that charter rate for vessels offered by private owners was unreasonable where it submitted operational results based on past use of government-owned vessels, from which results a reasonable operational forecast for the proposed use showed that there would be sufficient operating revenue available for charter hire in excess of the rate at which private vessels were offered. Id. (176).

Applicant for charter of government-owned Liberty vessels has not sustained its burden of proving that charter rate for vessels offered by private owners was unreasonable where the evidence purporting to show unprofitable past operation for 1½ years with government-owned vessels, chartered at a lesser rate than now offered by private owners, did not include operating results of its owned or privately chartered Liberty vessels; operations for the past year with government-owned vessels were profitable; and no figures were offered to show that operations during the same period at the private charter rate now offered would have been unprofitable. Moreover applicant has under charter, recently renewed, three privately owned Liberty vessels, at higher rate than offered for the vessels involved. Id. (177, 178).

Board will not take official notice of charter rates for private vessels existing after close of hearing since the charter market is subject to fluctuation, and

the fact or extent of a rise or fall in rates is a matter of proof and beyond the scope of official notice. Id. (178).

—Inadequacy of service

(a) *In general*

Application for bareboat charter approved by the Board where port congestion had seriously disrupted applicant's sailing schedule, the withdrawal from the service of a competitor's vessel was apparently the result of scheduling difficulties, the applicant had been forced to refuse cargo both outbound and inbound, and other lines operating in the trade were running full. Farrell Lines, Inc., 26.

Application for bareboat charter approved in part by the Board where applicant was forced to decline cargo and United States-flag service was inadequate. Application was disapproved for that portion of the route (New York to Japan and the Philippines) where cargo declinations were insubstantial and may have been for seasons other than lack of space, and other service was available. American President Lines, Ltd., 36.

Service was not adequately served where animals to be transported to Mediterranean ports originated in all parts of the United States; many were assembled in centralized points ready for transportation by rail to export yards upon assurance that a vessel was available; if applicant should not be able to charter the government vessel under consideration, an animal carrier, there would be no accommodations for the cargo for the 4 to 6 month period involved; and the cost of outfitting another vessel for the 4 to 6 month period would be prohibitive. Isbrandtsen Co., Inc., 151 (152).

1953 military and commercial movements to Alaska, and the commercial movement in the British Columbia trade and the northbound Pacific coastwise trade of Coastwise will be at least as large as during the 1952 season, during which Coastwise operated the three Libertys herein applied for in addition to its presently operated fleet. Therefore, the Alaska and British Columbia segments and the northbound Pacific coastwise segment of the service of Coastwise will not be adequately served without the use therein of the vessels applied for, or equivalent tonnage. There is also inadequacy of service in the southbound Pacific coastwise segment of the service insofar as the privately operated vessels of Coastwise and Olympic—Griffiths are unable to carry all cargo offerings. Coastwise Line, 211 (213).

Where applicant seeks charter of government vessel for use in the Columbia River service, so as to return for use in the Alaska service another applicant-owned vessel, which had been taken from its usual service in Alaska as a stop-gap measure because of the sale of a vessel employed in the Columbia River service, and where the government vessel sought to be chartered is not fitted with special equipment necessary to operate in the Alaska service, while the vessel to be replaced is so equipped, it is only the Columbia service which would be affected by the application and it is only in that service that inadequacy of service must be shown under P.L. 591. Coastwise Line, 597 (599).

Inadequacy of service is shown where only one vessel is operated on the route to be served, the service requires regularity of service to coincide with specific needs of shippers of lumber and paper, the vessel in operation was not in a position to carry lumber regularly without the aid of another vessel, and forecasts for the service indicated increased future traffic. Id. (600).

Inadequacy of service to meet an emergency (due to the collapse of a dock and accumulation of iron ore on port facilities) will be found under P.L. 591, where no other liners in the trade indicated an availability of space for early

loading, or of sufficient space to accommodate the quantity involved. The determination of the Board must be made on the basis of present availability of liner space, whether or not the emergency and the inadequacy of service might have been avoided by applicant's opportunity to insure movement of a preponderant volume of the cargo prior to the emergency. Pacific Far East Line, Inc., 785 (795).

(b) *Intercoastal trade*

Where two government-owned vessels were chartered to Alaska Steam in the summer of 1951 primarily to meet an abnormal movement of military cargo, which was expected to continue for an indefinite period; and the need was not still continuing, but the vessels were laid up due to lack of sufficient cargo offerings, the Alaska trade is adequately served without the two vessels. Thus the statutory finding that the service of Alaska Steam is not adequately served without the two vessels cannot be made. Annual Review of Bareboat Charters of War-Built Vessels, 1952, 133 (134).

Present passenger service between California and Hawaii is inadequate to meet the needs and demands of tourists of moderate income. Hawaiian S.S. Co., Ltd., 574 (578).

Present cargo service between San Francisco and Honolulu is inadequate to meet the need for a faster service, as proposed by applicant, represented as being an "express" or "expedited" service which would substantially reduce elapsed time between delivery dockside for shipment and delivery to consignee. Id. (579).

—Notice and hearing

While an affidavit submitted with a petition for reconsideration may be inadmissible as filed too late, the facts set forth therein were introduced at the rehearing, and since the affidavit therefore was not relied on, the objection based on lateness of filing of the affidavit is moot. Annual Review of Bareboat Charters of War-Built Vessels, 1952, 139 (141).

In view of the Board's authority to correct record by receiving additional evidence under Rule 201.231 and of the shortness of time before the berth must be filled for proposed voyage using chartered government-owned vessel, a new proceeding under Public Law 591 is not only unnecessary for continuance of the charter [denied originally] for one voyage but would prevent the maintenance of an adequate service on the route. Id. (142).

Steamship company which filed no exception and raised no objection to examiner's report recommending extension of charter of government-owned vessel, is not prejudiced by action of the Board in granting extension after rehearing of decision denying such extension, though the vessel might compete to a limited degree with the company's intercoastal vessels, but the extension of the chartered government-owned vessel was for service on trade route in foreign commerce of the United States on one voyage. Id. (142).

Whether a petition for reconsideration under Rule 201.231 should be granted in a particular case is a matter of the Board's best judgment, as is the extent of such reconsideration and the issues to be reconsidered. Limitation of a rehearing upon petition for reconsideration to the single issue of availability of suitable privately owned vessels, upon which the Board's earlier decision had turned and which was the sole reason assigned for reaching a conclusion different from that recommended by the examiner, is not prejudicial to another party to the proceeding whose position had allegedly changed as a result of the earlier decision denying it an extension of charter for government-owned vessels. Id. (142).

—Service required in the public interest

(a) *In general*

Since Trade Route No. 15A is an essential trade route, and applicant for charter of vessels for use on the route carries large quantities of cargo essential to the defense effort of the United States to the economy and development of the areas served in South and East Africa, the service is in the public interest. Farrell Lines Inc., 26.

Service under consideration was in the public interest where the vessel to be chartered was urgently needed to transport livestock to Mediterranean ports for a period of about 4 to 6 months and the animals were urgently needed for the spring plowing and planting of crops by new settlers in Israel. Isbrandtsen Co., Inc., 151.

Applicant's southbound and northbound Pacific coastwise/British Columbia/Alaska service is still in the public service for reasons set forth in 3 F. M. B. 515, 545. Coastwise Line, 211 (212).

Although a service in which a single commodity of a single shipper is shipped from one port to substantially one port is not necessarily in the public interest, exceptional circumstances are shown that justify such a finding under P.L. 591, for proposed service to move large quantities of iron ore from the port of Stockton, Calif., to Japan, where such service is vital to prevent further injury to facilities of that port seriously damaged by 20,000 tons of iron ore slipping into the channel and carrying away 300 feet of a dock. It is the duty of the Board to alleviate this grave danger to the facilities of the port, wherever responsibility for the existence of the damages may lie. Pacific Far East Line, Inc., 785 (794, 795).

(b) *Foreign trade*

Service in applicant's Round-the-World service, Line B, is in the public interest. American President Lines, Ltd., 36.

Service on essential Trade Route 29 between California and Japan is in the public interest in view of the importance of that service to the foreign commerce of the United States and to Japan. Pacific Far East Line, Inc., 785 (794).

(c) *Intercoastal trade*

Service between San Francisco and Honolulu is required in the public interest. Hawaiian S.S. Co., Ltd., 574 (578).

—Unavailability of privately owned vessels

Privately owned vessels found not available for charter on reasonable conditions and at reasonable rates. Farrell Lines, Inc., 26 (28); American President Lines, Ltd., 36 (39).

Where privately owned vessels are available at substantially the same rate as the reasonable bareboat rate for government-owned vessels for as short a time as 8 months, or at equivalent time-charter rates for the period required for a round intercoastal voyage, private charter rates and conditions are reasonable. The absence of a 15-day mutual cancellation clause does not render the private charters unreasonable inasmuch as this clause was included in government charters primarily to protect the public interest and to permit protection of privately owned vessels against competition from government chartered vessels, and is not a usual term in private charters. Annual Review of Bareboat Charters of War-Built Vessels, 1952, 126 (130).

Board was unable to find that privately owned vessels were not available for charter on reasonable conditions and at reasonable rates where suitable privately owned vessels were offered for charter to an operator by a competitor, to

replace government-owned vessels, and the competition appeared to be remote and the rates were not claimed to be unreasonable. Id. (131).

Privately owned U.S.-flag vessels are not available for charter from private operators on reasonable conditions and at reasonable rates where the additional vessels are needed for a 6-month period only and only one privately owned vessel was offered to applicant for a period of less than one year, and that one was for 9 months at $12,500 per month and lacked the heavy lift gear needed for the proposed service, and while the operation would have supported a monthly charter rate of $12,500 in 1952, after allowing for cost of installing needed special equipment, monthly wage costs had increased by over $3,000 per vessel and applicant had no general rate increase for over 2 years. Coastwise Line, 211 (214).

Privately owned American-flag vessels found not available for charter by private operators on reasonable conditions and at reasonable rates for use in service between California and Hawaii. Hawaiian S.S. Co., Ltd., 574 (579).

Privately owned American-flag vessels are not available for charter at reasonable rates for use in a service and the requirement of unavailability under Public Law 591 is satisfied, where the only suitable vessel available was offered at a monthly rate (including positioning the vessel for operation in the service) of $11,900, while the sum available for charter (taking into consideration overhead expenses) would be about $7,000 per month. Coastwise Line, 597 (601).

Where private vessels for charter for use in a service under P.L. 591, are not available because of the time and expense involved to position the vessels for delivery, a finding of unavailability will be made, notwithstanding the fact that applicant failed to offer break-even charter rates to private operators and that circumstances tend to show that applicant relied completely on procurement of government-owned vessels for carriage of merchandise in question. Pacific Far East Line, Inc., 785 (795, 796).

CHARTERS. See Charter of War-Built Vessels.

CITIZENSHIP. See Forwarders and Forwarding.

CLASSIFICATIONS.

The phrase "knowingly and willfully" in section 16 means purposely or obstinately, or is designed to describe a carrier who intentionally disregards the statute or is plainly indifferent to its requirements. A persistent failure to inform or even to attempt to inform himself by means of normal business resources might mean that a shipper or forwarder was knowingly and willfully in violation of the Act. Diligent inquiry must be exercised by shippers and by forwarders in order to measure up to the standards set by the Act. Indifference on the part of such persons is tantamount to outright and active violation. Misclassification of Tissue Paper as Newsprint Paper, 483 (486).

Where the shipper conceded that it knowingly and willfully misclassified a shipment to obtain transportation by water at less than the rate as charged which would otherwise be applicable, this constitutes a violation of section 16 of the Shipping Act of 1916.

A freight forwarder is not required to be an expert on the uses to which cargo he is handling may be put. Where a forwarder misclassified tissue paper as newsprint paper, and upon learning that there might be some question, received oral and written assurance from the shipper that the cargo was properly classified although the cartons containing the cargo were marked "napkin tissue," the forwarder did not violate section 16. Id. (486, 487).

COMMON CARRIERS. See also Findings in Former Cases; Free Time; Jurisdiction; Terminal Facilities.

—Who is common carrier

The term "common carrier" is not defined in the Shipping Act, but the legislative history indicates that the person to be regulated is the "common carrier" at common law. The essential characteristics of the common carrier at common law are that he holds himself out to the world as such; that he undertakes generally to carry goods for hire; and that his public profession of his employment be such that, if he refuse, without some just ground, to carry goods for anyone for a reasonably and customary price, he will be liable to an action. Consolo *v.* Grace Line, Inc., 293 (300).

A carrier, operating combination vessels and freighters generally as common carrier, may not be deemed a contract carrier as to a particular commodity (bananas) carried on the same common carrier vessel on the same voyage. Consequently, such carrier is subject to the provisions of the Shipping Act and to the jurisdiction of the Board with regard to such commodity. Id. (300).

The distinctions between common carriers and private carriers set out in judicial decisions relating to common carrier liability for loss or damage to cargo are applicable to regulatory proceedings under the Shipping Act. Congress, in adopting the common law definition of common carriers for use in the Act, adopted that definition from the cases that then existed, and the judicial definition of the term "common carrier" is the one which the Board is required to observe. Id. (302).

Respondent is a common carrier in its carriage of empty trailers, empty propane tanks and general cargo and must file a tariff in accordance with section 2 of the Intercoastal Shipping Act of 1933, though the vessel involved carried primarily respondent's own cement. Ponce Cement Corp.—Rates and Operations, 603 (607).

—Duties of common carrier

Contention that discrimination does not exist because vessel carried no bananas to the United States except under special contract is not valid. Discrimination arises because of the acceptance of cargo from one shipper and exclusion of cargo from another. The common carrier's duty to treat all shippers alike was violated. Consolo *v.* Grace Line Inc., 293 (303).

After positive statements by carrier that it would provide no space, the tendering of bananas by complainant would have been a futile and idle act, and was legally unnecessary to establish violation of the carrier's common carrier duty. Id. (303).

If more goods (bananas), requiring special storage for which space is at a premium, are tendered for transportation than a common carrier's facilities can accommodate, the carrier may not satisfy one shipper in full, thereby disqualifying itself from meeting the demands of others, but must apportion its facilities ratably among all shippers desiring them. Id. (303).

On the basis of facts adduced in the record, contracts under which present banana shippers have been favored by respondent constitute unjust discrimination in violation of section 14(4) and 16 of the Act. Respondent must cancel private contracts for the carriage of bananas from Ecuador to the United States, and prorate available space under forward booking arrangements reasonable for the banana trade. These arrangements must be on terms of equality as to rates and conditions, and may be made for periods not exceeding six months in advance, which is the limit of reasonableness. Id. (304).

Under the Shipping Act of 1916 the Board's power of regulation extends only to common carriers by water as the term is understood at common law, except as to ferry boats on regular routes and ocean tramps which might be common carriers but are excluded from regulation. A carrier which clearly does not offer common carrier service in the trades involved does not, and is not required to, become a common carrier in those trades because it offers to carry general cargo for all persons indifferently on other routes or in other trades. The common carrier status attaches to the carrier only for such trade or route as to which it holds itself out to carry for all persons indifferently. Galveston Chamber of Commerce *v.* Saguenay Terminals, Ltd., 375 (377, 378).

COMPLAINTS. See also Practice and Procedure; Practices; Subsidies, Operating-Differential.

Rules 5(0) providing that "motions to dismiss or otherwise terminate the proceeding . . . shall be addressed to the Board," does not mean that the Board has inherent power to proceed summarily to award reparation for violations of the Shipping Act before hearing is complete. Rule 5(o), in full context, does not create a type or types of relief but describes procedural requirements to which motions must conform. Furthermore, methods of terminating proceedings other than by motion to dismiss are provided by Rules 6(a) and 6(c) and require consent of the parties. Isbrandtsen Co., Inc. *v.* States Marine Corp. of Delaware, 511 (513).

A person filing a complaint under section 16 of the Shipping Act of 1916 does not have to be a person injured by the practice or practices alleged therein. This point has been completely settled by prior decision and section 22 of the Act. Anglo Canadian Shipping Co., Ltd. *v.* Mitsui S.S. Co., Ltd., 535 (539).

Complaint by conference against carrier quoting differentially lower rates and paying higher brokerage does not state a cause of action under section 17. While a complaint need not be filed by an injured party, it must allege facts amounting to discrimination against or prejudice to a person whom the statute, in terms, purports to protect. Id. (542, 543).

CONSTRUCTION COSTS. See Subsidies, Construction-Differential.

CONSTRUCTION-DIFFERENTIAL SUBSIDIES. See Subsidies, Construction-Differential.

CONTRACT CARRIERS. See Common Carriers.

CONTRACT RATES. See also Agreements under Section 15.

—In general

A dual-rate system may be valid under some circumstances and with some percentage differential as implied by the Supreme Court in Swayne & Hoyt, Ltd. *v.* U.S., 300 U.S. 297 . Contract Rates—North Atlantic Continental Freight Conference, 355 (370).

The Board's predecessors have been of the view that, while charging of different rates for similar cargoes identically destined is prima facie discriminatory, a difference in rates may be justified where made necessary by competitive conditions existing in the trade in which the carriers are engaged. Neither the courts nor the Board's predecessors have held the dual-rate system illegal per se. They have refused to find that (a) the system is necessarily retaliatory within the meaning of section 14(3); (b) assuming retaliation any discrimination is forbidden by section 14(3); (c) the words "unjustly discriminatory" as employed in section 15 are words of art forbidding any discrimination and therefore prohibt Board approval of dual-rate systems under

section 15; or (d) that the words "unjustly discriminatory" in section 17 and/or "undue or unreasonable preference or advantage" in section 16 prohibit any difference in ocean transportation charges not based on cost or value of service and therefore preclude approval of dual-rate systems under section 15. Contract Rates—Japan/Atlantic-Gulf Freight Conference, 706 (728, 729).

Of particular persuasion to the conclusion that the dual-rate system is not illegal per se is a remark of the Supreme Court in Swayne & Hoyt *v.* United States, 300 U.S. 297, stating that the Alexander Committee did not condemn the dual-rate system. Id. (729).

Decisions under section 2 of the Interstate Commerce Act making dual-rate systems unlawful are not persuasive as to ocean transportation. Section 2 has no counterpart in the Shipping Act. Id. (731, 732).

No power was granted to the Board to fix rates in foreign commerce. Unlike domestic transportation, where a certificate of convenience and necessity must be obtained by a new carrier prior to entry into a service, ocean carriers are entirely free to enter any field of competition. These peculiar differences between domestic and foreign transportation render inapplicable certain principles enunciated under the Interstate Commerce Act in connection with domestic transportation (which might otherwise bear on the legality of dual-rate contracts considered as volume discounts), particularly where concerned with problems relating to one mode of transportation only. Id. (734).

The dual-rate system is not necessarily unlawful under section 14(3). Charging of a higher rate to a shipper who voluntarily declines to give his exclusive patronage is not a retaliation. Id. (734).

The dual-rate system is, in itself, lawful, and does not require disapproval unless, in a particular case, the system would be unjustly discriminatory and unfair as between carriers, shippers, exporters, importers or ports, or between exporters from the United States and their foreign competitors, would operate to the detriment of our commerce, or would be in violation of the Act. Id. (736).

There is no need for contract rates on reefer cargo since vessels of nonconference carrier are not equipped with refrigerated space and are thus not competitive with conference vessels for reefer cargo. Id. (738).

Dual-rate system is consistent with the purpose of the Act. The spread between contract and noncontract rates, based in part on the percentage by which nonconference carrier most frequently underquotes conference tariff rates, will reasonably enable the conference to meet the nonconference carrier's competition without, as in the method of uniform conference rate reduction preferred by the nonconference carrier, eliminating a single American carrier from the trade. Id. (739).

