DECISIONS OF THE

FEDERAL MARITIME BOARD, AND MARITIME ADMINISTRATION DEPARTMENT OF COMMERCE

VOLUME 4

APRIL 1952 TO MARCH 1956

Published by Direction
of
The Federal Maritime Commission
and
The Maritime Administration

U.S. GOVERNMENT PRINTING OFFICE
WASHINGTON : 1963

For sale by the Superintendent of Documents, U.S. Government Printing Office
Washington, D.C., 20402 - Price $4.00

UNITED STATES DEPARTMENT OF COMMERCE

WASHINGTON, D.C.

FEDERAL MARITIME BOARD

CLARENCE G. MORSE, *Chairman*
BEN H. GUILL, *Vice Chairman*
G. JOSEPH MINETTI, *Member*
A. J. WILLIAMS, *Secretary*

MARITIME ADMINISTRATION

CLARENCE G. MORSE, *Maritime Administrator*
WALTER C. FORD, *Deputy Maritime Administrator*

CONTENTS

	Page
Table of cases reported	V
Docket numbers of cases reported	VII
Table of cases cited	X
Decisions of the U.S. Maritime Commission and Federal Maritime Board	1
Table of commodities	801
Index digest	803

TABLE OF CASES REPORTED

	Page
Ab Svenska Amerika Linien, Port of New York Authority *v.*	202
Alaska S.S. Co.—Charter of War-Built Vessels	173
American Export Lines, Inc.—Increased Sailings, Route 10	568
American Export Lines, Inc.—Sales Prices of "Independence" and "Constitution"	216, 263
American Export Lines, Inc.—Section 804 Waiver	379
American-Hawaiian S.S. Co. *v.* Intercontinental Marine Lines, Inc	160
American President Lines, Ltd.—Calls, Round-The-World Service	681
American President Lines, Ltd.—Charter of War-Built Vessel	36
American President Lines, Ltd.—Final Subsidy Rates 1949, 1950	327
American President Lines, Ltd., Mississippi Shipping Co., Inc., Moore-McCormack Lines, Inc.—Redetermination of Reconditioning Subsidy	396
American President Lines, Ltd.—Section 805(a) Application	436
American President Lines, Ltd.—Subsidy, Route 17	63, 488, 555
American President Lines, Ltd.—Subsidy, Route 29	51
American President Lines, Ltd.—Unsubsidized operations, Route 17	63, 488, 555
Anglo Canadian Shipping Co., Ltd. *v.* Mitsui S.S. Co., Ltd	535
Annual Review of Charters, War-Built Vessels, 1952	114, 126, 133, 139, 145
Annual Review of Charters, War-Built Vessels, 1953	325
Annual Review of Charters, War-Built Vessels, 1954	481
Bloomfield S.S. Co.—Subsidy, Routes 13(1) and 21(5)	305
Capital Necessarily Employed—General Order 71	646
Carrier—Imposed Time Limits on Presentation of Claims for Freight Adjustments	29
City of Portland, Ore. *v.* Pacific Westbound Conference	664
Coastwise Line—Charter of War-Built Vessels	173
Coastwise Line—Charter of War-Built Vessels	200, 211
Coastwise Line—Charter of War-Built Vessel	597
Consolo, Philip R. *v.* Grace Line, Inc	293
Contract Rates—Japan/Atlantic—Gulf Freight Conference	706
Contract Rates—North Atlantic Continental Freight Conference	98, 355
Contract Rates—Trans-Pacific Freight Conference of Japan	744
Fabre Line and Gulf/Mediterranean Ports Conference, Practices of	611
Farrell Lines Inc.—Charter of War-Built Vessels	26
Farrell Lines Inc.—Final Subsidy Rates, 1949	337
Farrell Lines Inc.—Subsidy, Combination Vessels	22
Feldman Clothing Export & Shipping Corp. *v.* Peter Bogaty	1
Galveston Chamber of Commerce *v.* Saguenay Terminals, Ltd	375
Grace—C. S. A. V. Pooling Agreement	528
Grace Line Inc., Philip R. Consolo, *v.*	293
Grace Line Inc.—Section 804 Waivers	466
Grace Line Inc.—Subsidy, Route 25	549

Page

Hawaiian S.S. Co., Ltd.—Charter of "SS La Guardia" 574
Huber Mfg. Co. *v.* N. V. Stoomvaart Maatschappij "Nederland" 343
Increased Rates, Kuskokwim River, Alaska 124
Intercoastal Steamship Freight Assn. *v.* Northwest Marine Terminal Assn. 387
Intercontinental Marine Lines, Inc., American-Hawaiian S.S. Co. *v.* 160
Isbrandtsen Co., Inc. *v.* American Export Lines, Inc. 442, 772
Isbrandtsen Co., Inc.—Charter of War-Built Vessel 151
Isbrandtsen Co., Inc. *v.* States Marine Corp. of Delaware 511
Japan/Atlantic-Gulf Freight Conference—Contract Rates 706
Joint Committee of Foreign Freight Forwarders Assn. *v.* Pacific Westbound Conference 166
Kuskokwim River, Alaska, Increased Rates 124
Lykes Bros. S.S. Co., Inc.—Increased Sailings, Route 22 153, 455
Lykes-Harrison Pooling Agreement 515
Misclassification of Tissue Paper as Newsprint Paper 483
Mitsui S.S. Co., Ltd., Anglo Canadian Shipping Co., Ltd. *v.* 535
Moore-McCormack—Swedish American Sailing Agreement 558
North Atlantic Continental Freight Conference—Contract Rates 98, 355
Northwest Marine Terminal Assn., Intercoastal Steamship Freight Assn. *v.* 387
N. V. Stoomvaart Maatschappij "Nederland", Huber Mfg. Co. *v.* 343
Oceanic S.S. Co.—Subsidy, "Marine Phoenix" 288
Pacific Coast Customs and Freight Brokers Assn. *v.* Pacific Westbound Conference 166
Pacific Coast European Conference—Payment of Brokerage 696
Pacific Far East Line, Inc.—Charter of War-Built Vessels 785
Pacific Far East Line, Inc.—Section 805(a) Applications 580
Pacific Far East Line, Inc.—Subsidy, Route 29 7, 136
Pacific Transport Lines, Inc.—Section 805(a) Application 144, 146
Pacific Transport Lines, Inc.—Section 805(a) Application 544
Pacific Transport Lines, Inc.—Subsidy, Route 29 7, 136
Pacific Westbound Conference, City of Portland, Oreg. *v.* 664
Pacific Westbound Conference, Joint Committee of Foreign Freight Forwarders Assn. *v.* 166
Pacific Westbound Conference, Pacific Coast Customs and Freight Brokers Assn. *v.* 166
Pennsylvania Motor Truck Assn. *v.* Philadelphia Piers, Inc. 192
Peter Bogaty, Feldman Clothing Export & Shipping Corp. *v.* 1
Philadelphia Piers, Inc., Pennsylvania Motor Truck Assn. *v.* 192
Philip R. Consolo *v.* Grace Line Inc. 293
Ponce Cement Corp.—Increased Rate on "Trailer Rate Cargo N.O.S." 603
Ponce Cement Corp.—Returned Empty Propane Gas Tanks 603
Port of New York Authority *v.* Ab Svenska Amerika Linien 202
Practices of Fabre Line and Gulf/Mediterranean Ports Conference 611
Review of Farrell Lines Subsidy, Route 15A 117
Review of Grace Line Subsidy, Route 2 40
Review of Mississippi Shipping Co. Subsidy, Route 14 107
Review of Mississippi Shipping Co. Subsidy, Route 20 68
Saguenay Terminals, Ltd., Galveston Chamber of Commerce *v.* 375
Sales Prices of "Mariner" Class Vessels 414
S. C. T. T., Inc.—Alleged Violation of General Order 70 179
States Marine Corp. of Delaware, Isbrandtsen Co., Inc. *v.* 511

DOCKET NUMBERS OF CASES REPORTED

		Page
696	Feldman Clothing Export & Shipping Corp. *v* Peter Bogaty	1
700	Pennsylvania Motor Truck Assn. *v.* Philadelphia Piers, Inc	192
706	Port of New York Authority *v.* Ab Svenska Amerika Linien	202
707	Huber Mfg. Co. *v.* N. V. Stoomvaart Maatschappij "Nederland"	343
712	Carrier—Imposed Time Limits on Presentation of Claims for Freight Adjustments	29
717	Philip R. Consolo *v.* Grace Line Inc	293
718	Joint Committee of Foreign Freight Forwarders Assn *v.* Pacific Westbound Conference	166
719	Pacific Coast Customs and Freight Brokers Assn. *v.* Pacific Westbound Conference	166
720	Intercoastal Steamship Freight Assn. *v.* Northwest Marine Terminal Assn	387
722	Increased Rates, Kuskokwim River, Alaska	124
723	City of Portland, Ore. *v.* Pacific Westbound Conference	664
724	Contract Rates—North Atlantic Continental Freight Conference	98, 355
726	Isbrandtsen Co., Inc. *v.* States Marine Corp. of Delaware	511
729	American-Hawaiian S.S. Co. *v.* Intercontinental Marine Lines, Inc	160
730	Contract Rates—Japan/Atlantic—Gulf Freight Conference	706
737	Galveston Chamber of Commerce *v.* Saguenay Terminals, Ltd	375
741	Misclassification of Tissue Paper as Newsprint Paper	483
743	Contract Rates—Trans-Pacific Freight Conference of Japan	744
759	Anglo Canadian Shipping Co., Ltd. *v.* Mitsui S.S. Co., Ltd	535
766	Ponce Cement Corp.—Increased Rate on "Trailer Rate Cargo N.O.S."	603
767	Pacific Coast European Conference—Payment of Brokerage	696
768	Practices of Fabre Line and Gulf/Mediterranean Ports Conference	611
769	Ponce Cement Corp.—Returned Empty Propane Gas Tanks	603
M–9	Grace Line Inc.—Charter of War-Built Vessels	114, 325
M–10	Pacific Far East Line, Inc.—Charter of War-Built Vessels	114, 325, 481
M–11 (et al.)	Annual Review of Charters, War-Built Vessels, 1953	325
M–11	Alaska S.S. Co.—Charter of War-Built Vessels	114, 325, 481
M–14	Luckenbach-Gulf S.S. Co., Inc.—Charter of War-Built Vessels	114, 325
M–20	American President Lines, Ltd.—Charter of War-Built Vessel	114, 126, 139
M–21	Lykes Bros. S.S. Co —Charter of War-Built Vessels	114
M–24	Coastwise Line—Charter of War-Built Vessels	114, 126, 133
M–26	Pacific Far East Line, Inc.—Charter of War-Built Vessels	114

		Page
M–27	American President Lines, Ltd.—Charter of War-Built Vessel	114, 325, 481
M–27	Pacific Far East Line, Inc.—Charter of War-Built Vessel	114, 325, 481
M–30	Coastwise Line—Charter of War-Built Vessel	114, 126, 133
M–31	Alaska S.S. Co.—Charter of War-Built Vessels	114, 126, 133
M–32	American President Lines, Ltd.—Charter of War-Built Vessel	114, 325, 481
M–33	South Atlantic S.S. Line—Charter of War-Built Vessels	114
M–34	Prudential S.S. Corp.—Charter of War-Built Vessel	114, 126
M–35	Lykes Bros. S.S. Co.—Charter of War-Built Vessels	114
M–36	Mississippi Shipping Co.—Charter of War-Built Vessel	114
M–37	Lykes Bros. S.S. Co.—Charter of War-Built Vessels	114
M–42	Pope & Talbot, Inc.—Charter of War-Built Vessels	114, 126
M–43	Pacific-Atlantic S.S. Co.—Charter of War-Built Vessels	114, 126
M–45	Prudential S S. Corp.—Charter of War-Built Vessel	114, 126
M–50	Luckenbach-Gulf S.S. Co., Inc.—Charter of War-Built Vessel	114, 325
M–51	American President Lines, Ltd.—Charter of War-Built Vessels	114
M–52	Farrell Lines Inc.—Charter of War-Built Vessels	26, 114
M–54	American President Lines, Ltd.—Charter of War-Built Vessel	36
M–55	Annual Review of Charters, War-Built Vessels 1952	126, 133, 139, 145
M–55 (Sub. 1)	Annual Review of Charters, War-Built Vessels, 1952	114
M–56	S. C. T. T., Inc.—Alleged Violation of General Order 70	179
M–57	Isbrandtsen Co., Inc.—Charter of War-Built Vessel	151, 325
M–58	Coastwise Line—Charter of War-Built Vessels	173
M–59	Alaska S. S. Co.—Charter of War-Built Vessels	173
M–60	Coastwise Line—Charter of War-Built Vessels	200, 211, 325
M–61	Annual Review of Charters, War-Built Vessels 1954	481
M–62	Hawaiian S.S. Co., Ltd.—Charter of "SS La Guardia"	574
M–63	Coastwise Line—Charter of War-Built Vessel	597
M–64	Pacific Far East Line, Inc.—Charter of War-Built Vessels	785
S–17 (Sub. 1)	American President Lines, Ltd.—Unsubsidized operations, Route 17	63, 488, 555
S–18	Pacific Transport Lines, Inc.—Subsidy, Route 29	7, 136
S–18 (Sub. 1)	Pacific Transport Lines, Inc.—Section 805(a) Application	144, 146
S–19	Pacific Far East Line, Inc.—Subsidy, Route 29	7, 136
S–23	Lykes Bros. S.S. Co., Inc.—Increased Sailings, Route 22	153, 455
S–26	American President Lines, Ltd.—Subsidy, Route 29	51
S–27 (Sub 1)	Moore-McCormack—Swedish American Sailing Agreement	558
S–27 (Sub. 2)	Lykes-Harrison Pooling Agreement	515
S–27 (Sub. 4)	Grace—C.S.A.V. Pooling Agreement	528
S–28	Review of Mississippi Shipping Co. Subsidy, Route 20	68
S–29	Review of Grace Line Subsidy, Route 2	40
S–30	Review of Mississippi Shipping Co. Subsidy, Route 14	107
S–31	Farrell Lines Inc.—Subsidy, Combination Vessels	22

		Page
S-31	Review of Farrell Lines Subsidy, Route 15A	117
S-33	American President Lines, Ltd.—Subsidy, Route 17	63, 488, 555
S-34	Bloomfield S.S. Co.—Subsidy, Routes 13(1) and 21(5)	305
S-36	American President Lines, Ltd.—Section 805(a) Application	436
S-38	Isbrandtsen Co., Inc. *v.* American Export Lines, Inc	442, 772
S-39	Farrell Lines Inc.—Final Subsidy Rates, 1949	337
S-40	American President Lines, Ltd.—Final Subsidy Rates, 1949, 1950	327
S-41	Oceanic S.S. Co.—Subsidy, "Marine Phoenix"	288
S-43	American Export Lines, Inc.—Section 804 Waiver	379
S-44	American Export Lines, Inc.—Increased Sailings, Route 10	568
S-45	Grace Line Inc.—Section 804 Waivers	466
S-46	Grace Line Inc.—Subsidy, Route 25	549
S-47	American Export Lines, Inc.—Sales Prices of "Independence" and "Constitution"	216, 263
S-48	American President Lines, Ltd., Mississippi Shipping Co., Inc., Moore-McCormack Lines, Inc.—Redetermination of Reconditioning Subsidy	396
S-49	Sales Prices of "Mariner" Class Vessels	414
S-50	Pacific Far East Line, Inc.—Section 805(a) Applications	580
S-51	American President Lines, Ltd.—Calls, Round-The-World Service	681
S-54	Pacific Transport Lines, Inc.—Section 805(a) Application	544
S-66	Capital Necessarily Employed—General Order 71	646

TABLE OF CASES CITED

Page

Addison *v.* Holly Hill Co., 322 U.S. 607 ... 657
Afghan-American Trading Co., Inc. *v.* Isbrandtsen Co., Inc., 3 FMB 622 ... 347
Agreement No. 6510, 1 USMC 775, 2 USMC 22 ... 738
Agreement No. 7620, 2 USMC 749 ... 300, 378
Agreement No. 7790, 2 USMC 775 ... 168, 677
Agreement Nos. 6210, 6210-A, 6210-B, 6210-C, 6105, 2 USMC 166 ... 301, 302, 303
Agreements and Practices Re Brokerage, 3 USMC 170 ... 166-172
Alaska S.S. Co., 3 FMB 545 ... 174
Alaska S.S. Co., 4 FMB 114, 126 ... 133
American Export Lines, Inc.—"Independence" and "Constitution", 4 FMB 216 ... 404, 412, 416, 433
American Export Lines, Inc.—"Independence" and "Constitution", 4 FMB 263 ... 411
American Export Lines, Inc.—Section 804 Waiver, 4 MA 379 ... 475, 476
American President Lines, Ltd., 3 FMB 726 ... 36, 38
American President Lines, Ltd.—Guam, Midway and Wake, 3 MA 450 ... 9, 499
American President Lines, Ltd.—Intercoastal Operations, Round-the-World Service, 3 FMB 553 ... 502, 557
American President Lines, Ltd.—Section 805(a) Application, 4 FMB 436 ... 500
American President Lines, Ltd.—Subsidy, Route 17, 4 FMB 63 ... 557
American President Lines, Ltd.—Subsidy, Route 17, 4 FMB-MA 488 ... 551, 554, 590, 687
American President Lines, Ltd.—Subsidy, Route 17, 4 FMB-MA 555 ... 590
American President Lines, Ltd.—Subsidy, Route 29, 4 FMB 51 ... 73, 74, 289, 291
American President Lines, Ltd.—Unsubsidized Operation, Route 17, 3 FMB-MA 457 ... 142, 440, 492, 501, 504
American President Lines, Ltd. *v.* Federal Maritime Board, 112 F. Supp. 346 ... 498, 551
American Range Lines, Inc.—Contract Carrier Application, 260 ICC 362 ... 301
American South African Line, Inc.—Subsidy, Route 14, 3 USMC 314 ... 108, 109, 119
American South African Line, Inc.—Subsidy, S. and E. Africa, 3 USMC 277 ... 18, 119
Anglo Canadian Shipping Co., Ltd. *v.* Mitsui S.S. Co., Ltd., 4 FMB 535 ... 608, 724, 732
Argentino, The, 28 F. Supp. 440 ... 34
A/S J. Ludwig Mowinckels Rederi *v.* Isbrandtsen Co., Inc., 336 U.S. 941 ... 726
A/S J. Ludwig Mowinckels Rederi *v.* Isbrandtsen Co., Inc., 342 U.S. 950 ... 100, 357, 726
Atlantic Coast Line *v.* Geraty, 166 Fed. 10 ... 303
Atlantic & Gulf/West Coast of Cent. America & Mexico Conf. *v.* United States, 94 F. Supp. 138 ... 169, 170

Page

Baltimore and Ohio R.R. Co. *v.* United States, 201 F. 2d 795 192
Baltimore Mail S.S. Co., 3 USMC 294 589
Barr *v.* United States, 324 U.S. 83 .... 276, 277
Bartel Common Carrier Application, 7 MCC 755 609
Baxendale and Great Western Ry. Co., [1858] 5 C.B. 336 542
Beaumont Port Commission *v.* Seatrain Lines, Inc., 2 USMC 500 674
Beaumont Port Commission *v.* Seatrain Lines, Inc., 3 FMB 556 674
Black Diamond S.S. Corp. *v.* Compagnie Maritime Belge (Lloyd Royal) SA, 2 USMC 755 163
Bloomfield S.S. Co.—Subsidy, Routes 13(1), 21(5), 4 FMB 305 .... 349, 692, 693, 694, 695
Bloomfield S.S. Co.—Subsidy, Route 15B, 3 USMC 299 .... 19, 20
California *v.* United States, 46 F. Supp. 474 674
Cargo to Adriatic, Black Sea, and Levant Ports, 2 USMC 342 .... 538, 539
Carrier-Imposed Time Limits for Freight Adjustments, 4 FMB 29 607
City of Dunkirk, The, 10 F. 2d 609 .... 301, 302
City of Mobile *v.* Baltimore Insular Line, Inc., 2 USMC 474 674
Coastwise Line, 3 FMB 515, 545 .... 174, 212
Coastwise Line, 4 FMB 114, 126 135
Coastwise Line, 4 FMB 173 211
Coastwise Line, 4 FMB 200 211
Coastwise Line, 4 FMB 211 .... 200, 601
Consolidated Edison Co. *v.* National Labor Relations Board, 305 U.S. 197 .... 208, 634, 635, 636
Consolo, Philip R. *v.* Grace Line Inc., 4 FMB 293 .... 378, 609
Contract Rates—Japan/Atlantic—Gulf Freight Conference, 4 FMB 706 .... 746, 761, 762, 765, 767, 770
Contract Rates—North Atlantic Continental Freight Conf., 4 FMB 98 .... 357, 368, 727
Contract Rates—North Atlantic Continental Freight Conf., 4 FMB 355 727
Contract Routing Restrictions, 2 USMC 220 .... 105, 368, 725
Davidson Extension—Specified Commodities, 51 MCC 401 609
Dwyer and Anderson Common Carrier Application, 11 MCC 749 609
Eastern-Central Motor Assn. *v.* United States, 321 U.S. 194 .... 732, 733
Eastern Trailer Transport Corp. Common Carrier Application 62 MCC 837 609
Eddy, The, 5 Wall. 481 (72 U.S.) 196
Eden Mining Co. *v.* Bluefields Fruit & S.S. Co., 1 USSB 41 .... 514, 540, 608, 720, 721, 722, 733
Everett Ch. of Comm. *v.* Luckenbach S.S. Co., 1 USSB 149 674
Ex Parte 5 Contract Rate Investigation 721, 722
Far East Conf. *v.* United States, 342 U.S. 570 728
Federal Communications Commission *v.* Pottsville Broadcasting Co., 309 U.S. 134 644
Federal Maritime Board *v.* United States, 345 U.S. 975 708
Federal Power Commission *v.* Natural Gas Pipeline Co., 315 U.S. 575 705
Feldman Family Clothing Export & Shipping Corp. *v.* Peter Bogaty & Hudson Shipping Co., Inc. (N.Y. Sup. Ct., Dec. 4, 26, 1950) 2–6
Free Time and Demurrage Charges at New York, 3 USMC 89 .... 196, 198
Fri, The, 154 Fed. 333 783
Gage *v.* Tirrell, 9 Allen 299 (Mass.) 302
Grace Line Inc., 3 FMB 703 794

Page
Grace Line Inc.—Subsidy, Route 2, Review of, 4 FMB 40 ---------- 57, 59, 61, 70, 72, 73, 119, 122, 526, 527, 534
Grace Line Inc.—Subsidy, Route 4, 3 FMB 731 --------- 462, 496, 551, 572, 693
G. R. Crowe, The, 294 Fed. 506 -- 783
Fulf Intercoastal Contract Rates, 1 USSBB 524 -------------------- 724, 734
Gulf-Puerto Rico Rates Via N.Y. & P.R.S.S. Co., 2 USMC 410 --------- 609
Hever Truck Lines *v.* Brownlee, 239 Iowa 267 ------------------------ 302
H. Kramer & Co. *v.* Inland Waterways Corp., 1 USMC 630 - 205, 347, 514, 540, 608
Huber Mfg. Co. *v.* N. V. Stoomvaart Maatschappij "Nederland", 4 FMB 343 -- 540, 608
Hubert *v.* Public Service Commission, 118 Pa. Super. 128 --------------- 302
Ilwaco Ry. & Navig. Co. *v.* Oregon Short Line & I.U.N. Ry. 57 Fed. 673 - 542
Inland Waterways Corp. *v.* Intercoastal Steamship Freight Assn., 1 USMC 653 -- 738
Intercoastal Investigation, 1935, 1 USSBB 400 -------------- 537–540, 723, 724
Intercoastal Rates of Nelson S. S. Co., 1 USSBB 326 ------------------ 538
Interstate Commerce Commission *v.* Alabama Midland Ry. Co., 168 U.S. 144 -- 732
Interstate Commerce Commission *v.* Baird, 194 U.S. 25 ---------------- 635
Interstate Commerce Commission *v.* Jersey City, 322 U.S. 503 ---------- 137
Isbrandtsen Co., Inc. *v.* American Export Lines Inc., 4 FMB–MA 442 --- 773
Isbrandtsen Co., Inc. *v.* North Atlantic Continental Freight Conf., 3 FMB 235 ------------------------------ 100, 101, 356, 367, 368, 726, 734
Isbrandtsen Co., Inc. *v.* United States, 81 F. Supp. 544 --------------- 100, 726
Isbrandtsen Co., Inc. *v.* United States, 96 F. Supp. 883 -- 100, 105, 357, 370, 726
Isbrandtsen Co., Inc. *v.* United States, 211 F. 2d 51 ------------------ 701, 702, 703, 708, 728, 742, 751
Isthmian S.S. Co. *v.* United States, 53 F. 2d 251 -------------------- 538, 539
John Bene & Sons, Inc. *v.* Federal Trade Commission, 299 Fed. 468 ------ 208
Kennedy *v.* Silas Mason Co., 334 U.S. 249 ---------------------------- 514
L & A Garcia & Co., Rates, Charges and Practices of, 2 USMC 615 ----- 538
Lipson *v.* Socony Vacuum Corp., 87 F. 2d 265 ------------------------ 527
Little Rock & M. R. Co. *v.* East Tennessee, V. & G. R. Co., 47 Fed. 771 -- 542
Los Angeles By-Products Co. *v.* Barber S.S. Lines, Inc., 2 USMC 106 ---- 703
Lucking *v.* Detroit Navig. Co., 265 U.S. 346 ------------------------ 609
Lykes Bros. S.S. Co., Inc.—Emergency Intercoastal Operation, 3 USMC 349 -- 441
Lykes Bros. S.S. Co., Inc.—Increased Sailings, Route 22, 4 FMB 153 ------ 456
Lykes Bros. S.S. Co., Inc.—Increased Sailings, Route 22, 4 FMB 455 ----- 499, 551
Lykes-Harrison Pooling Agreement, 4 FMB 515 -------------------- 534, 567
McCormick S.S. Co. *v.* United States, 16 F. Supp. 45 ----------------- 609
McDonald *v.* Hovey, 110 U.S. 619 ---------------------------------- 541
Menacho *v.* Ward, 27 Fed. 529 ------------------------------------ 720
Mississippi Valley Hardwood Co. *v.* McClanahan, 8 F. Supp. 388 -------- 526
National Labor Relations Board *v.* Columbian Enameling & Stamping Co., Inc., 306 U.S. 292 -- 635
National Labor Relations Board *v.* Thompson Products, 97 F. 2d 13 ----- 635
National Labor Relations Board *v.* Union Pacific Stages, 99 F. 2d 153 ---- 635
National Labor Relations Board *v.* Virginia Electric Power Co., 314 U.S. 469 -- 105
New York *v.* United States, 331 U.S. 284 ---------------------------- 734

Page

New York Marine Co. *v.* Buffalo Barge Towing Corp., 2 USMC 216 — 301, 378
Pacific Argentine Brazil Line, Inc.—Subsidy, Route 24, 3 USMC 357 — 19
Pacific-Atlantic S.S. Co., 3 FMB 705 — 601
Pacific Coast European Conf., 3 USMC 11 — 725, 726
Pacific Transport Lines, Inc.—Subsidy, Route 29, 4 FMB 7 — 57, 136, 158
Pacific Westbound Conference *v.* United States, 94 F. Supp. 649 — 169
Panhandle Eastern Pipe Co. *v.* Public Service Commission, 332 U.S. 507 — 137
Pennsylvania Motor Truck Assn. *v.* Phila. Piers, Inc., 3 FMB 789 — 192
Pennsylvania R.R. Co. *v.* Puritan Coal Co., 237 U.S. 121 — 303
Phelps Bros. & Co., Inc. *v.* Cosulich—Societa, 1 USMC 634 — 164, 725
Philadelphia Ocean Traffic Bureau *v.* Export S.S. Corp., 1 USSBB 538 — 197, 205, 347, 514
Philip R. Consolo *v.* Grace Line Inc., 4 FMB 293 — 378, 609
Phipps *v.* London and North Western Ry. Co., [1892] 2 QB 229 — 542
Pittsburgh S.S. Co. *v.* National Labor Relations Board, 180 F. 2d 731 — 635
Plomb Tool Co. *v.* American-Hawaiian S.S. Co., 2 USMC 523 — 346
Port Differential Investigation, 1 USSB 61 — 209, 674
Port of New York Authority *v.* Ab Svenska, 4 FMB 202 — 347, 496
Port of Philadelphia Ocean Traffic Bureau *v.* Export S. S. Corp., 1 USSBB 538 — 197, 205, 347, 514
Propeller Niagara *v.* Cordes, 62 U. S. 7 — 782
Prudential S. S. Corp., 3 FMB 627 — 599
Puerto Rican Rates, 2 USMC 117 — 301
Rates, Charges, and Practices of L. & A. Garcia and Co., 2 USMC 615 — 538
Rates, Charges, and Practices of Yamashita and O. S. K., 2 USMC 14 — 538, 539, 543
Rates from Japan to United States, 2 USMC 426 — 485, 637
Review of Charters, War-Built Vessels, 1952, 4 FMB 126 — 133, 139
Review of Charters, War-Built Vessels, 1952, 4 FMB 133 — 174, 212
Review of Grace Line Subsidy, Route 2, 4 FMB 40 — 57, 59, 61, 70, 72, 73, 119, 122, 526, 527, 534
Richard *v.* Credit Suisse, 242 N.Y. 346, 152 N.E. 110 — 513
River Plate and Brazil Conf. *v.* Pressed Steel Car Co., 124 F. Supp. 88, 227 F. 2d 60 — 702
Rochester Telephone Corp. *v.* United States, 307 U.S. 125 — 189
Sales Prices of "Independence" and "Constitution", 4 FMB 216 — 404, 412, 416, 433
Sales Prices of "Independence" and "Constitution", 4 FMB 263 — 411
Section 15 Inquiry, 1 USSB 121 — 105, 700, 701
Section 19 Investigation, 1935, 1 USSBB 470 — 538, 539, 543
Shoemaker Common Carrier Application, 4 MCC 765 — 609
Sigfried Olsen *v.* Blue Star Line, Ltd., 2 USMC 529 — 164
Southern Pacific Terminal Co. *v.* Interstate Commerce Commission, 219 U.S. 498 — 301
Sprague S.S. Agency, Inc. *v.* A/S Ivarans Rederi, 2 USMC 72 — 164
Stark *v.* Wichard, 321 U.S. 288 — 705
Swayne & Hoyt, Ltd. *v.* United States, 18 F. Supp. 25 — 724
Swayne & Hoyt, Ltd. *v.* United States, 300 U.S. 297 — 369, 370, 724, 725, 726, 729, 734, 735, 741, 763, 768, 769
Terminal Rate Increases—Puget Sound Ports, 3 USMC 21 — 391–394
Terminal Rate Structure—California Ports, 3 USMC 57 — 393, 394
Texas & Pacific Ry. *v.* Interstate Commerce Commission, 162 U.S. 197 — 541

Page

Texas & Pacific Ry. Co. *v.* United States, 289 U.S. 627 ---- 732
Titania, The, 131 Fed. 229 ---- 196
Transportation By Mendez & Co., Inc., Between U.S. and Puerto Rico, 2 USMC 717 ---- 301, 302, 303, 378
Turret Crown, The, 284 Fed. 434 ---- 34
Union Sulphur Co. Contract Carrier Application, 260 ICC 749 ---- 301
United Nations *v.* Hellenic Lines Ltd., 3 FMB 781 ---- 347, 540, 608
United States *v.* California, 297 U.S. 175 ---- 378
United States *v.* Eaton, 169 U.S. 331 ---- 105
United States *v.* Far East Conf., 94 F. Supp. 900 ---- 728
United States *v.* Illinois Central R.R., 303 U.S. 239 ---- 485
United States *v.* The Meachem, 107 F. Supp. 997 ---- 189
United States *v.* Stewart, 311 U.S. 60 ---- 65
United States *v.* Watkins, 73 F. Supp. 216 ---- 635
United States *v.* Wells-Fargo Express Co., 161 Fed. 606 ---- 735
United States Navigation Co. *v.* Cunard S.S. Co., 39 F. 2d 204 ---- 722
United States Navigation Co. *v.* Cunard S.S. Co., 50 F. 2d 83 ---- 104, 722
United States Navigation Co. *v.* Cunard S.S. Co., 284 U.S. 474 ---- 6, 542, 703, 722, 731, 734, 779, 781
U.S. Lines Co.—Subsidy, Route 8, 3 FMB 713 ---- 15, 693
U.S. Lines Co.—Subsidy, Routes 12 et al., 3 USMC 325 ---- 54, 492
Walling *v.* Fairmont Creamery Co., 139 F. 2d 318 ---- 513
Waterman *v.* Stockholms Rederiaktiebolag Svea, 3 USMC 131 ---- 302
West-Bound Intercoastal Rates to Vancouver, 1 USMC 770 ---- 301
West India Fruit & S.S. Co. *v.* Seatrain Lines, 170 F. 2d 775 ---- 704
Wharfage Charges and Practices at Boston, Mass., 2 USMC 245 ---- 104
Wildenfels, The, 161 Fed. 864 ---- 300, 378
Willapoint Oysters *v.* Ewing, 174 F. 2d 676 ---- 635
W. T. Rawleigh Co. *v.* N. V. Stoomvaart, 1 USSB 285 ---- 370, 722, 723
Yamashita and O.S.K., Rates, Charges, and Practices of, 2 USMC 14 ---- 538, 539, 543

DECISIONS OF THE

FEDERAL MARITIME BOARD, AND MARITIME ADMINISTRATION DEPARTMENT OF COMMERCE

688-650 O - 63 - 55

FEDERAL MARITIME BOARD

No. 696

FELDMAN FAMILY CLOTHING EXPORT & SHIPPING CORPORATION

v.

PETER BOGATY ET AL.[1]

Submitted January 30, 1952. Decided April 2, 1952

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

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

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

REPORT OF THE BOARD

BY THE BOARD:

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

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

[1] Hudson Shipping Co., Inc.

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

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

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

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

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

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

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

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

Sec. 17. * * * Every such carrier and every other person subject to this act shall establish, observe, and enforce just and reasonable regulations and practices relating to or connected with the receiving, handling, storing, or delivering of property. Whenever the board finds that any such regulation or practice is unjust or unreasonable it may determine, prescribe, and order enforced a just and reasonable regulation or practice.

688-650 O - 63 - 2

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ORDER

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

No. 696

FELDMAN FAMILY CLOTHING EXPORT & SHIPPING CORPORATION

v.

PETER BOGATY ET AL.

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

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

By the Board.

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

FEDERAL MARITIME BOARD

No. S-18

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

No. S-19

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

Submitted December 18, 1951. Decided April 8, 1952

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

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

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

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

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

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

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

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

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

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

REPORT OF THE BOARD

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

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

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

Freight Service:

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

Sailing Frequency: 24–26 sailings per year.

Number and Type of Ships: 5 C3 type freighters.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

688-650 O - 63 - 3

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSIONS

The Board therefore concludes:

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

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

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

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

By the Board.

A. J. WILLIAMS,
Secretary.

FEDERAL MARITIME BOARD

No. S-31

FARRELL LINES INCORPORATED—OPERATING-DIFFERENTIAL SUBSIDY, COMBINATION VESSELS

REPORT ON MOTION TO DISMISS PROCEEDINGS

BY THE BOARD:

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

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

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

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

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

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

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

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

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

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

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

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

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

ORDER

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

No. S-31

FARRELL LINES INCORPORATED—OPERATING-DIFFERENTIAL SUBSIDY, COMBINATION VESSELS

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

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

By the Board.

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

FEDERAL MARITIME BOARD

No. M-52

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

REPORT OF THE BOARD

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

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

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

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

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

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

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

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

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

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

FINDINGS, CERTIFICATION, AND RECOMMENDATIONS

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

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

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

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

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

By the Board.

APRIL 17, 1952.

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

FEDERAL MARITIME BOARD

No. 712

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

Submitted March 6, 1952. Decided April 30, 1952

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

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

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

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

REPORT OF THE BOARD ON MOTION TO DISMISS

BY THE BOARD:

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

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

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

---

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

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

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

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

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

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

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

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

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

688-650 O - 63 - 4

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

An order will be entered discontinuing the proceeding.

ORDER

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

No. 712

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

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

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

By the Board.

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

FEDERAL MARITIME BOARD

No. M–54

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

FINDINGS, CERTIFICATION, AND RECOMMENDATIONS

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

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

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

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

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

By the Board.

JUNE 2, 1952.

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

FEDERAL MARITIME BOARD

No. S-29

Review of the Operating-Differential Subsidy Contract With Grace Line Inc. for Service 1 of Trade Route No. 2

Submitted June 3, 1952. Decided July 27, 1952

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

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

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

Report of the Board

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

688-650 O - 63 - 5

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSIONS

The Board therefore concludes:

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

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

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

APPENDIX A

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

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

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

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

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

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

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

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

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

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

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

FEDERAL MARITIME BOARD

No. S-26

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

Submitted May 5, 1952. Decided September 3, 1952

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

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

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

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

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

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

REPORT OF THE BOARD

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

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

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

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

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

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

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

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

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

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

Passenger-Freight Service[2] (Subsidized):

Itinerary: Between Los Angeles, San Francisco (via Honolulu in each direction) and Yokohama, Kobe, Shanghai, Hong Kong, and Manila.

Sailing Frequency: 24–26 sailings per year.

Number and Type of Ships: Of the four P2 passenger-freight vessels specified for this service, two are at present in operation supplemented by one P2 type troop vessel.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Total passengers carried and accommodations available on all ships

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

688-650 O - 63 - 6

CONCLUSION

The Board therefore concludes:

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

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

FEDERAL MARITIME BOARD

No. S-33

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

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

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

Submitted September 4, 1952. Decided September 17, 1952

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

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

REPORT OF THE BOARD ON MOTION

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

---

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

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

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

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

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

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

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

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

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

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

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

> *Orient, the.* The East; generally, eastern countries. In ancient times, the countries E of the Mediterranean; today the countries of Asia generally, esp. the countries of E Asia; the Far East. See the East, 1.
>
> *East, the.* 1 The countries of Asia and of the Asiatic archipelagoes; the countries E of Europe; the Orient; "the East" usually connotes the civilized Asiatic countries, either ancient or modern. See Far East, Middle East, Near East.
>
> *Far East.* 1 The countries of E Asia bordering on Pacific Ocean; China, Japan, E Siberia, Korea, Indochina, Malay Archipelago (including the Philippine Is., etc.); the Orient.

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

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

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

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

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

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

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

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

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

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

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

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

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

An order will be entered denying the motion.

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

---

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

Order

At a Session of the Federal Maritime Board, held at its office in Washington, D. C., on the 17th day of September A. D. 1952.

No. S-33

American President Lines, Ltd.—Application for Operating-Differential Subsidy, Trade Route No. 17, Service C-2

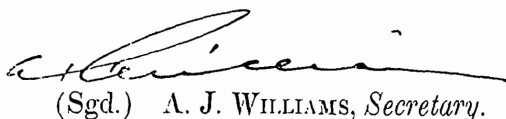
No. S-17 (Sub. No. 1)

American President Lines, Ltd.—Application for Extension of Existing Authority To Operate Without Subsidy on Trade Route No. 17, Service C-2

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

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

By the Board.



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

FEDERAL MARITIME BOARD

No. S-28

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

Submitted July 23, 1952. Decided September 17, 1952

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

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

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

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

REPORT OF THE BOARD

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

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

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

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

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

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

U. S. Gulf Ports—East Coast South America

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

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

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

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

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

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

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

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

[Cargo tonnage expressed in thousands of tons]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSIONS

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

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

FEDERAL MARITIME BOARD

No. S–28

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

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

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

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

RECOMMENDED DECISION OF A. L. JORDAN, EXAMINER

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

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

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

688-650 O - 63 - 7

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

TABLE 1

	1948		1950		1st 6 months 1951	
	Sailings	Cargo tonnage (000)	Sailings	Cargo tonnage (000)	Sailings	Cargo tonnage (000)
OUTBOUND AND INBOUND						
Total carryings	231	941. 7	205	695. 2	89	403. 3
Mississippi—total	128	568. 1	103	369. 5	49	262. 1
Combination ships	39	160. 0	39	108. 4	19	83. 2
Freighters	89	408. 1	64	261. 1	30	178. 9
Foreign-flag ships	103	373. 6	102	325. 6	40	141. 2
OUTBOUND						
Total carryings	132	604. 7	108	411. 5	42	229. 2
Mississippi—total	68	311. 9	52	176. 5	24	142. 9
Combination ships	20	83. 9	20	48. 1	9	41. 0
Freighters	48	228. 0	32	128. 4	15	101. 9
Foreign-flag ships	64	292. 7	56	234. 8	18	86. 1
INBOUND						
Total carryings	99	337. 0	97	283. 7	47	174. 1
Mississippi—total	60	256. 1	51	192. 8	25	119. 0
Combination ships	19	76. 1	19	60. 2	10	42. 1
Freighters	41	180. 0	32	132. 6	15	76. 9
Foreign-flag ships	39	80. 8	46	90. 7	22	55. 0

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

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

	Inbound	Outbound	Inbound and Outbound
	Percent	*Percent*	*Percent*
1948	24	48	39. 5
1950	32	57	46. 8
1951 (1st 6 months)	32	38	35. 0

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

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

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

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

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

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

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

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

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

TABLE 2

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

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

TABLE 3

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

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

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

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

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

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

TABLE 4

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

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

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

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

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

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

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

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

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

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

TABLE 5

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

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

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

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

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

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

TABLE 6

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

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

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

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

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

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

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

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

TABLE 7

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

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

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

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

TABLE 8

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

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

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

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

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

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

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

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

TABLE 10

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

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

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

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

688-650 O - 63 - 8

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Recommended Findings

The Board should find:

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

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

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

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

FEDERAL MARITIME BOARD

No. 724

CONTRACT RATES—NORTH ATLANTIC CONTINENTAL FREIGHT CONFERENCE ET AL.

Submitted September 26, 1952. Decided September 29, 1952

The Board has authority to direct the North Atlantic Continental Freight Conference to hold in abeyance its proposed dual-rate system pending an investigation by the Board under section 22 of the Shipping Act, 1916, as to whether the differential in rates of the proposed system is arbitrary or unreasonable.

For the conference to put its dual-rate system into effect prior to the completion of the Board's investigation of the proposed system would result in detriment to the commerce of the United States. Irreparable injury to the conference would not result by requiring it to hold its proposed dual-rate system in abeyance pending the Board's investigation.

REPORT OF THE BOARD ON MOTION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> The conference agreements make the contracts possible, and if the contracts[8] are unjustly discriminatory or otherwise unlawful, it follows that the conference agreements too may be canceled under section 15 if such discrimination is not removed.

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

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

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

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

The motion is denied.

By order of the Board.

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

FEDERAL MARITIME BOARD

No. S-30

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

Submitted July 14, 1952. Decided September 30, 1952

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

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

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

REPORT OF THE BOARD

BY THE BOARD:

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

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

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

688-650 O - 63 - 9

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

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

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

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

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

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

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

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

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

Outbound and inbound

[Thousands of long tons]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSIONS

The Board therefore concludes:

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

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

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

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

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

2. *Future Inadequacy*

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

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

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

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

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

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

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

Cargo Pool

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

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

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

---

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

[10] Transcript, Prehearing Conference, February 4, 1976 at 7 and 19.

[11] *United States Lines—Subsidy, Route 12*, 5 SRR 969, 977 (1967); *American President Lines, Ltd.*, 6 SRR 1031, 1042 (1966).

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

TABLE II
(000 L/T)

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

Source: I.D. at 44.

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

(i) *Type of Cargo*

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

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

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

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

FEDERAL MARITIME BOARD

No. S–31

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

Decided November 3, 1952

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

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

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

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

REPORT OF THE BOARD

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Outbound

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

Inbound

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

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

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

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

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

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

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

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

CONCLUSIONS

The Board therefore concludes that:

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

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

FEDERAL MARITIME BOARD

No. 722

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

Submitted October 14, 1952. Decided November 4, 1952

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

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

John P. Snow for respondent.

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

REPORT OF THE BOARD

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

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

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

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

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

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

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

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

An appropriate order will be entered.

FEDERAL MARITIME BOARD

ORDER

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

No. 722

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

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

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

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

By the Board.

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

FEDERAL MARITIME BOARD

No. M–55

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

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

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

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

William I. Denning for Pacific-Atlantic Steamship Company.

Robert F. Donoghue for Prudential Steamship Corporation.

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

Nicholas Manolis for North Eastern Steamship Company.

John S. Parry for Triton Shipping, Inc.

Alan F. Wohlstetter for the Board.

REPORT OF THE BOARD

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Prudential Steamship Corporation

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

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

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

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

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

American President Lines, Ltd.

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

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

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

FINDINGS, CERTIFICATION, AND RECOMMENDATIONS

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

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

NOVEMBER 5, 1952.

FEDERAL MARITIME BOARD

No. M–55

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

SUPPLEMENTARY REPORT OF THE BOARD

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

Alaska Steamship Company

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

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

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

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

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

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

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

Coastwise Line

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

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

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

FINDINGS, CERTIFICATION, AND RECOMMENDATIONS

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

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

NOVEMBER 20, 1952.

FEDERAL MARITIME BOARD

No. S-18

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

No. S-19

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

REPORT OF THE BOARD ON PETITION FOR RECONSIDERATION

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

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

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

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

Section 201.233 of the Rules of Procedure provides:

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

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

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

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

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

688-650 O - 63 - 11

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

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

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

DECEMBER 31, 1952.

2. *Quid Pro Quo and Related Costs*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> "Note was made of the fact that in the past, Board policy has been to disallow 'quid pro quo' payments where there were negotiations to effect reductions in crews down to a Board approved level. Under certain mitigating circumstances exceptions to this policy have been made and some 'quid quo pro' agreements have been approved by the Board. No similar circumstances exist in the instant case and the Board finds no basis to alter its policy in this instance, particularly in view of the fact that PGL operated these vessels on the Atlantic Coast free of such costly agreements.
>
> * * * * * * *
>
> Found and determined that costs incurred in the form of 'Quid Pro Quo' payments made by Prudential-Grace Lines, Inc., to compensate for crew reductions on the C4-S-64b design type vessels are not necessary for efficient and economical operation and shall be disallowed for all subsidy purposes." (MSB Minutes 3/12/1973, at 5605).

PGL has not received ODS for quid pro quo costs incurred with respect to its Jet Class vessels.

A fifth action of the Board is not subject to review in this proceeding. In Docket A-60 the Board determined the subsidizable manning of four proposed Ro/Ro vessels of States and the possibility of subsidy for any quid pro quo payments with regard to such vessels. The Board, as affirmed by the Secretary of Commerce on August 18, 1972, approved a maximum of 35 men for each of the vessels and tentatively stated with respect to quid pro quo payments:

> "It should be clearly understood that consistent with previous Board decisions 'quid pro quo' payments for the purpose of effecting crew reductions to the manning scales approved herein are not eligible for ODS assistance. States is being advised herein, prior to the award of CDS contract, that crew quarters for not more than 35 men exclusive of cadets are approved and that a manning scale for not more than 35 men exclusive of cadets is approved." *States Steamship Co.—Manning Scales*, 13 SRR 99, 107 (tentative decision, finalized June 29, 1972).

The Board's referral to hearing in this proceeding did not contemplate that this disallowance of subsidy for quid pro quo payments would be reconsidered. The quid pro quo disallowance in Docket A-60 did not involve problems of transition from the 1936 Act to the 1970 Act, as did other quid pro quo actions considered herein, and States' request for a Section 606(1) hearing at the time of referral did not include a request for reconsideration of this matter.

Further, the Board's action in Docket A-60 cannot be subject to administrative reconsideration. The intent of Section 603(c) of the 1970 Act is that "[n]o costs incurred in connection with those officers or members of the crew that have been found to be unnecessary for the efficient and economical operation of the vessel by the Secretary of Commerce . . . be allowed if the Secretary has made his finding prior to award of a contract for the construction or reconstruction of a vessel."[5] On June 16 and 29, 1972, the Board found prior to award of a CDS contract that officers and crew members on States' Ro/Ro vessels in excess of 35 were unnecessary for efficient and economical operation and that quid pro quo payments would not be subsidized for effecting crew reductions to the level of Board approved manning.[6] Therefore, under Section 603(c) the costs relating to those excessive men including quid pro quo must be excluded from subsidizable collective bargaining costs. This result is consistent with the legislative purposes of Section 603(c) of the 1970 Act that requires the Board to make a determination of disallowed manning and related costs prior to the time of the CDS contract so that the owner is aware of the subsidy available for his investment planning purposes and so that administrative litigation over disallowed items is concluded.[7]

Aside from these five actions of the Board no other past Board disallowance of subsidy for quid pro quo costs have been brought to the attention of the Board in this proceeding. If there are such other actions, the principles enunciated herein will be used as a guideline in considering whether to reconsider disallowance of subsidy for those actions.

4. *Hearings*

The operators affected consistently sought a hearing under Section 606(1) of the Act on the subsidization of quid pro quo expenses. Section 606(1) of the 1936 Act was changed by the 1970 Act only to substitute the term "Secretary of Commerce" for the term "Commission." The provision now provides:

"Every contract for an operating-differential subsidy under this title shall provide (1) that the amount of the future payments to the contractor shall be subject to review and readjustment from time to time, but not more frequently than once a year, at the instance of the Secretary of Commerce or of the Contractor. If such readjustment cannot be reached by

[5] S. Rep. No. 91-1080, 91st Cong., 2d Sess. 35 (1970). It follows that the determination is not subject to review under Section 606(1) of the Act. *States Steamship Co.—ODS Rates*, 13 SRR 241, 246 (1973), but is subject to whatever judicial review is available.

[6] The Board's finding was as follows: "All collective bargaining costs of those officers and ratings actually employed on these proposed subsidized vessels, to the extent in excess of the costs which would be incurred in the employment of . . . [35] officers and ratings . . . are not necessary for the economical and efficient operation of said vessels, and shall be disallowed for subsidy ratemaking and subsidy payment purposes."

While the Board's finding was addressed to "officers and ratings actually employed on these . . . vessels," it follows *a fortiori* that costs for excessive officers and ratings not actually employed on the ships are also disallowed.

[7] *Hearings on S. 3287 Before the Merchant Marine Subcomm. of the Senate Comm. on Commerce*, 91st Cong., 2d Sess. 79 (1970) (hereinafter referred to as Senate Hearings); *Hearings on H.R. 15424, H.R. 15425 and H.R. 15640 Before the Subcomm. on Merchant Marine of the House Comm. on Merchant Marine and Fisheries*, 91st Cong., 2d Sess. 187, 629, 642 (1970) (hereinafter referred to as House Hearings); see H. Rep. No. 91-1073, 91st Cong., 2d Sess. 41 (1970); 116 Cong. Rec. 16598 col. 2 (1970).

FEDERAL MARITIME BOARD

No. S–18 (Sub. No. 1)

PACIFIC TRANSPORT LINES, INC.—APPLICATION FOR WRITTEN PERMISSION UNDER SECTION 805 (a) OF THE MERCHANT MARINE ACT, 1936, TO CONTINUE TO ENGAGE IN DOMESTIC SERVICE BETWEEN CALIFORNIA PORTS AND THE HAWAIIAN ISLANDS

James L. Adams for applicant.

Alan B. Aldwell for Matson Navigation Company, and *Odell Kominers* and *William F. Ragan* for Pacific Far East Line, Inc., inteveners.

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

FINDINGS AND CONCLUSIONS OF THE BOARD

1. No written permission is required under section 805 (a) of the Merchant Marine Act, 1936, to permit Mrs. Helene Irwin Fagan to continue to hold her present stock interest in Matson Navigation Company.

2. Until further order of the Board, Pacific Transport Lines, Inc., is hereby granted written permission under section 805 (a) of the Act for its C–3 vessels recommended for operating-differential subsidy on Service 2 of Trade Route 29 to call at Hawaii outbound and homebound on approximately alternate sailings not to exceed 13 outbound and 13 homebound sailings annually, each such call to be subject to the prior approval of the Maritime Administrator.

3. The permission herein granted will not result in unfair competition to any person operating exclusively in the California/Hawaii trade, nor will it be prejudicial to the objects and policy of the Act.

The Board's report on this matter will follow (see 4 F.M.B.146).

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

DECEMBER 31, 1952.

FEDERAL MARITIME BOARD

No. M–55

Annual Review of Bareboat Charters of Government-owned, War-built, Dry-cargo Vessels, 1952, Under Public Law 591, 81st Congress

Report on Petitions for Reconsideration and to Take Further Evidence (Coastwise Line and Alaska Steamship Company)

The Coastwise petition was filed on December 15, 1952, and the Alaska petition on December 19, 1952. These petitions are considered together. Memorandum in opposition to the Coastwise petition was filed December 19, 1952, and in opposition to the petition of Alaska on Januray 2, 1953, by counsel for the Committee for the Promotion of Tramp Shipping. The same counsel filed motions to dismiss the two petitions on January 2, 1953.

All the documents above mentioned, filed in opposition to the petitions, are considered to be replies to the petitions as authorized by our Rules, section 201.234. Some of those documents were not filed until after the expiration of the 10-day limit set by section 201.234, and no consideration has been given to those documents not filed within time.

The petitions for reconsideration and to take further evidence are denied without prejudice to petitioners' right to bring new proceedings under Public Law 591. The Board recommends to the Maritime Administrator that the vessels referred to in the petitions be held without removal of the special Alaska-trade fittings, pending decision by the Board upon new proceedings under Public Law 591, provided petitioners respectively file such proceedings within ten days from the date of service of this report.

By the Board.

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

January 9, 1953.

FEDERAL MARITIME BOARD

No. S–18 (Sub. No. 1)

Pacific Transport Lines, Inc.—Application for Written Permission Under Section 805 (a) of the Merchant Marine Act, 1936, to Continue to Engage in Domestic Service Between California Ports and the Hawaiian Islands

---

Temporary permission is granted to Pacific Transport Lines, Inc., to continue, as a subsidized operator on Service 2 of Trade Route No. 29, its present Hawaiian service, and permission is granted for its majority stockholder to continue to own a stock interest in Matson Navigation Company.

James L. Adams for applicant.

Alan B. Aldwell for Matson Navigation Company, and *Odell Kominers* and *William F. Ragan* for Pacific Far East Line, Inc., interveners.

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

Report of the Board

Pacific Transport Lines, Inc. (hereinafter called ("PTL"), requests our written permission under section 805 (a) of the Merchant Marine Act, 1936, as amended (hereinafter referred to as the "Act"), (1) to continue, as a subsidized operator on Service 2 of Trade Route No. 29,[1] its service to and from the Hawaiian Islands, and (2) for its majority stockholder and wife of a director to continue to own a stock interest in Matson Navigation Company, which company is engaged in the service between California and Hawaii.

A public hearing was held before an examiner after notice published in the Federal Register. Matson Navigating Company (herinafter called "Matson") and Pacific Far East Line, Inc., intervened but did not oppose continuation of PTL's present Hawaiian service, nor did they offer any evidence. Counsel for the board took no position as to whether the application should be granted or denied; he pointed out, however, that since Hawaii

---

[1] PTL's 805 (a) application was filed on May 22, 1952; on December 31, 1952, we executed an operating-differential subsidy agreement with PTL for (freight) Service 2 of Trade Route No. 29.

is not on Trade Route 29, calls there might interfere with PTL's ability to procure Trade Route No. 29 cargoes and might prejudice the objects and policy of the Act.

The examiner recommended that we should grant the 805 (a) application of PTL. Matson filed exceptions to certain findings and statements in the examiner's recommended decision, but did not object to the examiner's conclusion. We agree generally with the conclusion reached by the examiner, although we do not necessarily agree with his reasoning.

Section 805 (a) of the Act provides in part as follows:

> It shall be unlawful to award or pay any subsidy to any contractor * * * if said contractor * * * or any holding company, subsidiary, affiliate, or associate of such contractor * * * or any officer, director, agent, or executive thereof, directly or indirectly, shall own, operate, or charter any vessel or vessels engaged in the domestic intercoastal or coastwise service, or own any pecuniary interest, directly or indirectly, in any person or concern that owns, charters, or operates any vessel or vessels in the domestic intercoastal or coastwise service, without the written permission of the Commission. Every person, firm, or corporation having any interest in such application shall be permitted to intervene and the Commission shall give a hearing to the applicant and the intervenors. The Commission shall not grant any such application if the Commission finds it will result in unfair competition to any person, firm, or corporation operating exclusively in the coastwise or intercoastal service or that it would be prejudicial to the objects and policy of this Act.

The "coastwise service" mentioned in the Act includes service between United States ports and Hawaii.

Three statutory issues are presented in this proceeding: (1) Does PTL or any officer, director, agent, or executive thereof own, directly or indirectly, any pecuniary interest in Matson, and if so, should we grant permission for the continuance of this interest; (2) would the continuation of PTL's Hawaiian service result in unfair competition to any person, firm, or corporation operating exclusively in the coastwise or intercoastal service; and (3) would the continuation of PTL's Hawaiian service be prejudicial to the objects and policy of the Act.

I. Mrs. Helene Irwin Fagan, the majority stockholder of PTL and wife of Mr. Paul I. Fagan, a director of PTL, owns about one-half of one percent of Matson's stock, which was acquired by her through inheritance. PTL argues that, under the laws of the State of California, where Mrs. Fagan is domiciled, her stock interest in Matson is her separate property and not communty property in which her husband has an interest. California Civil Code, section 162. Mrs. Fagan, although not an officer, director, agent, or executive of PTL, has, however, by virtue of her stock

interest, the possibility of exercising control over PTL. We believe that the spirit of the prohibition in section 805 (a) of the Act should apply whether the contracting corporation or its majority or sole stockholder owns a pecuniary interest in a concern engaging in the domestic intercoastal or coastwise service. In view of the above-related circumstances, we conclude that written permission should be granted for Mrs. Fagan to continue to hold her present stock interest in Matson, and our findings and conclusions of December 31, 1952, are modified accordingly.

II. PTL inaugurated its Hawaiian service in July 1950. Since that time, in conjunction with its service on Trade Route No. 29, PTL has made monthly calls at Hawaiian ports on outbound and inbound voyages. This service of PTL is as follows: (1) From California to Hawaii; (2) from Hawaii to Far East ports on Trade Route No. 29; (3) from Far East ports on Trade Route No. 29 to Hawaii; and (4) from Hawaii to California. In addition to the continuation of this service to Hawaii, PTL seeks permission for (1) additional calls inbound during the seasonal peak of the sugar and pineapple traffic, and (2) additional calls inbound when shipments of cargo from the Far East to Hawaii can be booked. PTL would, in any event, have to obtain specific approval from the Maritime Administrator prior to making such additional calls. Matson points out that requests for additional calls should be timely and that the Maritime Administrator should not approve them unless he were satisfied that Matson was unable to lift all cargo offered.

PTL carries only a very small percentage of the total cargo movement between California and Hawaii, and since no operator in this service objects to the continuation of PTL's present Hawaiian service, we find that, under present conditions, such continuation would not result in unfair competition to any person, firm, or corporation operating exclusively in that service.[2]

III. Trade Route No. 29 is designed to provide service between California ports and ports in the Far East. The primary obliga-

---

[2] Service between California and Hawaii is provided by Matson, PTL, and American President Lines, Ltd. In 1951 the outbound dry cargo movement was approximately 620,000 short tons and the inbound movement approximately 1,000,000 short tons. Matson, as the only carrier providing a regular, permanent, and frequent service, has carried the great majority of this cargo. PTL's carryings per voyage for the approximate two-year period since the institution of its Hawaiian service have averaged only 1,106 long tons outbound and 871 long tons inbound. Hawaii is a regularly scheduled call for the subsidized combination vessels of American President Lines operating on the Round-the-World service and on Service 1 of Trade Route No. 29, but the carryings of American President Lines have been very small in 1951 and 1952; however, the Hawaiian service of American President Lines will increase when this Company meets its contractual obligations with the Maritime Administration for the construction of additional combination vessels for these services.

tion of PTL as a subsidized operator is the maintenance and development of adequate, frequent, and regular service on this route as a whole. Hawaii is not on this route as now described in the subsidy agreement. A subsidized operator is permitted to depart from the described route or to engage in the protected intercoastal or coastwise service (including the service between California and Hawaii trade) only under the special conditions set forth in the Act.

The evidence is convincing, as the examiner has found, that the Hawaiian service of PTL, under presently existing conditions, does not materially detract from PTL's Trade Route No. 29 freight service. Many shippers on PTL's Trade Route No. 29 service also use PTL's Hawaiian service. Large shippers and forwarders of overland cargo, by routing export cars of mixed cargoes destined to the Far East and Hawaii to PTL's pier, can retain control of their traffic, expedite their shipments, and save the cost of drayage from team track to the different piers of the two carriers otherwise serving the respective areas. This gives PTL some advantage in the solicitation of Trade Route No. 29 traffic. Furthermore, the service between Hawaii and ports in the Far East is a part of the foreign commerce of the United States, and PTL's Hawaiian service contributes to its development.

Permission for the continuation of PTL's present Hawaiian service will be granted, subject to the provisions of its operating-differential subsidy agreement, pending further consideration by the Maritime Administrator of the service requirements of PTL's operations on Service 2 of Trade Route No. 29. This permission may be modified or discontinued at any time if new data, presented by the Maritime Administrator or any other interested party, discloses that the further continuation of this service would result in unfair competition to any operator engaged exclusively in the service between Hawaii and the United States, or would be prejudicial to the purposes and policy of the Act. The permission covers only C–3 type vessels of PTL, employed in its subsidized operations on Service 2 of Trade Route No. 29.

Findings and Conclusions

1. Permission is granted under section 805 (a) of the Act to permit Mrs. Helene Irwin Fagan to continue to hold her present stock interest in Matson Navigation Company.

2. Until further order of the Board, Pacific Transport Lines, Inc., is hereby granted written permission under section 805 (a)

of the Act for the C–3 type vessels employed in its subsidized operations on Service 2 of Trade Route No. 29 to call at Hawaii outbound and inbound on approximately alternate sailings not to exceed 13 outbound and 13 inbound sailings annually, each such call to be subject to the prior approval of the Maritime Administrator.

3. Under present conditions, the permission herein granted will not result in unfair competition to any person operating exclusively in the service between California and Hawaii, nor will it be prejudicial to the objects and policy of the Merchant Marine Act, 1936.

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

JANUARY 16, 1953.

FEDERAL MARITIME BOARD

No. M–57

ISBRANDTSEN CO., INC.—APPLICATION FOR BAREBOAT CHARTER OF A GOVERNMENT-OWNED, WAR-BUILT, DRY-CARGO VESSEL FOR USE IN THE SERVICE BETWEEN UNITED STATES ATLANTIC AND GULF PORTS AND EUROPEAN CONTINENTAL PORTS, INCLUDING MEDITERRANEAN PORTS

REPORT OF THE BOARD

This proceeding was instituted pursuant to Public Law 591, 81st Congress, upon the application of Isbrandtsen Co., Inc., for the bareboat charter for a 4 to 6 month period of the Government-owned, war-built, dry-cargo vessel SS *Pass Christian Victory* for use as an animal carrier between United States Atlantic and Gulf ports and European continental ports, including ports in the Mediterranean.

Hearing on the application was held before an examiner on January 21, 1953, pursuant to notice in the Federal Register of January 15, 1953. Because of the urgency of the matter, the usual fifteen days' notice was not given. There was no opposition to the application. The examiner's recommended decision was served on January 22, 1953, in which he recommended that we should make the statutory findings necessary for the charter. Counsel for the Board has advised us that he will not file exceptions to the recommended decision of the examiner.

The record is convincing that the service herein under consideration is in the public interest. Applicant's vice president testified that the vessel is urgently needed for the purpose of transporting livestock, principally horses and mules, from United States ports to Mediterranean ports for a period of about 4 to 6 months, or a minimum of three voyages. The SS *Columbia Heights*, an animal carrier owned by applicant, is under charter to the Military Sea Transportation Service until the end of March 1953. There is no privately operated animal carrier in this trade at present. The animals to be transported are primarily for the account of the Jewish Agency for Palestine, and they

688-650 O - 63 - 12

are urgently needed for the spring plowing and planting of crops by new settlers in Israel.

Applicant's vice president testified that no cargo except the animals here involved would be carried outbound and that no cargo at all would be carried inbound. It was testified by applicant's shipper witness that the animals to be transported originate in all parts of the United States, and that many have been assembled in centralized points ready to be transported by rail to the export yards upon assurance that the vessel is available; he further testified that, if applicant should not be able to charter the vessel herein under consideration, there would not be accommodations for the transportation of this cargo for the period involved.

Applicant's vice president testified that the cost of outfitting another vessel for a 4 to 6 months' period would be prohibitive. There is no privately owned United States-flag vessel suitable for carrying animals available for charter on any terms or conditions.

Findings, Certification, and Recommendations

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

1. That the service under consideration is in the public interest;
2. That said service is not adequately served; and
3. That privately owned United States-flag vessels are not available for charter from private operators on reasonable conditions and at reasonable rates for use in such service.

The Board recommends that any charter which may be granted pursuant to the findings in this case be for a period not to exceed six months or a minimum of three voyages, subject to the usual right of cancellation by either party on 15 days' notice.

By the Board.

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

JANUARY 23, 1953.

FEDERAL MARITIME BOARD

No. S-23

LYKES BROS. STEAMSHIP CO., INC.—APPLICATION FOR INCREASE IN MAXIMUM NUMBER OF SUBSIDIZED SAILINGS ON LINE D (LYKES ORIENT LINE), TRADE ROUTE NO. 22

Submitted January 28, 1953. Decided February 27, 1953

Unsubsidized operation of Lykes Bros. Steamship Co., Inc., on its Line D (Lykes Orient Line), Trade Route No. 22, found to be, to some extent, an "existing service." In view of this finding, the time which has elapsed since the close of the hearing before the examiner, and the additional evidence on the issues of the case that is now available, case returned to examiner to permit the parties to offer additional and more recent evidence.

William Radner, *Joseph M. Rault*, and *Odell Kominers* for applicant.

Francis H. Inge and *Sterling F. Stoudenmire, Jr.*, for Waterman Steamship Coropration, *John Tilney Carpenter* for States Marine Corporation of Delaware, *William G. Dorsch* for Isthmian Steamship Company, *Dale Miller, Mitchell C. Cunningham, John Lee Gainey, John C. White, Robert A. Nesbitt, F. H. Fredricks, George C. Whitney*, and *Lachlen Macleay* for various other parties, interveners.

Alan F. Wohlstetter for the Board.

REPORT OF THE BOARD

This proceeding concerns the application dated January 29, 1951, of Lykes Bros. Steamship Co., Inc. (hereinafter referred to as "Lykes"), for an increase in the maximum number of its subsidized sailings on Trade Route No. 22, Service 1, from 24 to 48 per annum, including the right to have 24 of them cover the Netherlands East Indies and Straits Settlements (hereinafter referred to as "NEI/Straits") ports instead of the 12 previously authorized to call at such ports. The application was filed pursuant to the provisions of Title VI of the Merchant Marine Act, 1936 (hereinafter referred to as the "Act"), and a hearing was held under the provisions of section 605 (c) thereof.

In the 1949 Report entitled "Essential Foreign Trade Routes of the American Merchant Marine", Trade Route No. 22 is described as follows:

> U. S. Gulf ports (Key West-Mexican Border)—Far East (Philippine Islands, China, Japan, U. S. S. R. in Asia, French Indo-China, Formosa, Siam, Manchuria and Korea).

Service 1 thereunder is described in footnote[1] and includes calls at NEI/Straits ports.

The States of Alabama, Louisiana, Mississippi, Tennessee, and Texas, the Alabama State Docks (Mobile, Ala.), the Board of Navigation and Canal Commissioners of the Harris County Houston Ship Channel Navigation District (Houston, Tex.), the Hillsborough County Port Authority (Tampa, Fla.), the City of Galveston, Tex., the Port of Beaumont Navigation District of Jefferson County, Tex., the Lake Charles Harbor and Terminal District (Lake Charles, La.), the Nueces County Navigation District No. 1 (Corpus Christi, Tex.), the Mississippi Valley Association, the Chamber of Commerce of the New Orleans Area (La.), Brownsville Navigation District of Cameron County, Tex., the City of Gulfport, Miss., and the Gulfport Port Commission intervened in support of the application, and Waterman Steamship Corporation (hereinafter called "Waterman") and States Marine Corporation of Delaware intervened in opposition thereto. Isthmian Steamship Company also intervened but took no position

---

[1] The following description of Service 1 of Trade Route No. 22, appearing on page 23 of "Essential Foreign Trade Routes of the American Merchant Marine" (1949), describes in full Lykes' Line D:

> Between a United States Gulf port or ports, via the Panama Canal, to a port or ports in Japan, China, the Philippine Islands, Hong Kong, French Indo-China, Siam (Thailand), the Netherland East Indies, Straits Settlements (including the Malay States); with the privilege of calling at ports in the Hawaiian Islands, U. S. S. R.-in-Asia, Manchuria, Korea and Formosa, also ports in Mexico and the West Indies for the loading and/or discharging of cargo to or from foreign ports on the route, and with the privilege of calling at United States Atlantic ports homeward with sugar, copra and liquid cargo in bulk loaded at ports not in the Netherlands East Indies or Straits Settlements (including the Malay States), provided that in the absence of specific authority of the Commission to the contrary, vessels calling at the Netherlands East Indies or Straits Settlements (including the Malay States, shall return to United States Gulf ports for unloading cargoes destined for such ports before proceeding to United States Atlantic ports, with the privilege (subject to cancellation by the Commission on 60 days notice to the operator) of calling at the following islands in the Pacific area (such privilege not to be considered as modification of the above route description) Caroline Islands, Marianas Islands, Palau Island, Marshall Islands, Okinawa Island, Admiralty Islands, Marcus Island, Wake Island, Gilbert Islands, Sakhalin Island (southern half).
>
> Sailing Frequency: 20 to 24 sailings per year.*
>
> *Subject to the stipulation that a minimum of seven (7) and a maximum of twelve (12) sailings per annum shall include ports in the Netherlands East Indies and Straits Settlements (including the Malay States).

as to the merits of the application. Of the interveners, only Waterman offered any testimony.

The purpose of the hearing held before an examiner was to receive evidence on issues under section 605 (c) of the Act. The examiner's recommended decision, served February 21, 1952, recommended that the Board find: (1) That the sailings for which applicant seeks subsidy would be in addition to the existing services; (2) that it is not shown that the service already provided by vessels of United States registry on the route is inadequate and that additional vessels should be operated thereon. Exceptions were filed by Lykes, memoranda in support of the recommended decision were filed by Waterman and Board counsel, and oral argument was heard by the Board on January 28, 1953, after delays due to granting of various extensions of time to the applicant and an intervener.

The first question, which involves the first recommendation of the examiner, is whether the additional 24 sailings requested by Lykes over and above the 24 sailings now subsidized are an "existing service" within the meaning of section 605 (c) of the Act. That section provides as follows:

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

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

Lykes and its predecessors and affiliate have operated on Trade Route No. 22 since 1922, except for the period of World War II.

It has had, since 1937, an operating-differential subsidy contract covering five separate trade routes, of which Trade Route No. 22 is one. The contract calls for a maximum aggregate of 339 sailings per annum and a minimum aggregate of 228 on all routes, and a maximum of 24 sailings per annum and a minimum of 20 on Trade Route No. 22. Lykes has stated that the extra subsidized sailings now requested will not require any increase in the present maximum aggregate, and that Lykes will not reduce the sailings of any of the other four trade routes below the required minimum. Lykes owns 54 vessels of suitable type, size, and speed to live up to its proposal.

Lykes has made an average of 60 outbound sailings per annum on Trade Route No. 22 during the 1946–49 period, making 42 sailings in 1950 and 24 sailings during the first 6 months of 1951. Sailings in excess of the maximum covered by the subsidy contract were performed after securing special permission as required by the contract. Included in the present application was a request for continuation of the special permission to make unsubsidized sailings at the rate of 24 per annum for 6 months pending consideration of the application so that the service would not be disrupted. Such interim permission was granted on February 19, 1951, subject to cancellation on 30 days' notice, and has been renewed from time to time, subject to the terms of the operating-differential subsidy agreement and the following conditions imposed upon the operator:

1. That all other provisions of said agreement are fully complied with;

2. That on these excess unsubsidized sailings, no calls will be made at the Netherlands East Indies and/or Straits Settlements ports except for homeward carriage of bulk cargoes; and

3. That the minimum sailing requirements stipulated in the contract for each of the subsidized services will be maintained with owned subsidized or unsubsidized vessels.

The evidence taken before the examiner did not cover operations beyond July 31, 1951. Upon this evidence counsel for Waterman and for the Board contend that Lykes' "existing service" on the route is limited to its 24 subsidized sailings, because its additional unsubsidized sailings were subject to successive permissions from the Maritime Administrator, which ran only for 6 months' periods and were subject to termination on 30 days' notice at the Administrator's option. It was also contended that because Lykes made

a total of only 42 subsidized and unsubsidized sailings in 1950, the total existing service in no event could exceed that number per year. Lykes explained that the reduction in sailings in that year was due primarily to the Government's request to charter some of its vessels for use to Korea, to which Lykes acceded.