Conference may not incorporate in its dual-rate contract rules, regulations, terms, and conditions in the conference tariff, which have not been submitted to the Board. Incorporation is forbidden of any such provision which, without Board approval, may operate directly or indirectly to change the amount of the spread, or may impose on contract shippers additional requirements not imposed on noncontract shippers. Id. (740, 741).

Approval of a dual-rate system in Japan-Atlantic trade does not require approval of such a system in Japan-Pacific trade because of the close relationship between the trades. Approval of a particular system depends on the facts adduced as to conditions in that particular trade. Conditions in the Japan-Atlantic trade cannot be determinative of the issues in this case. Contract Rates—Trans-Pacific Freight Conference of Japan, 744 (761).

—Authority to effectuate dual-rate system

Question of authority of Board to require conference to withhold putting dual-rate system into effect pending an opportunity to investigate it is not moot. On the contrary it is ancillary to the investigation. Approval heretofore given to basic conference agreement implies permission to institute dual-rate system, but such authority is clearly limited to permission for a lawful system only. Doubts as to spread of differential or discrimination as between shippers should be resolved before system goes into effect. A practical test of the system will not aid the Board in determining whether the spread is arbitrary or whether it is unjustly discriminatory as between shippers. Furthermore, the Board is not limited to proceeding under section 21 if authority under other sections of the Act is found more appropriate. Contract Rates—North Atlantic Continental Freight Conference, 98 (102, 103).

Argument that irreparable damage would be caused to conference members by order of Board requiring deferment of effective date of proposed dual-rate system, is completely answered by shipper's contract providing, in event of governmental regulation or interference, for cancellation at the option of the carrier and for holding the carrier free from liability for any loss or damage thereby caused. Id. (103).

Permission to initiate a dual-rate system will be denied where there is no showing of the existence of a competitive need in the trade for the dual-rate system to meet nonconference competition, in that (1) it is estimated that no additional revenue would be realized in carrying all the cargo in the trade at 9½% discount, rather than 90% of it without discount; (2) the possibility of a rate war would remain whether or not an independent carrier is eliminated as a competitor; (3) there are no sufficient reasons to justify the prima facie discrimination against shippers inherent in a dual-rate system. Contract Rates—Trans-Pacific Freight Conference of Japan, 744 (759, 760).

—Coercion of shippers

The inducement to a shipper under an exclusive-patronage agreement becomes coercive if it unduly forces his original choice, or places unreasonable restrictions upon his subsequent freedom to choose any carrier he may later prefer. A nonconference offer of rate 10% below a conference rate is an inducement which may compel but does not coerce; similarly, a conference rate with a 10% differential for 6 months of exclusive patronage is an inducement, but if the period is not too long or the differential too high, it is an inducement only and not a coercion. Contract Rates—North Atlantic Continental Freight Conference, 355 (372).

Where a shipper may use nonconference as well as conference carriers and ship part of his exports at about 10% below and part at about 10% above the conference contract rate, or use only conference carriers and ship all his exports at the intermediate contract rate, he has reasonable freedom of choice and is coerced neither for nor against making contracts with the conference which tie him to it for a 6-month period. Id. (373).

Dual-rate system would not be coercive of those shippers who require more frequent service than fortnightly sailings offered by Isbrandtsen, in view of Isbrandtsen's announcement of a proposed substantial increase in frequency of service. Contract Rates—Japan/Atlantic-Gulf Freight Conference, 706 (738).

Fact that nonconference carrier's vessels in the trade discharge only at U.S. North Atlantic ports and do not also call at U.S. Gulf ports is not of itself overly coercive of and unfair to those shippers who require service to both coasts.

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Such shippers could reduce costs, in the absence of preponderantly greater volume to North Atlantic ports, by shipping via the nonconference carrier to North Atlantic ports and via conference vessels, at noncontract rates, to Gulf ports. Nonsigning shippers would suffer a competitive disadvantage on Gulf shipments, but contract shippers would be at a greater disadvantage on North Atlantic shipments as compared with nonsigning shippers who enjoy the customary lower rates of the independent carrier. The preponderant volume of cargo in the conference trade moves to North Atlantic ports. Id. (738).

—Damages for breach of contract

Failure to specify the amount of damages in case carrier fails to provide adequate service under dual-rate contract is nothing more than recognition by the parties that damages may be readily ascertained, in the event of conference breach, on submission of the matter to arbitration. Contract Rates—Japan/Atlantic-Gulf Freight Conference, 706 (741).

The Board has no basis for finding that a 50 percent payment of the amount of freight which the shipper would have paid if a given shipment had moved by conference vessel rather than nonconference vessel, would be a penalty rather than an assessment of liquidated damages, since the Board has not been sufficiently apprised of the relationship between dead freight and tariff rates. Id. (741).

—Discrimination

Dual-rate contracts are highly analogous to volume discounts; although a shipper does not promise to ship a specific amount of cargo, conference lines are assured of a basic core of cargo. The volume discount nature of the contracts is free from the discrimination in volume contracts contemplated in section 14, Fourth, since the identical discount is available to all shippers. It was this type of contract which the Shipping Board, in Eden Mining, took pains to distinguish in condemning a particular dual-rate system. Contract Rates—Japan/Atlantic-Gulf Freight Conference, 706 (733).

The lawfulness or unlawfulness of a particular dual-rate system depends directly on the facts adduced in a hearing on the merits, and is judged by standards announced by the Supreme Court in Swayne & Hoyt *v.* United States, which require consideration of the reasonableness of the prima facie discrimination against shippers inherent in dual-rate systems in the light of the necessity for that discrimination in order to effectuate the Congressional plan for shipping in the foreign commerce of the United States. Id. (735).

—F.o.b., f.a.s., etc. shipments

Feature of dual-rate system that permits receiver under f.o.b., f.a.s. shipments to obtain contract rates as long as he patronizes exclusively conference vessels, is objectionable because such a receiver obtains the benefits of contract rates without signing a shipper contract whereas all other nonsigners are charged the full noncontract rates. F.o.b. receiver should receive contract rates only if he is a contract signatory. Contract Rates—Japan/Atlantic-Gulf Freight Conference, 706 (740).

Dual-rate contract should indicate that the person indicated as shipper in the ocean bill of lading shall be deemed to be the shipper regardless of whether the sales are c.i.f., c. & f., f.o.b., or f.a.s. However, this is not intended to preclude shipment by an exporter as agent for the buyer, where the exporter only renders assistance at the buyer's request and expense in obtaining the documents required for purposes of exportation. Id. (740).

—Monopoly

Dual-rate system proposed will not result in detriment to commerce of the United States. The system will decrease the probability of rate wars and will benefit shippers by tending to insure a greater measure of stability of rates. Continued participation of independent in the trade, as well as existence of strong shipper organizations, stand as strong deterrents against exorbitant freight rates and other objectionable monopolistic practices. Contract Rates—Japan/Atlantic-Gulf Freight Conference, 706 (739).

Monopoly by a conference of a trade is not in itself objectionable. However, a monopoly that would be created as a result of the institution of a dual-rate system is not permissible unless the potential disadvantages of the monopoly and the prima facie discrimination against shippers inherent in the use of dual rates are outweighed by the need for such a system and the benefit to shippers and the trade to be derived from the system. To hold that a dual-rate system may never be instituted where its use would result in monopoly would defeat the congressional purpose in passing the Act and in exempting agreements among carriers from the operation of the antitrust laws. Under such view, a conference could not use dual rates in protection against severe rate-cutting competition where an independent might be eliminated from the trade even though denial of permission to use dual rates would inevitably result in elimination of one or more conference members from the trade. Contract Rates—Trans-Pacific Freight Conference of Japan, 744 (763).

—Rate differential

The question whether a differential between contract and noncontract rates of conference carriers is unjustly discriminatory does not depend upon statistical analyses forecasting the transportation effect of the differential on carryings of the carriers involved or upon the fact that there is no difference in cost or value of the service rendered with or without a contract. Statistical forecasts are not dependable and, in any event, would throw little additional light on the overall effect of the differential upon the commerce of the United States as a whole. Contract Rates—North Atlantic Continental Freight Conference, 355 (369).

In determining whether a differential between contract and noncontract rates of conference carriers is unjustly discriminatory, the Board will be guided by the Supreme Court which pointed out that whether discrimination in rates was unreasonable was a matter peculiarly within the judgment of the agency charged with responsibility, and the agency must determine whether the advantages outweigh the disadvantages, after considering all facts affecting the traffic. The Court had in mind the advantages or disadvantages to the public economy as a whole and not to any separate element thereof. Id. (369, 370).

The differential of a dual-rate system, while it may appear to be prima facie discriminatory, is not unjustly discriminatory unless it violates the standards of section 15 of the Shipping Act of 1916, i.e., unless it is unfair as between carriers, or unfair as between shippers or other groups, or unless it operates to the detriment of the commerce of the United States, or unless it is in violation of the Act. Id. (370, 371).

In the final analysis, the question of fairness or unfairness of a dual-rate system differential to carriers, shippers, or other class of persons must be weighed in the light of all the circumstances and with a view to determining whether the differential proposed is beneficial or detrimental to the commerce of the United States and to our economy as a whole. Id. (371).

The validity of a proposed dual-rate system differential cannot depend upon the mere declarations of its proponents that they had in mind the public interest as well as their own; that rates should be fair and reasonable, nonretaliatory and noncoercive, and not unjustly discriminatory; and that the system should take into consideration advantages to shippers and carriers in order to promote stabilization of rates, in contrast with destructive rate cutting detrimental to trade and commerce. Id. (371, 372).

When related to a dual-rate contract, effective for not more than six months, a differential generally comparable to the percentage by which substantial and effective nonconference competitors are under-quoting conference rates, does not amount to coercion on shippers and is not unjustly discriminatory or unfair between shippers. Id. (372).

A proposed conference contract rate differential of 10% is not unjustly discriminatory or unfair between carriers where nonconference carriers may be admitted to membership in the conference, the nonconference lines have been attracting increasing cargoes by offering lower rates, and the differential is not so high as to take away from the shipper a reasonable choice between the carriers, and hence not so high as to impair unreasonably the ability of nonconference carriers to continue successfully in business. Id. (374).

Differential of 10% between contract and noncontract rates proposed by conference for a dual-rate exclusive-patronage system is not arbitrary or unreasonable, nor unjustly discriminatory, and is not in violation of the Shipping Act of 1916, where the differential was adopted after due deliberation and consideration of relevant factors and cannot be said to have been determined arbitrarily or to be based on unreasoned conduct. Any disadvantages of the differential are outweighed by advantages which tend to promote and strengthen the commerce of the United States. Id. (374).

Generally, 9½ percent spread between contract and noncontract rates is reasonable, with minor exceptions. The spread is large enough to furnish protection to conference lines against inducements offered by Isbrandtsen, and small enough to enable Isbrandtsen to remain competitive with the conference. Isbrandtsen's probable reduced carryings will still represent an equitable share of the trade. Increased share of cargo which will be received by conference lines will more than offset any loss of revenue attributable to the discount and will result in reducing fixed unit transportation cost. This may result in benefit to both contract and noncontract shippers by enabling conference lines to reduce freight rates to all shippers. Contract Rates—Japan/Atlantic-Gulf Freight Conference, 706 (737).

—Stability of rates

Agreement by conference carriers not to increase rates for 6 months is, on the record, in the interest of the commerce of the United States as it promotes forward trading and is a stabilizing influence on rates and services. A corresponding restriction on the shipper under an exclusive-patronage contract does not hold him too long, nor is it coercive. The carrier's guarantee against increased rates depends upon assurance that during the guarantee period he will receive a dependable volume of traffic. Contract Rates—North Atlantic Continental Freight Conference, 355 (372, 373).

Dual-rate system, by creating a basic core of cargo on which the conference can rely, will eliminate the pressure on conference lines to reduce rates to meet Isbrandtsen's lower rate competition, and will thereby create greater stability of rates and service, facilitate forward trading by shippers, and decrease the threat of rate wars. Id. (737).

"Stability of rates" means a level of rates which remains unchanged for periods of approximately six months. Contract Rates—Trans-Pacific Freight Conference of Japan, 744 (761).

—Stability of Trade

Inauguration of dual-rate system is a necessary competitive measure to offset the effect of nonconference competition in the trade. Non-Japanese conference carriers' participation in total traffic has been reduced to 25 percent because of severe rate-cutting competition of Isbrandtsen and because of resumed operations of Japanese carriers. Contract Rates—Japan/Atlantic-Gulf Freight Conference, 706 (736).

While a dual-rate system would probably result in an increase in average carryings per sailing, such increase, even assuming the elimination of Isbrandtsen as a competitor, would be insignificant. Institution of the system would result in injury to Isbrandtsen without appreciable benefit to the conference, since the overtonnaging problem would not be relieved. With overtonnaging remaining, no greater stability would be experienced under dual rates than under a closed single scale of rates. Dual-rate system is thus not necessary to meet Isbrandtsen competition. Contract Rates—Trans-Pacific Freight Conference of Japan, 744 (759).

"Stability of the trade" refers to conditions whereunder reasonably constant volumes of cargo move under reasonably constant rates with reasonably proportionate allocation of cargoes to individual lines. Id. (761, 762).

DAMAGES. See Contract Rates.

DEMURRAGE. See also Free Time.

Where the record failed to disclose that a difference in demurrage charges between truck and rail cargo caused injury to one or undue advantage to the other, because of lack of competition between the cargoes, the mere existence of a different demurrage rate does not constitute undue prejudice within the meaning section 16 of the Shipping Act of 1916. Pennsylvania Motor Truck Assn. *v.* Philadelphia Piers, Inc., 192 (197).

Demurrage charges on outbound cargo, consequent to delays on piers caused by lateness of a ship's arrival or ship owner's miscalculation in ordering cargo onto piers too soon, should not be for the account of the owner of the cargo, and the assessment of such demurrage against shippers is an unreasonable practice in violation of section 17 of the Shipping Act of 1916 when the shippers deliver cargo to the pier in compliance with the carrier's instructions. Id. (198).

DETRIMENT TO COMMERCE OF THE UNITED STATES. See Agreements under Section 15; Contract Rates; Port Equalization.

DEVICES TO DEFEAT APPLICABLE RATES. See Rebates.

DIFFERENTIALS. See also Contract Rates; Evidence; Findings in Former Cases.

Where the evidence shows that the small participation of a port in a trade resulted from congestion on the piers, free time limitation, difficulty of truck movement and other conditions unrelated to a port differential charge, the Board can make no finding that the port has suffered injury due to the differential; and the complaint of violations of sections 16 and 17 of the Shipping Act of 1916 must fail. Port of New York Authority *v.* Ab Svenska Amerika Linien, 202 (207).

A rate differential against a port may not be justified for the sole reason that the cost of operation at that port is greater than at another competing port.

Other elements, such as volume of traffic, competition, distance, advantages of location, character of traffic and frequency of service are to be considered. Id. (209).

DISCRIMINATION. See Agreements under Section 15; Common Carriers; Complaints; Contract Rates; Findings in Former Cases; Intercoastal Shipping Act, 1933; Port Equalization; Ports; Preference and Prejudice; Retaliation; Subsidies, Operating-Differential.

DISMISSAL OF COMPLAINTS. See Complaints.

DUAL COMMON AND CONTRACT CARRIERS. See Common Carriers.

DUAL RATE SYSTEM. See Contract Rates.

ESSENTIAL TRADE ROUTES.

A determination that a route is of essential importance to the promotion of the foreign commerce of the United States will be affirmed where it is found that it was a long-established route providing the most economical means for trade between eastern United States and Pacific coast ports of South America; both cargo and passenger movements were substantial; and the commodities carried were of considerable strategic and commercial importance. Review of Grace Line Subsidy, Route 2, 40 (43, 44).

Trade Route 29 is of essential importance to the promotion of the foreign commerce of the United States. Both the cargo and passenger movements on the route are and have been substantial. Thus the operation of combination vessels on the route is and has been, since January 1, 1947, necessary to promote the foreign commerce of the United States. American President Lines, Ltd.—Subsidy, Route 29, 51 (57).

Cargo and passenger movements on Trade Route 20 have been substantial from January 1, 1947, to the present. Outbound commodities on Mississippi's combination vessels included drugs and medicines, prepared foods, fresh fruits, automobiles, etc. Inbound freight movement included many South American products, such as coffee. The essentiality of the passenger service is evidenced by the large number of passengers transported during the period under review. Consequently the Board has no difficulty in finding that the operation of Mississippi's combination vessels on Trade Route 20 is, and since January 1, 1947, has been, necessary to promote the foreign commerce of the United States. Review of Mississippi Shipping Co. Subsidy, Route 20, 68 (71).

EQUALIZATION. See Absorptions; Port Equalization.

EVIDENCE. See also Practice and Procedure; Rebates.

An order with respect to alleged violations of sections 16 and 17 of the Shipping Act of 1916 cannot be premised upon the testimony of an American sales agent that foreign shippers divert cargo from one port to another port because of port differential charges. While testimony of such an agent as to acts reported to him by his own principal in a foreign country is probative, although hearsay, his testimony as to rumors of what other foreign shippers, not his principal, normally would or would not do comes within the realm of hearsay on hearsay and is mere uncorroborated hearsay or rumor and does not constitute substantial evidence. Port of New York Authority *v.* Ab Svenska Amerika Linien, 202 (208).

Remote hearsay evidence of one witness that Newark differential causes some unidentified Swedish pulp producer to divert pulp cargoes from Newark is not reliable, probative and substantial evidence of the type upon which the Board

can premise an order. In absence of any other evidence on which the Board could find that the Newark differential was the proximate cause of injury to that port, Newark's case under sections 16 and 17 must fail. Id. (208, 209).

Where direct evidence tending to show willful rebating by a carrier in violation of section 16-Second is scanty, in that it merely shows one cancellation and two unsuccessful solicitation efforts on three shipments, of which two subsequently moved via the respondent carrier and one via another carrier, hearsay evidence of conversation with third parties has no weight especially where it is contradicted by other hearsay evidence in the form of denials by such third parties. Practices of Fabre Line and Gulf/Mediterranean Conference, 611 (638).

Hearsay evidence of willful rebating is insufficient to support a finding of violation of section 16-Second, where, far from furnishing support to or corroboration of substantial evidence regularly adduced, the hearsay evidence itself constitutes the entire proof. Id. (639).

EXCLUSIVE PATRONAGE CONTRACTS. See Contract Rates.

FERRY BOATS. See Common Carriers.

FINDINGS IN FORMER CASES. See also Agreements under Section 15; Contract Rates; Port Equalization.

The Commission's decision in Agreements and Practices Re Brokerage, 3 USMC 170, that all prohibitions against the payment of brokerage were to be removed from conference agreements and rules, was accompanied by its statement that "any limitation below 1¼ percent of the freight involved, which is the amount generally paid by carriers in the various trades over a period of years, would circumvent our finding and result in the detriment condemned." The quoted requirement, although prefaced by the words "we believe," was an explanation and amplification of the prohibition, and was an integral part of the prohibition. This is borne out by the decision in Atlantic & Gulf/West Coast, etc. *v.* United States, 94 F. Supp. 138. Joint Committee of Foreign Freight Forwarders Assn. *v.* Pacific Westbound Conference, 166 (169, 170).

Permission granted to carriers not to pay brokerage or to pay less than 1¼ percent is given only to individual carriers acting individually so that conference carriers may not do so acting collectively or as a group. That part of the language in Agreements and Practices Re Brokerage, 3 USMC 170, which permits carriers acting under a conference agreement to establish rules preventing the payment of brokerage is limited to cases and circumstances where the payment of brokerage would violate the Act, and, similarly, the permission to place limitations upon the amounts of brokerage to be charged is subject to the fundamental ruling of that case, that the brokerage as limited must not be less than 1¼ percent. Id. (171).

In Intercoastal Rates of Nelson S.S. Co., 1 U.S.S.B.B. 326, the Secretary of Commerce disapproved a carrier's proposed tariff differentially lower than the tariffs of its competitors and condemned the practice without finding a violation of 1916 Act. In section 19 Investigation, 1935, 1 U.S.S.B.B. 470, no violation of section 16 or 17 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., 2 U.S.M.C. 14, or Cargo to Adriatic, Black Sea, and Levant Ports, 2 U.S.M.C. 342, held the practice of rate making by an amount or percentage differentially lower than the rates of competitors to be in violation of sections 16 or 17 of the Act, although the practice was considered to be harmful and contrary to the purposes of the

Act. Only in Intercoastal Investigation, 1935, 1 U.S.S.B.B. 400, was the practice found to violate section 16 (and 18) of the Act. Anglo Canadian Shipping Co., Ltd. *v.* Mitsui S.S. Co., Ltd., 535 (538, 539).

Although the interests of sound statutory interpretation dictate that the Board follow the principles enunciated by its predecessors, the Board must differ with the report in Intercoastal Investigation, 1935, 1 U.S.B.B. 400. 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 the Board and its predecessors. If the section applies to a preference given by a carrier in favor of itself as against a competitor, then the section must apply to relationships between a carrier and one shipper. This possibility is expressly excluded by many prior decisions. In the light of Huber Mfg. Co., 4 F.M.B. 343 and Eden Mining Co., 1 U.S.S.B. 41, the Board must disagree with the interpretation of section 16 implicity expressed in Intercoastal Investigation, 1935. Id. (539, 540).

Combined contract and common carriage was condemned in Consolo *v.* Grace Line Inc., 4 F.M.B. 293, upon a finding of actual discrimination. The decision did not consider the combination of proprietary and common carriage on the same vessel. The fact that private cargo exceeds public cargo in volume does not make the combined carriage unlawful per se. Motor carrier cases in support of 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. Ponce Cement Corp.—Rates and Operations, 603 (609).

FORWARDERS AND FORWARDING. See also Brokerage.

Freight forwarding corporation is not a citizen of the United States within section 2 of the Shipping Act, and its name must be removed from the registry under General Order 70, where the corporation was formed by a foreign freight forwarding corporation which determined the United States citizens to whom stock was to be issued; foreign corporation loaned all of the money to each citizen to pay for the stock, requiring no security or time limit for repayment; 130 shares each of stock was issued to two citizens and 240 shares to the foreign corporation; subsequently the two citizens gave up their stock and their loans were cancelled; several months later another citizen was given 260 shares without monetary consideration, and although the American corporation owed money to the foreign corporation, the new stockholder and president was not sufficiently concerned to ascertain why the indebtedness existed or when or how it was to be repaid, and although informed of a new line of credit opened in a bank in favor of his corporation, he knew nothing of the basis of its establishment; and American counsel for the American corporation was employed as counsel for the foreign corporation. These facts established that the foreign corporation was the lifeblood and dominant financial factor in the United States corporation and unquestionably gave the former power to control the functions of the latter. S.C.T.T., Inc.—Alleged Violation of General Order 70, 179 (188, 189).

FREE TIME.

While the responsibility for furnishing reasonable free time for delivery or removal of cargo rests on ocean carriers, where terminal operators (railroads) who are independent of the carriers are providing, for their own business reasons, the facilities which the carriers are obliged to furnish, they have assumed the carrier's responsibility of furnishing reasonable and nondiscriminatory pier

foreign trade route, will be granted where the operator carries only very small percentage of total cargo movement between the ports and no operator in the service objects. Thus no unfair competition would result, under present conditions, to any person operating exclusively in the service. Pacific Transport Lines, Inc., 146 (148).

Where vessels have made only 13 intercoastal voyages in a period of several years, carrying no cargo competitive with the operations of any intercoastal operator intervening, and have not deprived any intercoastal operator of cargo which it needed, or had the capacity to carry, or to which it was fundamentally entitled, the Board cannot make a finding of unfair competition or prejudice to the objects and policy of the Merchant Marine Act of 1936 under section 805(a) thereof. American President Lines, Ltd., 436 (440).

The fact that a good many intercoastal operators are "over-vesseled" because of lack of cargoes does not mean that they are to be penalized by limiting an evaluation of intercoastal capacity solely to those ships which are presently being used on regular schedules, in view of Congress' special concern for exclusively intercoastal operators, and in the face of the importance to the national security and to our domestic commerce of a healthy and vigorous intercoastal water transportation system. American President Lines, Ltd., 488 (504).

Intercoastal operators who presently have the capacity to carry available cargoes are entitled to whatever intercoastal cargoes they can carry, and for an offshore operator to carry intercoastal cargoes on an unrestricted basis would result in unfair competition to persons, firms, or corporations operating exclusively in the coastwise or intercoastal service, and would be prejudicial to the objects and policy of the Merchant Marine Act of 1936. It was not shown, however, that for APL to carry westbound intercoastal refrigerated cargoes would, under present circumstances, result in unfair competition or be prejudicial to the objects and policy of the Act. Id. (504, 505).

APL's request for permission to call at San Francisco to pick up eastbound intercoastal cargo on occasional voyages when Indonesia-Malaya cargoes are scarce and when Philippine cargoes are not available so that on the order of approximately 50 percent free space is available on a vessel arriving eastbound at California will be denied. Luckenbach claims that it is able to provide capacity to carry all available eastbound intercoastal cargo even during the canned goods season. Part of this capacity estimate is based on the availability of "extra" ships. Such "extra" capacity is to be included in an estimate of intercoastal capacity. With this estimate, it is the judgment of the Board and Administrator that eastbound intercoastal operators would have the capacity to carry all intercoastal cargo. However, APL may, in individual cases, apply to the Administrator for permission to call at San Francisco. Id. (505).

APL may continue lifting eastbound intercoastal cargo out of Los Angeles in view of the failure of interveners (intercoastal operators) to present substantial evidence that unfair competition would result to them or that the objects and policy of the Act would be prejudiced. Id. (506).

Permission under section 805(a) to load 1,500 tons of newsprint at Port Angeles, Washington on December 28 for discharge at Long Beach, California, would not result in unfair competition within the meaning of the section, and would not be prejudicial to the objects and policy of the Act, where it was shown that, (1) shipper's and consignee's needs required shipment before end of year; (2) operators on the route would not be able to handle the cargo prior to January 7; (3) if water transportation were not available the cargo would move by rail; and (4) there was no proof of shutting out or refusing to solicit

off-shore cargo in order to carry the domestic cargo in question. Pacific Transport Lines, Inc., 544.

Application by subsidized operator for permission under section 805(a) to charter to coastwise operator all unsubsidized transpacific vessels which are or may be owned by it, would result in unfair competition to competitor of coastwise operation, as it would permit operation of the vessels in southbound trade without the necessity of finding cargo for the return leg; the operator could employ as many or as few such vessels as required with no continuing expenses, whereas 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; and while cargo offerings are limited in both directions, the Board will not penalize an operator for its ability to obtain cargo northbound and to maintain a whole operation. Pacific Far East Line, Inc., 580 (594).

—"Domestic intercoastal or coastwise service"

Issues raised under section 805(a) for request to serve Guam, Honolulu, Midway, Wake and the Trust Territories, off-route areas, were settled, with the exception of Hawaii and the Trust Territories, by the Administrator in prior case at 3 M.A. 450, where he ruled that steamship service between continental United States and Guam, Midway, and Wake was not "domestic intercoastal or coastwise service" within the meaning of section 805(a). The Administrator's ruling did not apply to Puerto Rico or Alaska. Pacific Transport Lines, Inc., 7(9).

"Coastwise service" mentioned in section 805(a) includes service between United States ports and Hawaii. Pacific Transport Lines, Inc., 146 (147).

—Effect on subsidized operations

Application under section 805(a) to continue temporarily present Hawaiian service on trade route between California and Far East ports, which service is not on the route as described in subsidy agreement, will be granted where it was shown that Hawaiian service did not materially detract from applicant's trade route service; in fact, some advantage in the solicitation of the trade route traffic accrued to applicant by reason of shippers being able to expedite cargoes and save drayage cost by using applicant's pier for mixed cargoes destined to Hawaii and the Far East; and service between Hawaii and Far East is a part of United States foreign commerce to the development of which applicant's Hawaiian service contributes. Pacific Transport Lines, Inc., 146 (149).

—General agency relationship

Section 805(a) of the Merchant Marine Act of 1936 applies to applications by subsidized carrier to operate as general agent for intercoastal carrier and to charter vessels to such carrier, as the application to become general agent under which one party would have complete control of the other's common-carrier activities, is an application to "operate" vessels engaged in the coastwise trade, and the application to time charter vessels for employment in the coastwise trade is anticipated in the section by any or all of the words "owns, charters, or operates." Pacific Far East Line, Inc., 580 (589).

Argument that performance of general agency agreement by subsidized operator on added cost basis for coastwise operator would not violate second paragraph of section 805(a) since only overhead costs, for which no subsidy is paid, could be diverted to coastwise operator, and coast-operator's competitor operates on a similar basis, is not proper construction of the section. Further, since competitor is not associated with a subsidized operator, its financial structure is not relevant to this case. Id. (591).

Statutory finding that proposed general agency agreement between subsidized and domestic operators will not result in unfair competition to exclusive domestic operator cannot be made where the subsidized operator failed to furnish competent evidence to show the effect of financial aspects of the agreement. Obviously performance of the agency by the subsidized operator on an added cost basis would result in advantage to the coastwise trade operator, but whether this would amount to unfair competition cannot be determined on a record showing only a tentative agency fee of 3% of gross revenues of the coastwise operations, no basis for the fee or whether it would be compensatory, and no study of the costs of performing the general-agency services. Id. (591).

Proposed general agency agreement which would give subsidized operator control of a domestic operation, and for which the sole reasons advanced relate to minor operational and space allocation problems which could be readily resolved by amending the existing agency agreement, would be prejudicial to the objects and policy of the Act within the meaning of section 805(a). Id. (593).

—Grandfather rights

In disposing of the question of section 805(a) grandfather rights, the Board and Administrator are guided by two considerations: (1) substantial parity must exist as between proposed and past operations for the protection of domestic operators already interested in the trade, and (2) the grandfather clause cannot be so strictly read as to permit absolutely no flexibility in equipment. American Preident Lines, Ltd., 488 (502).

American President Lines or a predecessor in interest was not, as to its C–2 service (Route 17), in bona fide operation as a common carrier by water in the domestic, intercoastal, or coastwise trade in 1935. APL's proposed C–2 service is different from round-the-world on which APL or a predecessor operated a westbound intercoastal service in 1935; it was not in operation in 1935 as an Atlantic to Indonesia-Malaya service; it would increase APL's westbound intercoastal sailings by 50 percent, and it would add five C–3's or similar types to the westbound intercoastal service over and above the round-the-world service. In short, APL proposes to institute a new and different service. Congress did not intend that services operated prior to 1935 should provide a basis for a claim of grandfather rights for a new and different service. Id. (502).

Finding in section 805(a) proceeding that applicant had grandfather rights in its round-the-world service, based on decision in earlier proceeding to determine whether applicant should be permitted to resume subsidized operations in such service, need not be reargued. American President Lines, Ltd., 555 (557).

—Interlocking ownership or other interests

The spirit of the prohibition in section 805(a) against payment of subsidy to any contractor having a pecuniary interest in a concern engaging in domestic intercoastal or coastwise service should apply where the majority or sole stockholder of the contractor owns such an interest. Section 805(a) permission will be granted for majority stockholder of subsidy applicant and wife of a director of the applicant, to continue to hold her one-half of one percent of Matson's stock acquired through inheritance, Matson being a coastwise operator. Pacific Transport Lines, Inc., 146 (147, 148).

Motion for declaratory order that section 805(a) of the Merchant Marine Act of 1936 was not applicable will be denied where there was an interlocking stock and directorate relationship between the 805(a) applicant and an intercoastal operator which made 13 intercoastal voyages over a period of several years. American President Lines, Ltd., 436 (440, 441).

Motion for a declaratory order that the requisite section 805(a) permission had already been granted by virtue of proxies given by the Commission to elect directors to the board of the 805(a) applicant at a time when such directors had an interest in a company operating intercoastal, will be denied since section 805(a) calls for "written permission," and in view of Congress' concern for intercoastal and coastwise operators and the mandatory hearing requirement of the section, the Board cannot impute the force of statutory permission to the proxies. Id. (441).

Application for written permission under section 805(a), for interlocking stock and directorate relationship, will be granted where the applicant and intervening intercoastal operators have agreed that prospective permission may be given provided no cargoes are carried which would compete with intervener's cargoes. Id. (441).

—Intervention and hearing

Carriers furnishing an intercoastal service that does not include foreign ports are engaged exclusively in intercoastal trade and thus are entitled to intervene in a section 805(a) proceeding. Contention by subsidy applicant that one such intervener's standing was destroyed because of offshore charters was rejected previously by the Board in another 805(a) proceeding (though not mentioned in the report because not determinative of the case [4 FMB 436]). If in any event, that intervener and another who operated vessels for its own account in the offshore trades, and the subsidy applicant were parties to another proceeding where the Board and the Administrator made the first determination. American President Lines, Ltd., 488 (500, 501).

Where the Board/Administrator's conclusion, that grant of permission under section 805(a) would not result in unfair competition or be prejudicial to the purposes and policy of the Act, was supported by findings of fact, the burden of proof under the section was not shifted to interveners, but rather interveners failed to met their burden of rebutting the prima facie proof required by the section. American President Lines, Ltd., 555 (556).

As is apparent from examination of sections 2(d) and 8(a) of the Administrative Procedure Act, the Act does not require that the Board and the Administrator issue orders separate and apart from their reports or decisions. Moreover, in the instant section 805(a) proceeding the written permission required by the section was clearly set forth in the Board and Administrator's report. Id. (556).

Section 805(a) does not require a separate finding on public interest and convenience. The phrases "public interest and convenience" and "competition in such route or trade," appearing in the proviso of the section, do not impose any requirements in addition to those set out in the body of the section. Id. (556).

A revised application on which specific section 805(a) hearings have not been held cannot be granted by the Board where interveners have not been heard; although it might be argued that an unlimited application includes a request in a limited one, arguments of interveners have been directed to a particular proposal and did not anticipate a limited application; and it cannot be assumed that interveners would not, if given an opportunity, offer vigorous and sound objections. Pacific Far East Line, Inc., 580 (596).

Since the amount of charter hire is a potential source of unfair competition, the Board cannot exclude the amount payable from the hearing requirements of section 805(a), so as to grant applications to charter vessels conditioned upon

administrative approval of charter-hire rates prior to execution of each charter. Id. (596).

—Prejudice to objects and policy of the Act

Under section 805(a) chartering of unsubsidized vessels of subsidized operator for use on an intercoastal leg of an unsubsidized service would be prejudicial to the objects and policy of the Act where there is no need for additional sailings in the coastwise trade, the addition of vessels would overtonnage the trade, and the result would be the elimination of exclusively domestic operations. Pacific Far East Line, Inc., 580 (595).

In a section 805(a) proceeding, benefit to the coastwise operator which would charter vessels from a subsidized operator cannot be determinative of the issues where the application is otherwise prejudicial to the objects and policy of the Act. Id. (596).

—Retrospective permission

Application for written permission under section 805(a) of the Merchant Marine Act of 1936 will be granted retrospectively up to the date of filing of the application where no facts or argument were presented against such grant, or to the effect that such permission would be prejudicial to the objects and policy of the Act. American President Lines, Ltd., 436 (441).

Application for written permission under section 805(a) of the Merchant Marine Act of 1936 will be granted retrospectively for the period between the filing of the application and the date of the Board's order. Otherwise a subsidized operator could never file an application without entering upon a violation of section 805(f) which provides that a willful violation of section 805 constitutes a breach of subsidy contract, unless section 805(a) permissions were forthcoming instantly which, of course, is not administratively possible. Furthermore, Congress could not have intended such a result for section 805(a) contains provision for intervention and mandatory hearing thereon. Id. (441).

INTERCOASTAL SHIPPING ACT, 1933. See also Common Carriers.

Proposed increased rates for transportation of freight between ship's landing and Adiak, Alaska, and between Bethel, Alaska, and Adiak found not justified where, though the evidence would justify a rate increase for combined water and drayage service, there was no provision in the tariff for the performance of drayage. Without such a provision the tariff fails to comply with the requirement of section 2 of the Intercoastal Shipping Act of 1933, that "each terminal or other charge, privilege, or facility granted or allowed" shall be separately stated. Increased Rates, Kuskokwim River, Alaska, 124 (125).

Proposed increased rate for transportation of freight between ship's landing and Bethel, Alaska, was justified where carrier's expenses had increased 100% since the time the present rate was established; and where because of a change in the waterfront, it had become more difficult for the carrier to handle freight. Id. (125).

Quoting by carrier of indivisible roundtrip rate on tanks carried full southbound and empty northbound, without separately stating the charge for transportation in each direction, violates section 2 of the Intercoastal Shipping Act of 1933 which provides that schedule of rates shall state separately each terminal or other charge. Ponce Cement Corp.—Rates and Operations, 603 (607).

Publication of an indivisible round-trip rate on trailers and propane gas tanks (from Florida to Ponce, P.R.) is an unjust and unreasonable practice under section 4 of the Intercoastal Shipping Act of 1933 and section 18 of the Shipping Act of 1916, since the rate limits the carriage of empty trailers and

tanks northbound to those that have been carried full southbound, and no other shipper of empty trailers or tanks could avail himself of this service. Id. (607).

Respondent may not 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, as such actions, in addition to possessing potentialities for discrimination and preference, would violate the filing requirements of section 2 of the Intercoastal Shipping Act of 1933 where done without intention to abandon or discontinue common-carrier service. Id. (609).

Carrier's tariff trailer measurement requirements are unreasonable under section 4 of the Intercoastal Act, in that they were arbitrarily arrived at without regard to the lifting or spacial capacity of the vessel, or to the range of measurements of trailers which reasonably could be accepted for shipment. Id. (I, II).

INTERSTATE COMMERCE ACT. See Contract Rates; Preference and Prejudice.

JURISDICTION. See also Common Carriers; Contract Rates; Intercoastal Operations; Practice and Procedure.

Proceedings by the Board to determine whether and to what extent operating subsidy aid is necessary (under contracts already entered into), while indicating a broad inquiry into whether the subsidy is to be paid rather than how much, are not subject to attack upon motion to dismiss for lack of the Board's jurisdiction, where the Board has jurisdiction on the question of how much and cannot determine that question without having before it all material facts. Farrell Lines Inc., 22 (25).

Motion to dismiss proceedings for lack of jurisdiction in the Board was denied where the Board, pursuant to its authority to make or amend subsidy contracts, had instituted the proceedings to determine whether and to what extent subsidy aid was necessary, although petitioner previously had entered into a subsidy contract and argued that there was no statutory authority to review an existing contract, but the contract provided for the addition of addenda with respect to items and percentage rates for subsidy for two combination vessels and such items and rates had not yet been fixed. Id. (25).

The Board has no jurisdiction to make rules with respect to carrier-imposed time limitations in presentation of claims for freight adjustment. If the proposed rule were to apply only to "common carriers by water in interstate commerce," support for jurisdiction might be found in section 18. Or if the rule were to apply only to carriers who are parties to conference or other agreements subject to approval under section 15, jurisdiction might be found on the theory that the proposed rule was necessary to avoid detriment to United States commerce. Carrier-Imposed Time Limits for Freight Adjustments, 29 (32).