Counsel for the Board argues that none of the interveners had an opportunity at public hearing to contest the permissions granted to Lykes to make sailings in excess of 24 per annum, and that the Administrator could not have intended to confer the status of an "existing service" upon Lykes for its extra sailings without formal consultation with the other operators or consideration of their interests on an official record. It is clear, however, that the interveners knew of the extra sailings on the route from time to time permitted to Lykes and, so far as the Administrator's records show, raised no objection.

It seems that whether or not a service is "existing" within the meaning of the statute should be largely determined by operational facts. It is true that because of its subsidy agreement, Lykes could not operate any vessel in addition to the number subsidized on the route, without the permission of the U. S. Maritime Commission or of the Maritime Administrator. Lykes had secured such permissions as were required for a period of at least 3 years, and had established a history of continuity sufficient to denote a bona fide intention to continue operations substantially in excess of the subsidized service.

No reason is seen why more formalities or consultations should be required for a subsidized operator who starts a new service or expands an established service and seeks to have it qualify as an "existing service" than for a nonsubsidized operator to do the same thing. It is obvious that a nonsubsidized operator may increase an established service or start a new service without consulting the Administrator or other operators on the line, and should he later seek subsidy, this might readily qualify as an "existing service" if it had the necessary elements hereinafter discussed. The requirement for notice and public hearings set forth in section 605 (c) of the Act is not a condition to the establishment of an "existing" service but rather a condition to the making of a subsidy contract on the route served by two or more citizens of the United States operating with vessels of United States registry.

Once a subsidy contract has been made with an operator it is necessary for him to comply with the requirements of the contract

and obtain the Administrator's approval for any sailings in addition to the subsidized sailings. This requirement of administrative permission in such cases is not designed to affect in some manner the ability of an operator to qualify an extra service or even a new service as an "existing service," but is meant to safeguard against possible improper competitive practices and prevent operations prejudicial to the purposes and policies of the Act. By the terms of its subsidy contract, Lykes was required to obtain such administrative permission, but once this permission was granted, Lykes, in our judgment, was in this regard in the same position as an unsubsidized operator, free to develop a new service or expand an established service into one which could become an "existing" service within the meaning of the statute.

While permanency of service is an important factor in determining whether a service is in fact "existing," there are many other factors. As we said in *Pac. Transp. Lines, Inc.—Subsidy, Route 29*, 4, F.M.B. 7, 11:

> The term "service" embraces much more than vessels; it includes the scope, regularity, and probable permanency of the operation, the route covered, the traffic handled, the support given by the shipping public, and other factors which concern the bona fide character of the operation.

The evidence in the case is convincing that each one of these factors mentioned in the excerpt was fulfilled by Lykes with additional sailings, at least so far as they served the Far East ports on Trade Route 22 (other than in NEI/Straits area). It follows, and we so find, that the unsubsidized operation of Lykes was, to some extent at least, an "existing service" within the meaning of section 605 (c). Even though the additional sailings could not be made without the Administrator's consent, the fact that the necessary consents were obtained for a period of over 4 years preceding the close of the hearing and were then still in force is very strong evidence of the permanency of some extra service and of the bona fide intent of Lykes to maintain it.

In view of our finding that the additional service herein considered was, to some extent, an "existing" service, and in view of the time which has elapsed since the close of the hearing before the examiner, and the additional evidence on the issues of the case that is now available, we are returning the case to the examiner to permit the parties to offer additional and more recent evidence, and permit the examiner to make a further recommended decision, in the light thereof, as to the *extent* to which the operator has maintained an "existing service," both

as to the number of additional sailings and as to the geographical limits of the service covered. Upon the entire record the examiner also will be able to make a recommended decision on whether the effect of a subsidy contract for additional subsidized sailings would be to give undue advantage or be unduly prejudicial, as between citizens of the United States, in the operation of vessels in competitive services, routes, or lines, as well as upon any other issues arising under section 605 (c) as the amplified record may make appropriate.

An appropriate order will be issued.

ORDER

At a Session of the FEDERAL MARITIME BOARD, held at its office in Washington, D. C., on the 27th day of February A. D. 1953

No. S-23

LYKES BROS. STEAMSHIP CO., INC.—APPLICATION FOR INCREASE IN MAXIMUM NUMBER OF SUBSIDIZED SAILINGS ON LINE D (LYKES ORIENT LINE), TRADE ROUTE NO. 22

The Board, on the date hereof, having made and entered of record its report in this proceeding, which report is hereby referred to and made a part hereof;

It is ordered, That the case be, and it is hereby, remanded to the examiner for the purposes stated in said report.

By the Board.

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

FEDERAL MARITIME BOARD

No. 729

AMERICAN-HAWAIIAN STEAMSHIP COMPANY ET AL.[1]

v.

INTERCONTINENTAL MARINE LINES, INC.

Decided March 17, 1953

Respondent, a common carrier by water, found to be eligible for conference membership, and Conference under obligation to admit respondent.

Elkan Turk, Sr., *Elkan Turk, Jr.*, and *Herman Goldman* for all complainants except Isthmian Steamship Company.

Wendell W. Lang for Isthmian Steamship Company.

Leonard G. James and *Alan F. Wohlstetter* for respondent.

Allen C. Dawson for the Board.

REPORT OF THE BOARD

BY THE BOARD:

On October 14, 1952, respondent applied for admission to membership in the Far East Conference (hereinafter referred to as "the Conference"), stating that it intended to furnish common

---

[1] American-Hawaiian Steamship Company, American President Lines, Ltd., Daido Kaiun Kaisha, Ltd., The De La Rama Steamship Co., The Swedish East Asia Co., Ltd., The Ocean Steamship Co., Ltd., The China Mutual Steam Navigation Co., Ltd., Nederlandsche Stoomvaart Maatachappij "Oceaan" N.V., Ellerman Lines, Limited, Ellerman & Bucknall Steamship Co., Ltd., Hall Line, Limited, The City Iine, Limited, Skibsaktieselskapet Varild, Skibsaktieselskapet Marina, Aktieselskabet Glittre, Dampskibsinteressentskabet Garonne, Skibsaktieselskapet Sangstad, Skibsaksaktieselskapet Solstad, Skibsaktieselskapet Siljestad, Dampskibsaktieselskabet International, Skibsaktieselkapet Nandeville, Skibsaktieselskapet Goodwill, Isthmian Steamship Company, Aktieselskapet Ivarans Rederi, Skibsaktieselskapet Igadi, A/S Besco, A/S Lise, Kawasaki Kisen Kaisha, Ltd., Nissan Kisen Kaisha, Ltd., Toho Kaiun Kaisha, Ltd., Iino Kaiun Kaisha, Ltd., Mitsubishi Kaiun Kaisha, Ltd., Kokusai Kaiun Kaisha, Ltd., Lykes Bros. Steamship Co., Inc., Mitsui Steamship Company, Ltd., Dampskibsselskabet af 1912 Aktieselskab, Aktieselskabet Dampskibsselskabet Svendorg, Nippon Yusen Kaisha, Osaka Shosen Kaisha, Ltd., Prince Line, Ltd., Shinnihon Steamship Co., States Marine Corporation, States Marine Coropration of Delaware, The Bank Line, Ltd., United States Lines Company, Waterman Steamship Corporation, Wilhelmsen Dampskibsaktieselskab, A/S Den Norske Afrika—og Australielinie, A/S Tonsberg, A/S Tankfart I, A/S Tankfart IV, A/S Tankfart V, A/S Tankfart VI, Far East Conference.

carrier service in the U. S. Gulf-Japan trade, with liberty of calling at Mexican or west coast United States ports, that it planned regular sailings approximately monthly beginning either in November or December 1952, and that it was ready to make the deposit of $25,000 with the Conference as required by Article 24 of the conference agreement. After some correspondence the conference members, on December 18, 1952, voted not to admit respondent, and thereafter, on December 22, 1952, the conference members, as complainants, filed these proceedings asking for issuance of a declaratory order under section 5 (d) of the Administrative Procedure Act to determine whether respondent is eligible for conference membership, and whether it is the duty of the Conference to admit respondent. Respondent's reply requests the Board to find that failure to admit respondent to the Conference violates the Shipping Act, 1916, and the conference agreement.

The matter was initially decided by the Chief Examiner on the pleadings and a stipulation of facts. The Chief Examiner found that respondent was entitled to membership in the Conference, that it was the obligation of the Conference to admit respondent, and that failure of the Conference to do so immediately would result in making the conference agreement and the shippers' contracts entered into pursuant thereto unjustly discriminatory and unfair as between respondent and the Conference, and would result in subjecting respondent to undue and unreasonable prejudice and disadvantage.

The Conference filed exceptions to the initial decision and requested oral argument. In view of the adequate written argument of the Conference filed with its exceptions, we are, pursuant to section 201.211 of our Rules, denying the application for oral argument. We agree fully with the decision of the Chief Examiner.

The Far East Conference agreement (F.M.B. Agreement No. 17), originally approved on November 14, 1922, declares that the Conference was organized to promote commerce between Atlantic and Gulf ports of the United States and the Far East for the common good of shippers and carriers. Matters involving tariffs, freights, and charges are determined by majority vote of all the parties to the agreement. Each original party was required to deposit $25,000 with the conference chairman. Parties to the agreement are entitled to withdraw by giving sixty days notice, and after satisfying all obligations undertaken to the Conference are entitled to the return of their deposit. The following Article 24 relates to the admission of additional members:

Any person, firm or corporation may hereafter become a party to this agreement by the consent of a majority of the parties hereto, by affixing his signature hereto, and by depositing the sum of Twenty-five thousand ($25,000) Dollars in United States Government bonds, or in cash, with the Chairman as provided by Article 10 hereof.

The record shows that respondent is a corporation organized under the laws of the Republic of Panama, has no previous experience in the service to be undertaken, but that its general agents and sub-agents in the Gulf and their officers and staff have substantial experience in operating chartered vessels in the trade and liner services in other trades. The record further shows that respondent in October 1952 chartered the Swedish vessel *Mattawunga* on a lump sum basis, for loading in the Gulf in January, and this fact was notified to the Conference by letter dated November 3, 1952, in which respondent stated that if the Conference took prompt action to admit respondent to the Conference, a vessel might be put on the berth for December loading as originally planned. The *Mattawunga* actually sailed from Tampa for the Far East on January 14, 1953. Respondent published a daily advertisement in the New York Journal of Commerce beginning in December 1952, announcing the proposed sailing of the *Mattawunga*, and in January 1953 advertised the sailing of the Italian M/S *Luciano Manara* for the middle of February, and a "steamer" for the middle of March, all from the Gulf to Japan. Official notice is taken of the fact that the Italian-flag SS *Aequitas II* has been named in the card advertisement for the March sailing. The charter thereon, which has been stipulated in the record, shows that respondent time chartered this vessel on January 20, 1953, for a period of 9 months, with an option to extend the charter up to 12 months. Respondent's service is available to all shippers on a common-carrier basis, with respondent assuming all liabilities and obligations of a common carrier.

Respondent's answer asserts that the refusal of the Conference to admit respondent to membership resulted in substantial loss to respondent in connection with the January sailing of the *Mattawunga* because respondent's lack of conference membership prevented it from securing cargo from shippers having exclusive patronage contracts with the Conference. Respondent charges that continued refusal to admit respondent to conference membership will cause it further losses. The balance sheet of respondent as of January 15, 1953, shows cash in bank of $42,789.

The Conference, in support of its exceptions to the Chief Examiner's initial decision, urges that respondent's insubstantial

financial condition, its lack of any dependable supply of tonnage, and other circumstances surrounding its application, make the admission of respondent to the Conference contrary to the principles which underlie the Shipping Act, 1916, and particularly section 15 thereof. The Conference points out (1) that respondent is a newly organized Panama corporation; (2) that it has never had previous experience as a carrier in the trade; (3) that it intends to supply its berth with chartered vessels; (4) that after paying $25,000 to the Conference its cash resources will be reduced to only slightly over $15,000; (5) that except for respondent's chartered vessels, it has no agreement with any steamship owner for furnishing a regular supply of tonnage; (6) that three of respondent's stockholders are contract shippers with the Conference; and (7) that respondent launched its venture when the charter market was at or approaching the low for the postwar period.

We find that these facts when considered separately or in the aggregate are not a basis for refusing conference membership to respondent. In the first place, the conference agreement, which has the approval of the Board, specifically provides, as above set forth, the qualifications for membership. It appears that respondent meets the qualifications set up by the Conference and is prepared to make the necessary deposit.

In *Black Diamond Steamship Corp.* v. *Compagnie Maritime Belge (Lloyd Royal) S. A., et al.*, 2 U.S.M.C. 755, our predecessor, the Maritime Commission, held unreasonable a conference agreement limiting membership to operators actually engaged in operating vessels in the trade, and outlined a rule governing admission to membership which we fully endorse. The rule is to the effect that ability and intention in good faith to institute and maintain a regular service is sufficient. If the members of a conference decline to admit an additional common carrier to membership they must present very clear justification within the rule set forth above, or within such reasonable requirements as their conference agreement may include. No such justification appears in this record.

Taking up the other points made in the Conference's exceptions to the Chief Examiner's decision, we find that the only financial requirement for new members set up by the Conference is for the $25,000 deposit, and this, as stated above, respondent can meet. While it is true that the cash resources of respondent after making the deposit may be small, respondent avers that its stockholders, whose names are of record, are ready to furnish such

additional capital as may be reasonably required. There is no contradiction in the record that respondent has at its service the necessary managerial ability, and that its intention to institute and maintain a regular monthly service on the route is in good faith. That respondent lacks its own or any long-term charter supply of tonnage is an excuse which has been rejected by our predecessors in former cases where admission to conference membership was withheld on that ground. *Phelps Bros. & Co., Inc.* v. *Cosulich-Societa, etc.*, 1 U.S.M.C. 634; *Sprague S.S. Agency, Inc.* v. *A/S Ivarans Rederi*, 2 U.S.M.C. 72; *Sigfried Olsen* v. *Blue Star Line, Limited,* 2 U.S.M.C. 529.

In the first case cited, the Maritime Commission said at p. 640:

> Defendants stress the fact that complainant's service is operated with vessels which it neithers owns nor has under time charters "in sharp contrast with that of the other lines in the trade, operating either their own vessels or vessels under time charter." According to the record, whether complainant operated trip-chartered, time-chartered, or its own vessels, the conference would be no differently affected by its membership therein.

The charge that respondent is a newly organized foreign corporation is clearly not a bar to conference membership for many of the Conference's present members are foreign corporations and age is not essential. Nor is the charge that three of respondent's stockholders are contract shippers with the Conference a reason to deny conference membership, there being no bar in the conference agreement against the present conference members carrying their own or their stockholders' cargo. Likewise, the suggestion that the launching of respondent's service with chartered vessels when the charter market made tonnage available at low rates raises no question where good faith is shown.

FINDINGS, CONCLUSIONS, AND DECLARATORY ORDER

On the record before us in this case we find:

1. Respondent is a common carrier by water on regular routes from port to port in the trade covered by F.M.B. Agreement No. 17 and within the meaning of sections 1 and 15 of the Shipping Act, 1916.

2. Respondent is eligible for and entitled to membership in the Far East Conference functioning under F. M. B. Agreement No. 17 on equal terms with each of the complainants making up said Conference.

3. It is the duty and obligation of complainants as parties to the Far East Conference under F. M. B. Agreement No. 17 to admit respondent to membership in such Conference.

4. Complainants' failure to admit respondent to conference membership immediately, including participation in shippers' contracts entered into pursuant to Agreement No. 17, will result in said agreement and contracts being unjustly discriminatory and unfair as between respondent and complainants, and will result in respondent being subjected to undue and unreasonable prejudice and disadvantage in violation of section 16 of the Act.

Complainants are hereby allowed ten days within which to admit respondent to full and equal membership in the Conference, and they shall notify the Board of their action in this regard within the time limited. Upon satisfactory compliance by complainants of the obligation herein set forth, this proceeding will be discontinued.

By the Board.

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

FEDERAL MARITIME BOARD

No. 718

THE JOINT COMMITTEE OF FOREIGN FREIGHT FORWARDERS ASSOCIATION ET AL.

v.

PACIFIC WESTBOUND CONFERENCE ET AL.

No. 719

PACIFIC COAST CUSTOMS AND FREIGHT BROKERS ASSOCIATION

v.

PACIFIC WESTBOUND CONFERENCE ET AL.

Submitted March 10, 1953. Decided March 24, 1953

Provisions limiting the payment of brokerage on certain commodities to less than 1¼ percent of ocean freight charges and prohibiting the payment of brokerage on heavy lift and long length charges found to be in circumvention of the decision and order of the Maritime Commission in *Agreements and Practices Re Brokerage*, 3 U.S.M.C. 170.

Charles S. Haight, Benjamin M. Altschuler, George F. Galland, Gordon W. Paulsen, Clifford B. Alterman, and *Robert L. Rosensweig* for Joint Committee of Foreign Freight Forwarders Associations, Customs Brokers and Forwarders Association of America, Baltimore Custom House Brokers and Forwarders Association, Association of Forwarding Agents and Foreign Freight Brokers of Mobile, Inc., Forwarding Agents and Foreign Freight Brokers Association of New Orleans, Texas Ocean Freight Forwarders Association, of Houston and Galveston, and the individual members of those associations, *Gerald H. Ullman* and *John K. Cunningham* for New York Foreign Freight Forwarders and Brokers Association, Inc., and its individual members, *J. Richard Townsend* and *M. J. McCarthy* for Pacific Coast Customs and Freight Brokers Association, and its individual members, complainants.

Joseph J. Geary and *Allan E. Charles* for respondents.

Henry A. Cockrum for Department of Agriculture, intervener.

Max E. Halpern, Joseph A. Klausner, Alan F. Wohlstetter, and *John Mason* for the Board.

REPORT OF THE BOARD

BY THE BOARD:

Exceptions to the examiner's recommended decision were filed, and the matter was argued orally before us. We agree generally with the examiner's decision.

Complainants in No. 718 are associations of foreign freight forwarders on the Atlantic and Gulf coasts. Complainants in No. 719 are foreign freight forwarders on the West coast. Pacific Westbound Conference and its member lines[1] are the respondents named in each complaint. Since the issues raised by each complaint are substantially identical, they were heard together and both will be disposed of in this report.

The United States Department of Agriculture intervened.

Complainants allege that respondents' conference Rule 30 (b), which limits the rate of brokerage that member lines may pay to freight forwarders to less than 1¼ percent of the freight charges on certain commodities named therein, and prohibits the payment of any brokerage on "heavy lift" and "long length" charges (1) violates the decision and order of the Maritime Commission in *Agreements and Practices Re Brokerage*, 3 U.S.M.C. 170 (1949) (hereinafter referred to as "Docket No. 657"), and (2) is detrimental to the commerce of the United States in violation of section 15 of the Shipping Act, 1916 (hereinafter referred to as the "Act"), and (3) is unjustly discriminatory and unduly prejudicial, and is an unreasonable regulation and practice in violation of sections 15, 16, and 17 of the Act.

A cease and desist order is requested.

The part of Rule 30 (b) complained of limits conference members to the payment to qualified forwarders of brokerage not in excess of the following amounts, based on the applicable freight rates:

Commodity	Brokerage
Petroleum and petroleum products, packed	¾%
All bulk cargo, liquid or dry, n.o.s.	10¢ per ton as freighted
Fertilizer, packed	10¢ per ton as freighted
Grain in bags, including wheat, barley, corn, oats and rice	10¢ per ton as freighted
Flour, viz: barley, corn, rye or wheat	10¢ per ton as freighted
Woodpulp	10¢ per ton as freighted
Lumber, logs, poles, piling and other lumber articles, freighted on a board measurement basis	15¢ MBM

No brokerage is payable on heavy lift or long length charges.

[1] Member lines of the Pacific Westbound Conference operate between the Pacific coast of the United States and the Far East.

In two prior cases the Maritime Commission has had occasion to consider the relations of the respondent conference with freight forwarders regarding brokerage. In *Agreement No. 7790* (1946), 2 U.S.M.C. 775, respondent conference submitted to the Commission for approval under section 15 of the Act a new organic conference agreement to supersede its then existing Agreement No. 57, as amended. The new Agreement No. 7790 contained a provision prohibiting the payment of brokerage by conference members on shipments subject to the conference's local tariff[2] although permitting payments not in excess of 1¼ percent of ocean freight on shipments subject to the conference's overland tariff.[3] The Commission declined to approve the new arrangement with the prohibition against the payment of brokerage on local shipments, saying at page 781:

> In view of the Bland Act [46 U.S.C. 1127, 56 Stat. 171], we cannot consistently approve an agreement, the effect of which would prohibit brokerage on a large segment of respondents' traffic. We do not hold or imply, however, that carriers must pay brokerage, for that would seem to be a matter for individual managerial judgment. The agreement will not be approved, therefore, unless the prohibition under discussion is eliminated.

Respondents' then existing agreement under which they were operating at the time of the Commission's decision in *Agreement No. 7790,* supra, contained Rule 16, which was substantially similar to the brokerage rule which was disapproved by the Commission. Rule 16 of Agreement No. 57 and the rules of other conferences on the same subject were considered by the Commission in Docket No. 657. In that case the Commission stated on page 177:

> We find that concerted prohibition against the payment of brokerage results in detriment to the commerce of the United States in that it has had and will have a serious effect upon the forwarding industry. We are not impressed with the argument that removal of the ban against the payment of brokerage necessarily will result in increases in rates. Respondents should remove all such prohibitions whether contained in their basic conference agreements, the rules and regulations of their tariffs, or both.
>
> Nothing herein is to be construed as a directive that individual carriers must pay brokerage nor as any limitation as to the amount of brokerage that may be paid by such individual carriers, provided the payments do not result in violations of applicable statutes. A carrier should be free

---

[2] The local tariff applies on all traffc originating in the States of Montana, Wyoming, Utah, Arizona, and States west thereof, and from points in Canada west of the Saskatchewan-Manitoba boundary line and all other traffic originating east thereof on which overland rates may not be applicable.

[3] The overland tariff applies on traffic originating in the States of North Dakota, South Dakota, Nebraska, Colorado, New Mexico, and States east thereof, and from points in Canada east of the Saskatchewan-Manitoba boundary line.

within limits to pay brokerage or not as its individual managerial discretion dictates. Nor is anything herein to be construed as a prohibition against carriers, acting under a conference agreement, from establishing all reasonable rules or regulations which will prevent the payment of brokerage under circumstances which would violate the Act, or as a prohibition against such carriers from placing limitations upon the amounts which they may pay. On the other hand, as we have found that a prohibition against any payment of brokerage results in detriment to the commerce of the United States, we believe 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 Commission, after hearing reargument of that case on March 8, 1950, entered an order requiring the conferences "to modify their conference agreements, regulations, and tariffs so as to remove the prohibitions condemned." Respondent Pacific Westbound Conference filed proceedings in the United States District Court for the Northern District of California, Southern Division, to enjoin and vacate that order, and other conferences filed a similar proceeding in the United States District Court for the Southern District of New York. In both cases the action of the Commission was sustained.[4]

The respondent conference thereupon, on March 12, 1951, made effective a tariff rule providing for brokerage on local cargo not in excess of 1¼ percent. On December 1, 1951, however, the conference made effective a new tariff rule, including paragraph 30 (b), with the limitations quoted above.

There can be no uncertainty as to the meaning of the Commission's order of March 8, 1950, that all "prohibitions against the payment of brokerage" were to be "removed" from conference agreements and rules.

The respondent, however, points out that Rule 30 (b) is not a complete prohibition against the payment of brokerage. The record shows that limitations upon the amount of brokerage payable in accordance with the schedule set forth in Rule 30 (b), above quoted, are in every case less than 1¼ percent of the freight involved. The Commission in its report sought to guard against a circumvention of its purpose when it said "*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.*" [Emphasis supplied.]

[4] *Atlantic & Gulf/West Coast, etc.* v. *United States*, 94 F. Supp. 138; *Pacific Westbound Conference* v. *United States*, 94 F. Supp. 649.

The last quoted requirement of the Commission, although prefaced by the words "we believe", is an explanation and amplification of the Commission's prohibition, and is an integral part of the prohibition which the Commission's order of March 8, 1950, directs the conferences to remove.

The effect of the Commission's order was stated by the United States District Court for the Southern District of New York in *Atlantic & Gulf, etc.* v. *United States, supra,* at page 142:

> The Commission's order directs merely that plaintiffs' agreements not to pay brokerage be eliminated. * * * The Commission's report did not go so far as to state that all agreements relating to the payment of brokerage would be disapproved, *although it considered that an agreement to pay less than 1¼ percent would perpetuate the condemned detriment.* [Emphasis supplied.]

The conference argues that charges for handling "heavy lift" and "long length" shipments are assessed by ocean carriers to reimburse themselves for actual and indirect expenses incident to the handling of such shipments, and they are not "transportation" charges coming within the Commission's prohibition. The "heavy lift" charge, as set forth in the conference tariff, is assessed on packages which exceed a basic tariff weight, usually 8,960 pounds, and, similarly, the "long length" charge is an additional charge assesed upon any package over a certain length, usually 35 feet. In general, the tariff sets up a basic charge for the various commodities at so much per 2,000 pounds, or 40 cubic feet, whichever produces the greater revenue. The "heavy lift" charge is computed at so much per 2,000 pounds of the entire weight of the "heavy lift" package and added to the basic charge; similarly, the "long length" charge is computed at so much per 2,000 pounds, or 40 cubic feet, whichever is used in computing the basic freight rate, and likewise added to the basic charge. It is possible, therefore, for a single package, which qualifies both as a "heavy lift" and as a "long length" item, to pay a total charge made up of all three component parts described above. Respondent's witnesses were unable to state whether the "heavy lift" and "long length" charges assessed by the member lines were equal to, or more, or less than the additional cost incurred by the lines in handling the specialized items.

Ocean freight tariffs of all carriers vary according to the commodity carried, and one of the factors in the determination of the precise tariff for any commodity is the special trouble and expense which the carriage of such commodity involves. The division of the total ocean charge into a basic tariff and a sur-

charge does not remove either part of the total from the general category of freight charges where both parts must necessarily be paid for transportation of the items of cargo in question. We hold that the special charges named are part of the total freight charges on which brokerage may not be prohibited or reduced below 1¼ percent by the conference tariffs. This ruling is not contrary to the customary practice, for, according to the evidence, where the conference members pay brokerage without question on overland traffic, brokerage is paid on "heavy lift" and "long length" as well as basic freight charges.

Respondents make another point based on that part of the decision in Docket No. 657 which permits carriers individually to pay or not to pay brokerage as their respective managerial discretion dictates. The conference argues that Rule 30 (b) of the conference is no more than evidence that carriers who are members of the conference have each individually agreed on brokerage rates below 1¼ percent as to certain commodities. Respondents argue that since there was, under the decision in Docket No. 657, no prohibition against the carriers individually fixing rates below 1¼ percent, the carriers are within their legal rights to do so collectively and as a group. In this respect the conference's interpretation of the Commission's ruling in Docket No. 657 is erroneous. It was clearly set forth in that decision that "*concerted* prohibition against the payment of brokerage results in detriment to the commerce of the United States", and that respondent conferences should remove such prohibition "whether contained in their *basic conference agreements*, the *rules* and regulations of their *tariffs*, or both." (Emphasis supplied.) Respondent conference members in this case, through their conference Rule 30 (b), have taken *concerted* action, and have not removed the outlawed provision from their tariff rule. The permission granted by the decision in Docket No. 657 not to pay any brokerage or to pay less than 1¼ percent brokerage is given only to *individual* carriers acting *individually*.

That part of the language in Docket No. 657 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 Docket No. 657 that the brokerage as limited must not be less than 1¼ percent.

It follows that all provisions of Rule 30 (b) of respondent conference's tariff limiting brokerage rates to less than 1¼ percent of the ocean freight involved are in violation of the Commission's order in Docket No. 657, and must be promptly cancelled and withdrawn.

Conference Rule 30 (a), not attacked in these proceedings, which requires that brokerage

shall only be paid to such freight forwarder as is designated by the shipper and as defined and properly qualified and continues to be currently registered under General Order No. 72, issued by the United States Maritime Commission (predecessor of the Federal Maritime Board)

and Conference Rule 30 (c), also not under attack, requiring invoice for brokerage submitted by freight forwarders to contain a certificate signed by the shipper and the freight forwarder certifying that

the undersigned freight forwarder has been designated as such by the shipper with respect to the foregoing shipment * * * and has been authorized to book the cargo and to make such arrangements as may be required with the United States Customs Service,

and further certifying that

in compliance with section 16 of the Shipping Act, 1916, as amended, no part of any such freight brokerage paid, pursuant to this invoice, shall revert to the shipper or the consignee, either directly or indirectly, and the business of the above mentioned freight forwarder is in no sense subsidiary to that of the shipper or consignee,

appear to be regulations which the conference under the decision in Docket No. 657 is authorized to make to assure that brokerage will not be paid under circumstances which will violate the Act, and only to freight forwarders who have, in fact, earned brokerage by actually securing or booking the cargo for the ship.

In view of our conclusions, it is unnecessary to consider the other grounds for relief set forth in the complaint or the evidence in support thereof. We find it unnecessary to rule on respondent's exceptions Nos. 1 and 2. We overrule respondent's exceptions Nos. 3, 4, 5, and 6, and take no action on respondent's general exception No. 7.

An order will be entered requiring respondent conference promptly to cancel, withdraw, and nullify the provisions of Rule 30 (b) quoted above, and thereafter to cease and desist from the prohibitions and limitations condemned.

ORDER

At a session of the FEDERAL MARITIME BOARD, held at its office in Washington, D. C., on the 24th day of March A. D. 1953

No. 718

THE JOINT COMMITTEE OF FOREIGN FREIGHT FORWARDERS ASSOCIATION ET AL.

v.

PACIFIC WESTBOUND CONFERENCE ET AL.

No. 719

PACIFIC COAST CUSTOMS AND FREIGHT BROKERS ASSOCIATION

v.

PACIFIC WESTBOUND CONFERENCE ET AL.

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

It is ordered, That respondents be, and they are hereby, directed, within thirty days after the date of this order, to cancel, withdraw, and nullify the provisions of Rule 30 (b) of Local Tariff No. 1–V of Pacific Westbound Conference, and thereafter to abstain from the prohibitions and limitations condemned in said report.

By the Board.

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

FEDERAL MARITIME BOARD

No. M–58

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

No. M–59

ALASKA STEAMSHIP COMPANY—APPLICATION TO BAREBOAT CHARTER TWO GOVERNMENT-OWNED, WAR-BUILT, DRY-CARGO VESSELS FOR USE IN THE SERVICE BETWEEN PUGET SOUND PORTS AND ALASKAN PORTS AND BETWEEN PORTS AND PLACES IN ALASKA

REPORT OF THE BOARD

These are proceedings under Public Law 591, 81st Congress, upon the application of Coastwise Line and Alaska Steamship Company for the bareboat charter of Government-owned, war-built, dry-cargo, Liberty-type vessels for use in their services, as described below, for an indefinite period. Separate hearings on the applications were held before an examiner. Since much of the evidence is relevant to both proceedings and the statutory issues are identical, they may both be disposed of in this report. Each applicant intervened in support of the other's application. The Committee for the Promotion of Tramp Shipping, Ocean Tow, Inc., and Alaska Freight Lines, Inc., intervened in opposition to the applications.

The examiner has recommended that the services under consideration are in the public interest, that the services would not be adequately served without the use therein of the vessels applied for or equivalent tonnage, and that privately owned American-flag Liberty vessels are available for charter by private operators on reasonable conditions and at reasonable rates for use in these services. Because of the applicants' failure to meet the third statutory condition, the examiner has recommended that the applications be denied. We agree with the conclusions of the examiner.

Alaska Steamship Company (hereinafter referred to as "Alaska Steam") operates a regular berth service between ports in Puget Sound and various ports in Alaska with two reefer vessels and seven C1–M–AV1 type vessels chartered from the Government, and nine owned vessels including three Libertys. Alaska Steam, by its present application, seeks to charter two additional Liberty vessels, formerly under charter to it pursuant to our findings in Docket No. M–31, 3 F.M.B. 545. The charters of these Libertys were discontinued pursuant to our findings in *Review of Charters, Gov't-Owned Vessels, 1952,* 4 F.M.B. 133, after the vessels were laid up for the winter, because of our inability at that time to find that the service was not adequately served without them. These vessels have radar and other special equipment required for their operation in the service of Alaska Steam.

Coastwise Line (hereinafter referred to as "Coastwise") operates a regular berth service between ports in California, Oregon, Washington, British Columbia, and Alaska, with two owned Libertys and three Libertys chartered from private owners. It seeks, by its present application, to charter from the Government three additional Libertys, formerly chartered to it pursuant to our findings in *Coastwise Line—Charter of War-Built Vessels,* 3 F.M.B. 515, and Docket No. M–30, 3 F.M.B. 545. The charters of these Libertys were also discontinued pursuant to our findings in *Review of Charters, Gov't-Owned Vessels, 1952, supra.* The three Government-owned Libertys are also equipped with radar and other special equipment required for their operation in the service of Coastwise.

It is clear from the record that the Alaska trade engaged in by both applicants is highly seasonal and that a very substantial part of it moves in the spring and summer seasons. The critical issue in these proceedings is whether privately owned American-flag Liberty vessels are available for charter by private operators on reasonable conditions and at reasonable rates for use in the services.

Alaska Steam

Alaska Steam's application is to charter two Government-owned Liberty vessels for an indefinite period, subject to the usual 15-day cancellation privilege. However, the company's vice president stated that he would not accept a long-term charter that did not have a provision for off-hire in the off season when the vessels were laid up, but would accept a charter for a period of from 5 to 7 months at a bareboat rate of $4,500 a month without

right of cancellation. While the application in this case was pending, Alaska Steam applied by advertisement and through brokers for Liberty vessels, suitably equipped for the Alaska trade, for a period of from 5 to 7 months. The best offer received was for the charter of several Libertys at $9,350 per month, the charterer to install the Alaska fittings if not on the vessel and to have the right either to remove the radar at the end of the charter or to leave it on board and receive from the owner half the cost of the installation.

Since privately owned vessels were available to Alaska Steam for charter, we must determine whether the rate and terms offered can be considered reasonable. Alaska Steam takes the position that a bareboat charter rate for Libertys in excess of $4,500 a month (being 8½ percent of the statutory sales price of Government-owned Liberty vessels) cannot be considered reasonable because the company's past experience shows that it was not able to make a profit even at that rate. On this issue, as on the other statutory issues, the burden of proof is on the applicant. Alaska Steam has offered in evidence a summary statement of the receipts and disbursements of the two vessels now applied for, during the prior charter period from June 1951 to the end of 1952.

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. This was not done in this case. But even on the limited evidence before us Alaska Steam's contentions are not proven.

It is true that the statement covering the two chartered Libertys shows a substantial net operating loss over the entire year-and-a-half period of their operation. There was, however, a combined net profit of $51,800 on the two ships during the calendar year 1952. It is not necessary to make an analysis of this statement to explain why the operating results for 1952 showed a profit as against a loss in the second half of 1951. In forecasting the traffic to be carried to Alaska in 1953, applicant made a comparison with 1952, indicating that a substantial increase over 1952 was expected, so that the 1952 operating results, rather than combined results for 1951 and 1952, could appropriately be used as a basis to forecast what may be deemed a reasonable operational forecast for 1953. Expenses of operation under Government charters, not incident to operation under private charters, such as expenses and overhead during idle status not applicable under a private

charter, must be eliminated. Considering, therefore, the 1952 operating figures in the company's statement, we believe a reasonable estimate may be made as to what the company would have made in 1952 if it had not had any expenses attendant to the laying up and maintenance of the Government vessels during any idle period.

As stated above, Alaska Steam's statement shows a profit for these two Government-owned vessels for the year 1952 of $51,800, or an average of $25,900 per ship on approximately 8½ months' operations, after paying charter hire of $4,500 per month. The statement referred to shows the following approximate figures with respect to the 1952 operations of the two Libertys covered:

Profit from operations (average)	$25,900
Charter hire at $4,500 per month for period of operations (average)	38,000
Expenses during lay-up (average)	12,800
Overhead expenses during lay-up at $228 a day for average lay-up period of 122 days	27,800
Total	$104,500

When this total figure of approximately $104,500 is divided by 8½, for the months of operation of these vessels, it shows that Alaska Steam's 1952 revenue available to pay private charter hire would have been approximately $12,300 for each operating month. It may be assumed that operation of these vessels in the service of Alaska Steam in 1953 should not be less profitable than operation in 1952, considering that there was a protracted strike in 1952, and also that the cargo offerings in 1953 promise, according to Alaska Steam's testimony, to increase substantially over 1952. Even if the net cost of installing Alaska fittings of $22,000 had been charged against the 8½ months of Alaska Steam's 1952 operation, there would still remain operating revenue available for charter hire in excess of $9,350 per month at which private vessels were offered. Thus the figures presented do not support Alaska Steam's contention that a rate in excess of $4,500 a month is unreasonable for its service. We find that Alaska Steam has not sustained its burden of proving that the charter rate of $9,350 a month for vessels in this service, offered by private owners, is unreasonable.