Failure of Congress to legislate in the field of presentation of claims for freight adjustment as it did in the cargo damage field with respect to time limitations (Carriage of Goods by Sea Act, 46 U.S.C. § 1303(b)), and as it did on the question of time limits for recovery of freight overcharges by railroads (49 U.S.C. § 16(3)), is not conclusive on the power or jurisdiction of the Board to issue rules governing the right of common carriers by water to limit the time for presentation by shippers and consignees of claims for freight adjustments. Congress merely treated different situations differently. Id. (34).

That part of section 14 of the 1916 Act which makes it a misdemeanor for a carrier to "unfairly treat or unjustly discriminate against any shipper in the matter of . . . the adjustment and settlement of claims" is the only language

in sections 14, 14(a), 16, or 17 which refers to the subject matter (time limitations on presentation of freight adjustment claims) of proposed rule making. The language does not give the Board a power, duty or function to predetermine or define what does or does not constitute "unfair treatment" under the section. Section 204(b) of the 1936 Act is not a source of substantive or novel powers. The Board's rule making power under that section is limited to making such rules as are necessary "to carry out the powers, duties, and functions" vested in the Board. Id. (34, 35).

Alleged violation of a subsidy contract presents no controversy under the Shipping Act of 1916, and complainants alleging violations by a subsidy operator of sections of that Act have no standing to file a formal complaint as to violation by the operator of its contract, or to demand a public hearing thereon under the Merchant Marine Act of 1936. Irregularities in this regard are matters for consideration and determination by the Administrator and not by the Board. City of Portland *v.* Pacific Westbound Conference, 664 (679).

The Board has exclusive primary jurisdiction of complaints under section 810 in view of the many factual questions which require the exercise of administrative expertise for resolution. Isbrandtsen Co., Inc. *v.* American Export Lines, Inc., 772 (781).

LIABILITIES OF CARRIERS. See Common Carriers.

MERCHANT MARINE ACT OF 1920. See Port Equalization; Practice and Procedure.

MERCHANT SHIP SALES ACT OF 1946. See Charter of War-Built Vessels.

MONOPOLY. See Contract Rates.

NATIONAL-DEFENSE FEATURES. See Subsidies, Construction-Differential.

OPERATING-DIFFERENTIAL SUBSIDIES. See Subsidies, Operating-Differential.

POOLING AGREEMENTS. See also Subsidies, Operating-Differential.

Lykes—Harrison pooling agreement though tending to diminish competition slightly does not diminish competition between the parties below a substantial level, and a finding of substantial competition in the Gulf/Mersey trade is fully justified by these facts: (1) either line, if dissatisfied with the other's carryings and solicitation efforts, may withdraw on six months' notice; (2) each party solicits cargo as vigorously and as independently for the trade as for its other trades; (3) 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, and 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; and (4) carryings of non-pool, foreign-flag vessels have substantially increased during the first nine months of 1954, indicating increased competition in the trade. Lykes—Harrison Pooling Agreement, 515 (521, 522, 527).

Pooling agreements are not unlawful per se under the Merchant Marine Act of 1936 or under the Shipping Act, 1916, although pooling agreements necessarily tend to reduce "competition" as ordinarily defined. 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 1936 Act,

which contemplates continued existence of price regulation by conferences as well as other practices which, absent legislation, would violate the 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. Competition in this sense is an elastic term not readily categorized or restricted in application. Id. (526, 527).

The concept of competition inherent in decisions dealing with antitrust law violations and unfair trade practices is violated by Grace—C.S.A.V. pooling agreement, and the practices thereunder, but neither the agreement nor its effects in any way create relationships tending to diminish competition as necessarily defined in the Merchant Marine Act, 1936. [Lykes—Harrison Pooling Agreement, 4 FMB 515.] Grace—C.S.A.V. Pooling Agreement, 528 (534).

PORT EQUALIZATION. See also Absorptions; Agreements under Section 15.

Practice of equalizing inland transportation costs on cargoes of apples and other deciduous fruits is not unjustly discriminatory as between ports, detrimental to the commerce of the United States, or in violation of the Shipping Act of 1916 where cancellation of privilege of equalization between California and Pacific Northwest ports on Oregon and Washington apples would result in a substantial reduction in volume of apples shipped to the Orient because insufficient sailings, direct or indirect, are available from the Northwest ports to satisfy the requirements of shippers. City of Portland *v.* Pacific Westbound Conference, 664 (675).

Absorption of inland transportation costs to California ports on shipments of Oregon-produced onions and other produce from areas geographically tributary to Pacific Northwest ports is unjustly discriminatory against, and unfair to, those ports within the meaning of section 15 of the Shipping Act of 1916, in circumstances where such shipments to the Philippines must go by indirect sailings from the Northwest ports but no credible evidence was offered as to the necessity for direct sailings, as a regular practice, or the necessity for diverting such shipments to California on other than an emergency basis. Id. (676).

Practice of equalizing inland transportation costs to California ports on shipments of explosives is discriminatory and unfair as between ports, within the meaning of section 15 of the Shipping Act of 1916, where the shipments originate in Du Pont, Washington; nonconference vessels are able to provide the necessary service from Northwest port; although port from which explosives would have to move is physically located outside the jurisdiction of Seattle (complainant), nature of the cargo requires loading away from populous areas; and the actual loading berth is in the Puget Sound area and is the explosive loading area for vessels calling at Seattle. Furthermore, since adequacy of service to accommodate this cargo at Puget Sound port is admitted, the prima facie discrimination against Seattle area, inherent in the equalization practice, has not been justified. Id. (676).

Absorption practices re newsprint are unjustly discriminatory and unfair as between carriers, within the meaning of section 15 of the Shipping Act of 1916 where carrier absorbed 73 percent of ocean freight on shipment of newsprint from Oregon City, Oregon, to San Francisco via truck, there was no evidence of inadequacy of service from Portland or Seattle or other reason for equalization on this commodity, and equalization as practiced by other conference carriers as between California and Pacific Northwest ports does not extend to absorptions of domestic transportation costs on newsprint. Id. (676, 677).

Conference rules with respect to equalization practice between California and Pacific Northwest ports must show that practice will be carried out on

dairy products only when service is unavailable in the Northwest ports through which such products would normally move but for the practice. Id. (677).

Article 4 of conference agreement 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. While the Board approved a similar provision in Agreement No. 7790, 2 U.S.M.C. 775, its present findings of unjust discrimination in confernce equalization practices requires disapproval of Article 4 and Rule 2 insofar as found to authorize such unjustly discriminatory practices. The conference must cease and desist from effectuating Article 4 or Rule 2 by any practices condemned, and must submit an amended provision for Board approval. The amendment must reflect the understanding of the parties and must limit the percentage of absorptions of rail, truck, or coastal steamer freights and the areas to which the practice may extend. The amendment 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 absorption. Id. (677, 678).

Where the Board has found 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 Merchant Marine Act of 1920 which charges the Board with duty to promote the use by vessels of ports adequate to care for freight which would naturally pass through such ports. Id. (679).

PORTS. See also Differentials; Port Equalization.

Although the U.S. District Court for the Northern District of California indicated in State of California *v.* United States, 46 F. Supp. 474, that the word "localities" appearing in section 16, First of the Act refers to shippers only, it has been the uniform interpretation of the Board and its predecessors that the word "localities" refers to ports. City of Portland *v.* Pacific Westbound Conference, 664 (674).

Prejudice to localities (ports) within the meaning of section 16 of the Shipping Act, 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 a port. Whether the result is unjust or unfair discrimination or undue or unreasonable preference, however, is a question of fact for determination in each case. Id. (674).

PRACTICE AND PROCEDURE. See also Agreements under Section 15; Charter of War-Built Vessels; Complaints; Evidence; Intercoastal Operations (Sec. 805(a)); Jurisdiction; Subsidies, Operating-Differential.

—In general

The Board has no power express or inherent to summarily award reparation for violations of the Shipping Act. The manner in which the power to award reparations and order discontinuance of unlawful practices in freight rate matters is exercised is set forth in section 23 which plainly requires full opportunity for all parties to present evidence in questions of statutory violation, and precludes adjudications prior to completion of that presentation. Isbrandtsen Co., Inc. *v.* States Marine Corp. of Delaware, 511 (512, 513).

Whether or not the Board has power to summarily award reparations for violations of the Shipping Act, the moving party has not met the burden of showing absence of any genuine issue as to all material facts where the parties dispute whether complainant was denied an exclusive-patronage contract, as well as other facts necessary to show prejudice, disadvantage, and discrimination as alleged, and, although the parties agree on the facts as to the rates paid, it is incumbent upon complainant to show injury under section 22 of the Act. Id. (514).

Motion to dismiss petition to the Board to investigate rate and brokerage practices of carrier competing with conference carriers and to issue rules under section 19 of the Merchant Marine Act of 1920, does not lie as a matter of right even though a cause of action under sections 16 and 17 of the Shipping Act has not been stated. The petition serves to inform the Board of possible existence of practices and conditions described in section 19 and will be granted or denied in the Board's discretion as appears to be consistent with the purposes and policies of both Acts. Motion to dismiss denied. Anglo Canadian Shipping Co., Ltd. *v.* Mitsui S.S. Co., Ltd., 535 (543).

A requirement by the Board that a carrier file periodic reports to convey information as to cargoes and rates as recommended by the hearing examiner is proper under section 21 of the 1916 Act, although the recommendation had been made by the examiner under section 19 of the 1920 Act on the ground that respondent had violated section 16-Second of the 1916 Act and in so doing was guilty of competitive methods creating conditions unfavorable to shipping in the foreign trade, and the Board had, instead, reversed the finding of violations of the 1916 Act. The filing does not constitute a penalty against respondent, but is required as a step toward fulfillment of the Board's obligation fully to inform itself of conditions in the trade. Practices of Fabre Line and Gulf/Mediterranean Conference, 611 (643, 644).

Alleged violation of a subsidy contract presents no controversy under the Shipping Act of 1916, and complainants alleging violations by a subsidy operator of sections of that Act have no standing to file a formal complaint as to violation by the operator of its contract, or to demand a public hearing thereon under the Merchant Marine Act of 1936. Irregularities in this regard are matters for consideration and determination by the Administrator and not by the Board. City of Portland *v.* Pacific Westbound Conference, 664 (679).

—Exceptions

A general exception to an examiner's conclusions of law "insofar as inconsistent with the brief of respondent," fails to provide the particularity with which errors are to be indicated under Rule 13(h). Moore-McCormack—Swedish American Lines Sailing Agreement, 558 (567).

—Findings; issues; scope of hearing

A decision and judgment of a state court, which shows that certain relief was granted to complainant, but fails to disclose the adjudication of facts as between complainant and defendant, is not res adjudicata in proceedings before the Board on a complaint of violation of provisions of the Shipping Act, where the issues before the court were not the same as the issues before the Board. If the issues before the court had been the same, namely, whether there had been a violation of the Act, the court would not have been in a position to proceed until the Board's primary jurisdiction had been exercised. Feldman Family Clothing Export & Shipping Corp. *v.* Bogaty, 1 (5).

In a proceeding brought under section 22 of the Shipping Act of 1916, the Board, if in fact authorized to do so, will not make findings with respect to

violations of section 205 of the Merchant Marine Act of 1936 where the evidence of record related almost entirely to violations of sections 16 and 17 of the Shipping Act, section 205 was first referred to at oral argument by the Board itself, and the record was not sufficiently complete on issues material under section 205. Port of New York Authority *v.* Ab Svenska Amerika Linien, 202 (210).

Motion to take evidence from Bureau of the Census and from nonrespondent members of a conference, as to any shipments made by a company, for whom a lower rate on road rollers was established by the conference than the rate charged to complainant, was denied because any such additional evidence would not concern shipments made on any vessels of any of the responndents and could not be relevant to the issues under sections 16 and 17 of the 1916 Shipping Act. Huber Mfg. Co. *v.* N. V. Stoomvaart Maatschappij "Nederland," 343 (346).

Where the scope of an investigation by the Board is limited to a determination of whether the differential between contract and noncontract rates of conference carriers is arbitrary and unreasonable and therefore unjustly discriminatory, the issues may not be broadened to include consideration of whether such rate system itself violates section 14-Third of the Shipping Act of 1916. Interested parties are entitled to raise such issues by appropriate plenary proceedings. Contract Rates—North Atlantic Continental Freight Conference, 355 (369).

Examiner properly refused to consider question of whether or not sailing agreement conformed generally with the purposes and policy of the Merchant Marine Act of 1936, where the order of investigation and hearing was confined to the consideration of the effect of such agreements on foreign-flag competition as a factor for determining operating-differential subsidy under sections 603 and 606. Consideration of other matters would violate the notice requirements of the Administrative Procedure Act. Moore-McCormack—Swedish American Line Sailing Agreement, 558 (567).

—Oral argument

Oral argument will be denied where adequate written argument was filed with exceptions to the examiner's initial decision. American-Hawaiian S.S. Co. *v.* Intercontinental Marine Lines, Inc., 160 (161).

A complainant of violation of section 810 would not be prejudiced by the absence of the Chairman-Administrator from oral argument, where oral argument was heard by a majority of Board members and decided by those members for the Board. The Chairman's review of the record and participation in the decision, as Administrator, under section 214, in connection with his authority to administer operating-differential subsidy agreements which have been made by the Board, does not affect the Board's exercise of jurisdiction or in any way adversely affect complainant. Isbrandtsen Co., Inc. *v.* American Export Lines, Inc., 772 (781).

—Rules of evidence

The mere statement of a violation in a complaint is not proof of such violation. The production of proof before examiners is regulated by the Board's rules. Section 201.121 of the rules provides that rules of evidence in courts of the United States shall be generally applied and may be relaxed where the ends of justice will be better served. The right to offer oral and documentary evidence is preserved and all parties are entitled to such cross-examination as may be required for the full disclosure of facts. Feldman Family Clothing Export & Shipping Corp. *v.* Bogaty, 1 (4).

A transcript of testimony of witnesses before a state court would not necessarily be excluded from evidence in proceedings before the Board only because it is neither verified nor certified. Id. (4).

Written transcript of testimony of witnesses at a prior trial (before a state court) is not admissible in evidence in proceedings before the Board for alleged violations of the Shipping Act, where there is no preliminary proof that the issues of the earlier trial are substantially the same as in the later proceeding, and there is no proof or even any statement by counsel that the witnesses were unavailable to testify. Exhibits, the relevance and identity of which are dependent upon the excluded transcript, would also be excluded. Id. (4, 5).

While the Administrative Procedure Act relaxes the strict evidentiary rules obtaining in courts of law and permits the use of hearsay evidence, it is designed to eliminate wholesale use of hearsay evidence and the consideration of only one part or one side of a case. This limitation on the use of hearsay evidence derives from the requirement that orders be supported by "reliable, probative, and substantial evidence," by the power in reviewing courts to set aside actions unsupported by substantial evidence, and from the power of parties "to conduct such cross-examination as may be required for a full and true disclosure of the facts." Mere uncorroborated hearsay or rumor does not constitute substantial evidence. Practices of Fabre Line and Gulf/Mediterranean Conference, 611 (635).

Hearsay evidence, with proper limitations, is admissible in proceedings before the Board on charges of violations of section 16 of the Shipping Act, and the Board is not required to apply evidentiary standards proper in criminal proceedings, since, although section 16-Second provides criminal penalties, those penalties may only be imposed in a proceeding commenced by the Department of Justice in a court of competent jurisdiction. Id. (636).

The law imposes no duty on the president of a carrier corporation personally to respond to charges of violations of the Shipping Act or otherwise to appear in Board proceedings, and, in the face of his communication to the Board Chairman that prior commitments prevented his attendance, no adverse inferences would be drawn from his absence and failure to testify. Id. (641, 642).

—Rule making

Section 4 of the Administrative Procedure Act requires the formal procedure of section 8 only "where rules are required by statute to be made on the record after opportunity for an agency hearing." Since none of the statutory enabling provisions cited in the Board's notice of institution of a proceeding under section 4 requires a formal notice or hearing in connection with the rule making proceeding thereby instituted, the Board may direct the hearing officer to transmit his recommendations and the record directly to it without an opportunity for exceptions or oral argument and may permit interested persons not attending the hearing to submit verified statements. There is also no policy consideration compelling the Board to adopt a procedure requiring the hearing officer to submit a recommended decision to it. Carrier-Imposed Time Limits for Freight Adjustments, 29 (31).

Rule making under section 204(b) of the 1936 Act and within the framework of the Administrative Procedure Act is something different from investigation of actual or suspected violations of the 1916 Act pursuant to section 22 thereof. The Administrative Procedure Act defines "rule" and "rule making" in section 2(c) quite differently from "order" and "adjudication" in section 2(d). Id. (35).

PRACTICES. See also Demurrage; Differentials; Rebates.

Complaint alleging violations of section 16 by a carrier quoting rates differentially lower than conference rates and paying brokerage fees higher than those paid by competitors does not state a cause of action. The Board looks with disfavor on the practice of quoting rates in such manner but finds it, without more, not within the scope of section 16. The Board also looks 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. The practices complained of lead to disastrous rate wars, the siphoning off of freight earnings, and ultimately monopolization by a few big lines to the detriment of the United States. Anglo Canadian Shipping Co., Ltd. *v.* Mitsui S.S. Co., Ltd., 535 (542).

PREFERENCE AND PREJUDICE. See also Contract Rates; Demurrage; Findings in Former Cases; Free Time; Intercoastal Shipping Act, 1933; Ports; Retaliation.

The undue preference and undue prejudice mentioned in section 16, First, is always a relative matter, that is, the preferring of one person to another or the deferring of one person to another. To constitute a violation of this section there must always be two persons given unequal treatment by the carrier or other person subject to the Act, for any unjust discrimination when found to exist may be cured by raising the low rate as well as lowering the high rate or bringing both rates to a common point, and likewise under section 17 there must be unequal treatment between competing shippers or ports to constitute a violation. Here complainant paid the higher of two rates on road rollers, but no other shipper received any lower rate or better treatment. The conference had on file a lower rate for road rollers adopted to retain the business of an oil company but there was no evidence that respondent carriers, members of the conference, had carried any road rollers at the lower rate. Huber Mfg. Co. *v.* N.V. Stoomvaart Maatschappij "Nederland," 343 (347).

The language of section 16, "to make or give any undue or unreasonable preference or prejudice to any particular person, etc.," does not include the concept of self-preference unless the words "to make or give" can be so construed. "Give" clearly does not include self-preference. Legislative history indicates that "make" and "give" were used synonymously. Decisions under the second section of the English Railway and Canal Act of 1854 and section 3 of the Interstate Commerce Act which contain similar language are pertinent and persuasive. Cases considered under the English Act were concerned with self-preference of a carrier in a capacity other than as the carrier granting the preference. Decisions of the I.C.C. exclude self-preference as a practice regulated under section 3 of that Act. Anglo Canadian Shipping Co., Ltd. *v.* Mitsui S.S. Co., Ltd., 535 (541, 542).

Carrier's indivisible round-trip rates for carrying tanks full southbound and empty northbound has not resulted in violation of section 14-Fourth or 16-First of the Shipping Act, since as to 14-Fourth the Board's jurisdiction over unfair treatment and unjust discrimination is confined to existing practices and actions and no such practice or party discriminated against has been shown to exist, and as to 16-First only actual unequal treatment of two or more persons, localities, or descriptions of traffic constitutes a violation and since there is but one shipper of tanks, no actual unequal treatment has been shown. Ponce Cement Corp.—Rates and Operations, 603 (607, 608).