Coastwise

The application of Coastwise is to charter three Government-owned Libertys for an indefinite period, also subject to the usual 15-day cancellation privilege. While the application was pending, Coastwise applied by advertisement and through brokers for

Libertys suitably equipped for its service for a period of from 7 to 9 months. Several offers were received, but the rates and terms were deemed to be unfavorable by Coastwise. Among the offers so received was one for three vessels at the bareboat rate of $9,000 per month for a period of from 18 to 24 months, the owner agreeing to install radar. Coastwise also received an offer for the charter of three Libertys for from 7 to 9 months at $9,250 per month, the charterer to install the extra equipment required and to have the right either to remove the radar at the end of the charter or to leave it on board and receive from the owner half the cost of installation.

Coastwise points out that the charter rate of $7,980 per month (15 percent of the statutory sales price), paid to the Government for the Liberty vessels under the prior charter is less than the amount it would have to pay for the most favorable private charters, and that the cost of installing the special fittings, estimated to be $40,000 for this service, would have to be added to the private rate. Of this amount approximately $15,000 would be the cost of installing radar, of which $7,500 might be salvaged at the end of the charter. If Coastwise should transfer its presently owned radar from the Government vessels to privately chartered vessels the cost of installation of radar might be substantially less.

Coastwise takes the position that a bareboat charter rate in excess of $7,980 per month cannot be considered reasonable because the company's past 1½ years' experience in operating the three Libertys chartered from the Government resulted in a loss. The evidence of Coastwise on this point was fragmentary, showing only an average daily rate of revenue and expenses for all operations in the year-and-a-half period for the three ships involved. The evidence of Coastwise, like the Alaska Steam evidence, does not contain any record of the operating results of its owned or privately chartered Libertys during the same period. Furthermore, certain breakout expenses incurred at the beginning of the charter and expenses during idle status are charged against the operation of the three Government-chartered Libertys that would be inapplicable to operation of a privately chartered vessel, thus taking from the figures presented relevance as to what would be a reasonable charter rate from a private owner in 1953. The record indicates that the operations of the three Government-owned Libertys in the 12 months of 1952 was profitable, and specific figures are lacking to show that 1952 operations of these vessels would not support the private charter rate offered of $9,250 a

month and the cost of making the required installations for the service.

Under the circumstances, we find that Coastwise, like Alaska Steam, has failed to sustain its burden of proving that the privately offered charter rate is unreasonable for the particular trade for which these vessels have been requested. Moreover, the record shows that Coastwise now has under charter three Libertys from private owners recently renewed for 6 months at a bareboat rate of $10,000 a month, and that the special fittings required for the service were installed on these vessels at applicant's expense when the charters were first made about 3 years ago.

Coastwise, at the time of oral argument, urged that subsequent to the hearing there had been a substantial increase in bareboat rates for private Libertys, and that the vessels offered at the time of hearing, or substitutes therefor, are no longer available at the offered rates. Coastwise argues that this is a matter of which we may take official notice. Since the charter market is subject to fluctuation, we feel that the fact or extent of a rise or fall in charter rates subsequent to the time of hearing is a matter of proof and beyond the scope of official notice.

CONCLUSIONS

We are unable to make the affirmative finding that privately owned American-flag Liberty vessels are not available for charter by private operators on reasonable conditions and at reasonable rates for use in the two services under consideration. Under the circumstances, we deem it unnecessary to comment on the examiner's recommendations on the other two statutory issues.

By the Board.

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

APRIL 20, 1953.

DEPARTMENT OF COMMERCE

MARITIME ADMINISTRATION

ORDER

No. M–56

S.C.T.T., INC.—ALLEGED VIOLATION OF GENERAL ORDER 70

Notice having been published in the Federal Register of November 4, 1952, of the order of October 27, 1952, directing respondent, S.C.T.T., Inc., to show cause why an order should not be entered pursuant to section 243.2 (h) of General Order 70, striking its name from the list of freight forwarders eligible to service cargoes shipped under the Foreign Assistance Act of 1948 and other relief and rehabilitation cargoes, and hearing on the above order having been held before an examiner, who issued his recommended decision on February 13, 1953, finding respondent not to be a citizen of the United States within the meaning of 46 U.S.C. 802, and to be in violation of General Order 70 by failing to furnish certain information requested by the Administrator, and no exceptions or memoranda having been filed with respect to the examiner's recommended decision, and the Administrator being in agreement with the findings of the examiner;

It is ordered, That the name of respondent, S.C.T.T., Inc., be stricken from the list of freight forwarders eligible to service cargoes shipped under the Foreign Assistance Act of 1948 and other relief and rehabilitation cargoes.

By order of the Maritime Administrator.

(Sgd.) A. J. WILLIAMS,
Secretary.

MAY 4, 1953.

688-650 O - 63 - 14

DEPARTMENT OF COMMERCE

MARITIME ADMINISTRATION

No. M–56

S.C.T.T., INC.—ALLEGED VIOLATION OF GENERAL ORDER 70

Respondent, S.C.T.T., Inc., found (1) not to be a citizen of the United States within the meaning of 46 U.S.C. 802, and (2) to be in violation of General Order 70 by failing to furnish certain information requested by the Administrator.

Noah P. Rosoff for respondent.

Gerald H. Ullman for New York Foreign Freight Forwarders and Brokers Association, Inc., intervener.

Alan F. Wohlstetter for the Administrator.

RECOMMENDED DECISION OF A. L. JORDAN, EXAMINER

This is a proceeding initiated by the Maritime Administrator's order of October 27, 1952 (Appendix A), directing respondent to show cause why an order should not be entered pursuant to section 243.2 (h) of General Order 70, striking its name from the list of freight forwarders eligible to service cargoes shipped under the Foreign Assistance Act of 1948 and other relief and rehabilitation cargoes.

Hearing on the order was held November 18 and 25, 1952, pursuant to notice in the Federal Register of November 4, 1952.

The New York Foreign Freight Forwarders and Brokers Association, Inc., hereinafter referred to as the association, intervened. Prior to the institution of this proceeding the association had filed a formal complaint against S.C.T.T., Inc., and its predecessor New York agency, S.C.T.T. France, alleging, among other things, that S.C.T.T., Inc., was not a bona fide citizen of the United States within the meaning of Title 46 U.S.C. 802, and its predecessor was a foreign-owned freight forwarder as defined in section 243.2 (e) of General Order 70, and that both should be removed from the registry involved, retroactively, and required to repay to the United States all forwarding fees and brokerage collected for servicing cargoes and commodities shipped under

the Foreign Assistance Act of 1948 and other relief and rehabilitation statutes. The order instituting the proceeding, however, did not include investigation of the predecessor of S.C.T.T., Inc. Counsel for the association contended that if respondent's predecessor acted in violation of General Order 70, it received revenues to which it was not entitled and was depriving American foreign freight forwarders of revenues which otherwise they would have received. He stated that it was the purpose of the association's complaint to include investigation of the activities of the predecessor of S.C.T.T., Inc., and that the scope of the proceeding should be widened in order that this may be done. Accordingly, counsel for the association requested the Administrator to so enlarge the proceeding, which request the Administrator denied.

The issues in this proceeding are (1) whether respondent violated General Order 70 by failing to furnish information requested by the Administrator, and (2) whether respondent at the time of its registration under General Order 70, or at any time since, was or is a citizen of the United States within the meaning of 46 U.S.C. 802 which so far as relevant reads:

> (a) That within the meaning of this Act no corporation, partnership, or association shall be deemed a citizen of the United States unless the controlling interest therein is owned by citizens of the United States, and, in the case of a corporation, unless its president and managing directors are citizens of the United States and the corporation itself is organized under the laws of the United States or of a State, Territory, District, or possession thereof * * *.
>
> (b) The controlling interest in a corporation shall not be deemed to be owned by citizens of the United States (a) if the title to a majority of the stock thereof is not vested in such citizens free from any trust or fiduciary obligation in favor of any person not a citizen of the United States; or (b) if the majority of the voting power in such corporation is not vested in citizens of the United States; or (c) if through any contract or understanding it is so arranged that the majority of the voting power may be exercised, directly or indirectly, in behalf of any person who is not a citizen of the United States; or (d) if by any other means whatsoever control of the corporation is conferred upon or permitted to be exercised by any person who is not a citizen of the United States.

Guy dal Piaz testified that he was President, a stockholder and a director of S.C.T.T., Inc., from the time it was granted a charter under the laws of the State of New York on March 8, 1950, until he resigned both positions on March 31, 1952; that from 1945 until S.C.T.T., Inc., was created he was the representative of S.C.T.T. France in New York for the United States; that his brother-in-law Pierre Olphe-Galliard (Paris) was president of S.C.T.T. France, which is a French corporation, and is

one of the largest freight forwarding companies, with its head office in Paris and having branches in various ports of the world; that the French corporation started its activities in the port of New York in 1927 and continued from that date until the formation of S.C.T.T., Inc.; that in 1926 S.C.T.T. France sent one of its employees, Louis Pijon, from its Paris office to New York to act on its behalf to commence in 1927 its activities in the freight forwarding business, primarily to handle the forwarding of passengers' hold and unaccompanied baggage and automobiles sent forward on vessels of the French Line (arrivals and departures); that for the necessary customs formalities in this connection, the services of customs brokers Frederick Henjes, Jr., Inc. (New York), were utilized; and that such activities of S.C.T.T. France were not limited to the French line business but included, in conjunction with Henjes, all other freight-forwarding activities.

Dal Piaz testified that upon his taking over the agency of the French corporation in New York in 1945 when its activities were under the supervision of Henjes, he performed his duties for a while in association with Henjes, in the latter's office, but later set up his own office; that at this time in 1945 he had applied for American citizenship—granted in 1949; that not long after he became agent in New York for the French corporation he saw the desirability of forming an American corporation to be in existence and in operation in the event of another world war conflict and France again should be occupied or cut off from allies, and because there were new prospective activities in the travel business by air as well as by sea; that as early as 1946 he suggested the formation of an American corporation to his counsel, and again in December 1947; that in August 1948 he consulted counsel as to the requirements of forming a corporation under the laws of New York, and he was advised with respect thereto; that passing events increased the necessity for an American corporation, such as requirement in forwarding U. S. Government cargo under the Marshal plan that the forwarder be a citizen of the United States, although he was handling commercial cargo only and the citizenship requirement as to Government cargo (at that time) was not a handicap for him. Dal Piaz testified that notwithstanding this he continued to urge formation of an American corporation, but the French corporation was not disposed to form a corporation in the United States because in Europe and elsewhere it had grown and developed through representative agencies; that the matter, however, was kept under close study, and

the need for such corporation was clear and compelling when the Maritime Commission issued its General Order 70, effective June 6, 1949, placing heavy restrictions upon non-citizen freight forwarders with respect to commercial cargoes moving under ECA allocations, as thereafter the French corporation could participate in ECA shipments only under the formula in the order with respect to quota restrictions.

Dal Piaz testified that on June 15, 1949, on behalf of the French corporation, he furnished information, by questionnaire, to the Maritime Commission, upon which S.C.T.T. France was duly registered under General Order 70, and carried on its forwarding activities within the quota provisions of the order. He testified that qualifying the French corporation under General Order 70 was an interim action, as his plan for the formation of an American corporation continued, and in November 1949 his counsel, while in Paris on other matters, discussed with officials of the French corporation the question of forming an American citizen corporation; and that after his counsel's return to New York, decision was reached between dal Piaz, Daniel Hoey and S.C.T.T. France to form the American corporation, S.C.T.T., Inc., authorized capital stock of 500 shares, common, par value $10.

In this connection, dal Piaz testified that he and Hoey were in Paris, date not remembered, when the decision was reached that he was to have 130 shares, Hoey 130, and S.C.T.T. France 240. Dal Piaz stated that he considered he should have somewhat more than 50 percent of the shares in view of the business he had produced for the French corporation, but that this was not satisfactory to Hoey and the stock was divided as above stated; that Olphe-Galliard was directing the negotiations as president of S.C.T.T. France and made the decisions; and that the alternative to agreement would have been formation of an American citizen corporation by dal Piaz alone.

Dal Piaz stated that he and Hoey borrowed the money, $1,300 each, from S.C.T.T. France, with which to pay for the stock that was issued to them; that they gave their receipts for the money, but no security, and had no understanding as to time or method of repayment; that the stock was issued upon obtaining charter for S.C.T.T., Inc., March 8, 1950, on the basis agreed upon as above stated stated, and dal Piaz, Hoey and Edward J. Molano, all United States citizens, were elected directors of the new American corporation, and the following officers were then elected: dal Piaz, President, Hoey, vice president and treasurer, and

Molano, secretary. Dal Piaz stated that because of the specialized work of the corporation a provision was printed on the stock certificates that none of the stockholders would sell or transfer their stock without first offering it to the other stockholders; that the voting power of the American corporation was in the owners of the stock, and accordingly a majority of the voting power was vested in Hoey and himself; and that there was no understanding of any kind that the majority of the voting power might be exercised directly or indirectly in behalf of the French corporation or of any person not a citizen of the United States, nor were there any means whatsoever by which the control of the American corporation was conferred upon or permitted to be exercised by the French corporation or by any person not a citizen of the United States.

On March 29, 1950, dal Piaz gave S.C.T.T. France, on the latter's request, an option for 5 years to purchase his stock on 6 months' notice. There is no evidence as to whether Hoey executed a similar option.

Dal Piaz testified that during the first year's operation of S.C.T.T., Inc. the volume of export shipments to France held up fairly well, although the company was not able to break even; that by the end of the second year business had fallen off to such an extent that it was no longer possible for the company to pay him a salary sufficient to enable him to remain with the company, and he resigned as president and director on March 31, 1952; that on April 1, 1952, he delivered his stock certificate, signed by him in blank, to Noah P. Rosoff, then attorney for S.C.T.T., Inc., to be held in escrow until former counsel's fees for legal services to the New York agency of S.C.T.T. France were paid, covering the period from December 1, 1945 to March 8, 1950; that such fees were paid by S.C.T.T. France on July 29, 1952; and that he then gave up his stock in exchange for the canceling out of his obligation to S.C.T.T. France, namely, the $1,300 he had borrowed with which to buy the stock, originally, and left the stock certificate with Rosoff to dispose of as he saw fit.

From records of S.C.T.T., Inc., and a letter dated November 12, 1952, from S.C.T.T. France to Rosoff, shown dal Piaz at the hearing, he testified that as of September 30, 1952, S.C.T.T., Inc., owed S.C.T.T. France about $15,000 or about $12,000, depending upon whether or not a certain $3,000 item was entered in error, consisting of advances, loans, and credits.

The evidence shows that at the time of incorporation, S.C.T.T., Inc. assumed the assets and liabilities of the New York agency

of S.C.T.T. France. It is not clear what the assets were, if any, but real liabilities existed, ranging from $12,000 to $20,000.

Edward A. O'Brien testified that he is an American citizen and has been president of S.C.T.T., Inc., since April 1, 1952 (the day following the resignation of dal Piaz as president); that his employment as president of S.C.T.T., Inc., came about through a business acquaintance who, early in March 1952, arranged for him to meet officials of S.C.T.T. France, then in New York, who offered him the job as president of S.C.T.T., Inc. He stated that the representatives of the French corporation were in New York to restore S.C.T.T., Inc., to the business volume level it had been in 1950 and early 1951.

O'Brien testified that he is the only employee of S.C.T.T., Inc., and conducts its entire administrative business, taking orders from no one, but that the forwarding details are handled by Daniel F. Young, Inc., a New York foreign freight forwarder, on a percentage basis. He stated that he solicits shipments, and Young performs the paper work and service requirements; that S.C.T.T., Inc., has its own furniture, stationery and forms, but no lease, having an office arrangement with Young, and that the net profit on each billing of S.C.T.T., Inc., business is split percentagewise between S.C.T.T., Inc., and Young. O'Brien stated that the above described arrangement between S.C.T.T., Inc., and Young was in writing. There is no evidence, however, that it was ever considered as an agreement under section 15 of the Shipping Act, 1916.

O'Brien testified that he receives a salary for his services; that when he was employed as president of S.C.T.T., Inc., he did not know who the stockholders were, but he was promised by S.C.T.T. France that he would receive stock in S.C.T.T., Inc., if things went well, and that he would share in any profits from future business produced by him. He stated that in fulfillment of such promise he was, on October 8, 1952, issued 260 of the total of 500 shares of the stock of S.C.T.T., Inc., the other 240 shares being owned by S.C.T.T. France. He stated that he paid no money for the 260 shares he received, as they were given to him as an incentive to build up the business; that the stock certificate was handed to him by Rosoff; and that he did not know whose stock it replaced but he learned from the books that 260 shares were formerly held by dal Piaz and Hoey.

O'Brien testified that he did not know whether S.C.T.T., Inc., ever borrowed any money from S.C.T.T. France, but on accepting

employment as president of S.C.T.T., Inc., in April 1952 he was aware of an indebtedness by S.C.T.T., Inc., to S.C.T.T. France of approximately $20,000; that he had no knowledge concerning the time and source of the indebtedness and never checked the books to find out what it arose from; that he did not know whether S.C.T.T., Inc., had given S.C.T.T. France any security for the indebtedness, nor did he know anything concerning the terms of its repayment, but that the account had changed some since April 1952, as about a dozen entries had been made; that neither he nor S.C.T.T., Inc., had made any effort to borrow money from S.C.T.T. France since he went with the company on April 1, 1952, since which time there had been no one in S.C.T.T., Inc., except himself.

Further concerning the indebtedness of S.C.T.T., Inc., to S.C.T.T. France, O'Brien testified that between April 1 and 10, 1952, an official of S.C.T.T. France established a credit of $10,000 for S.C.T.T., Inc., in a New York bank; that no security was furnished for this credit by S.C.T.T., Inc., and he, O'Brien, signed no paper in connection with the credit; that he was merely introduced to an official of the bank by the officer of S.C.T.T. France, and he did not know whether the latter discussed with the bank official the interrelationships of the two companies; that no limit to the time or use of the credit was mentioned; that the workable cash or accounts receivable at the time of the hearing ran close to $15,000; that ordinary funds are sufficient to take care of small accounts; that running deposits keep the account fairly even; that interest is paid on occasional overdrafts of $1,000 or $1,500; and that sometimes freights amount to as much as $8,000 to secure bills of lading, for which purpose he has permission to overdraw the account up to $10,000.

Noah P. Rosoff testified that he had been attorney for S.C.T.T., Inc., for about a year; that he was employed by the Paris attorney for S.C.T.T. France; that at such time of his employment the stockholders of S.C.T.T., Inc., were dal Piaz 130 shares, Hoey 130 shares and S.C.T.T. France 240 shares; that the March 29, 1950, option agreement earlier mentioned was no longer in force because subsequent events nullified it; and that S.C.T.T. France has no option to purchase the stock issued to O'Brien.

Rosoff stated that in March 1952 dal Piaz told him he was leaving the company and returning the stock that had been issued to him; that Hoey had already gone into a monastery; that this left S.C.T.T. France with all the stock and nobody in America

to run the business; that money was owed S.C.T.T. France by S.C.T.T., Inc.; that the French attorney for the French company came to New York to reorganize S.C.T.T., Inc.; and that the French attorney had met O'Brien and arranged to employ him. Rosoff stated that there was a meeting of the Board of Directors of S.C.T.T., Inc., on March 31, 1952, at which time dal Piaz and Molano resigned their respective offices in the company; that the next day, April 1, 1952, he was elected secretary, and he and O'Brien and Andre Vulliet were elected directors of S.C.T.T., Inc., by a vote of 240 share of stock by the representative of S.C.T.T. France and 130 shares by Rosoff which shares he did not own but was custodian of for the French company; and that he, Rosoff, was also custodian for the French company of the 130 shares originally issued to Hoey. Rosoff stated that dal Piaz had signed his stock in blank and left it with him subject to escrow thereafter satisfied as earlier herein described, leaving it free, along with the Hoey stock, for transfer to O'Brien.

William A. Stigler, security officer for the Maritime Administration, testified that he had investigated the citizenship status of S.C.T.T., Inc., to obtain information which would be of aid to the Administrator in determining whether at the time S.C.T.T., Inc., registered under General Order 70, or at any time since, it was or is a citizen of the United States within the meaning of 46 U.S.C. 802. His investigation was occasioned by the complaint filed by the New York Foreign Freight Forwarders and Brokers Association, Inc., earlier referred to.

Stigler's testimony substantially paralleled the collective testimony herein summarized of other witnesses with respect to the organizational setup of S.C.T.T., Inc. He further testified, however, that, about May 16, 1952, he requested Rosoff to furnish the Maritime Administration a photostatic copy of the following documents:

1. Minutes of a board of directors' meeting held on June 27, 1951 (concerning requests on S.C.T.T. France for funds).

2. Copy of letter from Rosoff to dal Piaz, dated April 1, 1952, acknowledging receipt of Stock Certificate No. 3 to be held in escrow.

3. Option to purchase shares of stock in S.C.T.T., Inc., held by dal Piaz, executed in favor of S.C.T.T. France, dated March 29, 1950.

4. A narrative statement under oath from dal Piaz setting forth the origin of S.C.T.T., Inc.

5. Any documentary evidence from the files of S.C.T.T., Inc., which would tend to indicate that its incorporation was under consideration by S.C.T.T. France prior to the complaint filed with the Maritime Administration by the New York Foreign Freight Forwarders and Brokers Association, Inc.

Stigler testified that, as far as he was able to determine, the information requested had not been furnished up to the time of the hearing.

CONCLUSIONS

From 1946 until 1950 the agent in New York of S.C.T.T. France tried to induce the French corporation to form a United States citizen corporation for the purpose of engaging in the foreign freight forwarding business. In late 1949 or early 1950 S.C.T.T. France decided to form such corporation. Upon reaching such decision, it determined the number of United States citizens to whom authorized capital stock should be issued, and who such citizens should be. Upon determining this, it decided how many shares of such stock should be issued to each such citizen. Then it loaned all of the money to each such citizen with which to pay for such stock, without requiring security or fixing time and terms of repayment for such loans.

The American corporation was chartered under the laws of the State of New York on March 8, 1950. Of the authorized 500 shares of capital stock, 130 shares were issued to Guy dal Piaz and 130 shares to Daniel Hoey, both United States citizens, and 240 shares to S.C.T.T. France, a French corporation.

On March 29, 1950, dal Piaz gave S.C.T.T. France an option to purchase all of his shares within 5 years, on 6 months' notice. This option was never exercised. On April 1, 1952, dal Piaz delivered his stock certificate, signed in blank, to Rosoff. Hoey had sometime earlier done the same as to his stock certificate. Having giving up their shares of stock their respective loans from S.C.T.T. France were considered canceled, by all concerned. From April 1, 1952 until October 8, 1952, none of the stock of S.C.T.T., Inc. was owned by any United States citizens. On the latter date O'Brien was given 260 shares of S.C.T.T., Inc., by S.C.T.T. France, without monetary consideration, which represented the total shares formerly held by dal Piaz and Hoey. S.C.T.T., Inc., at that time, owed S.C.T.T. France between $12,000 and $20,000. While O'Brien was aware of this indebtedness he was not sufficiently concerned about it to ascertain why it existed or when or how it was to be repaid. He knew that after he became president of S.C.T.T., Inc., a credit of $10,000 was opened in a New York bank in favor of S.C.T.T., Inc., by S.C.T.T. France, but he was not informed as to the basis of its establishment with respect to security, guaranty or otherwise. In addition to the foregoing, New York counsel

Rosoff for S.C.T.T., Inc., was employed by French counsel for S.C.T.T. France.

The facts and circumstances under which S.C.T.T., Inc., came into being, the manner in which it has been financed, the way it has been operated, and the stake S.C.T.T. France has in it, establishes the French corporation as the life-blood and dominant financial factor in the respondent company, S.C.T.T., Inc., and unquestionably gives the former the power to control the functions of the latter. This control breaches the citizenship requirements of 46 U.S.C. 802, and the registration requirements of General Order 70. *Rochester Tel. Corp.* v. *U. S.,* 307 U. S. 125, 145, 146; *United States* v. *The Meacham,* 107 F. Supp. 997. Therefore, S.C.T.T., Inc., at the time of its registration under General Order 70, was not, has not been at any time since, and is not now, a citizen of the United States within the meaning of 46 U.S.C. 802.

S.C.T.T., Inc., failed to furnish information required by General Order 70, requested by the Administrator.

For the reasons stated an order should be entered, pursuant to section 243.2 (h) of General Order 70, striking the name of S.C.T.T., Inc., from the list of freight forwarders eligible to service cargoes shipped under the Foreign Assistance Act of 1948 and other relief and rehabilitation cargoes.

APPENDIX A

DEPARTMENT OF COMMERCE

MARITIME ADMINISTRATION

S.C.T.T., INC.

ORDER TO SHOW CAUSE

No. M–56

It appearing, from information before the Maritime Administrator that S.C.T.T., Inc. is registered as an American freight forwarder pursuant to General Order 70; and

It further appearing, That the Administrator is in receipt of a formal complaint filed by the New York Foreign Freight Forwarders and Brokers Association alleging, *inter alia,* that S.C.T.T., Inc., is not a citizen of the United States within the meaning of 46 U.S.C. 802; and

It further appearing, That an investigation conducted on behalf of the Administrator casts doubt upon the citizenship of S.C.T.T., Inc.; and

It further appearing, That S.C.T.T., Inc., is in violation of General Order 70 by failing to submit certain information requested by the Administrator;

It is ordered, That the Administrator, on his own motion, order an administrative hearing to determine whether S.C.T.T., Inc., at the time of its registration under General Order 70, or at any time since, was or is a citizen of the United States within the meaning of 46 U.S.C. 802;

It is further ordered, That S.C.T.T., Inc., be, and it is hereby, made the respondent in this proceeding, and that said respondent be, and is required in said proceeding to appear at a public hearing to be held before an examiner of this agency at a date and place to be announced by the Chief Examiner, and to show cause why an order should not be entered pursuant to section 243.2 (h) of General Order 70 striking S.C.T.T., Inc., from the list of freight forwarders eligible to service cargoes shipped under the Foreign Assistance Act of 1948 and other relief and rehabilitation cargoes;

It is further ordered, That a copy of this order be served upon the respondent;

It is further ordered, That this order be published in the Federal Register;

It is further ordered, That all persons (including individuals, corporations, associations, firms, partnerships, and public bodies) desiring to participate in the proceeding should notify the Maritime Administrator within five days after the date of publication.

Dated: October 27, 1952.

By order of the Maritime Administrator.

(Sgd.) A. J. WILLIAMS,
Secretary.

FEDERAL MARITIME BOARD

No. 700

PENNSYLVANIA MOTOR TRUCK ASSOCIATION ET AL.

v.

PHILADELPHIA PIERS, INC., ET AL.

Decided May 14, 1953

Respondent railroad companies required to modify their tariff regulations so as to allow not less than 5 days' free time for inbound and outbound cargo handled over their Philadelphia piers by truck.

When outbound cargo is delivered to respondents' piers at Philadelphia by truck for shipment by water carrier in accordance with instructions from the water carrier as to time of delivery to such piers, the collection from shippers of storage charges on such cargo due to causes beyond the control of the shippers is, and for the future will be, an unjust and unreasonable practice.

Robert H. Shertz for complainants.

Windsor F. Cousins for respondents.

George E. Miller for S. S. White Dental Manufacturing Company and *S. W. Moerman* for the Port of New York Authority, interveners.

SUPPLEMENTAL REPORT OF THE BOARD

BY THE BOARD:

Upon review of our earlier report in this proceeding, *Penna. Motor Truck Ass'n* v. *Phila. Piers, Inc.*, 3 F.M.B. 789, the United States Court of Appeals for the Third Circuit vacated our order and remanded the proceeding for appropriate findings of fact. *Baltimore and Ohio Railroad Co., et al.* v. *United States*, 201 F. 2d. 795, decided February 12, 1953. Accordingly, without further hearing or other proceedings, we restate in this supplemental report, with slight modifications, our findings of fact and our conclusions.

We find the facts to be as follows:

1. Complainants are Philadelphia truck operators and truck associations. Respondents Pennsylvania Railroad Company, the Reading Company, and the Baltimore & Ohio Railroad Company (hereinafter called "the respondents") operate 13 of the 18 general cargo piers currently in use in Philadelphia. Common carriers by water engaging in domestic and foreign commerce come to these piers at the invitation of respondents. The traffic passing over the piers is moved to and from inland points by truck or railroad. The traffic handled by complainants moves principally to and from locations which are not equipped with rail sidings, and hence not readily susceptible to rail handling.

2. By tariffs, most recently revised in 1950, respondents have fixed the free-time period applicable to inbound and outbound truck cargo to two days. By contrast, the free time applicable to inbound and outbound rail freight is either 5, 7, or 15 days, except that rail cargo to and from points within the Philadelphia port area is allowed only 2 days. Time on inbound truck cargo begins to run from 7 a. m. on the day following the completion of discharge of the vessel, and continues, exclusive of Saturdays, Sundays, and holidays, until removal from the pier. On the other hand, where the shipper or consignee instructs the respondents to route any cargo by rail, time stops upon receipt of such instructions rather than when the cargo is actually removed. On outbound cargo, both rail and truck, time begins when the shipment is deposited on the pier, and continues until the vessel for which the cargo is destined begins to load. Upon the expiration of the particular free-time period applicable under the tariff, the cargoes are subject to storage or demurrage charges. The charges applied to truck cargo differ from those applied to rail cargo. For the former, the charge is 15 cents per cwt. for the first 15 days of storage, while for rail cargo the same rate is charged for the first 30 days of storage. The rates exacted for additional periods of storage also favor rail cargo.

3. All general cargo piers at Philadelphia other that those operated by respondents allow 5 days free time to both rail and truck cargo both inbound and outbound. Shippers and consignees, however, normally have no choice between piers allowing 5 days free time and those of respondents. The steamship companies designate the piers at which their vessels berth.

4. Top wharfage, at the rate of 5 cents per cwt., is imposed upon inbound and outbound truck cargo. This is in the nature of compensation for the use of the pier. No top wharfage is imposed

upon rail cargo. The top wharfage charge is not an issue in this proceeding.

5. Respondents' piers for the most part are old wooden structures of the finger type, erected before the widespread use of large motor trucks and trailers. Their design is adapted primarily for the interchange of freight between vessels and railroad cars. Motor vehicles must be driven inside the pier sheds to load or unload freight from the floor. Some of the piers are double-decked and equipped with elevators or cargo chutes. In some cases, although there are two lanes of driveway, crossbeams and columns prevent two vehicles from passing through the pier at the same time. Ordinarily each trucking company is prohibited from placing more than one truck on a pier at one time. On some double-decked piers, only one chute is used at a time, making it necessary for trucks to wait in turn, thus causing delay. Truck cargoes are loaded and unloaded by truck company employees, and rail cargoes by railroad employees. Frequently, it is necessary for truckers to interrupt their work and move aside to permit rail carloading and unloading. Sometimes a trucker will arrive at the pier and find that his shipment is boxed in by other piles of freight, and hence inaccessible until the other piles are removed, also causing delay and congestion.

6. The 2-day free-time period tends to cause the trucks to converge on the piers at the same time. Thus, at times, as many as ten to twenty trucks may be waiting to enter a pier. The resulting waiting periods range from a half hour to 5 hours. After trucks have been loaded they may have to wait up to 2 hours to get off the pier.

7. The cargo is checked on and off the trucks by clerks employed by the steamship companies. Although the piers are kept open 7 days a week, the regular hours for loading and unloading trucks are only from Monday through Friday between 8 a. m. and 12 p. m. and 1 p. m. and 4:45 p. m. because of the working hours observed by the checking clerks.

8. Additional delays, apart from those described above, are occasioned in the removal of import freight by customs clearance and by the inspections which are required by various Federal agencies.

9. In the case of outbound shipments, ship arrivals are sometimes postponed. The shipper must comply with the delivery instructions given him in advance by the steamship company. If the ship is then delayed, or if the steamship company gives erro-

neous advice, the shipper may incur demurrage charges for reasons beyond his control. If he attempts to avoid demurrage charges by delaying his delivery to the pier, he risks having his cargo "shut out."

10. As a result of the above conditions, substantial quantities of inbound and outbound cargo cannot be handled within the 2-day free-time period. Several trucker witnesses estimated that in not over 40 percent of the shipments handled by them could all the cargo be removed from the pier within the 2-day period. The figures submitted by respondent Pennsylvania Railroad Company show that during a 9-month period in 1950, 66 percent of all outbound and inbound truck freight moving across its piers, including foreign and domestic traffic, was removed within free time. Figures of respondent The Baltimore & Ohio Railroad Company show that for the year 1949, 59 percent of its truck cargo was removed within free time, and that, in the first 6 months of 1950, 64 percent of its truck cargo was so removed. The figures of respondent the Reading Company show that in the first 7 months of 1949, approximately 80 percent of its truck cargo was removed within free time. Respondents' statistics, however, show percentages based on weight of traffic moving across the piers and do not necessarily reflect the frequency of the incurring of demurrage.

Discussion

The complaint alleges that the free-time period and the demurrage charges applicable to truck freight moving over respondents' piers subject truck freight to undue prejudice and disadvantage and constitute unjust and unreasonable regulations and practices in violation of sections 16 and 17 of the Shipping Act, 1916 (hereinafter called "the Act").

Respondents have submitted four "general exceptions" to the examiner's recommendations challenging (1) the finding that respondents are other persons subject to the Act, (2) the conclusion that free time on inbound cargo should be not less than 5 days, (3) the conclusion that the collection from shippers of storage charges on outbound cargo is an unreasonable practice, and (4) the conclusion that any difference in free time as between motor-carrier traffic and rail traffic is an unreasonable practice. We are in agreement with the first three of these recommendations of the examiner, and the exceptions thereto are accordingly overruled. Our conclusion on the last recommendation differs

from that of the examiner, and respondents' exception thereto is sustained. Our findings and conclusions on the first point are set forth in our prior report of February 25, 1952, and our findings and conclusions on the remaining points will be fully stated below.

Respondents take the position that the obligation to accord free time is incident to the ocean carrier's duty to receive or deliver cargo, and that respondents have no such duty with respect to truck freight which they do not handle. They argue that since they have no obligation at all, their present 2-day rule for truck cargo is a voluntary concession and cannot be the basis of valid complaint by truck operators.

It is true that the responsibility for furnishing reasonable free time for the delivery of outbound cargo on the pier and removal of inbound cargo from the pier rests on the ocean carrier as part of its transportation service. *Free Time and Demurrage Charges —New York,* 3. U.S.M.C. 89, 101 (1948).[1] In that case it appeared that the ocean carriers operated pier facilities at the port of New York and controlled their use according to tariffs, which included provisions governing free time and demurrage. At the port of Philadelphia, however, terminal operators such as respondents, who are independent of the ocean carriers, provide almost all of the available general cargo pier facilities. For many years respondents have permitted truck carriers to use their piers upon payment of the top wharfage of 5 cents per cwt. already mentioned.[2] Respondents solicit vessels to load and discharge freight at their piers in anticipation of movement of a substantial part of such freight by rail. Admittedly, few if any vessels could be induced to use respondents' piers unless respondents furnished facilities for the handling of truck as well as rail cargo. In effect, the ocean carriers have arranged with respondents for the use of respondents' piers for the receipt and delivery of vessel cargo. Respondents maintain control of the physical pier facilities; they fix the rules governing free time and demurrage in published tariffs; and they have held their piers open without restriction to truck-borne cargoes. Thus, the respondents, for their own business reasons, are providing the facilities which it is the obligation of ocean carriers to furnish.

---

[1] The Maritime Commission stated in *Free Time and Demurrage Charges—New York, supra,* that "free time is granted by the carriers not as a gratuity, but solely as an incident to their obligation to make delivery. *The Eddy,* 5 Wall. 481, 495; *The Titania,* 131 F. 229, 230. This is an obligation which the carrier is bound to discharge as a part of its transportation service, and consignees must be afforded fair opportunity to accept delivery of cargo without incurring liability for penalties. Free time must be long enough to facilitate this result—but need not be longer."

[2] A corresponding charge against rail cargo is said to be included in the rail line-haul rate.

Whether provided by the terminal operator or the ocean carrier itself, reasonable free time must be afforded to outbound and inbound cargo moving over the pier. In undertaking the ocean carrier's obligation to provide such facilities and in holding them out for public use, we hold that respondents have assumed the ocean carrier's responsibility of furnishing reasonable and nondiscriminatory pier services incident to the handling of truck cargoes on their piers, which include an allowance of reasonable free time.

We thus turn to the basic issues, whether the free time and demurrage practices of respondents subject the truck freight to undue prejudice and disadvantage or constitute unjust and unreasonable regulations and practices in violation of sections 16 and 17 of the act.

We find that the record does not establish a case of undue prejudice under section 16 of the Act. Complainants are primarily engaged in rendering trucking services to points within the local Philadelphia area. Rail cargo moving within this area is not shown by the record to be competitive with the local truck cargo carried by complainants, which is the only truck cargo mentioned in this proceeding. In view of complainants' failure to disclose an existing and effective competitive relation between truck and rail cargo, we find that the 2-day free-time limitation is not unduly prejudicial to truck cargo. *Phila. Ocean Traffic Bureau* v. *Export S. S. Corp.*, 1 U.S.S.B.B. 538, 541 (1936). As to the difference in demurrage charges between truck cargo and rail cargo, we find that there is no showing in the record of any injurious effect caused to the truck cargo or undue advantage to the rail cargo, and, under the circumstances, we find that the mere existance of a different demurrage rate does not constitute undue prejudice within the meaning of section 16 of the Act. *Ibid.*

The remaining cause of the complaint is under section 17 of the Act, which requires that respondents observe just and reasonable regulations and practices relating to the receiving, handling, storing, and delivering of property. We find that delays in the handling of outbound and inbound truck cargo beyond the 2-day free-time period are occasioned by the physical shortcomings of respondents' piers, the resulting congestion, the increased density of traffic on and about the piers, and the other conditions already referred to. These delays are apart from any delays caused by governmental inspections and procedures required for import cargo, and they render the present 2-day free-time allowance for

truck cargo unreasonable.[3] On the basis of the facts adduced in the record, we find that a reasonable free-time allowance on respondents' piers for all inbound and outbound truck cargo should be not less than 5 days, as now allowed on other general cargo piers in Philadelphia and as previously allowed by respondents prior to the institution of the present tariffs, assuming that the calculation of such free time is made in the manner now in force.

Respondents contend that complainants are not entitled to relief since complainants are not themselves liable for demurrage, and that the charges actually collected by respondents from shippers have been very small. We find that complainants have shown that they have been adversely affected by respondent's free-time limitation, by the wasted time of their trucks and drivers, and the resulting increased burden to their operations, and are, therefore, proper parties to seek remedial action in this case.

Another unreasonable aspect of respondents' present practice of making charges for demurrage is that shippers may now be assessed demurrage on outbound cargo because of delay in the ship's arrival or due to vessel owner's miscalculation in ordering the cargo onto the piers too soon. If shippers fully comply with the delivery instructions of the water carriers, any delays on the piers and consequent storage charges which respondents may be entitled to impose under reasonable regulations should not be for the account of the owner of the cargo since he has not caused and cannot prevent the delay.

In addition to the four "general exceptions" to the examiner's recommendations, which have been stated above, respondents have submited a list of 19 "specific exceptions," which are directed toward alleged errors and omissions in the examiner's basic findings. We have carefully read and considered each exception. In so far as points raised by these exceptions have not been dealt with in this report, we find them to be without merit or immaterial, and they are accordingly overruled.

Findings and Conclusions

We find and conclude:

1. That 5 days is a reasonable free-time period for outbound and inbound truck cargo moving over respondents' piers, and that respondent railroad companies should modify their tariff

[3] Our predecessor, the Maritime Comission, has held that delays which result from governmental inspections and procedures need not be considered by carriers in fixing the limits of free time, and that the delay in the removal of cargo thus caused is not proof that the free-time period is unreasonable. *Free Time and Demurrage Charges—New York, supra.*

regulations so as to allow not less than 5 days' free time for inbound and outbound cargo handled over their Philadelphia piers by truck;

2. That when outbound cargo is delivered by truck to respondents' piers at Philadelphia for shipment by water carrier in accordance with instructions from the water carrier as to time of delivery to such piers, the collection from shippers of storage charges on such cargo due to causes beyond the control of the shippers is, and for the future will be, an unjust and unreasonable practice;

3. That on this record respondents' tariff provisions relating to free time and storage on cargo shipped over respondents' Philadelphia piers have not been shown to be otherwise unlawful.

An order requiring respondents to promulgate and file with the Board new tariffs not inconsistent with this report will be entered.

SUPPLEMENTAL ORDER

At a Session of the FEDERAL MARITIME BOARD, held at its office in Washington, D. C., on the 14th day of May A. D. 1953

No. 700

PENNSYLVANIA MOTOR TRUCK ASSOCIATION ET AL.

v.

PHILADELPHIA PIERS, INC., ET AL.

The Board, on the date hereof, having made and entered of record a supplemental report in this proceeding, slightly modifying the findings and restating the conclusions in its report of February 25, 1952, which supplemental report is incorporated as a part hereof;

It is ordered, That respondents, Pennsylvania Railroad Company, the Reading Company, and the Baltimore & Ohio Railroad Company, shall promulgate and file with the Board, within 30 days from the date hereof, tariffs modifying their tariff regulations now in force so as to allow not less than 5 days' free time for inbound and outbound cargo handled over their Philadelphia piers by truck; and

It is further ordered, That when outbound cargo is delivered by truck to respondents' piers at Philadelphia for shipment by water carrier in accordance with instructions from the water carriers as to time of delivery to such piers, the collection from shippers of storage charges on such cargo due to causes beyond the control of the shippers is, and for the future will be, an unjust and unreasonable practice.

By the Board.

(Sgd.) A. J. WILLIAMS,
Secretary.

FEDERAL MARITIME BOARD

No. M-60

COASTWISE LINE—APPLICATION TO BAREBOAT CHARTER THREE GOVERNMENT-OWNED, WAR-BUILT, DRY-CARGO VESSELS FOR USE IN THE PACIFIC COASTWISE/BRITISH COLUMBIA/ALASKA SERVICE

FINDINGS OF THE BOARD

Exceptions to the recommended decision of the Chief Examiner were filed by interveners, and the case was argued orally before the vice chairman. The record, exceptions, and transcript of oral argument were considered by both members of the Board. We are in substantial agreement with the conclusions of the examiner. Exceptions and requested findings not reflected in our findings or conclusions have been carefully considered and are overruled, and they will be more fully discussed in a subsequent report (see 4 F.M.B. 211).

This is a proceeding under Public Law 591, 81st Congress, upon the application of Coastwise Line for the bareboat charter of three Government-owned, war-built, dry-cargo, Liberty vessels for use in its Pacific coastwise/British Columbia/Alaska service for a period of 6 months. The Portland Chamber of Commerce and the Portland Freight Traffic Association intervened in support of the application. The Committee for the Promotion of Tramp Shipping, Ocean Tow, Inc., Alaska Freight Lines, Inc., and Olympic-Griffiths Lines, Inc., intervened in opposition to the application.

FINDINGS, CERTIFICATION, AND RECOMMENDATIONS

On the basis of the facts adduced in the record, we find and hereby certify to the Secretary of Commerce:

1. That the service under consideration is in the public interest;

2. That such service (exclusive of a portion of the southbound Pacific coastwise segment thereof) is not adequately served; and

3. That privately owned United States-flag vessels are not available for charter from private operators on reasonable conditions and at reasonable rates for use in such service.

We recommend that any charters which may be granted pursuant to our findings in this proceeding be for a period not to exceed 6 months, subject to the usual right of cancellation by either party on 15 day's notice. We further recommend that such charters contain no provision for the nonpayment of charter hire during any idle period, and that additional charter hire, over such fixed charter hire as the Administrator shall determine, be determined with reference to all voyages made thereunder, computed, accounted for, and paid separately from any previous charters. We further recommend that such charters contain a restriction prohibiting Coastwise Line from carrying southbound coastwise cargo between Pacific coast ports on Government-chartered vessels, unless privately owned United States-flag vessels are unavailable for the carriage of such cargo.

By the Board.

(Sgd.) A. J. WILLIAMS,
Secretary.

MAY 31, 1953.

FEDERAL MARITIME BOARD

No. 706

THE PORT OF NEW YORK AUTHORITY

v.

AB SVENSKA AMERIKA LINIEN, REDERIAKTIEBOLAGET TRANSATLANTIC, REDERIAKTIEBOLAGET HELSINGBORG, ANTIEBOLAGET TRANSMARIN, AND WILH. WILHELMSEN

Submitted September 30, 1952. Decided May 31, 1953

Rates on wood pulp from Swedish Baltic ports, north of and including the Gefle district, to United States North Atlantic ports found not to be unduly prejudicial or unjustly discriminatory as to New York and Port Newark, in violation of sections 16 and 17, respectively, of the Shipping Act, 1916.

No violation of section 205 of the Merchant Marine Act, 1936, found.

Samuel H. Moerman for complainant.

Herman Goldman, Elkan Turk, and *Seymour H. Kligler* for respondents.

R. A. Cooke for Shippers Conference of Greater New York, and *Kenneth S. Carberry* for Newark Chamber of Commerce, interveners.

REPORT OF THE BOARD

BY THE BOARD:

Exceptions to the examiner's recommended decision were filed by respondents, and the matter was argued orally before us. Our findings and conclusions differ from those recommended by the examiner. Exceptions and requested findings not discussed in this report, nor reflected in our findings or conclusions, have been given consideration and found not justified.

Complainant is a municipal corporate instrumentality of the States of New Jersey and New York, charged with the duty of fostering and protecting, among other things, the ocean commerce

of the New York Port District.[1] Its jurisdiction extends over an area having a radius of approximately 25 miles from the Statue of Liberty in New York Harbor, including therein Port Newark, N. J. Respondents are common carriers by water transporting, among other commodities, wood pulp and wallboard from Swedish Baltic ports north of and including the Gefle district (hereinafter referred to as the "origin territory") to United States Atlantic ports north of Cape Hatteras. Respondents are parties to an agreement now awaiting our approval or disapproval pursuant to section 15 of the Shipping Act, 1916 (hereinafter referred to as "the Shipping Act"), which agreement provides generally that the parties may establish such uniform rates as are unanimously agreed upon and may contract for their joint account for the transportation of wood pulp and wallboard from the origin territory to United States North Atlantic ports, and that they may apportion among themselves the cargo thus contracted for in the agreement. Respondents have filed with their agreement schedules of their rates on wood pulp and wallboard to the various North Atlantic ports for the years 1950 and 1951.

The complaint, filed in 1950, alleges that respondents charge various basic rates for the carriage of wood pulp from the origin territory to North Atlantic ports, dependent upon the density of the pulp, but that an additional charge of 50 cents per ton is made for carriage of pulp to Albany and an additional charge of $1 per ton for the carriage of pulp to New York and to Port Newark. Complainant alleges that these rates are unduly prejudicial and unjustly discriminatory against New York and against Port Newark (hereinafter referred to as "Newark"), in violation of sections 16 and 17 of the Shipping Act. Complainant also alleges that respondents' proposed conference agreement "contemplates the assessment of unlawfully discriminatory and prejudicial rates against the Port of New York (including Newark) and shippers and importers using that port, and will be detrimental to the commerce of the United States in violation of section 15 of the Shipping Act." Complainant prays that respondents be required to cease and desist from the alleged violations of the Shipping Act, and that they be required to establish and

---

[1] The New York Port District, as officially established by the Compact of 1921 creating the Port of New York Authority, includes 219 civil divisions with a land area of approximately 1,500 square miles. The population of the district is approximately 11,500,000. The district includes all of New York City and the following counties in New Jersey: Hudson County, practically all of Essex, Bergen, and Union Counties, and portions of Passaic, Middlesex, Monmouth, Somerset, and Morris Counties.

put into force such other rates and charges as may be lawful, and also prays for general relief.

Respondents' answer, filed in 1951, admits most of the factual allegations of the complaint, but denies the allegations that the Shipping Act has been violated. Respondents also state that the differential on wood pulp to Newark was decreased from $1 to 50 cents since the filing of the complaint.

The Chamber of Commerce of the City of Newark, N. J., and the Shippers Conference of Greater New York intervened.

At the oral argument we requested the parties to comment on the relevancy of section 205 of the Merchant Marine Act, 1936, to the issues in this proceeding, and supplemental briefs on this issue were submitted.

In 1947, respondents established a basic rate for the transportation of wood pulp from the origin territory to North Atlantic ports, except that the rate to New York[2] was $1 higher and the rate to Albany 50 cents higher than the basic rate. There was no differential against Newark until 1950, when respondents for the first time imposed an additional charge of $1 upon the Newark rate. The Newark differential was reduced in 1951 as above stated. The Albany rate is not herein involved.

The undisputed evidence shows the following drop in imports of wood pulp from the origin territory to New York, Newark, and Philadelphia[3] between 1949 and 1950:

	1949	1950
	Tons	*Tons*
New York	847	248
Newark	17,901	8,251
Philadelphia	29,084	22,905

Newark suffered a loss of about 50 percent during the first year of the Newark differential as against a loss of about 22 percent for Philadelphia. New York suffered a greater loss percentagewise, but the imports at New York were not sufficiently large in either year to indicate a trend and cannot be attributed to the $1 differential since that differential was effective during both years.

[2] Port Newark was not included in the New York rates in 1947.

[3] As hereinafter explained, Philadelphia is the only port competitive with either New York or Newark for the importation of wood pulp from the origin territory.

Unjust discrimination under sections 16 and 17 of the Shipping Act

Section 16 and 17 of the Shipping Act, insofar as they have application to the present proceeding, provide:

SEC. 16. That it shall be unlawful for any common carrier by water, or other person subject to this Act, either alone or in conjunction with any other person, directly or indirectly—

First. To make or give any undue or reasonable preference or advantage tc any particular person, locality, or description of traffic in any respect whatsoever, or to subject any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever. * * *

SEC. 17. That no common carrier by water in foreign commerce shall demand, charge, or collect any rate, fare, or charge which is unjustly discriminatory between shippers or ports, or unjustly prejudicial to exporters of the United States as compared with their foreign competitors. Whenever the board finds that any such rate, fare, or charge is demanded, charged, or collected it may alter the same to the extent necessary to correct such unjust discrimination or prejudice and make an order that the carrier shall discontinue demanding, charging, or collecting any such unjustly discriminatory or prejudicial rate, fare, or charge.

In order to sustain the charge of unjust discrimination, under these provisions of the Shipping Act, complainant must prove (1) that the preferred port, cargo, or shipper is actually competitive with complainant, (2) that the discrimination complained of is the proximate cause of injury to complainant, and (3) that such discrimination is undue, unreasonable, or unjust. *Phila. Ocean Traffic Bureau* v. *Export S.S. Corp.*, 1 U.S.S.B.B. 538, 541 (1936); *H. Kramer & Co.* v. *Inland Waterways Corp. et al.*, 1 U.S.M.C. 630, 633 (1937). In the first of these cases the Secretary of Commerce said:

It is well settled that the existence of unjust discrimination and undue prejudice and preference is a question of fact which must be clearly demonstrated by substantial proof. As a general rule there must be a definite showing that the difference in rates complained of is undue and unjust in that it actually operates to the real disadvantage of the complaint. In order to do this it is essential to reveal the specific effect of the rates on the flow of the traffic concerned and on the marketing of the commodities involved, and to disclose an existing and effective competitive relation between the prejudiced and preferred shipper, localities, or commodities. Furthermore, a pertinent inquiry is whether the alleged prejudice is the proximate cause of the disadvantage.

On the requirements for specific proof the Secretary continued:

Manifestly, the general representations made by witnesses for complainant do not afford convincing proof of the alleged disadvantages under which they and other interests at Philadelphia operate, or that the rate situation

is solely responsible therefor. It may be that their conclusions are based on specific facts bearing upon the question of discrimination and prejudice, but the Department cannot accept such conclusions without an examination of the underlying facts upon which they are based, which facts are not of record in this proceeding.

Wood pulp from the origin territory is sold in the United States by American agents of the Swedish wood pulp manufacturers to domestic paper mills. The selling price of pulp does not vary by reason of the ports of delivery. The terms of sale are ex dock or on dock, which means that the Swedish seller pays the ocean transportation cost necessary to make this pulp available to the buying paper mill at the ocean carrier's discharging terminal. The seller of the pulp, therefore, and not the United States purchaser pays the ocean-rate differential.

In the past, pulp was sent to this country for sale on consignment, but now sales of pulp are made before the vessel arrives at the United States port. When the contract of sale is made, the American selling agent usually recommends that the cargo be shipped to the United States port designated by the buying paper mill. This recommendation is not followed in all cases however. If there are not shipments totaling a 500-ton minimum for discharge at a particular port, the vessel under respondents' freight engagement is not required to call there. This minimum, however, does not apply to New York, which is a port of discharge in any event.

The buyer pays all inland transportation charges from the port of delivery to his mill. Respondents presented a satisfactory study of inland transportation rates for the transportation of wood pulp from the various North Atlantic ports to the principal consuming mills in the area east of the Mississippi River and north of the Potomac and Ohio Rivers. From the evidence we find that wood pulp does not move from New York and Newark (the complaining ports) beyond the area immediately contiguous to New York Harbor, which includes parts of New York, Connecticut, Pennsylvania, and New Jersey. This area includes a number of consuming mills which import through New York and Newark and also through Philadelphia. We find that the ports of Newark and Philadelphia are competitive with each other for the importation of the pulp mentioned in these proceedings. The evidence as to the competitive relationship of New York with both Newark and Philadelphia for the importation of pulp is not sufficient to warrant a similar finding as to New York. Nevertheless, for the

purposes of the decision in this case, we may assume that all three ports are competitive.

The evidence of record with respect to the amount of imports of wood pulp from the origin territory into New York relates only to the years 1949 and 1950, and, as already stated, the differential against New York was in effect for both years. There is no evidence in the record upon which we can make a finding that the existence of continuance of the $1 differential against New York has caused injury to the port. On the contrary, the evidence shows that the small participation of New York in the wood pulp trade arises from reasons entirely apart from the assailed differential, such as congestion on the piers, the 5-day limit on free time, the lighterage problem, the difficulty of truck movement, and the lack of storage facilities. One sales representative testified that there would not in any event be any great quantity of pulp moved through New York, and another testified that specific instructions are given not to import large shipments of pulp through New York, and that such instructions would be given notwithstanding elimination of the $1 differential. Since we can make no finding that New York has suffered injury resulting from the differential, the case of New York under sections 16 and 17 must fail.

As to Newark, the great percentage of pulp imported there is for local consumption by the paper mills in nothern New Jersey and in the neighboring States mentioned above, for which area the inland transportation rates favor Newark.

The representatives of two paper mills testified that they preferred Newark over Philadelphia because they can transport their goods by truck from Newark at a cheaper rate than the rail rate from Philadelphia, and they enjoy many collateral advantages in doing so. From 65 to 70 percent of the pulp imported through Newark moves from the piers by truck, whereas practically all of the pulp imported through Philadelphia moves from the piers by rail. One witness testified that, in 1950, his company imported 7,500 tons of wood pulp from the origin territory through Newark and approximately 3,600 tons through Philadelphia. The other paper company witness testified that in 1950 his company imported 425 tons of pulp through Newark and only 85 tons through Philadelphia. These witnesses testified that they wanted all of their pulp imported through Newark even if they should incur the differential. They testified that on several occasions they had been forced to receive wood pulp through Philadelphia rather than Newark. This evidence was uncontradicted, but no evidence was

presented to show that delivery of pulp through Newark could not have been obtained in any case where the 500-ton minimum was available for discharge at that port.

The record shows that after the Newark differential was first enforced in 1950 the traffic decreased sharply. Complainants urge that because Newark decreased so much more sharply than the competitive port of Philadelphia, its case under sections 16 and 17 should succeed. The critical issue in this proceeding, however, is whether the drop in traffic was in fact caused by the differential complained of.

Complainants rely on the testimony of one of the American sales agents, who testified:

> Shippers abroad tell us that they frequently have difficulty in booking our tonnage for Port Newark, because the quantity to be shipped does not justify the vessel to go into Port Newark just for our tonnage, and that other importers[4] who would normally have woodpulp for Port Newark have objected or taken exception to the extra cost going into Port Newark and therefore their tonnage, instead of going to Port Newark, has gone to some other port.

This evidence raises the question of the probative effect of hearsay evidence. While administrative bodies are not bound to the strict application of the rule against the admissibility of hearsay, there is, of course, some limit as to its probative effect. In *John Bene & Sons, Inc.* v. *Federal Trade Commission*, 299 F. 468, at p. 471, the court said:

> We are of the opinion that evidence, or testimony, even though legally incompetent, if of the kind that usually affects fair-minded men in the conduct of their daily and more important affairs, should be received and considered; but it should be fairly done.

We think that where an American sales agent testifies as to the acts reported to him by his own principal in a foreign country, such evidence should be deemed probative and should, therefore, be given effect, but where an agent testifies, as was done in this case, as to rumors of what other importers not the principal of the testifying agent would or would not normally do comes within the realm of hearsay on hearsay and is "mere uncorroborated hearsay or rumor" and "does not constitute substantial evidence". *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U. S. 197 (1938). We do not believe that the remote hearsay evidence of one witness that the differential causes some unidentified Swedish pulp producer to divert pulp cargoes from Newark is "reliable, probative, and substantial evidence" of the type upon

[4] The witness here uses the term "importer" to refer to other Swedish shippers "importing" pulp into the United States.

which we can premise an order. The record contains no other evidence on which we can find that the Newark differential was the proximate cause of injury to that port. Consequently, Newark's case under sections 16 and 17 must also fail.

Respondents offered much evidence to show that the wharf and terminal costs at New York and Newark substantially exceeded those at Philadelphia and other North Atlantic ports. Respondents claimed that the New York and Newark differentials were imposed to offset these higher costs and that when the Newark excess terminal costs were reduced in 1951 the Newark differential was reduced from $1 to 50 cents per ton. By such evidence respondents attempted to show that any discrimination either at New York or Newark was in any event not undue, unreasonable, or unjust. Even though we find that no unjust discrimination has been shown to be the cause of any injury to New York or Newark, we may say that 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. In *Port Differential Investigation*, 1 U.S.S.B. 61 (1924), the Shipping Board said at page 69:

> * * * the board does not concur in the theory that a carrier is justified in burdening a port with a differential for the sole and only reason that the cost of operation from that port is greater than from some other port. It is obvious to the board that many elements, such as volume of traffic, competition, distance, advantages of location, character of traffic, frequency of service, and others are properly to be considered in arriving at adjustment of rates as between ports.

The record in this case fails to disclose the relevant facts on these other material elements.

Section 205 of the Merchant Marine Act, 1936, as amended, provides as follows:

> Without limiting the power and authority otherwise vested in the Commission, it shall be unlawful for any common carrier by water, either directly or indirectly, through the medium of an agreement, conference, association, understanding, or otherwise, to prevent or attempt to prevent any other such carrier from serving any port designed for the accomodation of ocean-going vessels located on any improvement project authorized by the Congress or through it by any other agency of the Federal Government, lying within the continental limits of the United States, at the same rates which it charges at the nearest port already regularly served by it.

The evidences discloses that the Federal Government has expended $20,146,000, from June 30, 1945, to June 30, 1950, for channel projects in the New York and Newark Harbor area, and that from 1853 to June 30, 1950, $154,136,000 of Federal funds were so expended.

688-650 O - 63 - 16

The language of section 205 very directly implies the possibility of coercive action by means of conference or other agreements between common carriers. There is some evidence in this case that respondents have in one way or another bound themselves and their fellow members to charge the rates which were filed with us with their proposed conference agreement, including unequal rates for New York, Newark, and Philadelphia.

The evidence in this case relates almost entirely to alleged violations of sections 16 and 17 of the Shipping Act and not to issues under section 205 of the Merchant Marine Act, which section was first referred to at the time of oral argument and then only at our suggestion. The present record is, in our judgment, not sufficiently complete on a number of issues material under section 205 for us to make findings with respect to any violations of that section if in fact we are authorized to do so in a proceeding such as this brought under the provisions of section 22 of the Shipping Act.

We shall not in this proceeding attempt to approve or disapprove respondents' proposed agreement. This matter is referred to our Regulation Office for appropriate inquiry and recommendations. The Regulation Office will consider whether the proposed agreement is inconsistent with any of the provisions of law, including the Shipping Act and section 205 of the Merchant Marine Act, and also whether respondents have heretofore been carrying out the terms of any unapproved agreement.

An order will be entered dismissing the complaint.

ORDER

At a Session of the FEDERAL MARITIME BOARD, held at its office in Washington, D. C., on the 31st day of May A. D. 1953

No. 706

THE PORT OF NEW YORK AUTHORITY

v.

AB SVENSKA AMERIKA LINIEN, REDERIAKTIEBOLAGET TRANSATLANTIC, REDERIAKTIEBOLAGET HELSINGBORG, ANTIEBOLAGET TRANSMARIN, AND WILH. WILHELMSEN

This proceeding being at issue upon complaint and answer on file, and have been duly heard and submitted by the parties, and full investigation of the matters and things involved and oral argument having been had, and the Board, on the date hereof, having made and entered of record a report stating its findings and conclusions thereon, which report is referred to and made a part hereof;

It is ordered, that the complaint in this proceeding be, and it hereby is, dismissed.

By the Board.

(Sgd.) A. J. WILLIAMS,
Secretary.

FEDERAL MARITIME BOARD

No. M–60

COASTWISE LINE—APPLICATION TO BAREBOAT CHARTER THREE GOVERNMENT-OWNED, WAR-BUILT, DRY-CARGO VESSELS FOR USE IN THE PACIFIC COASTWISE/BRITISH COLUMBIA/ALASKA SERVICE

REPORT OF THE BOARD

Exceptions to the recommended decision of the Chief Examiner were filed by interveners, and the case was argued orally before the Vice Chairman. The record, exceptions, and transcript of oral argument were considered by both members of the Board. Our findings, which are in substantial agreement with those of the examiner, were served on June 1, 1953 (4 F.M.B. 200). Exceptions and requested findings not reflected in our findings or conclusions have been carefully considered and are overruled.

This is a proceeding under Public Law 591, 81st Congress, upon the application of Coastwise Line for the bareboat charter of three Government-owned, war-built, dry-cargo, Liberty vessels for use in its Pacific coastwise/British Columbia/Alaska service for the summer and fall seasons. The Portland Chamber of Commerce and the Portland Freight Traffic Association intervened in support of the application. The Committee for the Promotion of Tramp Shipping, Ocean Tow, Inc., Alaska Freight Lines, Inc., and Olympic-Griffiths Lines, Inc., intervened in opposition to the application.

The record in Docket M–58, concerning a previous application of Coastwise Line for these same vessels, was incorporated into the record in this proceeding. In our report of April 20, 1953, in Docket M–58, we stated that we were unable at that time to make the affirmative finding that privately owned American-flag Liberty vessels were not available for charter by private operators on reasonable conditions and at reasonable rates for use in this service. For that reason, we considered it unnecessary to comment in that report on the other two statutory issues.

Coastwise presently operates a regular berth service between ports in California, Oregon, Washington, British Columbia, and

Alaska with two owned Libertys and three Libertys chartered from private owners. During the 1952 season Coastwise also operated with three Government-chartered Libertys, the charters of which were discontinued pursuant to our findings in *Review of Charters, Gov't-Owned Vessels, 1952*, 4 F.M.B. 133; these vessels have been equipped with radar and other special equipment required for their operation in the service of Coastwise, and they are the particular vessels sought by the present application. The service of Coastwise, which is under consideration, is operated with the three privately chartered Libertys; this service provides: (a) A southbound and northbound Pacific coastwise service; (b) a service between Pacific coast ports and Alaska, including southbound calls at British Columbia ports; and (c) a service between Alaska ports. The two owned vessels are employed exclusively in the trade between Pacific coast ports and British Columbia.

The record is convincing that the service herein under consideration is still in the public interest for the reasons set out in our previous findings to this effect. 3 F.M.B. 515 (1951), 3 F.M.B. 545 (1951).

The vessels applied for in this proceeding are sought by Coastwise primarily to accommodate the peak movement of cargo to Alaska, which will taper off in the late fall of this year. At the time of the hearing Coastwise was faced with a backlog of 56,555 short tons of cargo which has been offered for transportation from Pacific coast ports to Alaska during the months of May, June, and July. The carriage of this cargo alone would have required the employment of at least three more Libertys by Coastwise, making two voyages each during the months of May, June, and July. Coastwise estimates that the amount of cargo which must actually move during this 3-month period will be twice that which has already been booked.

The total military construction program of the Defense Department for 1953 in Alaska will amount to approximately $438,000,000, of which $260,000,000 is under contract, and $178,000,000 is to be awarded during this season. A United States Army witness testified that approximately $137,000,000 of military construction work will be fixed in place in Alaska during 1953, which is $4,000,000 more than in 1952. These figures include labor as well as other costs.

Coastwise estimates that it will move 50,000 tons of northbound cargo and 75,000 tons of southbound cargo in the segment of its service between Pacific coast ports and British Columbia,

and that it will move 50,000 tons of northbound cargo and 254,000 tons of southbound cargo in the Pacific coastwise trade. It is the only American-flag operator presently serving the British Columbia trade in both directions.

Intervener Olympic-Griffiths Lines operates a Liberty vessel in the Pacific coastwise trade. It has made 14 round voyages since the start of its service in August 1952, carrying full cargoes of salt northbound and two half shiploads of newsprint and lumber southbound. It has solicited southbound cargoes only since March 1953, and it points out that it has been largely unsuccessful in participating in the southbound newsprint trade because of the preferential business arrangement which one shipper has with Coastwise for the carriage of southbound newsprint. Olympic-Griffiths argues that the use of the Government-owned vessels sought herein will aid in excluding it from the southbound Pacific coastwise paper trade and will prevent it from acquiring another Liberty vessel for use in this trade. Newsprint is one of the principal commodities in the southbound Pacific coastwise trade. The other principal commodity moving southbound in this trade is lumber, the movement of which falls off during the summer months. Olympic-Griffiths requests that, if we should make the statutory findings herein, we recommend the inclusion of appropriate restrictions to prevent the use of Government-owned vessels chartered to Coastwise from competing for the carriage of southbound coastwise cargo with the privately owned vessels operated by it.

The evidence indicates that the 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. We find, therefore, that 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. We also find that there is inadequacy of service in the southbound Pacific coastwise segment of the service in so far as the privately operated vessels of Coastwise and Olympic-Griffiths are unable to carry all cargo offerings.

The need of Coastwise for additional Liberty vessels is immediate in view of its present backlog of cargoes. It was testified that this heavy seasonal movement will abate sometime in the late fall,

at which time Coastwise intends to return the Government-chartered vessels. The evidence discloses that Liberty vessels were available on the west coast for early June delivery. Coastwise has been offered the charter of several Libertys at bareboat rates ranging from $9,000 per month for a three-year charter to $15,000 per month for a one-year charter. A witness for the Committee for the Promotion of Tramp Shipping testified that he was authorized to offer Coastwise seven Libertys in behalf of member owners. All of these vessels are positioned on the west coast, available for deliveries beginning early in June. The witness testified that the bareboat rates asked by the owners ranged from $10,500 per month, and that the owners were ready to consider counter offers. While there is some doubt that any or all of these vessels are suitable for operation in the service of Coastwise, only one of these seven vessels was offered for a period under a year. This vessel was offered for a 9-month period at a bareboat rate of $12,500 per month, but it was a converted Liberty tanker with no heavy lift gear needed for this service.

The examiner has found that the 1952 earnings of Coastwise from the operation of these three Government-chartered Libertys would have in that year supported a charter hire in the neighborhood of $12,500 a month, after allowing for the cost of installing the special equipment required for operation in this service. The evidence shows, however, that monthly wage costs have increased since 1952 by over $3,000 per vessel. It was testified by Coastwise that it has not had any general rate increase in this service for over 2 years.

Under the circumstances, we find that privately owned United States-flag vessels are not available for charter from private operators on reasonable conditions and at reasonable rates for the 6-month period of peak seasonal movement in the service.

FINDINGS, CERTIFICATION, AND RECOMMENDATIONS

On the basis of the facts adduced in the record, we find and hereby certify to the Secretary of Commerce:

1. That the service under consideration is in the public interest;
2. That such service (exclusive of a portion of the southbound Pacific coastwise segment thereof) is not adequately served; and
3. That privately owned United States-flag vessels are not available for charter from private operators on reasonable conditions and at reasonable rates for use in such service.

We recommend that any charters which may be granted pursuant to our findings in this proceeding be for a period not to

exceed 6 months, subject to the usual right of concellation by either party on 15 days' notice. We further recommend that such charters contain no provision for the nonpayment of charter hire during any idle period, and that additional charter hire, over such fixed charter hire as the Administrator shall determine, be determined with reference to all voyages made thereunder, computed, accounted for, and paid separately from any previous charters. We further recommend that such charters contain a restriction prohibiting Coastwise Line from carrying southbound coastwise cargo between Pacific coast ports on Government-chartered vessels, unless privately owned United States-flag vessels are unavailable for the carriage of such cargo.

By the Board.

(Sgd.) A. J. WILLIAMS,
Secretary.

JUNE 16, 1953.

FEDERAL MARITIME BOARD

No. S-47

AMERICAN EXPORT LINES, INC.—REVIEW AND REDETERMINATION OF THE SALES PRICES OF THE "INDEPENDENCE" AND "CONSTITUTION"

Decided February 20, 1952

Kenneth Gardner for American Export Lines, Inc.
Francis T. Greene and *John F. Harrell* for the Board.

REPORT OF THE BOARD[1]

On August 10, 1948, Mr. J. E. Slater, then executive vice president of American Export Lines, Inc. (Export), read a written memorandum of understanding to the United States Maritime Commission (the Commission) setting forth the terms as fixed by the Commission on the previous day and orally communicated to him, under which Export would agree to the construction and purchase, pursuant to Title V of the Merchant Marine Act, 1936, as amended (the Act), of two 20,000-ton, 25-knot passenger vessels. The memorandum recited the construction cost of each ship, on an adjusted-price basis, to be $23,415,000 per ship, being the bid of Bethlehem Steel Company (Bethlehem), the low-bidding shipyard, and the purchase price to Export from the Commission to be $11,956,285, plus a proportion of any increase in cost due to escalation. The cost of certain additional items not included in the shipyard bid nor in the base price of $11,956,285 was recited to be shared 55 percent by Export and 45 percent by the Government. The memorandum also covered other matters discussed by the Commission with Mr. Slater on the previous day, including provisions for a new operating-differential subsidy contract to cover the new passenger ships as well as Export's cargo ships, to run for a period of 18 years. The statements in that memorandum were agreed to in principle by the Commission on August 10, 1948.

[1] See Supplementary Report of Board, 4 F. M. B. 263.

Thereupon Mr. Slater flew to New York and on the same day presented the same memorandum to the directors of Export, who thereupon gave their approval without qualification. Notice of the action of the directors of Export was telegraphed to the Commission on August 11, 1948. On that day the Commission accepted the bid of Bethlehem for the construction of the two ships and thereupon two tripartite contracts (Nos. MCc-61390 and MCc-61391) between the Commission, Export, and Bethlehem, for the construction of the two ships at the price mentioned, with provision for escalation, were duly executed and dated as of August 11, 1948.

Certain statutory findings and determinations by the Commission were required before formal sales (construction-differential subsidy) contracts could be entered into with Export, and, accordingly, on November 16, 1948, the Commission took the necessary formal action, and on that date authorized the sale of the two vessels to Export at the base unit selling price of $11,956,285 per ship, and directed the preparation of the usual sales (construction-differential subsidy) contracts by the general counsel of the Commission.

On November 22, 1948, the Commission formally advised Export that it had made the several findings of fact which, under sections 501 and 502 of the Act, are prerequisite to the sale of a vessel "at a price corresponding to the estimated cost * * * of building such vessel in a foreign shipyard," as provided by section 502. This letter computed the selling price to Export of $11,956,285, as follows:

(1) Base unit contract price (25-knot vessel)	$23,415,000
(2) Base unit contract price (22½-knot vessel)	23,116,000
(3) Amount included in (1) representing excess speed over 22½ knots	299,000
(4) Estimated base unit foreign cost (22½-knot vessel)	12,713,800
(5) Estimated base foreign cost of national defense features other than excess speed (55 percent of $1,377,300, the base United States cost of such features)	757,515
(6) Base unit selling price to applicant	11,956,285

The Commission's terms of November 22, 1948, were accepted in writing by Export.

The tripartite contracts of August 11, 1948, recited that the Commission had concurrently entered into separate contracts with Export for the purchase by Export of the vessels upon completion. However, the preparation and execution of these formal contracts of sale and for construction-differential subsidy was delayed and the contracts were not executed until January 11, 1951, by the Federal Maritime

Board as successor to the Commission. When executed, the contracts included provision of redetermination of the vessels' sales prices by the Board as is hereinafter explained.

Under section 502 (b) of the Act, the Government is authorized to absorb the difference in cost between the American shipbuilder's bid and "the fair and reasonable estimate of cost, as determined by the Commission, of the construction of the proposed vessel if it were constructed under similar plans and specifications (excluding national defense features * * *) in a foreign shipbuilding center which is deemed by the Commission to furnish a fair and representative example for the determination of the estimated foreign cost of construction of vessels of the type proposed to be constructed." In addition, "the cost of any features incorporated in the vessel for national defense uses * * * shall be paid by the Commission in addition to the subsidy."