Statement that common-carrier cargo would be shut out if vessel should be needed for full cargo of cement carried proprietarily, does not establish a violation of sections 14-Fourth or 16-First of the Shipping Act. It indicates an ability to discriminate or prefer in the future, if necessary, but whether the discrimination which might occur would be unjust, undue, unreasonable, or unfair would depend on facts alleged to establish violation of the Act at that time. While a violation of section 16 might arise out of undue preference by a carrier for itself in the capacity of shipper, undue preference must be actual and not potential. Id. (608).

PUBLIC LAW 591, 81st CONGRESS. See Charter of War-Built Vessels.

RATES. See Agreements under Section 15; Contract Rates; Findings in Former Cases; Intercoastal Shipping Act, 1933; Subsidies; Operating-Differential.

REBATES. See also Absorptions; Agreements under Section 15.

From the legislative history of section 14a of the 1916 Shipping Act it appears that under section 14, relating to transportation to and from American ports, fair treatment excludes deferred rebates, while under section 14a, relating to transportation between foreign ports, fair treatment does not exclude deferred rebates but requires for the United States-flag owner the right to join foreign conferences on equal terms. Isbrandtsen Co., Inc. *v.* American Export Lines, Inc., 442 (453).

Congress in enacting section 810 of the 1936 Act did not intend to repeal or modify the effect of section 14a of the 1916 Act. Thus a subsidy operator participating in agreements permitting deferred rebates in transportation of cargo between foreign ports, has not engaged in a practice which is unjustly discriminatory or unfair within the meaning of section 810 or of its subsidy agreement incorporating, in effect, that section. Id. (453, 454).

Although the words "knowingly and willfully" are not used, an "unjust or unfair device" within the meaning of section 16-Second must be a willful, knowing scheme or means to an end. 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 as to amount to an intent to collect less than the applicable rates and charges. Practices of Fabre Line and Gulf/Mediterranean Conference, 611 (637).

Carrier's admission that a commission or brokerage fee of 10 percent was paid for procurement of a shipment of lube oil falls far short of prima facie evidence of violation of section 16-Second of the 1916 Act, although such payment was in violation of the conference agreement. Id. (639).

No element of violation 16-Second, namely, (1) intent, constructive or actual to allow rebates, (2) charging and collecting lower rates, (3) granting lower rates as a result of an unjust device or means, can be found where there is no proof that a rate concession was in fact allowed, and the evidence shows only cancellation of shipments booked for other vessels and subsequent shipment via the respondent carrier at a higher rate. While from this it might be inferred that rebates had been granted, other inferences are equally reasonable. Although the testimony of respondent's witnesses did not provide a satisfactory explanation of the reasons for the shipment moving to respondent, where less than a prima facies case was made respondent was not required to rebut. Id. (639).

A practice of rebating may reasonably be inferred, but other inferences are equally reasonable, from the following facts: nineteen bookings for shipments of cotton with other carriers were cancelled at the request of consignees and the

shipments later moved via respondent; in three instances the goods had to be moved from another carrier's installation once at an additional cost to the consignee; despite the fact that respondent was new to the trade its average carriage of cotton far exceeded that of other conference members that were long-established cotton carriers; respondent booked cotton for Venice but discharged at Genoa although discharging costs at Genoa were higher than at Venice; respondent's Genoa agents extended substantial credit to Italian forwarders. Id. (640).

There is no "substantial evidence" to justify a finding of violation of section 16-Second, where a practice of rebating may reasonably be inferred from the facts shown by direct evidence but other inferences are not unreasonable, and hearsay evidence is relevant but not conclusive, especially where such hearsay evidence is contradicted by hearsay evidence adduced by respondent. Id. (641).

A carrier is not guilty of violating section 16-Second because of charging lower rates on a shipment of turpentine substitute where the record discloses and the Board finds that the undercharge was clearly inadvertent, since intent is an element of section 16-Second violations. Id. (643).

RECAPTURE OF PROFITS. See Capital Necessarily Employed.

RECONSTRUCTION OR RECONDITIONING SUBSIDY. See Subsidies, Construction-Differential.

REPARATION. See also Complaints.

The Board has no power express or inherent to summarily award reparation for violations of the Shipping Act. The manner in which the power to award reparations and order discontinuance of unlawful practices in freight rate matters is exercised is set forth in section 23 which plainly requires full opportunity for all parties to present evidence in questions of statutory violation, and precludes adjudications prior to completion of that presentation. Isbrandtsen Co., Inc. *v.* States Marine Corp. of Delaware, 511 (512, 513).

Whether or not the Board has power to summarily award reparations for violations of the Shipping Act, the moving party has not met the burden of showing absence of any genuine issue as to all material facts where the parties dispute whether complainant was denied an exclusive patronage contract, as well as other facts necessary to show prejudice, disadvantage, and discrimination as alleged, and, although the parties agree on the facts as to the rates paid, it is incumbent upon complainant to show injury under section 22 of the Act. Id. (514).

RETALIATION. See also Contract Rates.

Absence of the modifying word "unjustly" preceding the word "discriminatory" in section 14(3), does not make unlawful any retaliation by discriminatory methods. As stated in United States *v.* Wells Fargo Co., 161 Fed. 606, 610, "It is difficult to conceive of the terms 'discrimination,' 'prejudice,' or 'disadvantage' as not associated with what is unjust, unreasonable, and undue." Contract Rates—Japan/Atlantic-Gulf Freight Conference, 706 (734, 735).

RULE MAKING. See Practice and Procedure; Subsidies, Operating-Differential.

SALE OF VESSELS. See Subsidies, Construction-Differential.

SECTION 804 WAIVERS.

Section 804 of the Merchant Marine Act of 1936 prohibits a subsidized American operator from acting as agent for any foreign-flag vessel which competes with an essential American-flag service. The Maritime Administrator is vested

with discretionary power to waive this prohibition when he feels that special circumstances exist and that good cause has been shown that such waiver will promote the purposes and policy of the Act. The legislative history of section 804 shows clearly that Congress did not intend waivers would be granted except for compelling reasons. American Export Lines, Inc., 379 (384).

Extension of waiver of provisions of section 804 of the Merchant Marine Act of 1936, requiring a showing of special circumstances to permit a subsidized American operator to act as agent in this country for a foreign line, will not be granted where the small percentage of gross revenue derived from emigrant traffic depended more on the foreign line's counter-agreement to act as agent for the American line than upon the agreement for which waiver was sought; even if termination of the agency resulted in termination of the counter-agency, the subsidized operator might be able to increase its passenger business from abroad; alleged increased operating efficiency and decreased operating costs were not presented for the record; the financial advantage of pier sharing, while real and measurable, does not depend necessarily on a section 804 waiver; the American operator's earnings from the agency, unsupported by other special circumstances, cannot be considered in themselves a special circumstance under section 804; reduction in turnaround time at foreign port, secured through close association with the foreign line, was not related to the section 804 waiver; and increased percentage of passenger travel to the area involved was not the result of the agency relationship, but presumably of the natural interest of both lines in promoting such travel, and, moreover, the first year for which an increase was shown was that during which the American line operated its two new liners. Id. (384–386).

Subsidized operators should be encouraged to use every means at their command to increase carryings and efficiency, or reduce overhead or other costs, whenever they can do so without incurring obligations that are unduly disadvantageous. The means used to accomplish these objects may include acting as agent for foreign-flag vessels competing with American-flag service, which requires waiver of section 804 of the Merchant Marine Act of 1936. However, such arrangement must necessarily result in greater benefit than detriment to the American subsidized operator. Grace Line, Inc., 466 (475, 476).

In considering whether a section 804 waiver requiring showing of special circumstances and good cause, should be granted to permit a subsidized operator to act as soliciting agent for a foreign line, the fact that the subsidized operator is free to give preference in every respect to its own vessels is in itself a special circumstance of substantial weight. In addition, the records showed that with respect to cargoes in which the said operator was interested, its vessels secured disproportionately larger loadings than its sailings might ordinarily have entitled it to. Id. (477).

A preference agreement giving a subsidized operator complete freedom to prefer its own vessels over those of a foreign line for which it acts as soliciting agent does not lose its character as a special circumstance, required to be shown for a waiver of section 804 of the 1936 Act, merely because it is consistent with the operator's obligation under its subsidy contract. The mere fact that the record does not show an exact measure of the extent of the preference does not mean that such preference is not in fact being secured. The indications are that preference in passengers and cargo that would otherwise move over the foreign line is being secured and is a proximate result of the fact that the agency agreement is qualified by the preference agreement. Id. (477).

The fact that a subsidized operator uses foreign tonnage to compete with foreign tonnage by giving foreign line the cargo which it is unable to carry, under an agency agreement requiring a section 804 waiver, does not require the Administrator to find that the operator should charter additional vessels or invite another American operator to institute a new service where the traffic shunted to the foreign line amounted to an average of less than 400 tons per sailing, whereas the operator carried an average of approximately 1,800 tons. To require such chartering or new service in these circumstances would be an improper governmental invasion of private managerial discretion. Id. (477, 478).

Although subsidized operator's transshipment business was developed during part of the time when its affiliates did not represent foreign line, but foreign line was probably helpful to the operator in the latter's competition with a foreign conference for such business, continuation of the agency relationship, requiring waiver of section 804 of the 1936 Act, will aid the operator in the future by enabling it to keep informed of conference rates and conditions. Id. (478, 479).

Agreement permitting subsidized operator to act as agent for foreign line, requiring approval under section 804 of the 1936 Act, benefits the operator without imposing a disadvantage upon it or upon the American merchant marine where as a result of the agreement the operator carries a larger share of cargo than might be justified by its sailings. Id. (477).

General agency relationship between subsidized operator (general agent) and another steamship company under which, although the agreement specifically excludes the former from participation in any agency services performed by the latter, absolute separation cannot practically be achieved since, for example, employees of the latter, who will act under its supervision for a foreign-flag competitor of the former, will also perform services for the former under the latter's supervision and will act for the former under its control and direction, violates section 804 which makes it unlawful for a subsidized operator or an associate or agent to act as an agent for a foreign-flag vessel with which it competes, except by permission under special circumstances and for good cause. Pacific Far East Line, Inc., 580 (592).

SERVICE CHARGE. See Terminal Facilities.

SPECIAL RESERVE FUND. See Capital Necessarily Employed.

SUBSIDIES, CONSTRUCTION-DIFFERENTIAL.

—In general

The principle of parity underlying the Merchant Marine Act of 1936 is basically sound, but it is apparent that some of the procedures laid down in Title V to achieve this principle, while suited to the more or less static conditions and relationships that may have existed in 1936, are inadequate now in light of changes and fluctuations of economic conditions created by the passage of time and by World War II. Sales Prices of "Independence" and "Constitution," 216 (259).

In planning for new vessels to be operated under subsidy, the operator and the government must consider the kind of vessel needed in the particular trade and national defense and prestige values are particularly important where large passenger vessels are concerned. Since section 211 of the Merchant Marine Act of 1936 directs the Board to consider "other facts and conditions that a prudent businessman would consider when dealing with his own business," it is clear that general business conditions and expected results must be care-

fully weighed in determining what maximum capital outlay a prudent businessman would make for projected vessels. Without joint consideration of these factors by the government and the operator the project may fail. If the purposes of the Act are to be accomplished corrective measures should be considered to replace present uncertainties and indefiniteness in the relations between the operator and the government with a degree of certainty and definiteness as well as reasonable promptness in defining what those relations shall be. Id. (259).

—Estimate of foreign construction cost

Under section 502(b) of the Merchant Marine Act of 1936 the Board's estimate of the foreign construction cost of proposed vessels must be based on vessels built to American standards rather than foreign. The legislative history of the 1938 amendment to the section which substituted "similar" for "like" in reference to plans and specifications upon which the Board must base its estimate of the hypothetical foreign counterpart of the American ship, and the administrative construction followed by the Board's predecessor for 10 years lead to this conclusion. While this construction of the Act does not result in putting the American ship buyer and operator on a capital parity with his foreign competitors, the remedy, if one is needed, lies in an amendment to the law. Id. 216.

Estimated foreign construction cost of a vessel under section 502(b) of the Merchant Marine Act of 1936 may be made subject to an escalation clause in circumstances where the American shipbuilder's accepted adjusted price bid was subject to escalation; information available to the Commission indicated that foreign shipyards would not submit fixed price bids; the method used was the most accurate to estimate foreign construction cost since the amount of a foreign shipyard's estimating factor would be largely a matter of conjecture; escalation is an accepted feature of government shipbuilding contracts and generally benefits the government; and section 502, when coupled with the authority given under section 207 to enter into contracts that appear to be necessary, contains sufficient flexibility to permit subsidy determinations to conform to accepted commercial practices. Id. (225, 226).

Under section 502(b) of the Merchant Marine Act of 1936, requiring a fair and reasonable estimate of cost of a vessel built foreign, the escalation clause in a foreign vessel sales contract should be geared theoretically to appropriate foreign wage and material indices since the vessel sales price is to be "a price corresponding to the estimated cost . . . of building such vessel in a foreign shipyard." However, where at the time of entering into a construction-differential subsidy contract, the trend of foreign costs is similar to the trend of U.S. costs, administrative convenience warrants the use of domestic indices as such use would normally result in reasonably accurate provision for future changes in costs and would obviate an administrative burden, the cost of which might be disproportionate to a changed result. Id. (226).

In redetermining vessel's sales price the Board may make adjustments to give effect to changes in the wages, material, and other elements of foreign-construction costs and in the value of the foreign currency during the period of construction and payment provided such redetermination is made on the basis only of circumstances existing as of the date of the construction contracts. Id. (227).

Neither the Merchant Marine Act of 1936 nor its legislative history show how fluctuations in foreign exchange rates should be treated when they occur during construction and progress payments on a vessel purchased under Title V of the Act. However, since the objective of Title V is to permit purchase of a vessel

at closest approximation to actual dollar price than it would have cost if built foreign, the Board is not precluded in redetermining the estimated foreign cost from giving effect to an event such as devaluation of foreign currency occurring subsequent to the date of the construction contract which controls the estimated foreign cost, provided that at the time of the original determination (by the Commission) such devaluation could have been reasonably foreseen and might have been provided for in the contract. Id. (228).

Legislative history of 1939 amendment to section 705 of the Merchant Marine Act of 1936 shows that Congress intended that the floor price of vessels sold under Title VII was intended to be the same as provided for ships built and sold under section 502. Thus the limitations of section 705 with respect to floor price and date for determination thereof are applicable to the sale of vessels with construction-differential subsidy under Title V and Congress intended Title V to require that estimate of foreign construction cost be made as of the date the American construction contract therefor is executed. Id. (229).

Since fees for preparation of bidding plans and specifications, cost of inspection during construction, interior decorator's fees, increases in cost due to running standardization trials, and cost of supplying items not included in the construction but which may be furnished separately by the Commission or purchased by the subsidy applicant with prior approval of the Commission, are items which either were or could have been included in the American shipyard bid and are all items of cost to the American buyer which would be included in the total cost of constructing a vessel in a foreign country, under a reasonable construction of sections 502 (a) and (b) of the Merchant Marine Act of 1936 they are properly considered for inclusion in the estimated foreign construction cost of a vessel in amounts equal to the estimated foreign cost of each such item. Id. (229–231).

For purposes of construction-differential subsidy calculation, that portion of the cost of inspecting a vessel during construction which was borne by the applicant could be included to the extent that the work was in fact in lieu of and in substitution of Commission inspection, since in most cases the Commission itself undertook the entire work as part of its administrative responsibility under Title V of the Merchant Marine Act of 1936, and did not include any part of the costs in the ship sales prices. Id. (230).

The cost of materials and furnishings required for a ship's outfitting, which are part of the construction cost under section 905(d) of the Merchant Marine Act of 1936, are costs which normally would have been included in the contract of an American and foreign shipbuilder and are subsidizable under section 502 of the Act, although furnished to the ship by the Commission or the subsidy applicant apart from the construction contract. Since there is no reason to assume that the differential between the foreign costs of these items and their American costs will be the same as the differential between the foreign and domestic costs of the rest of the ship, it is necessary to determine the estimated foreign costs as separate and distinct cost items to be included in the overall foreign cost estimate. Id. (231).

In redetermining a vessel's sale price under Title V of the Merchant Marine Act of 1936 the Board would not adjust the estimated foreign construction cost to give effect to foreign currency devaluation occurring subsequent to the construction contract and during construction and progress payments since no provision for such adjustment was contained in the earlier contract, such a provision would have created uncertainties in the final sale price, and evidence

was lacking that prudent businessmen would have desired to include such a provision in the contract at the time it was made. Id. (232).

Board's redetermination under Title V of the Merchant Marine Act of 1936, of the estimated foreign cost of vessels [made by the Commission in 1948] must be made without adjustment for any disparity between the official and free rate of a foreign currency in circumstances where the record failed to show concessions based on the disparity between the rates of exchanges in known contracts with Western European shipyards; the record contained unsupported statements by bankers and the subsidy applicant's representative that some unidentified U.S. businessmen were obtaining such concessions; and even if a concession could have been obtained with reference to the vessels involved, the amount itself would be a matter of conjecture only. Id. (237).

The subsidy percentage determined for vessels as a whole should not be applied to determine the subsidizable portion of (1) fees for preparation of bidding plans and specifications, (2) cost of inspection during construction, (3) interior decorator's fees, (4) increases in costs due to running standardization trials, and (5) costs of supplying items not included in the construction contract but which were furnished separately by the Commission or purchased by the applicant with prior approval of the Commission, unless the estimated foreign cost is included in the overall foreign cost estimate for the entire ship and is thus reflected in the resulting subsidy percentage for the entire ship. Id. (238).

Board would determine that Holland was representative foreign shipbuilding center for the redetermination of vessels' sales prices under section 502(b) of the Merchant Marine Act of 1936 where it had the personnel, facilities and experience necessary for construction of proposed vessels; a political and economic environment such as to give reasonably certainty that contractual obligations as to time, quality, and price would be performed; the lowest prices; and no other shipbuilding center could meet all of these requirements. Id. (238, 239).

In redetermining vessels' sales prices under Title V of the Merchant Marine Act of 1936, the Board now will use cost estimates of the vessels built foreign and made by a foreign shipbuilder [rather than an item by item estimation based on best evidence available at earlier date] where such estimates were carefully prepared, represented the fair and reasonable estimate of base costs, and were predicated upon actual invoices and transaction prices. American Export Lines, Inc., Sales Prices of "Independence" and "Constitution," 263 (273).

In redetermining vessels' sales prices under Title V of the Merchant Marine Act of 1936, the Board will adjust the estimated foreign construction cost to give effect to foreign currency devaluation occurring subsequent to the construction contract and during construction and progress payments where there is convincing evidence that a buyer with dollars in 1948 would have been able to arrange for construction of vessels in the foreign country at a price in dollars substantially below the official rate of exchange. Id. (283).

The Board will make no subsidy allowance for government-furnished ship's outfit such as navigating instruments, flags, steward's outfit, and deck and engine room portable tools since there is no evidence that the cost of these items in the representative foreign shipbuilding center is less than cost at which they will be supplied by the government to the Mariner vessels involved. Sales Prices of "Mariner" Class Vessels, 414 (432).

—National-defense features

Allowance for national-defense features under section 502 of the Merchant Marine Act of 1936 need not be limited to vessel features added to the applicant's plans and specifications pursuant to specific Navy Department request. Section 501(b) does not specify any particular procedure for determining what features qualify for national-defense allowances but the Board will follow the sound policy adopted by its predecessor in 1948, namely, to pay for such features if, and to the extent, they do not have a commercial utility, or if, and to the extent, their cost is disproportionate to their value for commercial purposes. Sales Prices of "Independence" and "Constitution," 216 (223).

Inclusion of a vessel feature in an applicant's plans and specifications does not bar per se the granting of a national-defense allowance for such feature since the Merchant Marine Act of 1936 contains no such bar; section 502(a) provides that bids for vessel construction can be secured only if the Secretary of the Navy approves; and under section 501 this approval imports the finding merely that the vessel is suitable for conversion into a naval or military auxiliary, or otherwise suitable for government use in time of war or national emergency. Id. (223).

The Merchant Marine Act of 1936 permits but does not require that national-defense features, referred to in section 502(b), be added to original plans for a vessel as a result of the Navy's suggestions as authorized by section 501(b). Id. (223).

Inclusion of vessel features in a subsidy applicant's plans and specifications generally creates an inference that they were included for commercial reasons, but when they were incorporated at the request of the Commission's staff, acting in the Navy's interest, the Board will deem the staff request the equivalent of a Navy request so that the features will be considered as national defense features under sections 501(b) and 502 of the Merchant Marine Act of 1936. Id. (239, 240).

Speed exceeding 22½ knots on vessels involved will be considered by the Board as national defense feature where the additional horsepower required for such excess is not needed to maintain projected schedules, the excess has little or no commercial value, the Navy and the Commission affirmatively required increased horsepower from that incorporated in the original plans, and the applicant explained in an amended subsidy application that such increase was installed "at the pointed suggestion of the Navy." Id. (240, 241).

Increased evaporator capacity over that commercially valuable, on vessels involved, will be considered by the Board as national defense feature where the Navy stated that the total capacity was agreeable to it, and the shipbuilder knew that excess evaporator capacity would be required by the Navy (because of possible use of vessels as troop ships). Id. (241–243).

Extra generating capacity over and above that required for commercial purposes on vessels involved, will be considered by the Board as national defense feature where it was requested by the Commission staff to meet Navy requirements. This fact, together with the fact that the excess capacity was not needed commercially, overcome any inference that the excess capacity had or was intended to have commercial utility. Id. (243, 244).

Extra cost of dual engine rooms on vessels involved will be considered by the Board as includable in allowances for national-defense feature where such rooms were incorporated by the shipbuilder after consultation with the Navy, the Commission's staff affirmatively requested the feature based on their understand-

ing of Navy requirements, and divided engine rooms are not commercially desirable or necessary. Id. (244).

Increased third-class passenger accommodations on vessels involved will not be considered a national defense feature where American-flag participation, as to such accommodations, in the proposed service was insignificant and such accommodations would provide an obvious avenue of competition with foreign-flag ships; the Navy approved original plans which did not include such increased accommodations; the Navy approved revised plans greatly increasing such accommodations but merely noted that "the passenger capacity has been increased"; the Navy, upon request for certification of such accommodations as a defense feature, stated that if the proposed ships were converted to naval transports, much of the third-class accommodations would probably be removed to increase troop capacity; the Navy later requested that its refusal be cancelled and certified the space as a defense feature but there was no evidence that it asked for or suggested the increased space; troops and crews of transports would be more efficiently berthed in larger spaces; the subsidy applicant testified that there was commercial value to the increased third-class space; and the applicant candidly implied that such space was needed to meet competition by other carriers and by airlines. Id. (245, 246).

Additional bulkheads will not be allowed by the Board as a national-defense feature on vessels involved since, although they are not required by the Coast Guard or the American Bureau of Shipping, they are called for by Senate Report 184, 75th Cong., 1st Sess. and have been required consistently by the Maritime Administration for commercial vessels; no mention of bulkheads as national-defense features was made either by the Navy or the Commission in connection with the vessels' original plans although the Navy subsequently certified them upon later request of the subsidy applicant; and the policy of the Merchant Marine Act of 1936 as expressed in section 101 is that the American merchant marine should be composed of the safest and most suitable types of vessels. Id. (246, 247).

In redetermining sales prices of the Independence and Constitution pursuant to Title V of the Merchant Marine Act of 1936 the Board used the method of estimating foreign cost in detail, paralleling every item in the detailed estimate of the low United States bid with a corresponding estimate of the foreign cost of that particular item. This included estimation of costs of materials, labor, overhead and profit. Id. (247, 252–257).

In keeping with the policy heretofore adopted by the Commission and approved by the Board in Sales Prices of "Independence" and "Constitution," 4 F.M.B. 216, generally speaking the following items should be paid for by the Government as national defense features, in sale of "Mariner" class vessels: (a) 25 percent excess shaft horsepower over normal, extra cost of main and auxiliary machinery, feed and fuel pumps, and blowers, (b) vessel strengthening for navigation in ice, (c) splinter protection in the form of special treatment steel plating for sides and deck of bridge house, (d) installation of trunks for wartime carrying of degaussing cables, (e) vital machinery parts to be made shock resistant, (f) installation of two 600 kw. turbo-generator units instead of two 500 kw. units, with piping and valve connections provided for two additional 600 kw. turbo-generator units, (g) lubricating oil system to be operated by pressure as well as by gravity, (h) two 12,000 g.p.d. low pressure evaporators instead of two 8,000 g.p.d. units, (i) increasing fuel oil transfer system to receive and discharge at 2,100 g.p.m. for fueling at sea instead of normal system having

capacity of 350 g.p.m., (j) increased size of firefighting pumps and piping, (k) two 60-ton booms instead of one 30-ton boom. Sales Prices of "Mariner" Class Vessels, 414 (416–418).

Since a sustained speed of 20 knots has commercial utility for a Mariner converted to a combination vessel to carry more than 12 passengers, no national-defense allowance for characteristics in Mariners designed to produce such speed will be made, unless a special showing is made with respect to prospective operation on short runs that a lesser speed will provide commercially equivalent service. Id. (419).

A sustained speed higher than 18 knots for a Mariner to be used as a cargo vessel has no commercial utility, and, in any event, the cost thereof is disproportionate to its value for commercial purposes since the newer and faster U.S.-flag cargo vessels have lesser sustained speed; only 11 foreign-flag vessels engaged in U.S. foreign commerce had a higher sustained speed in 1953; and several foreign vessels are being built having a design speed of 18 knots or better, but the factor of speed is becoming less important in the competition for cargo. Id. (421–424).

—Reconstruction or reconditioning subsidy

The authority for granting subsidy aid for reconstructing or reconditioning merchant vessels of the United States is contained in section 501(c) of the 1936 Act. In general, the requirements are the same as for the granting of subsidy assistance for construction of a new vessel, with the additional requirement that aid for reconditioning shall be granted only in exceptional cases and after a thorough study and a formal determination that the proposed reconditioning is consistent with the purposes and policies of the Act. American President Lines, Ltd.—Redetermination of Reconditioning Subsidy, 396.

Applications for reconditioning vessels were properly considered by the Commission as exceptional cases, as required by section 501(c) of the Merchant Marine Act of 1936, where all vessels involved were built by the government in wartime and not designed for the commercial needs of the services in which they were ultimately to be employed; at the time the applications were under consideration the Act read that a subsidy should be granted for construction of a new ship where "plans and specifications call for a new vessel which will meet the needs of the service, route, or line and the requirements of commerce"; and if the vessels had not been built, for war use, the full cost thereof including the facilities requested in the reconditioning applications, would have been the proper basis for subsidy award under section 501(a) of the Act. Id. (401, 402).

Determination by the Commission to treat reconditioning applications as exceptional cases when the vessels involved were recently built, was expressly within the contemplation of Congress when section 501(c) of the Merchant Marine Act of 1936 was being enacted. Congress did not want government subsidy money used to recondition older ships, but indicated that alterations on newly built ships to meet special trade requirements might well be subsidized. Id. (402).

Selection by Commission in 1946–47 of particular foreign country (Sweden) as representative shipbuilding center, and computation of subsidy rate of 34.10 percent for reconditioning work on vessels, will not be modified by the Board where the conditions prevailing in foreign countries in the latter part of 1946 were still fluctuating so as to make sound estimates of foreign cost most difficult to obtain; no valid substitute was available for use by the Board; and the Board could not say that the Commission should have made use of the Joint Resolution of June

11, 1940, authorizing the Commission to estimate foreign costs on the basis of conditions existing prior to September 3, 1939, which, in effect, meant 50 percent subsidy because domestic costs climbed rapidly after June 11, 1940. Id. (411).

Estimated Netherlands reconditioning costs of vessels will be made on the basis of the official rate of exchange (dollars-florins) prevailing at the respective contract dates where it was not certain what conditions the Netherlands might have imposed for the use of credits to arrange, through "transferable sterling" or otherwise at less than official rates, for reconstruction work on foreign (U.S.) ships; the mere possibility of establishing florin credits at less than official rates would give no assurance they could be used for the kind of work involved; and all reconstruction work on the vessels involved was completed before the date of the official devaluation of Netherlands currency, and hence no progress payments would have been delayed until after such devaluation. Id. (412).

SUBSIDIES, OPERATING-DIFFERENTIAL. See also Capital Necessarily Employed; Essential Trade Routes; Intercoastal Operations; Jurisdiction; Pooling Agreements; Practice and Procedure; Section 804 Waivers.

—In general

An operating-differential subsidy is necessary to meet competition from foreign-flag vessels and to promote the foreign commerce of the United States in furtherance of the purposes and policy of the Merchant Marine Act of 1936, as amended, where the route is an essential trade route under section 211(a) of the Act, and vessels now constituting applicant's fleet are of the type, size, speed and number required. Review of Mississippi Shipping Co. Subsidy, 68 (74).

Title I of the Merchant Marine Act of 1936 establishes the goal of a Merchant Marine sufficient to carry a "substantial portion" of the foreign commerce of the United States. For diplomatic reasons "substantial portion" was adopted in place of the 50 percent standard set forth in earlier drafts of the law. This general guide is subject to other controlling considerations in dealing with individual trade routes, such as section 211(a) which enjoins, in determining essential services, routes and lines, consideration of the number of sailings and types of vessels that should be employed and other facts which a prudent businessman would consider in his own business. In determining adequacy of service of a particular trade route, section 211(a) and other provisions of Titles II and IV emphasize principally the needs of the specific route under consideration. Bloomfield S.S. Co.—Subsidy, Routes 13(1) and 21(5), 349 (352, 353).

Shipping company was not shown to have failed to cooperate with other American-flag companies in the development of the American Merchant Marine as a whole in violation of its operating-differential subsidy agreement where it made it clear that it had no objection to the admission of another American-flag company to foreign conference on equal terms with other members, and had no objection to the participation of the latter company in the carriage of the commodity in question on equal terms with other conference members, although it had participated as a conference member in agreement to give deferred rebates in transportation between foreign ports. Isbrandtsen Co., Inc. *v.* American Export Lines, Inc., 442 (454).

A subsidized service may include a call at Guam. Section 605(a) of the Act authorizes such a call and provides for pro rata abatement of subsidy on account of domestic cargo, mail, or passengers to Guam. American President Lines, Ltd.—Subsidy, Route 17, 488 (499).

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. 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. Lykes—Harrison Pooling Agreement, 515 (524).

—Accomplishment of the purposes and policy of the Act (§ 605(c))

A finding, pursuant to section 605(c), that additional vessels should be operated in the accomplishment of the purposes of the Act is justified primarily by a prior finding of inadequacy of service and by additional reasons, such as increasing effectiveness of foreign-flag competition, inability of some vessels to meet such competition in the future, and desirability of adding more vessels that will meet the strict requirements of a subsidized service. Bloomfield S.S. Co.—Subsidy, Routes 13(1) and 21(5), 305 (324).

Where there is a finding of inadequacy of service under section 605(c), such finding is the primary reason for making the second finding that additional vessels should be operated on the service in question, in the accomplishment of the purposes and policy of the Act. American President Lines, Ltd.—Calls, Round-The-World-Service, 681 (694, 695).

—Adequacy of service

Board must decide under section 605(c) whether subsidy is necessary to provide adequate United States-flag service only where applicant seeks to establish a service not in existence or where the Board finds that the prospective subsidy contract would be unduly advantageous or prejudicial. Legislative history of the section does not lend cogent support to an interpretation that, in any event, the Board must decide whether a subsidy is necessary to provide adequate United States-flag service. However, adequacy of service remains as a consideration in the ultimate disposition of subsidy applications. Maritime Commission decision seemingly at variance with the above interpretation of section 605(c), was decided under section 601(a), the Commission stating that as a matter of policy subsidy would be granted whenever "necessary to maintain adequate United States service on essential trade routes." Pacific Transport Lines, Inc.—Subsidy, Route 29, 7 (19, 20).

Under section 605(c) adequacy of service is not an issue unless the Board finds that an applicant's proposed service is in addition to existing services, or unless the Board finds that the granting of subsidy would give undue advantage or be unduly prejudicial as between citizens of the United States. Pacific Transport Lines, Inc.—Subsidy, Route 29, 136 (138).

Adequacy of services under consideration in section 605(c) is adequacy of berth or liner service on the particular trade route in question. What may be considered adequate United States-flag service on one route may be quite inadequate on another. Bloomfield S. S. Co.—Subsidy, Routes 13(1) and 21(5), 305 (317).

Adequacy of service under section 605(c) is not necessarily determined exclusively by the mathematical percentage of cargo capable of being carried. Type, size and speed of vessels, regularity, frequency and probable permanence of service, relative importance of export to import on particular route, and effectiveness of foreign competition, are among factors to be taken into consideration. In view of these considerations, and in view of the increasing effectiveness of foreign competition, U.S.-flag service must be deemed inadequate unless dependable U.S.-flag liner sailings are available sufficient to carry at least one-half of the outbound commercial cargo that may be expected to move in liner service. Id. (317, 318).

Adequacy of service in the future within the meaning of section 605(c) is properly measured by adequacy of service in the past, modified to such extent as may appear justified by the best available judgment as to what the future may have in store. For this purpose opinion evidence of economist witnesses will be given due consideration. Id. (318).

Service already provided by vessels of United States registry is inadequate within the meaning of section 605(c) of the Merchant Marine Act of 1936 where there is no dependable United States-flag liner sailings available sufficient to carry at least one-half of the outbound commercial cargo that may be expected to move in liner service, United States-flag liner carryings were less than 50% of total liner exports, and most important there was an adverse trend over the last four-year period. Id. (322, 323).

Argument that United States-flag vessels presently operating on routes involved are carrying all the liner cargo available to vessels of this country, and that additional vessels will merely dilute the United States carryings and not attract cargo from foreign competitors is rejected, since United States-flag sailings have recently been fully loaded without capacity for added cargo, and some United States-flag vessels now on the routes are inferior in type and speed to new ships placed in competition with them by foreign operators. Id. (323).

While 50 percent participation by vessels of United States registry in our total foreign commerce was intended by Congress to be a generally desirable goal, Congress never intended to establish 50 percent as an absolute level below which the Board, in exercising its discretion, might never descend in determining adequacy for any particular trade route under the Merchant Marine Act of 1936. Bloomfield S.S. Co.—Subsidy, Routes 13(1) and 21(5), 349 (352).

The award of subsidy is a function inherently stamped with the exercise of discretion, and to follow rigid mathematical formulae alone [50% U.S.-flag participation as an absolute level for adequacy of U.S.-flag service] would largely frustrate the application of the Board's independent judgment as contemplated by Congress. Id. (352).

By declining to find inadequacy of service in a particular case, the Board does not mean to establish that under other circumstances it would be unable to reach a different conclusion where a similar estimate of United States-flag participation was made (49 percent). The question of adequacy must be resolved on the basis of the particular facts in each case. Id. (353).

Where the estimated annual liner capacity of United States-flag operators on a trade route amounted to 49 percent of the estimated total liner cargo available annually, and in view of the margin of possible error inherent in estimating future capacities and traffic, there has been no such showing as would convince the Board, in a section 605(c) proceeding, that service is inadequate and that additional vessels should be operated on the trade route involved. Id. (353).

While 50 percent U.S.-flag participation in cargo moving in our foreign commerce is the goal to be sought under section 101 of the Merchant Marine Act of 1936, U.S.-flag service on every route need not provide such carrying capacity, and much less is such participation the standard of adequacy of U.S.-flag participation in cargo moving over a particular part of an essential trade route. Where an additional 25 percent participation by a steamship line would increase carryings by only 29,000 tons a year the Board will not find that U.S.-flag service is inadequate under section 605(c) for a particular part of an essential trade route, and, in any event, the Board will not find that additional vessels should be operated thereon in accomplishment of the purposes and policy of the Act. Lykes Brothers S.S. Co., Inc.—Increased Sailings, Route 22, 455 (464).

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Infrequency of direct sailings is not enough alone to render service provided by American-flag vessels inadequate under section 605(c) of the Merchant Marine Act of 1936 where the subsidy applicant itself carries about half of the cargo moving in the trade. With respect to the fear of the applicant that foreign-flag operators may invade the route, the Board will note that the applicant has not applied to the Maritime Administrator for permission to make additional unsubsidized sailings thereon. Id. (464).

All cargoes which common carriers on a particular route may reasonably expect to carry must be included in statistics adduced to test adequacy of U.S.-flag service on a route for section 605(c) services. Thus coal presently carried by Japanese vessels would be solicited by U.S.-flag vessels if those vessels were in distress for cargo, and must be included. Captive ore must be considered as proprietary; there is no indication that this cargo would ever be available to U.S.-flag vessels other than Isthmian. American President Lines, Ltd.—Calls, Round-The-World Service, 681 (692).

It is the applicant's service rather than intervenors' services which are to be considered in determinations of adequacy of service under section 605(c). Id. (693).

Adequacy of service under section 605(c) should be weighed on the basis of separate inbound and outbound services, where export traffic far exceeds import traffic. However, inefficiency of operations which may result from overly refined examination of adequacy or inadequacy of service is inconsistent with the purposes and policy of the Act and militates against consideration of adequacy of service on the basis of four segments of applicant's round-the-world service. Id. (693).

Service is inadequate within the meaning of section 605(c) where American-flag carriers, participating in trades competitive with applicant's proposed service, have carried no more than 27% of the total traffic originating in any United States North Atlantic port other than New York or Boston and no more than 41% of inbound traffic on such routes. Id. (693, 694).

While the goal of 50% United States-flag participation is not a rigid standard for application in section 605(c) matters, where statistics show a participation sufficiently below that standard, they would indicate, in the absence of cogent counterbalancing considerations, inadequacy of service. Id. (694).

—Authority of the Board

A complaint by a steamship company initiated under section 810 of the Merchant Marine Act to terminate the subsidy agreement of another line alleging unjust discrimination and unfairness because of violations of section 810 and of provisions of the subsidy agreement relating to violations of the 1916 Shipping Act, does not charge any violation of the 1916 Act and complainant therefore has no statutory right to file a complaint for relief under that Act. Moreover, complainant has no statutory right as a taxpayer or competitor to intervene in statutory or contractual relations between the United States and a subsidized operator. Under the 1936 Act and Reorganization Plan No. 21 of 1950, the Board has authority to make, amend, and terminate operating-subsidy agreements, and the Maritime Administrator, acting for the Secretary of Commerce, has authority to take all actions to administer such agreements when once made. Isbrandtsen Co., Inc. *v.* American Export Lines, Inc., 442 (448, 449).

Application for operating-differential subsidy will be considered only insofar as it seeks a prospective award. The Act neither contemplates nor authorizes retroactive payment of operating subsidy. American Export Lines, Inc.—Increased Sailings, Route 10, 568 (571).

—Contract provisions

The requirement of a subsidy contract that permission be obtained for sailings additional to those subsidized is not designed to affect the ability of an operator to qualify an extra or new service as "existing," but rather to safeguard against possible improper competitive practices and prevent operations prejudicial to the purposes and policies of the Act. Lykes Bros. S.S. Co., Inc.—Increased Sailings, Route 22, 153 (158).