On July 11, 1949, the Comptroller General submitted a report (**H. R.** Rep. No. 1423, 81st Cong., 1st Sess.) criticizing the determinations of the Commission with regard to the amount of construction-differential subsidy and the allowances for various national defense features on several passenger vessels, including the two Export ships which are the subject of this review. The gist of the Comptroller General's criticisms with respect to the two Export ships appears to be that the Commission's foreign cost estimate of $11,956,285 per ship was not founded on "convincing evidence" as required by section 502 (b) of the Act where the subsidy is over 33⅓ percent, and, further, that the allowance of $1,676,300 per ship for national defense features was, in his judgment, an allowance, at least to some extent, for certain features sought by Export for commercial reasons. Following extensive hearings before a subcommittee (Hardy Committee) during the summer of 1949, the House Committee on Expenditures in the Executive Departments published its Fourth Intermediate Report (H. R. Rep. No. 1423, 81st Cong., 1st Sess.—the Hardy Report). The Hardy Report, while containing numerous critical implications, left open the issues of law and policy dealt with therein and concluded with the recommendation that the Commission should review the instant and other construction-differential subsidy agreements and that all possible action be taken to prevent excessive expenditure of Government funds. Under Reorganization Plan No. 21 of 1950, the Board is the successor to certain of the powers, duties, and unfinished business of the Commission, including the responsibility for the review and redetermination of the sales prices which properly should be charged to Export for these ships.

On August 14, 1950, the Board appointed a special committee to study and submit its recommendations as to the problems herein involved, considering and giving due weight to the reports of the Comptroller General and the Hardy Committee.[2] In addition to the study which has been given by the special committee to the postwar award of subsidies on passenger vessels, the Board and the Board's staff have also independently reviewed the history of these subsidy determinations and have analyzed all available data, which, under the Act, are the bases for subsidy determinations.

On January 11, 1951, when the *Independence* was ready for delivery by her builders, the Board, as already explained, entered into two contracts with Export (Nos. MCc–61468 and MCc–61469) to formalize the prior informal sales agreement between the Commission and Export, and in addition (article 5), to permit the Government to "make a redetermination of the vessels' sales prices, in accordance with the provisions of the Merchant Marine Act, 1936, as amended, as of the date of the Commission's grant of the construction-differential subsidy to the Buyer * * *." The deadline date for this redetermination has been extended. The contracts further provide that within 30 days after the redetermination, Export may refuse to accept the redetermined price and may terminate the agreement *in toto*. In the latter event, the vessels shall be returned to the Government, Export to pay charter hire for their use at the rate of 8½ percent per annum of the Government's redetermined sales price, plus one-half of Export's total net profits from the operation of each ship. Furthermore, Export's operating-differential subsidy agreement of June 6, 1951 (Contract No. FMB–1) provides (article I–11) that if Export fails to accept the Board's redetermination of the sales prices of the *Independence* and *Constitution*, then Export's operating subsidy contract as to all its vessels "shall terminate automatically on December 31, 1952." By those contractual provisions, the Board has sought, pending redetermination of the prices, to discharge its operating responsibilities under both titles V and VI of the Act, precipitated by the completion and delivery of the ships, while at the same time taking no correlative action which might jeopardize the legitimate interests of the Government in the event that it should be decided, after review, that the terms of the sale of these vessels should be renegotiated. What follows is our review of the Government aid granted under Title V of the Act pursuant to direction from the President and to recom-

[2] The original appointees were Prof. H. L. Seward, chairman, Mr. R. E. Gillmor, and Mr. William B. Jones. Mr. Jones being unable to serve, Dr. Walter H E. Jaeger was appointed in his place on October 12, 1950. Professor Seward resigned March 14, 1951. The remaining members submitted their report, discussed below, under date of September 7, 1951.

mendations of the Hardy Committee, and also our redetermination of the vessels' sales prices pursuant to the provisions of contracts Nos. MCc–61468 and MCc–61469, dated January 11, 1951, between the Board and Export.

It is clear that certain fundamental issues must be resolved before the estimates and calculations can be made of the foreign construction cost of these vessels, and the determination of the vessel features which properly should be classed as national-defense features and be paid for by the Government. Accordingly, a letter was addressed to Export under date of September 12, 1951, posing six issues of law and six issues of fact and policy upon which the views and positions of Export were invited. Thereafter, hearings were held on October 4 and 5 with respect to those issues. Following a 3-week period for Export's examination of the staff's estimate of the 1948 foreign cost of building these ships, further hearings on the validity and basis of the staff estimates were held on November 19, 20, 28, and 30. Briefs have been submitted by Export's counsel and by Board counsel. Counsel or representatives of Export, the Comptroller General, and the Hardy Committee attended all hearings, while the Bureau of the Budget, the Departments of the Navy, Treasury, and Commerce, and the special committee were represented at the October hearings on the general substantive issues.

In order to focus the substantive issues involved and to provide a basis for pointed discussion at the hearing, the Board's staff prepared memoranda stating its opinions and recommendations (exhibits 4, 5, 6, 7, and 8). These, together with the September 7, 1951, report of the special committee (exhibit 10) and a short statement by Export dated September 27, 1951 (exhibit 9), were circulated to all interested parties in advance of the hearing. Inasmuch as the witnesses at the hearings of October 4 and 5, as well as memoranda prepared by the staff and Export, discussed the issues in the order in which they are posed in the Board's letters, we will state and discuss our decisions in the same order.

Issues of Law

1. *In the redetermination by the Board of the respective vessels' sales prices, must the Board's estimate of the foreign-construction cost of the proposed vessels be estimates of the vessels built to American standards or may it be based upon the cost of the vessels if built to foreign standards?*

Decision. American standards.

So far as pertinent, section 502 (a) of the Act provides:

* * * Concurrently with entering into such contract with the shipbuilder, the Commission is authorized to enter into a contract with the applicant for the purchase by him of *such vessel* upon its completion, *at a price corresponding to the estimated cost, as determined by the Commission pursuant to the provisions of this Act, of building such vessel in a foreign shipyard.* [Emphasis added.]

Section 502 (b) of the Act provides:

The amount of the reduction in selling price which is herein termed "construction differential subsidy" may equal, but not exceed, the excess of the bid of the shipbuilder constructing the proposed vessel * * * over the fair and reasonable estimate of cost, as determined by the Commission, of the construction of the proposed vessel *if it were constructed under similar plans and specifications* * * * in a foreign shipbuilding center * * *. [Emphasis added.]

The legislative history of the 1938 amendment, which provided for the substitution of the word "similar" for the original word "like" in the 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 Commission from 1938 to 1948, lead us to conclude that the comparison should be with the hypothetical foreign vessel built to American standards. Export appears to agree (exhibit 9).

We recognize, as did the Commission, that this construction of the act does not achieve full capital parity between the American operator and his foreign competitors and that, to this extent, the Act falls short of its general objective of putting the American ship buyer and operator on a capital parity with his foreign competitors. However, we believe that the remedy, if one is required, should lie in an appropriate amendment of the Act.

2. *In the redetermination by the Board of the respective vessels' sales prices, must the allowance for national-defense features be limited to vessel features added to the applicant's plans and specifications pursuant to specific Navy Department request?*

Decision. No.

The Act does not define what features incorporated in a vessel and useful for national-defense purposes may be made the subject of a national-defense allowance, the entire cost of which shall be paid by the Government. Neither does the Act specify any procedure for the determination of features qualifying for national-defense allowances which must be followed to the exclusion of any other procedure.

Section 501 (b) of the Act provides only:

The commission shall submit the plans and specifications for the proposed vessel to the Navy Department for examination thereof and suggestions for such changes therein as may be deemed necessary or proper in order that such vessel

shall be suitable for economical and speedy conversion into a naval or military auxiliary, or otherwise suitable for the use of the United States Government in time of war or national emergency. If the Secretary of the Navy approves such plans and specifications as submitted, or as modified, in accordance with the provisions of this subsection, he shall certify such approval to the Commission.

Section 502 of the Act provides that the sales price of the vessel (its estimated foreign construction cost) shall exclude "the cost of any feature incorporated in the vessel for national-defense uses, which shall be paid by the Commission in addition to the subsidy."

In the case of the two Export ships, most of the vessel features which were made the subject of the national defense allowances granted by the Commission were included in the plans and specifications of the two vessels (Design P2–S1–DL2) submitted by Export in December 1947. While Export did not then originally claim that any features were incorporated for national defense purposes, still, after the many conferences between the staff of Export and that of the Commission, held for the consideration of the vessel plans, as well as correspondence between Export and the Commission, the Commission determined that the following features had been incorporated in the vessel plans for national defense purposes and therefore should qualify as national defense features:

(1) The difference between 55,000 maximum shaft horsepower (giving a speed of 25 knots) and the 40,700 shaft horsepower estimated to be required for 22½-knot speed at a cost of	$299, 000
(2) Additional bulkheading at a cost of	96, 850
(3) The increase in third-class passenger space from 116 to 308 at a cost of	827, 365
(4) The increase in generator capacity from 3,600-kilowatt generators to 4,400 generators at a cost of	112, 085
(5) The increase in evaporator capacity above 90,000 gallons per day at a cost of	269, 000
(6) Design expenses, insurance, classification fees, etc., for the above features	72, 000
	1, 676, 300

In addition to the criticism of the Comptroller General, previously referred to in this decision, the Hardy Report (p. 25) states:

* * * The present wording of the statute appears in practice to present an inadequate administrative criterion, and the lack of legislative history in connection with the applicable provisions sheds further doubt on the real intent of the Congress. It is most difficult to read into the statute the interpretation placed upon it by the Maritime Commission in determining the national defense features of the superliner.

The statute lends itself much more readily to an interpretation that only those features which the Navy determines should be added to commercial requirements are appropriate as national defense features. The language as now written does

not authorize a payment by the Government for those features inherent in every vessel which make it useful as an instrument of national defense, nor is it recommended that it should. Certainly we do not consider that the present law authorizes the utilization of the national defense feature provision as a substitute for awarding an increased construction-differential subsidy. A review of this phase of the statute is of paramount importance toward clarification of congressional intent. The present situation calls for a clear-cut provision setting forth the policy of Congress as to the national defense aspects of the merchant marine and the extent to which the payment for national defense features is a responsibility of the Government.

The Commission, in the exercise of its administrative discretion, adopted on June 10, 1948, the policy of paying for such national-defense features in addition to the construction-differential subsidy, if, and to the extent, such features did not have a commercial utility, or if, and to the extent, their cost was disproportionate to their value for commercial purposes. In our opinion, the above policy is sound.

We conclude that the inclusion of a vessel feature in the applicant's plans and specifications does not *per se* bar the granting of a national-defense allowance for such vessel feature; the Act contains no such bar. The only express requirement in the Act is contained in section 502 (a), which provides that bids for the construction of the vessel can be secured only "If the Secretary of the Navy certifies his approval * * *." Under section 501 of the Act, this approval imports the finding merely that the vessel is "Suitable for economical and speedy conversion into a naval or military auxiliary, or otherwise suitable for the use of the United States Government in time of war or national emergency." It is to be noted that, under this language, the Navy certification could be based solely upon the usefulness of the ship to the Government for *civilian* purposes in a national emergency, such as evacuation of nationals; facility of conversion to a troop transport or other military auxiliary is not in such case a prerequisite.

The Act appears to permit but not to require that national defense features, referred to in section 502 (b), be added to the original plans as a result of the Navy's suggestions as authorized by section 501 (b).

The Board takes notice of the fact that the major United States shipyards and principal naval architects, including Bethlehem, which prepared Export's plans in this case, have planned and built large numbers of vessels of numerous kinds for the Navy and are generally familiar with the structural and other features which the Navy considers desirable for inclusion in auxiliaries such as troop transports. Bethlehem, in designing these ships, was necessarily aware of the known desires of the Navy concerning speed, additional bulkhead-

688-650 O - 63 - 17

ing, dual engine rooms, etc. If a ship designer were required to disregard the known objectives of the Navy, it follows, as stated by Mr. Slater, president of Export, that "anybody who designs a ship should design the worst ship they can think of and then let the Navy force them into providing the type of ship that should be there" (R. 110). Such practice would require extensive redesign in order to incorporate subsequent suggested changes into the plans and specifications as originally developed. A ship is an operating unit, and any substantial modification of a final design may entail a vast number of additional coordinating changes.

In 1948 the Commission had a Technical Division (U. S. M. C. Administrative Code, April 24, 1946), which was later redesignated the Technical Bureau. This Bureau, in addition to reviewing from an engineering standpoint vessel plans and specifications submitted by applicants for Government aid, was directed "to authorize the installation of national-defense features on privately owned vessels." [3] Thus, there was close collaboration between the technical staff of the Commission, Export, and the marine architect in the development and expansion of the original plans and specifications for these vessels, to the end that the final plans and specifications would ultimately be approved.

Because of the close liaison between the Commission's technical staff and the Navy, the former (many of whom had had extensive Navy design experience) suggested the inclusion of features during the development of the plans which in their professional capacity they knew the Navy would desire. For example, Andrews, vice president of Export in charge of operations, stated (R. 166) that the divided engine rooms were originally included because the Commission's Technical Division stated that "on a national-defense basis, the Navy no doubt would require the size of this vessel to have two divided (separated independent) engine rooms, and we went along on that basis with the Technical Division of the Maritime Commission." According to Andrews, the generator capacity was increased at the request of the Technical Division so as "to have a surplus in the ship for any emergency purposes that may be placed at a later date for national defense" (R. 184).

In short, it is our conclusion that the bidding plans and specifications for the Export ships were developed with the close collaboration of the technical staff of the Commission and the applicant's ship-

[3] This directive was supplemented by U. S. M. C. General Manager's Order No. 17 of September 24, 1948, which directed the Chief, Bureau of Engineering, to "cooperate with the National Military Establishment in the *preparation of plans and studies for both new designs* and for the conversion of vessels to military types in time of national emergency * * *." [Emphasis added.]

design agent, with full knowledge of the requirements of the Navy. Accordingly, we have no hesitation in rejecting a construction of the Act which would limit allowance for national-defense features to those which are added to Export's plans and specifications as originally filed, in order to comply with the subsequent request of the Navy Department.

3. *In the determination of the respective vessels' sales prices, could vessel-sales prices (estimated foreign construction costs) have been made subject to an escalation clause to reflect changes in wages, material, and other elements of construction cost?*

Decision. Yes.

This question arises from the fact that the Bethlehem bid for the Export ships which was accepted was an "adjusted price" bid of $23,415,000 per ship, which was $2,698,000 less than its fixed price bid of $26,113,000. The "adjusted price" bid was subject to the usual type of escalation under which the price was to be adjusted upward or downward in mathematical relationship to fluctuations in designated indices of wage and material rates. Furthermore, the estimated foreign construction cost under section 502 (b) of the Act was developed by the staff of the Commission as its estimate of what an adjusted price bid of a Netherlands shipyard might be. That basis of estimation was used for three reasons: (1) It corresponded with the basis of Bethlehem's bid; (2) the information available to the Commission indicated that at that time the foreign shipyards would not submit fixed price bids (C. R. 34); and (3) it was the most accurate way to estimate the foreign construction cost of the ships since the amount of a foreign shipyard's estimating factor to cover anticipated increases in labor and material costs would be largely a matter of conjecture. It might or might not coincide with the approximately 11-percent factor that Bethlehem actually used to cover its anticipation of wage and price rises in the United States, i. e., the percentage excess of its fixed price bid over the adjusted price bid.

Furthermore, escalation is and long has been an accepted feature of Government shipbuilding contracts. In general, the shipbuilder, for his own protection, estimates potential cost increases when figuring a fixed price bid above the actual rise experienced. Consequently, an adjusted price basis plus escalation is, in general, to the Government's advantage; the same would be true of the American buyer of the hypothetical foreign-built ship. Consequently, the decision of the Commission to use an adjusted-price basis for its estimate of foreign cost appears reasonable, sound, and in keeping with the parity principle of the Act. For these reasons, the Board has also used the adjusted-price basis for its estimate of the foreign-construction cost of

the two Export ships. Finally, this method has been formally agreed to by Export and the Board in article 3 (a) (iii) of the construction-differential subsidy agreements of January 11, 1951. Section 502 of the Act, particularly when coupled with the authority given under section 207 to "enter into such contracts * * * as may, in its discretion, be necessary," contains sufficient flexibility to permit subsidy determinations to conform to accepted commercial practice in this regard.

There remains the mixed question of law and policy whether the escalation adjustment for the hypothetical ship should be based on changes in foreign shipbuilding costs or whether the adjustment, for administrative convenience, may be geared to United States wage and material indices (exhibit 4, R. 369; exhibit 5, R. 393; exhibit 14, R. 479). From a strictly theoretical point of view, the escalation clause in a foreign vessel sales contract should be geared to appropriate foreign wage and material indices since the vessel sales price is to be "a price corresponding to the estimated cost * * * of building such vessel in a foreign shipyard." Where, at the time of entering into a Title V vessel-sales contract, the trend of foreign labor and material costs is similar to the trends in the United States, administrative convenience may warrant the use of domestic indices. The use of United States indices with which both the Government and the purchaser are familiar would, under such circumstances, normally result in a reasonably accurate and sound provision for future changes in construction costs, and obviate an administrative burden, the cost of which might be disproportionate to a changed result one way or the other, if at all. Hence, the procedure actually followed both by the Board and its predecessor with respect to the Export ships falls within the ambit of "the fair and reasonable estimate of cost * * * of the construction of the proposed vessel * * * in a foreign shipbuilding center", which is our guiding standard under section 502 of the Act.

In the case of the Export ships, the trends of the Netherlands indices of prices for metal and metal products and average hourly wage earnings are substantially similar to those in the United States up until the latter part of 1950. Commencing in October 1950, the Netherlands trend of rising prices was steeper than the domestic trend, presumably due to the delayed impact of the September 1949 devaluation of western European currencies (exhibit 15, R. 481–482). Any attempt to put a money value on the factors for purposes of subsidy determination would be speculative, and if determinable at all would probably be minor in view of the completion dates of the vessels. On the contrary, the original assumption as applied to the Export agreement in 1948, that the foreign cost of labor and materials

would fluctuate up or down on the same general basis percentagewise as would domestic costs, was, in our judgment, a reasonably sound assumption under the conditions then prevailing.

4. *In the determination of the respective vessels' sales prices, could the vessel-sales contract have provided that the estimated foreign construction cost in terms of American dollars should be subject to changes in the value of the foreign currency during the period of construction and payment?*

Decision. Yes. See reasoning under Question 5 below.

The decision on this question is academic since the Commission's agreement with Export of August 1948 contained no provision therefor.

5. *In the redetermination of the respective vessels' sales prices by the Board, does the Act now prohibit 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?*

Decision. No, provided such redetermination is made on the basis only of circumstances existing as of the date of the construction contracts.

The importance to any American who, during the past 3 or 4 years, was purchasing western European products, of the approximately 30-percent devaluation of sterling and all associated western European currencies which occurred in September 1949, obviously required us to give the most searching scrutiny to its legal and factual impact upon the Export agreement of August 1948. The method by which the estimated foreign cost in foreign currency of the subsidized vessel should be converted into dollars is not touched upon by the Act. The only guidance given us by Congress with respect to price is that the final sales price in dollars should be a "fair and reasonable estimate of cost" of the vessel, were it being built by a foreign yard. The legislative history of the Act sheds no light at all upon the problem of how the Commission should treat fluctuations in foreign exchange rates occurring during the period of construction and progress payments.[4]

On the other hand, the Act and its legislative history is definite beyond substantial question that the estimate of foreign construction cost (below which vessels cannot be sold under the Act) must be made as of the date the contract is entered into for the construction of the ship. The last sentence of section 502 (a) provides:

---

[4] At p. 81 of the Hearings on S. 2582, 74th Cong., 1st sess., Senator Vandenberg asked but obtained no answer to the question: "So long as international exchanges are in a flux, are not your differentials bound to be very much a speculation anyway?"

Concurrently with entering into such contract with the shipbuilder, the Commission is authorized to enter into a contract with the applicant for the purchase by him of such vessel upon its completion, at a price corresponding to the estimated cost, as determined by the Commission pursuant to the provisions of this Act, of building such vessel in a foreign shipyard.

The last sentence of section 705 of the Act, added by the Act of August 4, 1939 (53 Stat. 1182), reads:

No vessel constructed under the provisions of this Act, as amended, shall be sold by the Commission for operation in the foreign trade for a sum less than the estimated foreign construction cost exclusive of national defense features (*determined as of the date the construction contract therefor is executed*) less depreciation based on a twenty-year life * * * [Emphasis supplied.]

The legislative history of this amendment shows that Congress intended to put the same floor under vessels sold pursuant to Title VII as was provided for ships built and sold pursuant to section 502 (Title V). Thus, Senate Report No. 724, 76th Congress, 1st session, states:

Vessels constructed for the Maritime Commission account under Title VII (or built under Title V and then taken back because of buyer's default) under existing law might be thrown on the market at bargain prices. Section 11 would provide a statutory "floor" such as is provided in Title V * * * under the price at which such vessels may be chartered or sold.

See, also, to the same effect, House Document No. 208, page 8; hearings on House bill 5130, page 7; and House Report 824—all 76th Congress, 1st session. The Board therefore concludes not only that the limitations of the last sentence of section 705 of the Act are applicable to the sale of vessels with construction-differential subsidy under Title V, but that Congress intended Title V to require that the estimate of foreign construction cost should be made as of the date the American construction contract therefor is executed. In the case of the *Independence* and the *Constitution*, the crucial date for purpose of estimating foreign-construction cost is, therefore, August 11, 1948, the date of the two tripartite contracts between the Commission, Bethlehem, and Export.

The requirement of section 705, however, that the estimated foreign cost must be made as of the date the contract is entered into, does not preclude the Board from giving effect to a subsequent occurrence such as devaluation, provided it is a matter which the Commission and the applicant, exercising the judgment of prudent businessmen, would have foreseen and might have provided for in their contract. The reasoning which underlies our conclusions is that the whole objective of Title V is to permit the purchase of the American ship by the American operator at the closest possible approximation to the actual dollar price that it would have cost him had the ship been built foreign. If Export had actually contracted for these ships with

a Netherlands shipyard, and would have had the opportunity to contract in dollars at an appreciable discount because of impending devaluation or had been able to provide for progress payments to be made in guilders during the life of the construction contracts, it would in fact have had the benefit of a substantial reduction in dollar cost. Consequently, to the extent that devaluation could have been reasonably foreseen and turned to the advantage of a purchaser in Export's supposed position, the Board in making its redetermination of the vessel sales prices in 1951 may make adjustments to obtain the benefit of potential devaluation which a prudent businessman would or should have made as of August 1948.

6. *In the determination of the respective vessels' sales prices, could the vessel-sales contract have included in the estimated cost of the respective vessels the following costs not included in the domestic shipyard bid:*

a. *Fees for preparation of bidding plans and specifications;*

b. *Cost of inspection during construction;*

c. *Interior decorator's fees;*

d. *Increases in cost due to running standardization trials;*

e. *The cost of supplying items not included in the construction contract but which may be furnished separately by the Commission or purchased by the applicant with prior approval of the Commission?*

Decision. Yes.

The question here really is whether a subsidy may be paid for these items. The Commission included all of the above items as subsidized cost, of which the Government was to bear 45 percent and Export 55 percent.

So far as pertinent, section 502 (a) of the Act provides:

> * * * Concurrently with entering into such contract with the shipbuilder, the Commission is authorized to enter into a contract with the applicant for the purchase by him of such vessel upon its completion, *at a price corresponding to the estimated cost, as determined by the Commission pursuant to the provisions of this Act, of building such vessel in a foreign shipyard.* [Emphasis added.]

Section 502 (b) of the Act provides:

> The amount of the reduction in selling price which is herein termed "construction differential subsidy" may equal, but not exceed, the excess of the bid of the shipbuilder constructing the proposed vessel * * * over *the fair and reasonable estimate of cost, as determined by the Commission, of the construction of the proposed vessel if it were constructed under similar plans and specifications * * * in a foreign shipbuilding center* * * *. [Emphasis added.]

In connection with these items of ship-construction costs, the Comptroller General indicated that there is some question as to whether these items properly can be subsidized and that, in any event, the

subsidy rate determined without regard to these items should not be applied to them (H. R. Rep. No. 1423, 81st Cong., 1st sess., p. 36).

With regard to these same items, the Hardy Committee stated (H. Rep. No. 1423, 81st Cong., 1st sess., p. 25):

> Special examination is recommended of the problem involving items which are normally outside the scope of shipyard bids and their relationship to the granting of a construction-differential subsidy.

All of the items of cost referred to above enter into a completed ship and are costs which would necessarily be incurred in the construction of a ship in a foreign shipbuilding center.

(*a*) The plans and specifications of the ships, including the "bidding plans and specifications" furnished by Export, would be required by the foreign shipbuilder in its construction of the ships. The cost of preparing all such plans and specifications are a part of the over-all cost of a ship whether it is built here or abroad.

(*b*) In constructing a ship either in an American shipyard or in a foreign shipyard, the party for whom the ship is being constructed will employ inspectors who, on behalf of such purchaser, will inspect the work of the shipyard to make certain that the shipyard constructs the ship in accordance with the contract plans and specifications. The purchaser of a ship to be built in a foreign shipyard would employ such inspectors, and their cost necessarily is a part of the total cost of the ship.

The inspection of ships sold under the provisions of Title V was the administrative responsibility of the Commission, and in meeting this responsibility the Commission, in the case of the greater number of ships constructed for it for sale, inspected the construction of such ships with inspectors from its administrative staff, and did not, since no provisions of the Act require the charge of such costs to the sales price of the respective ship, include any part of such inspection costs (or other administrative costs) of the Commission in the ship sales prices. The Commission could have undertaken the entire work and the entire cost for its own account. In this instance Export undertook certain inspection work, a portion of which was in lieu of and/or in substitution of the Commission's inspection. It would appear that it is proper, therefore, to include for subsidy calculation that portion of Export's inspection cost covering work authorized by the Commission to the extent that such work was in fact in lieu of and in substitution of Commission inspection.

(*c*) The interior decorator's fees cover the work of preparing the interior design plans and specifications required in the construction of the ships, and the work of supervising the work of the shipyard in carrying out such plans and specifications. These are costs necessarily

included in the total cost of constructing the respective ships, and cover work which ordinarily would be included in the American shipbuilder's contract and in the contract of a shipbuilder constructing the ships in a foreign country.

(*d*) Standardization trial runs customarily were had in connection with the construction of a new type of ship by the Commission. Such trials were generally run on one ship of a group and were for the purpose of securing operating performance data with respect to all ships in the group and to assist the Commission in its ship design responsibilities under the Act. These trials are run by the shipyard constructing a ship selected for such trials, and their cost would be included in the final contract price of the American shipbuilder; if such trials were required in connection with the construction of a ship in a foreign country, the cost of such trials would be included in the contract price of the foreign shipbuilder.

(*e*) The cost of items not included in the construction contract, furnished to the ships by the Commission or Export with Commission approval, cover the cost of materials and furnishings required for the ships' outfitting. These costs are a part of the construction cost of a ship (sec. 905 (d) of the Act) and are costs which also would normally have been included in the contract of the American shipbuilder and would be similarly included in the contract of a foreign shipbuilder. Such costs, however, should not be included at a figure in excess of the fair and reasonable estimate of the foreign cost. 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. Consequently, it is necessary to determine the estimated foreign cost of these items as separate and distinct cost items to be included in the over-all foreign cost estimate.

Since all of the above items of cost 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 the proposed ships in a foreign country, it is our opinion that, under a reasonable construction of the applicable provisions of section 502 of the Act, these cost items are properly considered for inclusion in the estimated foreign construction cost of the ships in amounts equal to the estimated foreign cost of each such item.

Issues of Fact and Policy

1. *In the redetermination by the Board of the respective vessels' sales prices, should the estimated foreign-construction cost be subject to adjustment by an escalation clause?*

Decision. Yes.

Our discussion of this matter under Issue of Law No. 3, above, concluding that under section 502 of the Act the vessel-sales prices of the *Independence* and *Constitution* can legally be made subject to escalation geared to American wage and material indices, is largely dispositive of the question of policy whether we should do so in the instant redetermination. As a matter of policy, we see no reason to upset either the original agreement of 1948 between Export and the Commission that the prices to Export would be

> * * * plus its proportion of the additional price brought about by the acceleration[5] in the cost as specified in the bidding conditions

or the more detailed provisions of our formal contract of January 11, 1951.

2. *In the redetermination by the Board of the respective vessels' sales prices, should the estimated foreign-construction cost in terms of American dollars be subject to adjustment for the changes in the value of the foreign currency during the period of construction and payment?*

Decision. No.

While we believe it would have been legally possible for the Commission to have included provisions for such an adjustment, and while we must approach this question knowing that a substantial change in the value of foreign currency actually did take place during the course of construction, we must answer this question only on the basis of what our position would have been had we actually been considering the problem in 1948. No provision for adjustment for changes in the value of foreign currency was made in the 1948 contract, and had it been made it would have created further uncertainties in the final sales price, and evidence is lacking that prudent businessmen would have desired to include in contracts made in 1948 provisions committing both parties to such uncertainties. Export frankly states it would not have agreed to assume such risks. We deem the considerations applicable to the solution of this question quite different from those applicable to question of fact and policy No. 1 covering provisions for adjustments for escalation which are quite usual in this sort of construction contract, and the effects of which can often be forecast with a reasonable degree of accuracy.

[5] "Acceleration" is here used synonymously with "escalation."

2a. *In the redetermination by the Board of the respective vessels' sales prices, should the estimated foreign-construction cost, in terms of American dollars, be subject to an adjustment because of the disparity existing as of August 10, 1948, between the official governmental exchange rate and the free-market rates, in terms of dollars, of the foreign currency of the representative shipbuilding center?*

Decision. No.

After carefully weighing the evidence introduced on this point, we conclude that the answer must be "No," because there is no convincing evidence that the foreign-construction cost of vessels similar to the ones under discussion, in terms of dollars, would have been reduced in August 1948 because of the then existing disparity between the official rate of exchange and the free rate.

It is clear that by reason of well-enforced governmental restrictions, foreign (Netherlands) funds sufficient to pay the estimated foreign-construction cost could not have been purchased in the ordinary course of business with dollars at the free-market rate or at any material reduction from the official rate. Our inquiry, however, must consider whether there were other means available and generally used by international merchants to accomplish the same result in a different manner.

The special committee recommends that the foreign-construction cost estimate should be based on "the average free rate throughout the period of construction." The Committee argues that the free rate was a realistic rate and that a foreign operator planning to purchase a ship in a foreign yard could have accumulated a reserve of foreign currency sufficient to pay the foreign price, and that the true value of such a reserve in dollars would have been measured by the free and not the official rate. The Committee did not deal with the practical difficulties of actual conversion facing the owner of dollars endeavoring to accumulate such a reserve at less than the official rate or the difficulties thereafter of using such a reserve fund or of obtaining an export license for a ship purchased therefrom.

Export, outlining its position (exhibit 9), contends that the Board, although making its estimate as of August 11, 1948, should take into account circumstances which have transpired since that date, of which the most important has been devaluation. In apparent support of this position, it argues that an American purchaser armed with dollars in 1948, by making a dollar contract, "unquestionably could have obtained most important concessions in price by reason of the great need of American dollars in the European countries at that moment." During the hearing, Mr. Slater of Export stated, in effect, that an American buyer had two alternatives: (1) To make a contract at "a fixed price in dollars as of the time," or (2) to purchase the foreign

currency to meet a commitment expressed in guilders. He indicated his own preference for the first alternative, saying (R. 239):

> Personally, I believe that the first method would have been the logical one to have followed because we would then be dealing with a known value and not gambling in the foreign currency.

He continued, pages 242–246:

> I would have expected to have made a deal on a fixed dollar basis with substantial reduction below what the Dutch cost, or British cost, would have been in dollars if translated at the official rate * * * I am saying in substance that I would have made a deal in dollars at a fixed price in dollars but at a substantial reduction in cost. * * * I want to say we, from our point of view with what we had in foreign currency, would not have made a deal in which we would have wanted to gamble in foreign currency. * * * I would have expected to have let that job in American dollars at a very substantial reduction as against the former figure that I mentioned, and if I hadn't been able to do that, I would have gone elsewhere because that would have been the obvious prudent thing to have done.

Mr. Slater stated that the substantial reduction which he would have expected for making a dollar, rather than a guilder contract, was "at least in the range of 15 or 25 percent." Strong inferences and rumors of various financial deals to augment the proceeds of dollar credits beyond the official exchange have been reported from foreign countries, and it appears possible that some such transactions took place. The Board has, however, been unable to establish the full nature or amount thereof and cannot take cognizance of them. Export can point to no major important transaction where such an augmentation was obtained (R. 89, 91, 247).

The staff takes the position, opposed to Export, that no consideration should now be given to the disparity between the official and the free rate of exchange existing in 1948. The staff points out that such disparity was not deemed material by the Commission in 1948, and that, insofar as its records show, the Commission gave no consideration to the prospect of devaluation, recognizing that guilders could not be obtained at the free-market rate in any such amounts as would be necessary to cover the foreign purchase price of these ships.

Export, in view of the 45 percent subsidy rate accorded to it in 1948, raised no objection to the conversion of funds at the official rate. The Commission records show that Mr. Curtin of Export stated to the Commission on August 4, 1948:

> In converting we would be justified in using the lower rate and use of it would build up a bigger differential. However, we are satisfied to stand on the official rate, which we know. Using the higher rate, the differential is still there. (See Transcript, Commission meeting August 4, 1948.)

The staff concludes that there is no basis in the record for any presumption that if we had been considering Export's application in 1948 without the hindsight knowledge of the devaluation which actually occurred in 1949, we would, or should have made any provision for the contingency of devaluation. The staff takes the position that, in view of the strong governmental policy both in this country and abroad to protect official rates of exchange, neither a prudent businessman nor a United States Government agency could well make calculations based on a rate of exchange which would have appeared to sanction a business transaction prohibited by law.

After hearing the testimony of the staff and of Export on the point, and before reaching a final conclusion, we directed a field investigation to identify, if possible, any large business transactions between this country and European "soft-money" countries in which concessions or discounts were granted because of dollar payments. This investigation covered foreign transactions generally and also foreign ship construction contracts for American account and included reports obtained both in this country and abroad. In no case were we able to discover any conclusive evidence that substantial business transactions were conducted in a manner which avoided the effect of the various governmental regulations establishing official rates of exchange. A responsible executive of a leading New York bank reported that in the past Americans with dollars were able to obtain discounts from the official rate of exchange on foreign transactions, including those with Holland, but that since early in 1948 the major New York commercial banks discontinued facilitating transactions otherwise than at the official rate of exchange. No discount transaction known to this official involved vessel construction in Holland. Similarly, the official responsible for the foreign department of another prominent New York bank stated that he had no doubt but that American businessmen with dollars in 1948 could have obtained discounts from the Netherlands official rate, which he surmised would have ranged from 10 to 20 percent. He stated, however, that his bank had not handled any foreign transactions except at the official rate nor could he identify any transactions where any such discounts had been arranged. Two officers of still another leading New York bank reported that, although their bank handled no transactions at less than the official rate, they knew that in 1948, as well as today, the Netherlands needed dollars and believe that discounts ranging from 10 to 20 percent could have been arranged in dollar payments. Reports of unidentified transactions in grain, coal, and automobiles at discounts in both pounds and guilders were obtained, but no informant of the banking community could point to any specific case

of monetary concessions or price reduction obtained in connection with the construction of vessels in European yards either in 1948 or 1949.

Certain American companies which were known to have had ships constructed in foreign yards were interviewed. Their reports failed to show that there was either any effort or success in avoiding foreign exchange regulations. One American corporation, designated "Company A," between 1947 and 1950 built seven tankers in Britain and three in Belgium. The British contracts were expressed in sterling and were negotiated without discussion of possible discount for dollar exchange. In order to obtain the necessary British export licenses for the vessels, the buyers found it necessary not to use their existing sterling credits, and used instead American dollars to buy necessary sterling funds at the official rate. The contracts for the Belgian tankers were made in Belgian francs, and in this case the owner's existing franc balances were permitted to be used, supplemented by additional francs bought at the official rate. A second American corporation, designated "Company B," contracted with a British yard in 1948 in sterling for two ore carriers. In negotiating the price, there was no discussion of a discount for a dollar contract, and it is reported that if the British yard had sought a dollar contract the company would not have objected. Sterling was purchased at the official rate as needed to meet contract payments. Since the ships were only 60 percent complete at the time of the September 1949 devaluation, the company bought the remaining 40 percent at the reduced official rate. A third American company, designated "Company C," contracted in sterling with a British yard in 1948 for two tankers, again without discussion of a discount for dollars. The British Ministry of Finance permitted the company to draw on its existing sterling account to pay not more than 15 percent of the contract price. However, a substantial part of the price did not become due until after the 1949 devaluation. A subsidiary of Company C contracted in guilders in 1951 with a Netherlands yard for four super tankers. In this case the Netherlands Government permitted the use of the parent company's existing guilder balances on hand in 1951 to be used in payment, but this entire transaction, of course, occurred after the devaluation of the Netherlands currency in 1949.