Clause of operating-differential contract by which carrier has bound itself not to enter into any agreement restricting the coverage of its subsidized services without Board permission certainly places some limitation upon any conversion of a subsidized service from a common-carrier operation to a private or contract-carrier operation. Consolo *v.* Grace Line Inc., 293 (304).

Subsidy operator has not been shown to have violated section II–18(c) of its subsidy agreement, requiring it to secure prior approval of the Commission to enter into an agreement restricting the volume, scope, frequency, or coverage of its subsidized service on a trade route, where as a member of a foreign conference it entered into a freight agreement to transport commodity between foreign ports, which agreement provided for deferred rebates, called for conference members to provide sufficient tonnage to insure regular and quick transportation of the commodity, established a minimum agreed rate and the privilege for conference members to admit other shipowners to the benefits and obligations of the agreement, and bound the exporters of the commodity to ship exclusively on conference members' vessels except with consent of the conference members. Such an agreement does not have the alleged restrictive effect, does not require approval, and the evidence does not show any violation of section II–18(c) of the agreement. Isbrandtsen Co., Inc. *v.* American Export Lines, Inc., 442 (454).

Agreements with other carriers for the exclusive transportation of cotton from Alexandria, Egypt, to ports in India and Pakistan falls squarely within the class of agreements required by section II–18(c) of operating-subsidy contracts to be filed for approval. Such approval, however, will be granted by the Administrator where the agreements have not been found to be in contravention of the purposes, policy, or provisions of the 1936 Act. Isbrandtsen Co., Inc. *v.* American Export Lines, Inc., 772 (784).

—Definitions of terms used

Under section 605(c) of the Merchant Marine Act of 1936 "existing service" is not confined to that provided by a carrier's owned vessels but may include chartered vessels as well. "Service" includes the entire scope of an operation and this interpretation is consistent with the word as used in sections 211, 215, 501, 606 and 608. Pacific Transport Lines, Inc.—Subsidy, Route 29, 7 (11).

Although the word "substantial" is not used in sections 601 and 602 to modify "competition" it must be assumed that operating subsidy was intended to offset the effects of real and substantial foreign-flag competition. Review of Grace Line Subsidy, Route 2, 40 (44).

The word "Orient" in section 605(a) of the Merchant Marine Act of 1936 is broad enough to include Malaya and Indonesia. The word must be given its usual and well-settled meaning. In 1936, in government and industry shipping circles, Orient and Far East had substantially the same meaning and included the ports in question. Moreover, if Congress had intended to protect only existing services, and there was none from the Atlantic coast to Malaya/Indonesia in 1936, it could readily have so provided by giving "grandfather" rights as it

did in section 805(a) of the Act. Thus subsidy may be paid for that portion of voyage from Atlantic ports to Malaya and Indonesia which does not include intercoastal trade, in accordance with the formula of section 605(a). American President Lines, Ltd.—Subsidy, Route 17, 63 (65–67).

The legislative history of the Act establishes that, in reaffirming the policy that the United States shall have a merchant marine sufficient to carry a "substantial" portion of the foreign commerce of the United States, Congress meant by "substantial" more than half of that commerce. Bloomfield S. S. Co.—Subsidy, Routes 13(1) and 21(5), 305 (317).

—Discrimination by subsidized operator (sec. 810)

While Congress may have intended to give the protection of section 810 only to United States-flag carriers operating no lines or services under foreign flag, the Board need not decide that point where the record showed that the carrier complaining of unjust discrimination might have operated foreign-flag ships as tramps over the trade route involved as well as its American-flag vessels on regular service, and, furthermore, the so-called tramp sailings were common carrier operations. Thus no finding can be made by the Board that complainant is operating as a common carrier exclusively with American-flag vessels. The word "exclusively" in section 810 clearly denotes every kind of operation whether regular or so-called tramp. Isbrandtsen Co., Inc. *v.* American Export Lines, Inc., 442 (451).

Section 810 extends protection only to those common carriers who employ American-flag vessels exclusively on each of the trade routes served by those carriers; it does not extend its protection against competition on a certain route to an American citizen who operates foreign-flag vessels as common carriers on trade routes other than that in question. This interpretation is supported by the legislative history of section 810, whereby "an established route" was amended to read "any established route." Isbrandtsen Co., Inc. *v.* American Export Lines, Inc., 772 (780).

Section 810 does not deny its protection to an American-flag carrier who also employs or operates foreign-flag vessels in private carriage on any of the world's trade routes. For the purposes of section 810 the term "tramp" is antonymous of the term "liner" and not of the term "common carrier." Whether or not a tramp is in private or in common carriage will be determined on the facts of each case as to the function of the particular vessel and the manner in which it is regarded by the public, not on the classification given the vessel by the operator. Where it is shown that 12 foreign-flag tramps carried all cargoes under contracts with foreign governments except in the one instance of one ship, which, in addition to contract cargo, carried machinery as a matter of accommodation at the request of one of the contracting governments, such vessels were deemed to have been operated in private carriage and such operation did not disqualify the operator from the protection of section 810. Id. (782, 783).

—Dual or multiple subsidies

Section 605(c) gives the Board power to grant dual and multiple subsidies on a single route and a subsidy contract does not have the effect of an exclusive franchise. The Board's power is not affected by an offer of a subsidized operator to increase its service to provide additional subsidized voyages on a route for the service of which other operators have applied for subsidy. Pacific Transport Lines, Inc.—Subsidy, Route 29, 7 (18).

On the basis of a record showing that neither subsidy applicant can carry all, or a substantial portion, of the cargo being carried by the other, the grant of a subsidy to both will not unduly prejudice either. However, the question of

undue prejudice will be left open for future consideration in the event one applicant should fail to qualify under other sections of the Merchant Marine Act of 1936, which may raise a question of the necessity of entering into a subsidy contract with the qualifying applicant in order to provide adequate service. Id. (18, 19).

—Existing service

Under section 605(c) of the Merchant Marine Act of 1936 "existing service" is not confined to that provided by a carrier's owned vessels but may include chartered vessels as well. "Service" includes the entire scope of an operation and this interpretation is consistent with the word as used in sections 211, 215, 501, 606 and 608. Pacific Transport Lines, Inc.—Subsidy, Route 29, 7 (11).

The term "service" in section 605(c) embraces much more than vessels; it includes the scope, regularity, and probable permanency of the operation, the route covered, the traffic handled, the support given by the shipping public, and other factors which concern the bona fide character of the operation. Under section 708 of the Act the Board has express discretion to grant operating-differential subsidy, if necessary to a charterer of Government-owned vessels under Title VII of the Act on the same terms and conditions as are elsewhere provided in the Act with respect to payment of such subsidies to operators of privately-owned vessels. Thus, the Board is authorized to determine that the charterer of Government-owned vessels is operating an "existing service" within the meaning of section 605(c); it does not appear that different considerations, for the purposes of section 605(c), should be applicable to the charterer of privately-owned vessels. Id. (11).

PFEL has stated that, should its present application for subsidy be approved, it will purchase vessels to replace chartered vessels presently being operated. Vessel ownership is a matter which the Board must consider under section 601(a) and other apposite sections of the Act, but it is not germane to an inquiry as to whether PFEL is operating an existing service on the route. Id. (11, 12).

Where the evidence showed that numerous factors embraced in the term "service" were fulfilled by subsidized operator with additional unsubsidized sailings, it follows that the unsubsidized operation was, to some extent at least, an "existing service" within the meaning of section 605(c). Even though the additional sailings could not be made without the Administrator's consent, the fact that necessary consents were obtained for a period of over 4 years and were in force at present is very strong evidence of permanency of some extra service and of the bona fide intent of the operator to maintain it. Lykes Bros. S.S. Co., Inc.—Increased Sailings, Route 22, 153 (158).

Whether or not a service is "existing" within the meaning of section 605(c) must be largely determined by operational facts. The requirement in the section for notice and public hearing is not a condition to the establishment of an "existing" service but a condition to the making of a subsidy contract on a route served by two or more United States citizens operating with vessels of United States registry. The requirement of a subsidy contract that permission be obtained for sailings additional to those subsidized is not designed to affect the ability of an operator to qualify an extra or new service as "existing," but rather to safeguard against possible improper competitive practices and prevent operations prejudicial to the purposes and policies of the act. Thus a subsidized operator is in the same position as an unsubsidized one, once he has obtained permission for additional unsubsidized sailings, i.e., free to develop or expand a service into one which could become "existing." Id. (157, 158).

A sailing constitutes part of an existing service under section 605(c) of the Merchant Marine Act of 1936 where it sails full outbound and returns in ballast though offering space, since whether or not a service offered is availed of by shippers is not determinative of the existence of such service. Lykes Brothers S.S. Co., Inc.—Increased Sailings, Route 22, 445 (461, 460).

In determining the extent of existing service under section 605(c) of the Merchant Marine Act of 1936, the Board will take account of the service provided over a period of years (vs. the year immediately preceding filing of the application, or any other particular year), and where the average number of sailings was well above 48 for the five years preceding the section 605(c) application, the Board will find that the applicant has provided an existing service at least to the extent of 48 sailings per year for which subsidy was sought. Id. (461).

Applicant for increase in number of subsidized voyages found to be an existing operator within the meaning of section 605(c) of the Merchant Marine Act of 1936 after examination of statistics concerning number of calls, amount of cargo carried to the ports in question, and the number of outward sailings. American Export Lines, Inc.—Increased Sailings, Route 10, 568 (572).

—Foreign-flag competition

Since Congress has not provided a definition of the term "competition" as used in sections 601 and 602 the term 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 and to determine, on the facts of each particular case, what constitutes foreign-flag competition on a particular trade route and whether such competition is substantial. Review of Grace Line Subsidy, Route 2, 40 (45).

In determining what constitutes foreign-flag competition, the Board is not required to isolate or categorize special items of traffic and weigh each item against the foreign-flag competition therefor. A determination that a subsidized line encountered substantial foreign-flag competition on a route is proper, although, for example, such traffic as reefer cargo may not be subject to such competition. Id. (45).

Argument that insofar as the question of foreign-flag competition is concerned, passenger service on combination vessels, because of the special privileges that inure to the whole vessel, may be considered as an essential and integral part of the cargo service, and the Board may thus avoid evaluation of foreign-flag passenger service, has cogency, but need not be adopted since foreign-flag passenger competition on the route was of such a type and of such a magnitude that subsidy was required to meet such competition. Id. (46).

Substantial foreign-flag competition has been encountered on Service 1 of Trade Route 2 since 1947 and an operating subsidy for the six combination vessels of Grace is necessary to meet such competition and to promote the commerce of the United States in furtherance of the purposes and policy of the Act. Id. (46).

The determination having been made under section 211(b) of the Merchant Marine Act of 1936 that it is in the furtherance of the purposes and policy of the Act to operate a certain number and certain types of vessels on each essential foreign trade route, and the finding having been made that there are foreign-flag vessels competing on the route, it is not a requirement to the awarding of an operating-differential subsidy that the foreign-flag competitors must offer exactly the type of service with the same types of vessels or carry exactly the same kinds of traffic as the United States-flag operator. Id. (47).

Payment to APL of an operating subsidy for combination vessels does not depend on the substantiality of foreign-flag passenger competition standing alone. Under Title VI of the Act separate treatment of any element of traffic was not specified or inferred. American President Lines, Ltd.—Subsidy, Route 29, 51 (59).

Foreign-flag cargo competition is sufficient under the Merchant Marine Act of 1936 to authorize subsidy award for combination vessels where 74 percent of the revenue earned is derived from cargo carryings and, therefore, the vessels can be regarded as predominantly cargo carrying units, and substantial competition for cargo constitutes substantial competition for operation of each ship as a whole. Review of Mississippi Shipping Co. Subsidy, Route 20, 68 (73).

For subsidy purposes it is not necessary to determine that combination vessels are predominantly cargo vessels (the record showing substantial foreign-flag competition for cargo but not for passengers) since individual combination vessels may be treated as an element of an entire fleet serving a route, which integrated fleet of vessels is required to meet foreign-flag competition existing thereon. Id. (74).

The Maritime Commission, in approving the application of Mississippi for subsidy on Service 2 of Trade Route 14, clearly premised its action on the competition from foreign-flag vessels serving Atlantic ports on Service 1, the Commission observing that "to the extent that traffic could move by a Gulf service, the foreign-flag competition from the Atlantic ports is considered as indirect competition with Gulf port services." Review of Mississippi Shipping Co. Subsidy, Route 14, 107 (109).

On the basis of the commodities considered, the vessels of Mississippi operating on the Gulf service (Service 2, Route 14) have encountered substantial foreign-flag competition from Atlantic service (Service 1, Route 14), and no change has been shown in the character or extent of such competition since January 1, 1948, which would require or warrant an adjustment in operating-differential subsidy payments to Mississippi. Id. (113).

Farrell argues that the magnitude of the foreign-flag competition cannot be measured only by the number of vessels actually placed on berth or by the volume of traffic carried. Foreign-flag lines operating on Route 15A are among the strongest and most successful lines in the world, and stand ready at any time to place additional tonnage on the route. Farrell urges, therefore, that the Board should consider the character and resources of the competing foreign-flag operators, since traffic statistics alone do not disclose the true extent of the competition, but only the results of the "battle of competition" for available traffic. The Board recognizes that traffic statistics may not supply the complete answer of the extent of foreign-flag competition, but they do disclose the fact of such competition. Farrell's combination vessels have, from the time of their entry into service in 1949 to the present, encountered substantial foreign-flag competition for cargo (33 percent outbound and 16 percent inbound). Review of Farrell Lines Subsidy, Route 15A, 117 (120).

Where substantial foreign-flag competion for cargo but not for passengers is shown, an integrated operation provided by combination vessels may be subsidized. The Merchant Marine Act requires that an operator's fleet on an essential foreign trade route be viewed as a whole, and where an integrated operation is meeting most satisfactorily overall passenger and cargo requirements, the Board is not required to await improvements in foreign-flag service before permitting improvements in our own. It is not the purpose of the Act to maintain a second-rate United States-flag service but to promote and maintain

a modern and efficient merchant marine. No modification of Farrell's contract is warranted. Id. (122, 123).

Foreign-flag competition was properly found to have been diminished by a sailing agreement in that the agreement permitted the subsidized operator to divert its service to Iceland for defense purposes and to resume its position in the pool when the defense movement ended. It was proper to find that, aside from such diversion, the agreement would have no appreciable effect on competition, where solicitation was active and the agreement was carried out in a perfunctory manner and resulted in providing subsidized operator with a 16% to 23% share of total traffic, as compared to an estimated 15–20% without an agreement. Moore-McCormack-Swedish American Lines Sailing Agreement, 558 (565, 566).

—Hearings and determinations

Maritime Board has authority under section 105(1) of Reorganization Plan No. 21 of 1950 to conduct hearings with respect to the making or amending of subsidy contracts where the existing contract left open for future consideration rates for combination vessels. Until such rates were fixed in the original contract or by addendum the matter could not become a mere incident of administration for the Maritime Administrator. It was not important to decide whether the act of completing the original agreement by adding the differentials applicable to the combination vessels is a completing of the original contract (thus a "making") or an adding to the contract (thus an "amending"). Farrell Lines Inc.—Subsidy, Combination Vessels, 22 (24).

Considerations of convenience to the Board and to the parties favor determination of issue prior to hearing where intervenor raises an issue under section 605(a), in connection with a subsidy application proceeding to determine section 605(c) and 805(a) issues, and the deterimnation under 605(a) may relieve intervenor of necessity of further participation, and may result in a finding that no subsidy can be granted in any event unless applicant ceases all intercoastal carryings. American President Lines, Ltd.—Subsidy, Route 17, 63 (64).

Section 601 of the Act and other sections upon which the Board based its action granting subsidy applications, do not provide for public hearings or oral argument. Pacific Transort Lines, Inc.—Subsidy, Route 29, 136.

Petition for reconsideration, based on argument that decision on 605(c) issues did not become final until subsequent administrative determination approving subsidy applications, will be denied as not filed within time prescribed by the Board's Rules since findings under 605(c) are entirely distinct from those required under other sections of the 1936 Act; 605(c) questions were completely and finally decided in the decision, except for possible questions arising between two subsidy applicants if one had failed to qualify under section 601 and other provisions of the Act; both applicants were later found qualified for subsidy and thus it was not necessary to decide the reserved issues, in which petitioner was in no event interested; and the Board had given careful consideration to petitioner's extensive arguments and its position as a competitor, in the said decision. Id. (137).

Petition for reconsideration of decision on 605(c) issues and of Board's later administrative determination approving subsidy applications, based on contention that Board's findings, made in 1952, as to service offered on route should have been based on traffic data extending beyond 1949, was denied where adequacy of service was not an issue, and prior to the decision and the administrative determination the Board had before it authoritative traffic data running through 1951 with some supplemental information for 1952, all of which supported conclusions indicated by the earlier data. Id. (137, 138).

The requirement in the section for notice and public hearing is not a condition to the establishment of an "existing" service but a condition to the making of a subsidy contract on a route served by two or more United States citizens operating with vessels of United States registry. Lykes Bros. S.S. Co., Inc.—Increased Sailings, Route 22, 153 (157).

Where a subsidy operator makes seasonable objections to a subsidy rate, tentatively determined by interlocutory order, and the case is set for hearing, the issues become the statutory ones under section 606(1) of the Merchant Marine Act of 1936, and whichever party (Board or operator) is moving for readjustment of the prior year's rate has the burden of proof. Farrell Lines, Inc.—Final Subsidy Rates for 1949, 337 (338, 339).

Motion to dismiss complaint against operator subsidized by Maritime Commission on grounds that complainant had no statutory standing to initiate a proceeding for a violation of section 810 of the 1936 Act, that section 810 conferred no jurisdiction on the Board with respect to commerce between points in foreign countries, and that respondent violated no law but rather complied with section 14a of the 1916 Shipping Act, will be denied since under section 214 of the 1936 Act the Maritime Commission had full power to conduct investigations necessary to carry out provisions of the 1936 Act, and the Board and the Administrator have all the powers of the Commission and their determination to proceed is fully authorized by section 214 and Rule 10(a) of their Rules of Practice and Procedure. Isbrandtsen Co., Inc. *v.* American Export Lines, Inc., 442 (449).

Board's conclusions under section 605(c) that service proposed by subsidy applicant would not be in addition to existing service, and that award of subsidy would not have the effect of giving undue advantage or of being unduly prejudicial as between citizens, makes it unnecessary to inquire into adequacy of service or whether, in accomplishment of the purposes and policy of the Act, additional vessels ought to be operated. However, these conclusions are not tantamount to finding that applicant is entitled to subsidy for such conclusion can be reached only after administrative study and action under section 601 and other provisions of the 1936 Act. American President Lines, Ltd.—Subsidy, Route 17, 488 (498).

Where the Board and the Administrator have heard argument in advance of hearing on the meaning of a word (Orient) in section 506 and 605(c) of the Merchant Marine Act of 1936, on motion of intervenor itself, and the issue was decided as a matter of law, there was no error in failing to remand recommended decision to Examiner for further testimony on the issue as requested by intervenor. Assuming the decision was based on facts officially noticed, intervenor's remedy was to petition at the time for an opportunity, provided by the Administrative Procedure Act, to show facts to the contrary. The issue was not before the Examiner and evidence thereon was properly excluded. American President Lines, Ltd.—Subsidy, Route 17, 555 (557).