Finally, the advices from the American Embassy at The Hague and in London must be noted. In October 1951 The Hague reported to us that during the period under review, no large ships were contracted for in the Netherlands by United States citizens, and the Embassy obtained no evidence that the Netherlands Government or any ship-

yard in that country granted monetary concessions to any foreign purchasers contracting for Netherlands ship construction in dollars, or other so-called "hard currency." The Embassy also reported that it had been reliably informed that no financial inducement would have been offered in 1948 to obtain the construction of two large passenger ships in Netherlands yards for a dollar payment. A similar communication was received from the maritime attaché in London to the effect that he had no evidence of monetary concessions for ship construction contracts expressed in dollars.

On this state of the record and in the absence of a showing of concessions based on the disparity between the official and the free rates of exchange in known contracts with western European yards, and with only unsupported statements by certain bankers and by Export's representative that some unidentified United States business men were obtaining or could obtain such concessions, we are unable to make a finding of fact that a price reduction consequent upon such concessions could in fact have been obtained by an American purchaser contracting with a Netherlands yard in 1948. We must mention in passing that even if such a concession would have been obtained, the amount itself would be a matter of conjecture only. It follows, therefore, that our redetermination of the estimated foreign cost of these ships must be made without adjustment for any disparity between the official and free rate.

3. *In the redetermination by the Board of the respective vessels' sales prices, should there be included in the construction cost of the respective vessels the following costs not included in the shipyard bid:*

(a) *Fees for preparation of bidding plans and specifications;*

(b) *Cost of inspection during construction;*

(c) *Interior decorator's fees;*

(d) *Increases in cost due to running standardization trials;*

(e) *The cost 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?*

Decision. Yes, subject to limitations.

As stated above in connection with Issue of Law No. 6, Additional Items, it is legally proper to include the above-listed items of cost in the estimated foreign construction cost of the Export ships for the purpose of determining their respective sales prices. It is our opinion, for the reasons already set forth, that in our redetermination of these sales prices these cost items should, as a matter of policy, be included in the estimated foreign-construction costs of said ships, subject to the limitations set out herein.

Limitations on items (a), (b), and (c).—On August 9, 1951, the Board approved certain recommendations of the staff to include in the construction cost the services of Bethlehem and Henry Dreyfuss, the interior decorator, in preparing bidding plans and specifications not exceeding $200,000 for each ship; also payments by Export to Henry Dreyfuss for interior design and decoration work not exceeding $400,000 per ship, plus $75,000 per ship for additional design and decoration work required in connection with approved changes in vessel plans, subject to certain audits and verifications as recommended. The Board also approved further recommendations from the staff to include in the ship construction costs of each vessel one-half of the payments made by Export for inspection work in connection with the construction of the ships, said half being deemed to be inspection work done in lieu of inspection by the Commission for the purpose of ascertaining that the shipyard construction work was properly performed. It is our opinion that there should be included in the vessel construction cost of each ship the items so approved and that the estimated foreign cost of such items should be included in estimating the sales price of each ship.

Limitations on item (e).—On June 4, 1951, the Board approved a budget in the amount of $686,245.45 for certain outfitting items to be purchased after competitive bids by Export for each ship. It is our opinion that there should be included in the vessel construction cost of each ship the outfitting items so approved, subject to the budget limitation indicated, and that the estimated foreign cost of such items should be included in estimating the sales price of each ship.

Further, it is our opinion that the subsidy percentage determined for the ships as a whole should not be applied to determine the subsidizable portion of the foregoing items listed in this paragraph No. 3 unless the estimated foreign cost is included in the over-all foreign cost estimate for the entire ship and is thus reflected in the resulting subsidy percentage for the entire ship.

4. *In the redetermination by the Board of the respective vessels' sales prices, should the Board determine that Holland is a foreign shipbuilding center which furnishes a fair and representative example for the determination of the estimated foreign cost of construction of vessels?*

Decision. Yes.

The staff and the special committee have recommended that the selection of a fair and representative foreign shipbuilding center for the determination of the estimated foreign-construction cost should be based upon certain requirements: First, that it have the personnel, facilities, and experience necessary for the construction of the pro-

posed vessel and be regularly engaged in building vessels of that type; secondly, that it have such a political and economic environment as to give reasonable certainty that contractual obligations as to time, quality, and price would be performed; and, thirdly, that it have the lowest costs. The evidence before us indicates that France, Italy, Britain, and the Netherlands met the first requirement in 1948; that France and Italy must be eliminated because they did not at that time meet the second requirement, France because of the situation there created by inflation, strikes, and social unrest in 1947 and in the early part of 1948, and further because the French shipyards were fully engaged in 1948 in the reconstruction of the French merchant marine and were unable to accept foreign orders; Italy because of then-existing political and economic disturbances which cast serious doubt on the ability of non-Italian vessel operators to obtain from Italian shipyards the performance of ship construction contracts within reasonable time and price limits, and furthermore because of the Italian Government pressure upon shipyards in that country to relieve national unemployment at the expense of construction efficiency. As between the two remaining countries, Great Britain and the Netherlands, the evidence before the Board indicates that shipbuilding costs in the Netherlands in 1948 were at least 5 percent lower than in Britain.

5. *Should all or any part of the construction cost of the following items be determined by the Board to be national-defense features:*

(a) *Speed exceeding 22½ knots;*

(b) *Evaporators;*

(c) *Electric generators;*

(d) *Dual engine rooms;*

(e) *Third-class passenger accommodations;*

(f) *Other items?*

Decision:

Yes, as to (a), (b), (c), and (d).

No, as to (e), and extra bulkheading under (f).

It has been suggested that the inclusion of vessel features in the applicant's plans and specifications when filed with the Commission created an inference that these features were included for commercial reasons, and that this inference of commercial desirability could only be rebutted by a showing that the feature was included at the request or direction of the Navy Department, or to meet a known requirement of the Navy Department. We think this is true as a general proposition, but the amount and nature of evidence necessary to rebut it varies with the nature of the particular feature concerned. Thus,

688-650 O - 63 - 18

if a design included 5-inch gun mounts or ammunition magazines—features of no commercial value whatsoever—defense could be their only purpose. They would be in fact detrimental to commercial use and the characteristics of the features in such case would in themselves be evidence sufficient to rebut a commercial-use presumption. On the other hand, a feature such as the third-class passenger accommodations, which might have both national-defense and commercial characteristics, would require strong evidence of Navy request in order to rebut the presumption of commercial use. Again it must be pointed out that in this case the technical staff of the Commission was charged with the duty of cooperating with the military establishment in the preparation of plans and studies for the installation of national defense features upon merchant vessels. If Export incorporated a vessel feature at the request of the Commission's staff, acting in the Navy's interest, we believe the request should be deemed the equivalent of a Navy request. It is of little moment whether the request was made directly by Navy or by Commission personnel acting in the light of known Navy desires.

The specific features now in controversy will be discussed in the order stated above, in the light of the record before us and after consideration of the record of the 1949 hearings before the Hardy Committee.

(a) *Speed (horsepower)*.—The record shows that Export can make good its projected schedule of 26 fortnightly sailings per year with the *Independence* and the *Constitution* to the west coast of Italy with the use of 40,700 shaft horsepower, which the Commission considered commercially necessary to assure a sustained sea speed of 22½ knots. The record further shows that additional horsepower between 40,700 and 55,000, determined by competitive bids to cost $299,000, has, at least under present-day conditions, little or no commercial value. The contention that this increased horsepower, giving 2½ knots increased speed, is in reality a commercial and not a defense feature, appears to be based principally upon the fact that the Trade Routes Committee of the Commission and the final report of the Commission dated May 22, 1946 (exhibit 20, R. 509) had originally recommended two 28-knot special-type passenger and freight vessels for fortnightly sailings on the service. However, the Trade Routes Committee about 2 months later, on July 13, 1946, endorsed a 22½-knot speed and eliminated certain ports from the proposed itinerary. The earlier recommendations for a 28-knot speed are, therefore, not relevant.

Furthermore, it is now assured that the *Independence* and the *Constitution*, operating at 22½ knots, can make a total of 30 sailings per year to the west coast of Italy. It is also demonstrated that these

ships can make 22½ knots with 27,500 shaft horsepower, leaving ample margin in the 40,700 shaft horsepower for the performance at that speed under adverse conditions.

The highest average observed speed, pilot to pilot, on any of the regular voyages of the *Independence* and the *Constitution* up to the date of our hearings, was 23.24 knots logged by the latter ship on her first voyage in June–July 1951 (exhibit 11). According to the model basin curves as well as the performance data obtained from the Rockland, Maine, trials of the *Independence*, this speed requires only 30,300 neat shaft horsepower. The commercial power rating required on ships of this type is 125 percent of the neat s. h. p. required for scheduled speed of approximately 22–23 knots. The 25 percent margin is provided to take care of adverse weather and fouling of bottoms (R. 419). Consequently, the maximum commercial rating so far indicated is only 37,875 s. h. p. It should be further noted that these power ratings are on the basis of the trial test displacement of 26,068 tons. Even at a maximum displacement of 29,685 tons, which will seldom if ever be encountered on commercial operation, a 23-knot speed would require a commercial power rating of only 40,000 s. h. p. after allowance of the 25 percent margin discussed above.

Finally, the record convinces us that both the Navy and the Commission affirmatively requested Export to increase shaft horsepower from the 40,700 originally sought by Export for the DL1 ships in 1945 to the 55,000 incorporated in the DL2s. Thus, Adm. E. W. Mills, USN, Chief of the Navy Department's Bureau of Ships in 1948, testified:

> We did insist on boosting these American Export ships from 22½ to 25 knots (C. R. 567, 568).

Moreover, Export's original proposals for the DL1 design in 1946 called for only a 22-knot ship, which, by addendum 2 to the bidding plans and specifications dated December 31, 1947, was increased to 25 knots. In Export's amended application for subsidy filed April 20, 1948, it explained that the increased horsepower of 55,000 to develop 25 knots was installed "at the pointed suggestion of the Navy." Mr. Slater also stated at the hearing that the speed feature was the only one which the Navy either asked for or suggested directly to Export (R. 113).

(b) *Evaporators.*—The plans and specifications for the original DL1 vessels as submitted in December 1945, and the *Independence* and *Constitution* as submitted in 1947, provided for two evaporators of 90,000 gallons a day each. A national-defense allowance for evaporator capacity in excess of a total of 90,000 per day was made by the Commission. Although not specifically referred to in the Comptroller

General's report or by the Hardy Committee, the propriety of the allowance must be considered. The staff has submitted a revised recommendation that at least the difference in cost between a 120,000-gallon a day evaporating plant and the 240,000-gallon a day plant actually installed in the vessels should be recognized as a national-defense feature. The staff estimates that with the maximum load of 1,580 persons on board, the total requirements for fresh water, including boiler feed, would not exceed 80,000 gallons per day, and that were it not for standby requirements, a 90,000-gallon a day output would give ample margin of safety. The staff points out, however, that evaporating machinery is of comparatively recent origin and that sound commercial practice requires substantial standby facilities, and in this case the staff believes that two 60,000-gallon per day evaporators would meet such standby requirements. The record shows that the daily evaporation output on the *Independence* and *Constitution* prior to the hearings ranged from a low of 6 tons or 1,380 gallons a day to a high of 424 or 97,520 gallons a day on the *Constitution* on August 21, 1951. The median daily evaporator output of fresh water appears from experience to range between 200 tons or 46,000 gallons and 300 tons or 69,000 gallons per day. The high median figure of 69,000 gallons per day is well within the 120,000 gallons per day total capacity which we hold ample for commercial purposes and indicates only a slight reduction in high median production in case of the breakdown of one of the two evaporator plants. We find from the foregoing estimates that evaporating capacity installed on these vessels in excess of two 60,000-gallon per day units producing a total of 120,000 gallons per day is without commercial value.

Export's representatives testified that the Navy did not affirmatively ask for additional evaporator capacity, but the Navy stated that the 240,000-gallon capacity installed on the ships was agreeable to it (R. 196, 197). Export's witness also stated that Bethlehem, from its experience in building several Navy-type ships, knew that evaporation capacity in excess of that needed for commercial purposes would be required by the Navy. As troopers, these ships are intended to carry about 6,000 persons, including increased crews (R. 415). At the suggestion of Bethlehem that 180,000 gallons per day would not produce adequate fresh water for the comfort of troops in this number, under crowded conditions, with a satisfactory margin of safety, the capacity of the plant was changed to 240,000 gallons a day, but this change from 180,000 gallons to 240,000 gallons was effected by certain redesigning of the plant without additional cost.

We therefore conclude that the increased evaporator capacity from 120,000 gallons a day (two 60,000-gallon units) to 240,000 gallons a

day as actually installed, is properly to be allowed as a national-defense feature. The extra cost of this installation, however, should be only the excess cost of a 180,000-gallon installation over a 120,000-gallon installation.

(c) *Extra generator capacity.*—In the DL1 plans of 1945 four generating turbines were contemplated, each driving a 750-kilowatt a. c. generator and a 200-kilowatt d. c. generator. In the DL2 revision of 1947, the four power plants were increased in size so that each turbine drove a 900 kilowatt a. c. generator and a 200-kilowatt d. c. generator, making 4,400 kilowatts altogether.

In July 1948 the staff recommended to the Commission that the cost of the machinery necessary to generate a. c. electricity in excess of a total of 3,000 kilowatts be considered a national-defense feature and an allowance for this was made in the sum of $112,085. Thereafter, in November 1948, at the suggestion of Bethlehem, the builder, and with the approval of Export, the design was changed so that each turbine drove one 1,100-kilowatt a. c. generator. Two separate 200-kilowatt a. c.-d. c. motor generators were installed for port use and two other 40-kilowatt a. c.-d. c. motor generators for sea use. The a. c.-d. c. motor generators were driven from power taken from the a. c. line. Thus the total maximum power that could be generated at the same time still remained at 4,400 kilowatts. This change in design was made without increasing the cost of construction. The question remains, however, what, if any, part of the total 4,400 kilowatts may be considered a national-defense feature.

The load analysis of the ship as revised September 15, 1951, shows a maximum load under tropical conditions of 3,092 kilowatts. However, the heaviest *normal* load under tropical conditions (normally the severest) [6] is 2,752 kilowatts. This load could be carried without difficulty by three generators of 900 kilowatts each so as to comply with the American Bureau of Shipping rules for building and classing steel vessels, section 35, page 142, as follows:

> The aggregate capacity should be sufficient to carry the necessary load under normal operation with one generator in reserve.

If the vessel should be used as a naval auxiliary, a substantial amount of additional generating capacity would be required for the operation of guns, director systems, radar installations, etc.

Since the heaviest normal load of the vessel, even under tropical conditions, is substantially 2,700 kilowatts, which could be carried on three out of four 900-kilowatt generators, keeping one in reserve as

[6] Tropical conditions are normally the severest because the ventilating and air-conditioning load is highest.

required by the American Bureau of Shipping rule quoted above, we conclude that the excess in generating capacity over 3,600 kilowatts should be made the subject of a national-defense allowance, always assuming that the arrangement outlined above would supply the necessary d. c. power for commercial use from the a. c. line. It thus appears that the value of the excess generating power not needed for commercial purposes as now installed, is measured by the excess cost of four turbines, generators, etc., producing 1,100 kilowatts a. c. each, over the cost of four similar installations producing 900 kilowatts a. c. each. It will be necessary to compute this cost to ascertain the exact amount now properly allowable as a national-defense feature.

It is not disputed that extra generating capacity over and above commercial needs was requested by the Commission staff to meet known Navy requirements. This fact, added to the fact that the commercial needs of the vessel do not exceed 3,600 kilowatts, is sufficient evidence to overcome any inference that the additional generating capacity as installed has or was intended to have commercial utility.

(d) *Dual engine rooms.*—Both the original DL1 plans of 1945 and DL2 plans of 1947 provide for divided engine rooms separated by a 39-foot compartment, either of which could, in the event of casualty, operate independently. The record shows that this feature is of importance to a ship operating in danger of enemy attack, but of negligible importance for operation under usual commercial conditions where the risk of loss of propulsion is minor and, even if incurred, would normally not subject the ship to any increased hazard. The Commission approved the feature for national-defense allowance, but because the purchaser submitted no satisfactory evidence on the extra cost involved, the Commission made no allowance. Both the staff and special committee have recommended that a national-defense allowance be granted for the extra cost entailed by the dual engine-room arrangement. It appears that this feature was incorporated by the shipbuilder after consultation with the Navy, and that the affirmative request of the Commission's staff was made based on their understanding of Navy requirements (R. 165). The record is clear that divided engine rooms are not commercially desirable (R. 193, 413, 167) nor commercially necessary (R. 210, 305). Under the circumstances, we believe that the extra cost of this item, when computed by the staff, should be included in the allowances for national-defense features.

(e) *Third-class passenger accommodations—increase from 116 to 308.*—The Commission granted an allowance of $827,365 for this increased passenger capacity and this decision was the principal focus of the criticism by both the Comptroller General and the Hardy Committee on the allowances for defense features on these ships. Both

the Chief, Office of Ship Construction, and the special committee have recommended that no defense allowance should be granted for this feature (R. 417, 458). Our own review of the record and consideration of the problem leads to the same conclusion. The grounds of our decision may be summarized:

Over 60 percent of the 76,248 passengers carried on Trade Route 10 in foreign-flag vessels in 1948 were third class. American-flag carryings in 1948 of 909 passengers is insignificant in amount. The third-class business is thus an obvious avenue for competition by these two passenger ships being introduced by Export on Trade Route 10.

In connection with the DL1 designs submitted in 1945, the Commission's staff pointed out on January 8, 1946, that "third class has been [the] predominant trade on this route" and recommended that, on the basis of the experience of the *Rex* and *Conte de Savoia*, "further consideration should be given to this matter", i. e., the inadequacy of only 58 third-class accommodations (C. R. 404). Under date of March 18, 1946, the Navy Department approved the plans for the DL1 ships pursuant to section 501 (b) of the Act. No comment was made with respect to increasing passenger accommodations, the only suggestions made were related to increased deck stiffening for gun mounts and increased stability.

The DL2 plans submitted to the Commission in December 1947 increased third-class accommodations from 58 to 308. No claim for national-defense allowance was then made.

On March 5, 1948, the Navy approved the DL2 plans. A supplemental letter from Navy dated March 30, 1948, noted without comment "that the passenger capacity has been increased to about 972."

Export's letter to the Commission of April 14, 1948, requested that the conversion of cargo space to increase third-class passenger space and the related water, light, and sanitary accommodations be certified as a defense feature. As to this, the Navy Department replied on June 8, 1948:

> * * * the Department is of the opinion that inasmuch as such facilities are presumably being provided as a necessary part of the operator's trade requirements, they do not properly form the basis of such certification. It may be further stated that if the proposed ships were converted to naval transports, much of the third-class accommodation would probably be removed to increase troop capacity (C. R. 417).

Although the Navy by letter of July 29, 1948, subsequently certified increased third-class space as a defense feature and by letter of August 4, 1948, requested that the turndown of June 8, 1948, be canceled (C. R. 419), and although Admiral Mills testified that the June 8 letter was written by "a new officer who had just reported" and "with

an incomplete understanding of the case" (C. R. 568), the June 8, 1948, rejection, coupled with the failure of any Navy witness to so testify that the Navy suggested or asked for the increase, weakens Export's position on this item. It should also be noted that our present Chief, Office of Ship Construction, a naval officer of long experience (R. 300–301), agrees that the increased accommodations are of limited utility. Troops and crews of transports are more efficiently berthed in larger spaces, which are more easily maintained, more accessible, and more susceptible of proper sanitation (R. 416).

Export's President stated unequivocally at the Board's hearing that there was commercial value to the increased third-class space (R. 224), that the change from cargo to third-class space was due in part to the change in route, eliminating the east Mediterranean, and that it was done at "our own decision" (R. 225, 226).

On October 19, 1948, Export requested a change under the contract for convertibility between cabin-class space and third-class space so that the latter could be increased from the normal of 308 up to a maximum of 400, using semipermanent cabin-class space for this purpose (R. 221, 416, C. R. 416). This action of Export, supported by passenger traffic statistics for the years 1925 to 1948, indicating the need for even more expanded third-class facilities (R. 416, C. R. 420) and its fear of the impact of airplane competition on first-class traffic (R. 220), leads to the belief that the prior increase of third-class space from 116 to 308 was a commercial feature sought for commercial reasons. Indeed, Export's witness candidly so implied at the hearings (R. 224–226).

In the light of the foregoing, we are unable to grant a defense allowance in this respect.

(f) *Other defense items* (*additional bulkheads*).—The Commission determined that a defense allowance of $96,850 should be granted for installation of two additional bulkheads. This action was not the subject of specific comment by either the Comptroller General or the Hardy Committee.

These bulkheads are not required by the Coast Guard or the American Bureau of Shipping (R. 180) and hence are not within the minimum mandatory requirements for a commercial vessel (R. 421). However, they are called for by the standards for commercial vessels set out in Senate Report No. 184.[7] Nevertheless, Export contends, and

[7] Senate Report No. 184, 75th Cong., 1st sess., grew out of the investigations of the *Morro Castle* and *Mohawk* disasters and the adequacy of methods and practices for the safety of life at sea. The report contains the full test of safety rules recommended by the various subcommittees composed of outstanding marine architects and marine engineers drawn both from industry and Government. These standards have in all cases been applied in the building of all large oceangoing vessels since their publication, since all such vessels have either been built by the Government or with Government aid.

the special committee has recommended, that they should be considered as a defense feature. We do not agree.

The DL1 plans of 1945 had 14 transverse W. T. bulkheads. No mention of bulkheads as national-defense features was made either by the Navy or the Commission.

The DL2 plans of 1947 provided for the same hull and same number of bulkheads—those forward being spaced slightly differently.

On April 14, 1948, the question of defense allowances was first brought up by Export. The item was later submitted to the Navy, and was certified by the Navy on July 29, 1948.

The standards of Senate Report No. 184, in the matter of subdivision, although higher than those required by international convention and the American Bureau of Shipping, nevertheless represent what an informed committee of the Congress considered desirable commercial practice. The Maritime Administration has consistently required this higher standard for commerical vessels, and has stated that ships built by it would meet the safety standards of Senate Report No. 184. Moreover, the policy of the Act is that the American merchant marine should be "composed of the * * * safest, and most suitable types of vessels" (sec. 101). Accordingly, the bulkheading cannot be allowed as a defense feature.

6. *In the redetermination by the Board of the respective vessels' sales prices, what should be the method of estimating the construction cost of the vessels if constructed under similar plans and specifications (excluding national-defense features) in a foreign shipbuilding center, including items mentioned in Issues of Fact and Policy No. 4 a, b, c, d, and e above, i. e., obtaining bids from foreign shipyards on plans and specifications or any other method? (See special committee report discussion of "Methods of Estimating Foreign Costs.")*

Decision. The Board will use the "detailed method" of estimating foreign costs as outlined and recommended in the staff's memorandum dated September 14, 1951, subject to such modification and supplementation by such other methods of cost computation and the inclusion of any additional pertinent factors as the Board may deem proper.

Neither the Comptroller General nor the Hardy Committee comments with respect to the method by which the estimate of the foreign-construction cost of these or other Title V vessels should be made, the gist of their positions being only that the Commission's determination under section 502 of a "fair and reasonable estimate" must in these cases be based upon "convincing evidence." The special committee discusses at considerable length five possible methods for

making the foreign cost estimate (R. 462). These are (1) obtaining bids from foreign shipyards on the actual vessels involved; (2) comparison with the known cost of similar foreign vessels; (3) estimating by the relationship between major categories of cost such as labor, steel plate, joiner work, main engines, auxiliary machinery and equipment, etc.; (4) using predetermined ratios between the foreign cost and the United States cost of hull machinery and equipment; and, finally, (5) estimating foreign cost in detail by 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.

Method No. 1 is, in theory, of course, an excellent one, but we do not believe a foreign yard would undertake this costly and lengthy job though compensated for the work. It is well known also that in the private ship construction field the details of a bid are closely guarded business secrets. It is highly improbable that a foreign yard would make substantially public to an agency of a foreign government that information which, if revealed at all, is usually revealed only to actual purchasers. Further, the accuracy of a result from such a procedure would, in our opinion, be impaired by the knowledge on the part of the foreign yard that the vessel under no circumstances would be built in the foreign yard, and that the sole purpose of the bid would be for the establishment of financial aid to an operator who might be in trading competition with the foreign yard's actual customers, with advantage also to a competing American shipyard.

In this instance, however, Export, through Bethlehem, developed cost studies through the use of Method No. 1 in reverse, so to speak. That is to say, it procured building plans and specifications of the Norwegian MS. *Oslofjord* and projected costs in a United States yard. The *Oslofjord* was built for the Norwegian American Line, having been contracted for in a Netherlands shipyard in 1946, the keel laid in May of 1948, delivery made in October 1949, and maiden voyage accomplished in November 1949.

In analyzing this procedure we did not feel, considering all of the factors, that Bethlehem, in its cost study based on the foreign plans and specifications, would necessarily be subjected to the same inhibitions controlling a foreign yard making a study based on United States plans and specifications. Export projected an American yard cost of the *Oslofjord* in 1948 at $15,396,000. To establish a firm cost, they added 10 percent for profit plus 11.5 percent on the combined cost and profit to reflect the percentage differences between the lowest "adjustable" and "firm" bids actually submitted for the *Independence* and the *Constitution*. This resulted in a projected "firm" bid of $18,883,194. As against this, Mr. Slater testified that the foreign price

of the *Oslofjord* was $7,200,000. He further stated that in 1948 the Netherlands builders of the *Oslofjord* quoted $8,200,000 for a sister ship. No details of this quotation were made available, but for the purposes of comparison Export assumes it to be a "firm price."

Export's witness Pennypacker of Bethlehem stated, however, that in his projection of the United States cost of the *Oslofjord* he used the foreign plans and specifications, but that his unit pricings "reflected American practices" (R. 945). It is possible, therefore, under this comparison, that the reported foreign cost figures of $7,200,000 or $8,200,000 would have to be raised to reflect the higher cost of the "American practices." We do not seek to discredit Export's position because of this factor, but use it to illustrate one of the inherent difficulties in the application of the reverse of Method No. 1 as developed by Bethlehem. These same problems would arise in the basic Method No. 1 scheme, since therein the requirements of American practice would be unknown to a foreign shipyard preparing an estimate for the hypothetical foreign ship.

Assuming the validity of the American "firm" cost of $18,883,194 and the $8,200,000 quoted for a sister ship to the *Oslofjord*, the differential for passenger-ship construction in the American yard would have been 56.58 percent, or in excess of the 50-percent limitation.

Even admitting the soundness of Bethlehem's United States projection of the *Oslofjord*, its application is dependent on the final cost of the *Oslofjord* to its owners, a figure which, because of conflicting information, is largely a matter of conjecture. In addition to Export's figure of $7,200,000 for the *Oslofjord* and $8,200,000 supposedly quoted in 1948 for a sister ship, both figures from sources which Export is not at liberty to disclose, reports from other sources show a substantially higher price. State Department Foreign Service representatives and other sources, including the 1949 annual report to its stockholders by the owners of the *Oslofjord*, indicate that the final cost of the vessel might be somewhere between $9.1 million and $11.3 million. Taking the higher of these figures, $11.3 million, and applying it to the projected American cost of $18,883,194, the differential is approximately 40 percent. As was stated, the *Oslofjord* was contracted for in 1946, but, with a lack of reliable information as to its foreign cost, little reliance can be placed on the $8,200,000 quotation in 1948 for a sister ship. It appears then that controlling weight cannot be given to the relationship between the conjectural cost of the *Oslofjord* or its proposed sister ship and Bethlehem's estimate of the 1948 United States cost of this ship. For these reasons, we can see no practicable application of Method No. 1 or the variation thereof in this recalculation. This case is, however, of considerable interest in show-

ing the highly unstable situation as regards shipbuilding costs in the Netherlands during this period, and the difficulty that the Netherlands yards had in determining prices even for ships built by them during the period in question.

Method No. 2 would be of considerable value, but has limited application unless it can be found that an American and a foreign yard are contemporaneously building fairly equivalent vessels. In this instance Export has sought to indicate a proper differential applicable in 1948 by using for comparison under Method No. 2 the British-built *SS Chusan*, laid down in the early part of 1947 and completed in the middle of 1950 for the U. K./Hong Kong service of the Peninsula & Oriental Steamship Co. A comparison as to the *Chusan's* general characteristics with those of the Export ships is as follows:

	Chusan	Independence and Constitution
LOA	672 feet	682 feet.
Beam	85 feet	89 feet.
Propulsion	Steam turbine (2 screws)	Steam turbine (2 screws).
Shaft horsepower, normal	34,000	40,700.
Shaft horsepower, maximum.	42,500	55,000.
Engines	Turbine, 500 pounds square inch gage.	Turbine, 625 pounds square inch gage.
Gross tonnage (British)	24,215	29,496.
Passenger capacity	First class, 475 Tourist, 551	Cabin, 348. Tourist, 316. Third class, 308.
Dry cargo space—bale cubic feet.	409,690	148,000.
Insulated space—cargo and stores.	71,065	75,000.
Crew	Asians, 256 Europeans, 316	592.
Air conditioning	First-class dining room, beauty parlor, and some cabins.	All living space.
Promenade deck and public spaces.	14,000 square feet	16,500 square feet.

Export reports that its indirect advices from the owners of the *Chusan* indicate its total cost at £3,650,000, which amount includes £50,000 for stabilizers, with which the Export ships are not equipped. This cost converted to dollars at the exchange rate of 4.03 produces an estimated total cost to owners of $14,709,500. As against this, and again for comparative purposes, a cost of $26,058,000 each for the

Export ships may be projected. Thus, assuming that the *Chusan* as is constitutes a suitable vessel for Method No. 2 purposes, we arrive at a differential (using a British yard) of roughly 44 percent. It is evident, however, that the Export ships are superior to and larger than the *Chusan*.

Export suggests that the *Chusan* is a suitable vessel for Method No. 2 comparison because "in short, the *Chusan* is not importantly different (with some improvement of accommodations) to what our ships might have been had they been built abroad and for operation under foreign flag without regard to our national-defense requirements." Our disposition of Issues of Law No. 1, however, is clearly indicative that a sound use of the *Chusan* would necessitate its expansion and improvement to closely approximate the *Independence* or *Constitution*. Some of the reasonable and important adjustments figured roughly would be:

Estimated 10 percent difference between United States and British standards	$1,470,950
Supplemental air conditioning	500,000
Increase in size (on basis gross tonnage)	2,725,000
Supplemental working pressure	50,000
Crew space added	73,000
Total added	4,818,950
Less stabilizers	201,500
Net added	4,617,450
Reported cost of *Chusan* as is	14,709,500
Total expanded *Chusan* in British yard	19,326,950
Less 5 percent to reflect lower Netherlands costs	966,348
Estimated net expanded *Chusan* in Netherlands yard	18,360,602

Using this rough figure for a "built up" *Chusan* against the Export ships' figure, we reach a differential of approximately 29.5 percent. Method No. 2, however, is deemed impracticable in this redetermination for two principal reasons. The first is that there is no convincing evidence as to the cost of the *Chusan* to its owners, the only evidence produced by Export being that their London representative reported to them he had been told the cost by an unidentified official of the owning company. Secondly, it is clear that the similarity of the *Chusan* and an Export ship is superficial and the great amount of conjecture necessary to "build up" the *Chusan* further renders Method No. 2 in this instance impracticable.

Inclusive material was also examined covering comparisons fo ships nonsimilar to Export's. We do not believe it is important to g into the details, but we list the differentials they purport to indicate

		Possible differentia (percent)
1950	Proposed reconversion work, *SS General Pope* and *SS General Weigal:* United States, $3,391,650; Netherlands, $1,651,270 (converted to 1948 predevalued guilder)	30
1948	United States and British tanker bids	28
1947	Ore carriers ((1), 422 feet); ((2), 353 feet):	
	(1) United States low bid, $3,494,000; European low bid, $1,720,000	50
	(2) United States low bid, $2,710,000; European low bid, $1,350,000	50
1946	Proposed Argentine Government combination passenger and cargo ships:	
	United States high bid versus Netherlands bid	45
	United States low bid versus Netherlands bid	31
1946	Proposed Argentine Government reefer ships:	
	United States high bid versus Netherlands bid	48
	United State low bid versus Netherlands bid	44. 3

Methods 3 and 4 we do not consider necessary to discuss as it is clea they are only elements of the comprehensive Method No. 5.

We therefore believe that Method No. 5 is the most practicable fo this redetermination. The special committee and the staff recommen Method No. 5 as being the most accurate method for this case.

Our determinations of the issues of law and fact having been se forth, consideration must now be given to the mathematics of th redetermination of the estimated foreign-construction cost of the tw Export ships under Method No. 5. The staff prepared a memorandum dated November 16, 1951 (exhibit 23–A), accompanied by a lengthy appendix (exhibit 23–B) containing the summary of the staff's work sheets. These documents supported the staff's recommendation that

$715,000 represents the estimated base domestic cost of national-defens features built into each vessel;

$17,308,000 represents the estimated foreign-construction cost and therefore, the base selling price of each of the vessels;

$6,425,000 or 27.07 percent of the base domestic cost is the base amoun of the construction-differential subsidy on each vessel; and

$18,970,217 is the total estimated foreign construction cost and th total selling price of each vessel, including the cost of escalatio and changes in the contract calculated to the date of the memorandum, subject to minor further adjustments after final audit.

These documents were submitted to Export for examination 2 weeks before the 4-day informal hearings beginning November 19, 1951, at which the Board received full explanation of the staff's calculation and analysis thereof by representatives of Export. It may be said that the calculations were prepared by the staff in accordance with the prior determinations of the Board on the questions of law and policy outlined above.

The Board, after considering all the evidence, including evidence presented by witnesses on behalf of Export testifying at the November 1951 hearings, has come to the conclusion that the recalculated total figure of $18,970,217, as recommended by the staff, is the best estimate of foreign-construction cost of each of the two vessels as of August 11, 1948, that can now be made.

This estimate which we adopt as our own is based, we believe, on the best information available at this time.

We now discuss some of the important elements that have been considered in making up this estimate.

MATERIALS

Efforts have been made to obtain the Netherlands cost of each item of material going into the ships. There was available to us an itemized breakdown of the materials actually put into the ships by Bethlehem and the cost of each and the time expended for the installation of each. The items of material were divided into two main categories—hull items and machinery items. The members of our staff who made the analysis and calculations were men of wide practical engineering background with particular experience in shipbuilding and ship-construction estimating. On this estimating staff were economic experts practiced in the handling of economic statistical material and economic indices. The information as to foreign costs, foreign shipbuilding practices, and the general foreign economic conditions, particularly in Holland, came from maritime attachés stationed with various American diplomatic missions in Europe who had similar practical experience in ship construction and ship estimating and a working familiarity with the foreign conditions involved and a wide acquaintance among foreign shipbuilders. Where possible, these foreign representatives obtained the actual 1948 Netherlands prices of the material items. Where this was not possible and where an item was subject to breakdown into its component parts, these parts were priced and the Netherlands labor cost added to estimate the price of the assembled article. In other cases it was necessary to take Netherlands 1951 prices and by use of appropriate indices derive

the proper 1948 Netherlands price by calculation. Again, where the Netherlands price for the exact size or shape of an item could not be obtained, the Netherlands price of a similar or closely related article was obtained and the ratio of the 1948 Netherlands cost to the American cost of the priced article was deemed to apply to the article for which the exact Netherlands price was not obtainable. For example, the foreign price for 12-inch ports was not obtainable whereas the foreign price for 16-inch ports was obtainable. The actual American price of both types was set forth in the Bethlehem detailed estimate, and by using the ratio derived by comparing the American 16-inch ports with the foreign price of such ports, the foreign price for 12-inch ports was calculated. In one way or another, directly or indirectly, an actual Netherlands price or a derived Netherlands price as of 1948 was obtained for 83 percent in value of all hull items and for 92 percent in value of all machinery items. From such results it appeared that hull items had an over-all average Netherlands price of 100 percent of the American cost, and machinery items had an average of 111 percent of the American cost. The remaining 17 percent of hull items were thereupon assumed to have an average Netherlands price equivalent to 100 percent of the American price, and the remaining 8 percent of the machinery items were similarly assumed to have a Netherlands price of 111 percent of the American price.