—Performance of services for subsidized operator (§ 803)

Evidence that subsidized operating company was organized by predecessor of steamship company for which the former proposes to act as general agent; that president of latter company holds stock in the former and is also president of stevedoring company which performs services for both lines, and that vice-president of ship-chandler company performing services for subsidized company holds stock in both companies does not substantiate a violation of section 803 making it unlawful for subsidized operator, without permission, to obtain

such services from any company in which the operator or an associate company has a pecuniary interest. Pacific Far East Line, Inc., 580 (585, 592).

—Pooling agreements

The Board is required as a matter of law to consider, under sections 603(b) and 606 of the Act, diminution of competition (by reason of a pooling agreement) in computing the amount of operating-differential subsidy. Lykes—Harrison Pooling Agreement, 515 (523, 524).

The acts and policies of the Shipping Board prior to passage of the Merchant Marine Act of 1936 do not enter into consideration of matters arising under that Act. The Board is not precluded from considering diminution of competition, by reason of a pooling agreement, in computing subsidy rate by virtue of a policy previously laid down by the Shipping Board. Id. (524).

Lykes 1937 subsidy agreement and resumption agreement executed in 1949 were one agreement. Thus since a Lykes—Harrison pooling agreement entered into in 1933 was terminated and cancelled in 1939 and its present agreement (approved in 1948) did not refer to earlier agreements or purport to be other than an independent and original agreement, the Board is not precluded under section 606 of the Merchant Marine Act from recomputing Lykes' subsidy, as the pooling agreement was not in effect when the subsidy contract was awarded. Id. (524).

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 and 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 bases 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. Id. (525).

Operational efficiency by subsidized operator is required by section 606 in order to minimize the public expenditure necessary for competition with foreign lines; consideration of diminished competition for the purpose of reviewing subsidy payments is required by sections 606 and 603(b) in review of subsidy payments. Id. (525).

Maritime Commission's express order of approval of Lykes—Harrison pooling agreement was issued only under section 15 of the Shipping Act, and the Commission's implicit approval of the agreement, if any, under subsidy provisions was limited to the lawfulness per se of the agreement and did not extend to the practices thereunder. The Board is not estopped from reviewing the amount of subsidy payments to Lykes. Id. (525, 526).

Where the Board finds that concessions made to foreign-flag interests in revenue-pooling agreement were due to restrictions imposed by foreign government; subsidized operator has no alternative means to preserve its position in the trade; the agreement has not caused any relaxation in operator's solicitation; foreign competition continues to be substantial; the agreement has not affected the volume or frequency of service specified in the subsidy contract, and the agreement has not resulted in diminution of competition, there is no basis for continuing an investigation for readjustment of operating-differential subsidy under section 606. Grace—C.S.A.V. Pooling Agreement, 528 (534).

—Service in addition to existing service

Applicant's proposed services would be in addition to existing services where on Route 13 applicant made 11 sailings from Gulf ports between April 1951 and August 1952, carrying bulk grain and cotton outbound and a small amount of beet pulp homebound. there was no regularity of sailings, 7 of the 11 vessels carried full cargoes of grain and in all only 3 export shippers were served; on Route 21(5), applicant made 19 sailings between October 1951 and August 1952, and on all but one of these over 8,000 tons of either bulk grain or bulk sulphur were carried, leaving little space for other services; and, if subsidy is granted, applicant's proposed services would have to be substantially superior to past operations in the type of vessel regularly employed, the extent of service offered, the regularity and frequency of sailings, the port coverage at origin and destination, and the availability of service to the general public. Bloomfield S.S. Co.—Subsidy, Routes 13(1) and 21(5), 305 (307).

Vessels proposed to be operated on Trade Route 17, Freight Service C–2, would not be "in addition to the existing service" or services where the proposed service would differ from the existing service in respect of vessel type, number of ports called, extent of intercoastal service permitted. and the maximum number of sailings permitted per annum, but the proposed change of vessel type (from AP3's to C3's) was not so substantial as to cause the Board, under section 605(c) of the Merchant Marine Act of 1936, to discount the present service as not "existing"; only one additional Philippine and one additional California port were sought to be served; the extent of intercoastal service to be permitted was the same as that provided; and the maximum-minimum limits on numbers of sailings were so close to the actual average performed over the past six years that the proposed service could not be regarded in that respect as one "in addition to the existing service." American President Lines, Ltd.—Subsidy, Route 17, 488 (494, 495).

Under section 605(c) of the Merchant Marine Act of 1936, proposed service would not be in addition to existing service where the only change in itinerary would be service to one port on a regular rather than occasional basis, service on the trade route has been provided consistently by the subsidy applicant for at least six years, and although the use of newer, larger and faster vessels will greatly increase available cargo capacity, regarding this as additional service would put a penalty on the incentive of United States-flag operators to improve their lot in foreign commerce of the United States. and would not be consonant with the spirit of the Act. Grace Line Inc.—Subsidy, Route 25, 549 (553, 554).

—Subsidy rates; foreign costs (See also Pooling agreements, supra)

Section 606 of the Act is applicable only to readjustments made, from time to time, after original differential rates have been established. It is not applicable where original rates have not yet been established, as herein for combination ships. Farrell Lines Inc.—Subsidy, Combination Vessels, 22 (24).

The Board may properly include the cost to a foreign operator of repatriation of his officers and crew in estimating foreign-flag wage costs under section 603(b), where such cost is not a gratuity but is incurred in pursuance of an obligation arising either from a bargaining agreement or from a statutory provision. American President Lines, Ltd.—Final Subsidy Rates, 1949, 1950, 327 (328. 333).

Computation of the cost to foreign operators of repatriation of officers and crew in estimating foreign-flag wage costs under section 603(b) should be made in accordance with the provisions of law applicable to crews. Consequently, where tentative subsidy rates were based on figures which charged a Norwegian com-

petitor with the full cost of repatriating all crew every two years, whereas, under the applicable law, the Norwegian operator is responsible for only one-third of such cost, the computation will be revised accordingly. Id. (328, 333, 334).

Section 603(b) requires that the amount of subsidy shall not exceed parity; it does not require that the amount awarded be exactly, or not less than parity. Consequently, an operator may not complain of the Board's alleged lack of authority to include cost of repatriation as an item of expense in estimating foreign-flag wage costs, since such inclusion, even if it were improper, would not result in payment of an amount of subsidy in excess of parity. Id. (333).

The Board may properly include within the term "fair and reasonable cost of wages" (section 603(b)) payment which an employer is required to make with respect to an employed seaman which redound to his benefit and which both he and his employer take into consideration at the time of employment. Such payments, whether made directly into the seaman's hands or into the hands of others for his benefit, come within the broad definition of "that which is paid for his work" (Webster's definition of wages). The definition does not include gratuities which are not bargained for and which are purely voluntary in the part of an employer. Id. (333).

Computation of estimated foreign-flag competitor's cost of operation under section 603(b) will not be disturbed on the basis of information provided by such competitor, where that information is more favorable to the subsidized operator in one detail (social benefit payable to crew) but less favorable in other detail, and if all the information were considered the result would be less favorable to the subsidized operator. Id. (335).

Subsidy rates for subsistence of officers and crews as well as wages and other items are based on a comparison of the American operator's costs with the foreign competitor's cost for the same ship under section 603(b) of the 1936 Act, and neither the Act nor the Board's Manual contemplates an estimate based on hypothetical operation by the American operator under foreign-flag. Thus actual costs of a foreign competitor afford a factual basis for foreign-cost estimate, whereas a speculation only would be derived from an estimate of the American operator's costs on the assumption it sailed under a foreign-flag. However, actual costs are not acceptable, and the case will be referred back to the Examiner for further evidence, where the actual foreign cost used was reported to be 50% greater than the actual meal-day cost of the operator's American-flag vessels from August 1947 to May 1950; another report from the same source stated the cost to be considerably lower from January 1948 to January 1951; after April 1950 the cost appeared to be further reduced on the average; and no effort was made toward a reconciliation or verification of the figures. Farrell Lines, Inc.—Final Subsidy Rates, 1949, 337 (340–342).

—Undue advantage or prejudice as between citizens

In determining whether services are competitive, within the meaning of section 605(c), the Board must consider, inter alia, "the ports or ranges between which they run"; in administering the subsidy program, an underlying consideration as expressed in the preamble to the Act is to further development of an adequate merchant marine; and the Board must also consider the policy expressed in section 101 that the merchant marine must be sufficient to provide service "on all routes essential for maintaining the flow of such domestic and foreign waterborne commerce at all times." Therefore, the standing of an intervenor operator in any claim of undue prejudice or advantage under section 605(c) is diminished to the extent that it does not offer a direct and regular

service in general conformity to a route as a whole. Pacific Transport Lines, Inc.—Subsidy, Route 29, 7 (14, 15).

Although grant of subsidy for operation on a trade route may give an advantage to operator over other United States-flag operators to the extent they are competing in certain segments thereof, the resulting prejudice, if any, suffered by these operators which cover only part of the route would not be undue within the meaning of section 605(c) of the 1936 Act. Thus an applicant for subsidy which regularly and comprehensively serves an entire route will not be disqualified solely to protect operators which serve only such portions thereof as suit their preference. Id. (15).

A subsidized competitor of a subsidy applicant has a greater burden in proving undue prejudice under section 605(c) than would an unsubsidized operator, since it derives long-range benefits from its subsidy. Id. (17).

Where competitor of two subsidy applicants has operated profitably on a route and has held its own with substantial success since the entry of applicants into the trade, notwithstanding that applicants have secured more than one-third of the total traffic, and where, on the basis of operation for the test year, it could not have handled with its then existing service the outbound traffic of either or both applicants in addition to its own traffic, there is no convincing evidence that the granting of either or both applications would adversely affect competitor's relative position on the route. Id. (17).

An offer by an intervenor, which is a competitor of subsidy applicants, to furnish such additional vessels as may be required on a route, has no bearing on the question of undue prejudice or advantage under section 605(c). That question depends on the existing service of intervenor as well as of applicants since the section refers to such prejudice or advantage "as between citizens of the United States, in the operation of vessels in competitive services, routes, or lines." Neither a subsidized nor a nonsubsidized operator is entitled under the section to assert a claim of undue prejudice to a prospective but nonexisting operation. Id. (17, 18).

Even if, under the second part of section 605(c), the effect of a contract would be to give undue advantage as between citizens, such a contract will be authorized upon a finding of inadequacy of service under the first part of section 605(c), since it would be necessary to provide the adequate service contemplated by the Act. Bloomfield S. S. Co.—Subsidy, Routes 13(1) and 21(5), 305 (316, 317).

Evidence on whether an award of subsidy, in connection with an existing service, would give undue advantage or be unduly prejudicial as between citizens must come from party claiming undue prejudice under section 605(c) of the Merchant Marine Act of 1936. Where the prejudice is that an unsubsidized operator will have to compete with the subsidy applicant, it is not undue as it was contemplated by the Act. Where the prejudice is that an unsubsidized operator will have to compete with the subsidy applicant for MSTS cargo allocations, it is not a consequence of the allegedly aggrieved party being unsubsidized but of the number of sailings made by both operators since MSTS allocates cargo according to the number of sailings offered by each U.S.-flag operator. Lykes Brothers S.S. Co., Inc.—Increased Sailings, Route 22, 455 (462).

Award of subsidy contract does not result in undue advantage or prejudice to any competitors of applicant who do not intervene or to a competitor who intervenes but does not offer any evidence on the question since evidence of undue advantage or prejudice under section 605(c) of the 1936 Act must come from parties claiming undue prejudice. American President Lines, Ltd.—Subsidy, Route 17, 488 (496, 497).

A subsidy award has not been shown to enable applicant to increase the effect on a competitor of advantages or prejudices already existing by virtue of unsubsidized service, and to result in undue advantage and undue prejudice where if the competitor had carried its share of liner commercial cargo in the service involved (California-Philippines-Hong Kong) it would have amounted to less than 25 additional tons per sailing outbound and inbound over a period of two years, and the record was devoid of data to measure the extent to which the mere existence of the applicant's service operated to draw cargo away from its competitor, to applicant's other transpacific services. Id. (497, 498).

Operators serving Guam are not protected from subsidized competition by section 805(a) of the Merchant Marine Act of 1936 relating to intercoastal or coastwise trade, nor can section 605(c) be applied to Guam leg of a proposed service because that section relates to proposed subsidized services in their entirety. In fact, the section does not apply to Guam under any circumstances because it relates to a contract made under Title VI which in section 601, makes such contract applicable only to vessels in the foreign commerce of the United States. However, operators trading to Guam are entitled to some protection and the Board will determine whether the effect of subsidy award will be to give undue advantage or be unduly prejudicial as between the applicant and another U.S. operator. Id. (499).

Board is unable to find that the effect of awarding a subsidy contract would be to give undue advantage or be unduly prejudicial as to service to Guam where the record shows that the volume of commercial cargo handled by applicant has been small (around 9 percent of competitor's total, or less than 200 tons per sailing); applicant and its competitor provide the only commercial ocean carrier service on the route in question; and during the years of record, the competitor has increased its sailings. Id. (499, 500).

Authority is granted for applicant for operating-differential subsidy to call outbound with its unsubsidized vessels at Guam, subject to the condition that cargoes destined to foreign areas served by the service may not be sacrificed for cargoes destined to Guam, where it appears there is a real need for ocean carrier service; that applicant's vessels help meet that need, and have provided substantial and increasing service to Guam; that without the service of the vessels, the area would be without service from the United States Atlantic Coast; that even with the extra time involved in making the call, the applicant's vessels have been and will be able to maintain a schedule that is competitive with the fastest schedules offered by any competitor; and that the carryings are minor when compared with the carryings of a U.S.-flag competitor (from California), and have not constituted an unduly prejudicial burden on the competitor. Id. (508).

Vessels of applicant for operating-differential subsidy may call homebound at two Philippine outports, subject to the caveat that Indonesia-Malaya cargoes may not under any circumstances be sacrificed, where on most voyages applicant does not call at these outports; the calls that have been made have not appeared to lessen either applicant's participation in cargo moving in the trade in question or to have increased the homeward transit time of the vessels beyond a length that is competitive with the best transit times of other operators; and these minor carryings do not constitute undue prejudice and advantage as between the applicant on the one hand and its competitors on the other. Id. (509).

Board is unable in the absence of proof, to find that permitting an increase in the combined number of subsidized sailings 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. The burden of showing undue prejudice or advantage under section 605(c) is on those opposing the award. Section 605(c) does not interpose a bar to granting a prospective increase in the number of Export's subsidized sailings on Trade Route 10. American Export Lines, Inc.—Increased Sailings, Route 10, 568 (572, 573).

Findings of inadequacy of United States-flag service in both inbound and outbound segments of applicant's proposed service make it unnecessary to determine whether the effect of granting the application 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. American President Lines, Ltd.—Calls, Round-The-World Service, 681 (694).

—Vessels, suitability of

In determining the types, sizes, speeds and other requirements of vessels to be operated on a route, the Board, under section 211, cannot be content only to meet the immediate competitive situation, but, like the prudent businessman, must also consider the reasonable probabilities of the future. Review of Grace Line Subsidy, Route 2, 40 (47).

Where the foreign-flag operator is a substantial competitor for traffic on the route, be it for cargo or passengers. the policy of the Act, both as to the selecting of the best types of ships to meet the competition and as to subsidizing the types of ships when selected, does not require the existence of foreign-flag competition in each category (passenger and freight) any more than in each specialized category of freight service. If the American operator can engage and excel in the battle of competition, if, as in the case of Grace on Trade Route 2, he has an integrated fleet of 6 combination freight and passenger ships plus 3 freighters, rather than a fleet of 9 freighters, it would be strange to make it a condition of subsidy support that he shall have a less effective fleet with inadequate passenger accommodations because the foreign-flag operator is only so equipped. The objectives of section 211 of the Act would thereby be defeated. Id. (47, 48).

The preamble to the Merchant Marine Act of 1936, section 101, section 211 (a) and (b) setting forth the purposes and policy of the Act require, given the existence of substantial foreign-flag competition on an essential foreign trade route, support of that United States-flag service best calculated to meet the flow of commerce thereon, i.e., a service composed of the best-equipped, safest, and most suitable types of vessels. Where it has been determined that separate passenger-freight (carrying a large number of passengers) and freight services are necessary to provide such a service, although physical traffic requirements might be met, as in the past, by a large number of combination vessels carrying a limited number of passengers, it would not be in accordance with the policy of the Act to subsidize only one service (freight). Thus the Board will renew subsidy for passenger-freight vessels on a trade route, to be operated in connection with freight vessels, although foreign-flag passenger competition, standing alone, may not have been substantial. American President Lines, Ltd.—Subsidy, Route 29, 51 (59–61).

In establishing a subsidized United States-flag service on an essential foreign trade route, the Merchant Marine Act of 1936 does not require or contemplate that this service should be identical with or even substantially similar to that offered by foreign-flag competitors; such requirement would not only be contrary to the purposes and policy of the Act but would allow foreign-flag competitor to dictate determinations under section 211 as to what services should be established and number and types of vessels. by compelling United States operation at level of foreign. Id. (60, 61).

Applicant for subsidy for operation of a certain vessel fails to meet the requirements of section 601(a) where, (1) the vessel (an austerity passenger ship used as a troop ship during the war and placed into service as a temporary measure to meet an emergency situation) is not suitable for the transportation of commercial passengers, and, admittedly, would not meet foreign-flag competition by better equipped ships; and (2) there is no showing of applicant's ability to acquire a suitable vessel other than that in question. Whether or not the vessel was the best-equipped, safest, and most suitable vessel available at the time it was put into service is immaterial. Oceanic S.S. Co.—Subsidy, "Marine Phoenix," 288 (291, 292).

TARIFFS. See Brokerage.

TERMINAL FACILITIES. See also Free Time.

"Arranging berth for vessel" is clearly an administrative expense connected with dockage or berthage and should be eliminated from terminal "service charge." Intercoastal Steamship Freight Assn. *v.* Northwest Marine Terminal Assn., 387 (391).

Item of terminal service charge for "providing terminal facilities," if not incidental to the receiving and checking of cargo, is a charge for administrative expense or for special services, and should not be included as a part of the "service charge." Id. (391).

"Ordering Barges and Lighters" and "Giving Information to Shippers and Consignees Regarding Cargo Sailing and Arrival Dates of Vessels. etc.," cover services neither requested by nor beneficial to the ship. The ship's supercargo himself orders barges and lighters alongside when lumber is brought in that manner. The ship's own office or agent has all information as to ship's movements where authoritative information is available, thus making item "Giving Information . . ." of terminal service charge unnecessary to the ship. Id. (391, 392).

While carriers' obligations include the receiving of cargo from shippers and the giving of a receipt therefor, together with the handling of necessary papers, the imposition by a terminal company of a service charge against a carrier for items such as checking and receipting cargo is an unjust and unreasonable practice where the particular cargo (lumber) is accepted and carried by the ship without check as to amount, the terminal actually checks the lumber and gives a receipt for the shipper's benefit, and the only receipt given by the carrier are the mate's receipt and the bill of lading which are expressly based on the shipper's count, so that the service is for the use of the shipper and not the carrier. Id. (393, 394).

While ordering railroad cars under ship's tackle is a service performed for the benefit of the vessel, such service does not justify the imposition by terminal operators of a service charge against the vessel when other services, not for the benefit of the vessel, are included in the charge. In the interest of uniform and clear definitions, the services included in a service charge should be limited to those concerned with or incidental to the receiving and checking of cargo and if terminal operators desire to make a charge against the vessel for ordering railroad cars, they should set up a special charge therefor. Id. (394).

TRADE ROUTES. See Essential Trade Routes; Subsidies, Operating-Differential.

TRAMPS. See Common Carriers.

WAIVERS, SECTION 804. See Section 804 Waivers.

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