It appears that the largest item of metal included in the hull items covered steel plates and shapes. The cost of steel to the Netherlands shipyards in 1948 was found to be 325 florins per metric ton or 5.56 cents per pound. This figure was obtained by a United States maritime representative who in 1948 visited various Netherlands yards and ascertained that their steel came from various European sources at that figure. The result thus obtained by personal inquiry was verified from the Netherlands Government Industrial Report (Maandschrift Report) which gave the 1948 cost of steel plates at Netherlands shipyards in 1948 as 324.97 florins per metric ton. This Netherlands cost proved to be 155 percent of the American cost of similar material, and the question naturally arose as to why American steel could not have been imported into Holland at less than 155 percent of the American cost. It developed, however, that in 1948 the American steel industry was working under a system of voluntary allocations and that surplus steel for export was not available.

It may be noted that counsel for Export has, in many instances, challenged the correctness of the Netherlands figures or the propriety in deriving Netherlands estimated costs by methods of sampling or the use of indices, etc., urging that the methods of pricing used by the staff might not produce the correct result. The staff in each case has

produced its work sheets to show exactly which of the Netherlands material prices were direct quotations, and, as to those prices which were derivative, which of the various methods of derivation outlined above had been used. In our judgment, the methods used by the staff were the best available in 1951 in the absence of direct quotations. It may be pointed out that in no case did Export offer evidence of Netherlands quotations on items of material used in the construction of the ships which were different from either the direct or derivative quotations presented by the staff.

LABOR

The Bethlehem analysis of cost of actual construction of the two Export vessels showed the hours of labor necessary to complete and install the various items of material. The total number of American hours multiplied by the average American hourly rate of shipyard labor of $1.71 per hour gave the total American labor cost of each ship. The problem of the staff with respect to foreign labor was twofold—first, to determine the average cost per hour of Netherlands labor, and then, to determine the relative productivity of Netherlands and American labor, and thereupon calculate the total Netherlands labor cost. Reports from the American maritime attaché showed the prices paid by Netherlands shipyards in the second half of 1948 for skilled, semiskilled, and unskilled labor and the proportion of each going into the construction of comparable vessels. By proper weighting of the three types of labor, the average cost of Netherlands labor was found to be the equivalent of 40 cents (U. S. A.) per hour in contrast with the American figure mentioned above of $1.71 per hour.

In order to estimate the relative productivity of Netherlands shipyard direct labor and American shipyard direct labor, the staff made comparisons of the man-hours required to erect the steel hulls of two Netherlands ships built between 1947 and 1949 with the man-hours required to erect the steel hulls of the *Independence* and *Constitution.* Since the ships were not identical, the figures were then reduced to a common denominator of man-hours necessary to erect one ton of steel hull in each case. The staff had available the total direct labor cost of erecting steel hulls on a Netherlands passenger-cargo ship built between 1947 and 1949 and on a Netherlands tanker built in 1949. By dividing the direct labor cost per ton with the then prevailing Netherlands average wage rate, the number of Netherlands man-hours necessary to erect each ton of the steel hull was obtained. The total number of man-hours necessary to erect the steel hulls on the Export ships were shown from the Bethlehem breakdown, and from this was obtained the corresponding American figure. By comparison of the

688-650 O - 63 - 19

figures thus obtained, it appeared that in the case of the Netherlands cargo-passenger ship, the per ton man-hour requirement was 118 percent of the American figure, and, in the Netherlands case of the tanker, the Netherlands man-hour figure was 123 percent of the American figure. A further check was made by the American maritime representative in Europe who obtained figures that indicated the productivity of Netherlands shipyard labor was somewhere between 10 and 20 percent less than American labor. This general result was confirmed by the opinion of one of the leading American shipbuilding companies. The relative productivity ratio of 118 percent, derived from the Netherlands cargo-passenger vessel, was deemed a satisfactory basis for computing the relative productivity of all direct shipyard labor. The man-hours shown on the Bethlehem breakdown for each job were, therefore, multiplied by 118 percent to show the estimated Netherlands man-hours to do the same job, and this was then multiplied by the 40-cent rate derived as above to show the Netherlands direct labor cost.

Export has indicated that it has information to indicate the Netherlands over-all direct labor rate for the second half of 1948 to be 40½ cents, which corresponds generally with the 40-cent rate developed as above. Export claims, however, that neither of these rates should be used in computing the Netherlands labor cost because the 40½-cent rate developed by Export for the second half of 1948 was for adult labor only. Export claims that this rate should be reduced to 37.2 cents to give effect to the lower rates paid to a certain proportion of minor employees in the yard, and still further reduced to 35 cents per hour to give effect to an adjustment necessary to relate the scale to the first half of 1948 on the ground that escalation computations were made from rates effective at that time. However, a careful examination of the record shows that the staff rate of 40 cents per hour was based on the combination of adult and minor labor for the entire year of 1948. Furthermore, the statistics relied on by Export to tie the labor rate back to the first half of 1948 appear to be statistics relating to volume of employment in Holland and not wage rates, and for this reason are not here applicable.

Overhead

Next to be considered is overhead, comprising all indirect, supervisory, and executive labor, taxes, insurance, electricity, yard upkeep, etc., as well as the large item of social charges imposed by law on Netherlands employers. Inquiries made by the Maritime representatives in Europe showed that Netherlands shipbuilding overhead ran

in 1948 from 125 percent to 140 percent of direct labor charges. This information was checked with the cost analysis of the construction of three Netherlands ships built contemporaneously, which showed that the combined overhead and profit to the builder ran from 163 percent to 178 percent of direct labor. It was learned that one of these ships was constructed at a loss and that the builder's profit on the two remaining ran somewhat less than 10 percent of total cost. If, however, a full 10 percent profit on over-all cost is deducted from the combined profit and overhead figures on the two ships that were built at a profit, the remaining amounts attributable to overhead alone represent, in one case, 120 percent of direct labor, and, in the other case, 148 percent of direct labor. We feel that the figure of 130 percent of direct labor costs adopted by the staff is a fair median figure for Netherlands shipyard overhead in 1948. Export points out that the United States rate for overhead in the Bethlehem breakdown of costs on the *Constitution* and *Independence* amounted to only 51 percent of the direct American labor charge and that a Netherlands rate of 130 percent appears excessive. The record shows, however, that there are substantial differences in what goes into Netherlands shipyard overhead and what goes into American overhead. A direct comparison of the two rates is, therefore, meaningless. We were bound to rely, therefore, on evidence of reported Netherlands practice.

PROFIT

Finally, the staff has included an estimate of 10 percent of other costs to cover profit and margin. The difference between Bethlehem's actual cost and Bethlehem's bid price necessarily represents Bethlehem's allowance to cover its margin and profit, and, in the case of these ships, amounts to 9.4 percent of cost. The estimate of Netherlands profit is based upon reports from the maritime representative abroad who made various inquiries and was uniformly advised that 10 percent of cost was the usual Netherlands allowance for profit and margin. Furthermore, the results of these inquiries are supported by the analysis of actual operating results covering the operations of a major Netherlands shipyard in 1948, which showed that the business of this shipyard ran to 60,029,000 florins and the profit derived thereon was 6,528,000 florins, or approximately 10 percent.

BIDDING PRACTICES

Export urges that the price estimates of the staff as well as the estimates for overhead and profit are not based on "fighting bids," and that if the Netherlands shipyards or suppliers were really anxious to

obtain business, their bids would have been reduced below the usual and normal quotations. While this possibility must be admitted, the evidence shows that in 1948 the Netherlands shipyards were well occupied, and their annual reports for 1948 operations show that 1948 was for them a busy and prosperous year. Such reports of actual conditions hardly warrant a generalization that Netherlands prices would have been, to any general extent, cut below the customary and usual levels.

COMMENTS

Before concluding this review the Board deems it appropriate to make certain observations, not only with respect to the redetermination, but also to the whole problem of determining foreign-construction costs and construction-differential subsidies under the Act. These are derived from our study of staff recommendations, extensive testimony and exhibits, arguments of counsel, and from our review of the findings of the Commission in this case. Little administrative history is available.

Our estimate differs greatly from the estimate of our predecessor, the Commission, made in 1948. Where estimates are made at different times, from different approaches, with different sources of material, and in a large measure based on opinion and judgment, closely identical results cannot be expected. This is perhaps best illustrated by the following comparisons of some of the elements reviewed:

Netherlands cost (on two-ship basis) for—	As estimated by U. S. Maritime Commission, 1948		As estimated on redetermination, 1952	
Material		$9,842,875		$11,482,000
Labor	4,900,000 hours at 46.65 cents per hour, less 2 percent for two-ship basis.	2,240,133	3,763,000 hours at 40 cents times 118 percent for productivity.	1,771,000
Overhead	At 50 percent of labor and material.	1,120,066	At 130 percent of labor and material.	2,302,000
Profit	At 7 percent	924,215	At 10 percent	1,556,000

The staff of the Commission and the present staff were confronted with the fundamental problems of properly evaluating foreign costs, with the handicapping knowledge that the sources of information divulged much of it, if at all, reluctantly and usually anonymously. We encountered some difficulties in making recalculations after a considerable lapse of time, but had the advantage of official publications, industrial indices, and a wealth of new material as to conditions in 1948, which information was not in existence at the time of the Commission's computation in that year.

From June 11, 1940, until as late as July 25, 1947, there existed

statutory congressional recognition of the fact that war conditions made reliable foreign-construction costs virtually unobtainable. Between 1936, when the Act was passed, and 1948, construction-differential subsidies for all but one newly constructed ship were governed by special emergency legislation.[8]

We believe the principle of parity underlying the Act 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 today in light of changes and fluctuations of economic conditions created by the ordinary passage of time and by World War **II.**

In planning for new vessels preparatory to entering into a subsidy contract, the operator and the Government must first consider the general type, size, speed, and characteristics of a ship to meet the requirements of the particular trade. National defense and prestige values are additional considerations, particularly important where large passenger ships are concerned. Section 211 of the Act, among other things, directs the Commission in these considerations to determine "other facts and conditions that a prudent businessman would consider when dealing with his own business * * *" It is clear then that a forecast of general business conditions and expected results from operations must be carefully weighed by the Government and the operator in determining what maximum capital (operator's share) outlay a prudent businessman should make for the projected vessels. Without such a joint consideration, we might find the Government making its estimate of the proper capital outlay for the operator by the comparison of United States and foreign shipbuilding costs, and the operator reaching his corresponding figure by an analysis of the economics, competition, and potentialities of his trade route. Yet if these two figures, obtained from nonrelated bases, should not be substantially alike, the project may fail of attainment. Furthermore, if the Act is to accomplish the purposes for which it was designed, including the important statutory aim that the United States must have a merchant marine "composed of the best-equipped, safest, and most suitable types of vessels," it seems clear that the present uncertainties and indefiniteness in the relations between the operator and the Government, such as have been experienced in this case, must be replaced with a degree of certainty and definiteness as well as reasonable promptness in defining what those relations shall be. That corrective measures should be considered was succinctly pointed out by the Hardy Committee in its Recommendation 1 (a) of the Fourth Intermediate Report, when it stated:

[8] PR 82, 76th Cong. (extended from time to time).

Your subcommittee accepts the fact that the process of determining foreign costs is a difficult and complex task perhaps impossible of accurate accomplishment. At the same time, it would seem extremely probable that considerably more detailed data on the subject could be obtained than those upon which the Maritime Commission relied.

and recommended further that:

Revision of the differential-subsidy provision of the statute along clarifying and practical lines would undoubtedly be helpful in dispelling some of the confusion now surrounding its administration.

Conclusion

Being of the opinion that the foreign-construction cost estimate, as presented by the staff, was prepared from the best information now available, we adopt as our best estimate of the 1948 foreign cost of the *Independence* and *Constitution* the figure which the staff has presented. As already stated, this is $17,308,000, and indicates a construction-differential subsidy rate of 27.07 percent of $23,733,000, the base domestic cost of each vessel.

(Sgd.) A. J. Williams,
Secretary.

Chairman Cochrane, concurring:

I concur in this report of the Board because it is based (*a*) upon our interpretations of the applicable law made as closely to its letter and in the light of the previous history of its administration as could be done, and (*b*) upon the information available (meager though it is, even three years after the date of interest) on the possible level of construction costs in the selected foreign shipbuilding center, of combination passenger-cargo ships.

In reviewing this case, sight must not be lost of the intense contemporary interest of the then newly created Secretary of Defense therein, nor of the national interest in these ships as partial replacements for the serious losses in troop transports during the war and the dire situation in the shipbuilding industry resulting from the suspensions and cancellations of the Navy war building programs as well as of the Maritime war building programs. Because of these two factors, there was an intense urgency to get the contracts placed even at a time when foreign costs were experiencing inflations of such degree that the value of foreign currency in the free market was strongly reduced, although the official exchange was not devalued until some 12 months later.

The Act was drafted following the recovery from the depression of 1933 and apparently envisaged an era of world-wide economic stability in which "fair and reasonable" estimates might be possible.

It did not, I believe, foresee a period of such violent adjustments as have occurred since 1940 and after the war. The Congress itself recognized this situation in extending through July 25, 1947, its joint resolution No. 82 of the 76th Congress, approved June 11, 1940, establishing the foreign shipbuilding costs existing prior to September 3, 1939 (i. e., prewar costs), as the basis for computing construction-differential subsidies. The President's Advisory Committee on the Merchant Marine, of which I was a member, recognized in 1947 the continuing instability, and predicted the difficulty which has developed.

Estimating the cost of building a large ship of a new design is a difficult job even by the management of the shipyard concerned, which over the years accumulates files of carefully analyzed data based on its own methods of recording actual cost returns and upon the shrewd use of quotations from various vendors of materials and parts. Moreover, evidence from the source of most of the foreign information used in the present redetermination shows clearly that the Netherlands builders of a moderately large ocean-going passenger-cargo ship, completed in November 1949, missed the actual costs of that ship widely, even though they were building the ship to their own plans.

In the case in hand, however, it was expected that a "fair and reasonable" estimate of cost could be made "of the construction of the proposed vessel if it were constructed under similar plans and specifications (excluding national defense features * * *) in a foreign shipbuilding center * * *," even though we only had, to start with, the estimate of man-hours of the American shipbuilder, submitted with his bid, and his estimates of the American unit costs of materials in a large number of items. These items are not clearly defined, however, nor of our own records. In addition it was necessary to apply to these values, correction factors for currency devaluation as between present quotations and August 1948 and to correct for the estimated difference in inflation as between the date of the reestimate and the 1948 date of the contract.

This is one situation in which the duties of the chairman of the Board, in his dual capacity also as maritime administrator, have been exceedingly difficult. Because of my ultimate responsibility of sitting in review of the redetermination, I held myself clear of the preparation of the new estimate by the staff. From the presentations made before the Board, it is clear that the best data available to the staff cannot be considered sufficiently complete in scope nor precise in values to be a satisfying basis for a decision of the importance of the one which is now hinging on the result.

The spread of the bids received on January 31, 1951, from ten (10) American shipyards for building ships of the new Mariner class in blocks of five identical sister ships, under conditions as nearly identical as could be provided, ran from $7,775,000 for each of five to $10,526,000 for each of five, i. e., the high bid was 35 percent above the low bid. This spread was due in part to real differences in building costs in various yards—in part no doubt to the estimating. Any one of these bids would clearly qualify as a "fair and reasonable estimate of the cost," etc., but the result in determining a construction-differential subsidy for another ship on these figures, assuming they were from a foreign yard, would vary correspondingly.

In short, while the Act in section 502 (b) purports to present a precise, mathematical formula for determining the construction-differential subsidy for a new ship, it actually presents a practical impossibility from the administrative point of view.

The amount of the subsidy is, of course, very important, equally to the Board and to the prospective steamship operator, in planning what kind of a ship the trade route in view can support. Manifestly, the success of a new ship will be strongly influenced by the degree in which it surpasses the foreign-flag competition on the run, but only, of course, within the over-all trade potential of the route contemplated.

It is even more important that once determined and made a matter of contract the subsidy rate shall remain fixed.

I recommend most earnestly in the interest of these two essential objectives and to avoid a repetition of the grave difficulty which has developed in the present case, that the law be amended to permit a predetermination from time to time of the subsidy rate which can be approved objectively and free from specific application if possible; so that future contracts can be negotiated with confidence and promptness and with fairness and reasonableness both to the Government and to the prospective shipowner. None of these critical elements of satisfactory contract administration exists today. Many thousands of dollars, 4 years of time, and many hours of deep study and concern have produced in the case before us a result which is unsatisfactory to all hands. Unless a more businesslike and realistic method is evolved, it will be difficult to continue to build passenger ships under the Act.

FEBRUARY 25, 1952.

(Sgd.) A. J. WILLIAMS,
Secretary.

FEDERAL MARITIME BOARD

No. S-47

AMERICAN EXPORT LINES, INC.—REVIEW AND REDETERMINATION OF THE SALES PRICES OF THE "INDEPENDENCE" AND "CONSTITUTION"

Decided November 4, 1952

Gerald B. Brophy and *Carl S. Rowe* for American Export Lines, Inc.

Francis T. Greene for the Board.

SUPPLEMENTARY REPORT OF THE BOARD

Our prior report in this matter, dated February 20, 1952 (4 F. M. B. 216), adopted as the 1948 estimated foreign-construction cost of the *Independence* and *Constitution* the estimate of $17,308,000 per vessel, based on a study of the best information then available to us and our staff. This estimated foreign cost made in 1952 was over $5,000,000 per ship higher than the estimate made by the Maritime Commission in 1948, and indicated a construction-differential subsidy rate of 27.07 percent instead of 45 percent as originally found. As previously explained, American Export Lines, Inc. (Export), agreed to the redetermination, and further agreed either to accept the redetermined price within a certain time limit and keep the ships at that price, or to reject the redetermined price and return the ships. The time limit for Export's definitive action has been extended, although Export indicated that if forced to an immediate decision it would have to reject the redetermined price. In the meantime, it asked that the proceedings be reopened to consider additional evidence, some of which it has procured in the Netherlands.

A prehearing conference with Export disclosed that the additional evidence on foreign-construction costs would come from a thoroughly reliable source and would bear directly on the issues involved. Some of the witnesses, officers, employees, or subcontractors of Wilton-Fijenoord (Wilton), a large and well-established shipyard of Schie-

dam, Netherlands, indicated willingness to testify in the Netherlands, but because of their business responsibilities were unable to appear in the United States. Accordingly. we arranged to hear their evidence abroad, and this was accomplished between July 29 and August 8, 1952, at Schiedam. Other witnesses testifying principally as to foreign exchange were heard in Washington on September 10 and 11, 1952. Export had sent to Wilton copies of the bidding plans and specifications of the *Independence* and *Constitution*, and Wilton's estimators and subcontractors who testified before us studied these and inspected the *Constitution* in Italy in March 1952. Wilton agreed with Export to estimate the 1948 cost of constructing the two vessels in its yard; Export agreed to pay Wilton the actual cost of making the estimate, but no fee or profit. This estimate, in summary form, was submitted to us in Washington in July, showing Wilton's estimate for one ship to be 41,306,403 Dutch florins, with a 2 percent reduction for a second ship.

With Wilton's estimate in hand, we visited the Wilton yard, and for the better part of 2 weeks interviewed Wilton's managing directors, Mr. van West and Mr. van Daalen, the manager of the shipbuilding department and chief estimator, Mr. Vermaat, their engineers, estimators, and subcontractors, and examined the contracts, documents, calculations which, in detail, supported the Wilton estimate. Our proceedings were informal, attended, in addition to the Board, by representatives of the Board's staff, representatives of the State Department, two representatives of the General Accounting Office, and representatives of Export. All the Netherlands witnesses spoke English fluently, and we were impressed not only with their complete knowledge and understanding of the subject matter, but by their clearly frank and very comprehensive responses to the questions which we addressed to them regarding the basis for their estimate and the breakdown of various elements that made up the total. Our inquiry of Wilton's methods of estimating and of building ships was searching, and their responses were most satisfactory in the details which they disclosed freely. We were indeed more than gratified at the willingness of Wilton's chief executives to disclose to us matters of business practice and policy which under usual circumstances might have been withheld for business reasons.

The facilities for a verbatim stenographic report were not available. Very full notes were kept, however, which were formalized into a record of 93 pages. Before we left the Netherlands this record was reviewed by all parties attending the hearings and, with minor corrections, was found to be accurate.

Before taking up the Wilton estimate in detail and questioning

witnesses, the Board went through the company's yard and plant. The company is one of the oldest and largest shipbuilding and repair companies in the Netherlands and has a business history of almost 100 years. The company has built and is building various war vessels and also merchant vessels of all classes, and, in addition, does extensive repair work. Many vessels were in the yard when we visited it. Besides a hull construction department, the yard has an engine-building department where both diesels and turbines are now being built, although turbine construction has only recently been resumed at the plant. The company's joiner department includes a furniture-making section, and the yard's practice is to manufacture the furniture both in wood and in metal for staterooms and crew accommodations on passenger ships, but not for public rooms. The latter are subcontracted, as are ventilating, heating, refrigerating, and electrical installations. In the areas of work usually subcontracted for by Wilton, the subcontractors furnished and explained to us their estimates for the work they would have done on the ships. The competence of the Wilton yard and its management to construct vessels of the type of the *Independence* and *Constitution* was established to our entire satisfaction. The yard has recently completed the *SS Rijndam* and *SS Maasdam*, sisterships, for the Holland-America Line's North Atlantic passenger service. These vessels are somewhat smaller than the *Constitution* and *Independence*, being about 503 feet long, 15,000 gross tons, with 8,500 s. h. p. delivered from American-built geared turbine engines, furnishing a speed of 16½ knots per hour. These Netherlands vessels are designed to carry about 800 passengers, mostly in the tourist class. The accommodations are air-conditioned throughout. We spent a day on the *Maasdam* during her trial run out of Rotterdam and had an opportunity to see in operation this excellent product of the Wilton yard.

Wilton's officials explained that their estimate as submitted was a fair estimate of the cost of constructing the *Independence* and *Constitution* in their yard in 1948, based on facts and prices now known. The senior director of Wilton was frank in admitting inability to say whether that yard in 1948 would have been willing to enter into a contract to build the two American ships at the submitted estimate without provision for escalation to protect against rising labor and material costs during construction. He said his yard might have done so, depending on considerations of business judgment such as the work then in hand, general desirability of passenger-ship construction which engages a larger proportion of the yard's facilities than cargo or tanker construction, customer relationships, etc. He said his company would probably not have wanted to assume the risk of rising prices

unless strong business considerations at the time made such a course seem wise.

It was explained that the yard's direct labor going into each item of the estimate was carefully computed according to the yard's regular practice when estimating on its own account, and to this figure was added 130 percent for overhead in all departments except the engineering and machinery department, where 175 percent overhead rate was used. These, it was explained, are the yard's customary and only overhead percentage rates for new commercial construction work, although different rates are used for naval construction and for repair work. Similarly, the Wilton executives stated that 6 percent of the cost of labor, material, and overhead is the rate used for risk and profit on new commercial construction, and that this same rate was generally used by other Netherlands yards.

It was also explained that direct labor was paid at an hourly rate and to this was added incentive pay or "tariff." These two items together make the company's basic hourly rate; all other items of labor, including designing, engineering, and drafting, were included in overhead. The average basic hourly rate, including "tariff," used in Wilton's estimate for 1948 was 1.15 florins per hour in all departments except the machinery department, where it was 1.20 florins per hour. (These labor rates used in the estimate were slightly higher than actual rates paid in May 1948 as discussed hereinafter but were deemed by Wilton to be *fair* and *reasonable.*)

The costs of materials going into the estimate were based on the yard's actual 1948 purchase records so far as comparable items were purchased in that year. Failing 1948 purchases, the cost of comparable items purchased at a later date, particularly in connection with the construction of the *Rijndam* and *Maasdam*, were used, and here the later cost of materials was adjusted for price increases between 1948 and the year of purchase.

We reviewed with the Wilton estimators and subcontractors the computations going into each of the 12 subdivisions making up the estimate. In each case they substantiated from their records the estimated cost of material and gave the estimated number of yard hours required to do the work or make the installation. In the case of refrigeration work, air-conditioning work, public-rooms construction and furnishing, and electrical installation, the subcontractor's estimate included the subcontractors' labor, and to this was added the cost of such yard labor as was connected with the subcontractor's work.

The detailed estimate, summarized under 12 subdivisions, is as follows:

Estimate based 1948

Subdivision	Material	Wage factor
	Florins	*Florins*
1. Hull steel	3. 794. 725	4. 552. 700
2. Hull outfit	1. 196. 070	609. 500
3. Carpenter's work	284. 800	265. 000
4. Joiner's work	5. 567. 500	1. 828. 500
5. Plumber's work	860. 000	675. 750
6. Deck auxiliaries [1]	1. 520. 800	251. 750
7. Ventilating and heating	1. 786. 360	5. 300
8. Kitchen and galley	332. 000	10. 600
9. Refrigerating installation	396. 000	2. 650
10. Electrical equipment	3. 160. 800	26. 500
11. Special items	950. 000	----------
Material total	19. 849. 055	8. 228. 250
12. Propelling machinery and auxiliaries	9. 010. 000	1. 881. 000
Material total	28. 859. 055	10. 109. 250
Wage factor	10. 109. 250	----------
Total before profit	38. 968. 305	----------
Profit and risk 6 percent	2. 338. 098	----------
Total	41. 306. 403	----------

[1] Excluding side port cargo gear.

Each subdivision was considered by us in turn, and the basis of all figures of both material and labor were examined and explained. The first schedule covering hull steel showed 10,500 metric tons of steel required, based on Wilton's experience for multiple-deck passenger ships. This quantity estimate varied only 1.6 percent from the quantity estimate made by our staff. The cost of the steel was estimated at f.267.85 per ton, this being the basic contract price for 3,690 tons of British steel contracted for by Wilton in April 1948 for the tanker *Mitra.* The British price, however, was subject to adjustment for changes in basic English steel prices between the date of contract and the date of delivery in 1949. Documents submitted by Wilton showed that the *Mitra* was under construction from January 1949 to December 1949, and that the delivery price of this steel was actually f.281 per ton. The difference between the contract price of f.267.85 and the delivery price of f.281 was due to adjustment in the British price for escalation. Since we hold, as will later be developed, that the Wilton estimate for this ship was not a "fixed price" estimate and that it must, therefore, be considered as an estimate subject to over-all escalation,

we think it consistent to include the steel at the April 1948 contract price rather than at the price after escalation, thus avoiding double escalation on the steel item. The American bids for the ships were based on April 1948 prices, and American escalation on the Bethlehem costs have been computed from that date.

In our February report we used a price for hull steel of f.325 per metric ton, which was obtained for us by Maritime's representative in Europe who visited various Netherlands shipyards and reported that that was an average cost. Furthermore, the official Netherlands Government Industrial Report (Maandschrift) gave the cost of ship construction steel at Netherlands shipyards in 1948 as f.324.97 per ton, which, as we stated in our earlier report, appeared to verify our representative's report. However, Wilton's executives explained that the Maandschrift statistics were based on the price of all steel used in shipyards, including steel requiring quick delivery for repair work as well as special and premium steel, steel used for yard structures and drydocks, and steel used in naval construction. These types, they explained, are considerably more expensive than steel bought ahead for new commercial construction where immediate delivery is not important. It appears that the actual cost of new construction steel is a more accurate figure for our purpose than the average price of shipyard steel, including "special" and "quick delivery" steel. The time for erecting all steel was estimated by Wilton at 110 man-hours per ton. This was based on their past experience for passenger ships. They explained that this was a higher figure than 89.48 man-hours per ton required on tanker construction (*Mitra*, built 1949) and a little lower than 117 man-hours per ton required on the *Rijndam*, which was a smaller passenger ship.

The cost of the other hull steel items was explained by Wilton in detail, with the estimated weights and cost per ton or kilo and the man-hours necessary for fabrication and installation. Their estimate for sternpost propeller brackets and rudder was found to be substantially identical with the 1948 estimates of our staff. In the case of sheet metal, Wilton's estimate of the material cost was over 2 cents United States currency a pound higher than our estimate. The total Wilton estimated cost of labor and material going into the hull steel schedule amounted to 8.347.425 florins.

The remaining 11 subdivisions of the estimate will not be considered in this report with the same detail as the hull steel subdivision, although each item going into the various subdivisions was scrutinized by the Board and its experts and explained by Wilton's representatives. Under subdivision 2, marked HULL OUTFIT, were included estimated costs of derricks, lifeboats, davits, and such heavy items as

anchors and their chains, and such light articles as compasses and other nautical inventory. The cost of most of these items was derived from purchase records for such items installed on the *Rijndam* and the *Maasdam*, although the cost of underflooring installed on the steel deck under the linoleum or other surface material and the cost of heat and sound insulation was taken from subcontractor's figures. The contract of the Wilton yard in acquiring lifeboat davits for the *Rijndam* and *Maasdam* showed care to obtain low prices by encouraging competition between British and Netherlands suppliers. The costs thus incurred in constructing the Netherlands ships were reflected in Wilton's estimate submitted to us. Due to incomplete bidding information furnished to them on lifeboats, the Wilton estimate for this item was based on steel and not aluminum construction as specified, and, therefore, requires adjustment upward.

The items under subdivision 3, CARPENTER WORK, were not extensive, covering the cost of Oregon pine and teak deck lumber, and the processing of this lumber into deck planks and deck margin planks. They also include the construction of wooden hatches, hold ceilings, and wooden gratings throughout the ship.

Next to the hull steel, subdivision No. 4, JOINER'S WORK, involved the greatest cost, showing 5.567.500 florins for material and 1.828.500 florins for labor. Under this subdivision was included the construction of all public rooms and passenger and crew accommodations as well as their furnishings. Fireproof marinite for partitions was specified. This is a proprietary product of American manufacture and Wilton's estimates were based on 1948 quotations for this product with transatlantic freight charges added. Wilton's estimators selected typical cabins, estimated the area and furnishings of each, and from these built up the cost of erecting and completely furnishing all the sleeping accommodations on the ship. The estimator's record showed in detail the number of pieces of furniture in each room and the cost of materials entering into each. In all, 690,000 hours of joiner's work was included under this schedule for installations made by Wilton. In addition, this schedule included the lump-sum charge of the subcontractor de Nijs for material and labor in installing and furnishing the public rooms, swimming pool, and other areas not installed by Wilton. Mr. de Nijs had decorated and furnished the public rooms on the *Rijndam* and *Maasdam* in 1950–52, and also a large part of similar work on the *Oslofjord*, constructed at another yard in the Netherlands in 1948, and on the reconditioning of the ***Nieuw Amsterdam***. During the last 21 months, Mr. de Nijs showed that he had completed 4.500.000 florins worth of ship joiner and decorating work. He furnished worksheets showing the area of the floor

and cubic capacity of each of the public rooms on which his estimates were based.

The largest single subdivision of the estimate was No. 12, for supplying and installing the PROPELLING MACHINERY AND AUXILIARIES. For this the material estimate was 9.010.000 florins, with a labor cost of 1.881.000 florins. The detailed estimate was explained by Mr. Sterkman, the chief engineer of Wilton, and also responsible for its engineering estimating department. Mr. Sterkman explained that his company had not in 1948, nor since the war, constructed turbine engines, but in view of the requirement for four large engines for these ships his company might well have undertaken the construction of these turbines, pointing out that Wilton had at the time of our visit to the yard the construction of turbines for seven ships in their shops. Mr. Sterkman stated that he was able to obtain from de Schelde shipyards, another large Dutch concern, estimates which that yard made in 1948 for the construction of turbines for a sistership for the *Nieuw Amsterdam.* He said that his company would have made the turbines as cheaply as de Schelde because the Wilton shipyards were, in Mr. Sterkman's opinion, at least as efficient as the de Schelde yards. In any event, the de Schelde 1948 bid was broken down and refigured for turbines of the size required for the *Independence* and *Constitution.* The profit item in the de Schelde estimate was eliminated inasmuch as, had Wilton constructed the turbines, their profit on them would have been included in the overall 6 percent charge on the cost of the entire ship. Mr. Sterkman pointed out that his plant was not equipped to build reduction gears, which could have been obtained cheaper and better in 1948 in England or Switzerland.

Mr. Sterkman not only examined the plans and specifications of the *Independence* and *Constitution*, but inspected the latter, and all estimating was done with the requirements of high temperature and high steam pressure set forth in the specifications, and all in accordance with the American Bureau of Shipping requirements. The cost of shafting was calculated from the weight and labor required. Two four-blade bronze propellers were included and two spares at the price of 60.000 florins each, which the supplier Lips quoted for 1948. The specifications called for only one spare for each ship, and this has been taken into account in the computation hereinafter set forth. As to boilers, Mr. Sterkman supplied quotations from Stork, the Netherlands licensee of Babcock & Wilcox, for supplying boilers identical to those on the Export ships at a price of 1.500.000 florins per ship. Three competitive bids were obtained to establish the 1948 price of the burners for the boilers, the lowest price for burners being 235.000 florins per ship. Similarly, Wilton's estimates for auxiliaries

were examined, and it was learned that Wilton planned to purchase all auxiliaries from recognized manufacturers. In part Wilton had obtained the 1948 prices on these auxiliaries, and in part the 1952 prices, which were adjusted to give effect to the change in price level between 1952 and 1948. Similarly the cost of generators and other equipment connected with the engine room was presented, with supporting figures showing careful estimate of the cost of material and amount of labor necessary for installation.

Subdivisions 5 and 11, showing PLUMBER'S WORK and SPECIAL ITEMS such as insurance, classification and measurement, scaffolding and launching expenses, docking and tugs, and trial trips were explained in detail.

Subdivision 6, showing DECK AUXILIARIES,[1] including steering engine, windlasses, winches, capstans, watertight doors, and elevators were explained, and it appeared that most of this equipment, as well as the equipment under subdivision 8, KITCHEN AND GALLEY, was to be purchased. The contracts for similar equipment used in preparing the estimate were submitted and explained by Wilton's representative. In the deck auxiliary schedule, it was stated frankly that they were unable to obtain costs for side port cargo gear, and no figure was included in their estimate for this item. The Wilton estimate for elevators was developed from the size and type of elevators installed in the *Rijndam*, designed to lift about 850 pounds, whereas the Export ships' elevators had a capacity of 2,900 pounds. Both the Wilton estimate and the estimate of our staff were based on elevators made under Otis Elevator Co. license. Wilton's total cost of elevators was 190.000 florins as against a considerably higher figure from our staff. The Wilton estimate requires adjustment upward to provide for side port cargo gear equipment and an increase in the elevator figure.

Some remaining comment is required upon subdivision 7, VENTILATING AND HEATING, and subdivision 9, REFRIGERATING INSTALLATION, the former including air-conditioning machinery for passenger rooms, public spaces, and crews quarters, and the latter including refrigerating machinery for cargo holds. The estimate for this equipment assumed it was to be supplied and installed by the firm of Gebr. van Swaay, the Netherlands representative of the Carrier Corporation of America. Mr. Sipkes of this firm explained his experience in air conditioning other vessels built in Holland, and supplied detailed 1948 prices on marine air-conditioning machinery and equipment furnished, for the most part, from the Carrier Corporation. Mr. Sipkes pointed out that his calculations had been based on examination of plans and

[1] Wilton's estimate covered four more topping lift winches than were specified. Adjustment accordingly will be made hereinafter.

specifications and also an examination of both the *Independence* and the *Constitution* while in Italian ports. Added to the estimate of Mr. Sipkes' firm for labor and material was an item of 10 percent for subcontractor's profit. Mr. Sipkes said that his firm could readily have done the work on the two Export ships and in 1948 would have welcomed a contract at the price which he quoted to Wilton and explained to us.

Similarly, Mr. Nagelkerke supplied to Wilton an estimate for supplying and installing all the electrical equipment on the ship covered by subdivision 10. Mr. Nagelkerke's over-all figure was:

	Florins
Material	2. 373. 445
Labor and overhead	500. 000
10-percent profit	287. 345
Total	3. 160. 790

This subcontractor supplied detailed work sheets showing the cost of switchboards, transformers, transmitters, and cables, and all necessary switches, outlets, and even the normal lighting fixtures where specially decorative features were not required. We had the advantage of the expert advice of Mr. H. F. Harvey, Jr., the electrical engineer of the Newport News Shipbuilding & Dry Dock Co., who accompanied us to the Netherlands on a special-services contract for the particular purpose of checking into the equipment contemplated by the Wilton estimate, and the competence of the Wilton yard, or its subcontractors, to install electrical equipment of a type and in a manner to meet American standards. As Mr. Nagelkerke explained his estimate he was questioned in detail by Mr. Harvey. Mr. Nagelkerke satisfied Mr. Harvey and, through Mr. Harvey, satisfied us that the equipment proposed to be installed under the Nagelkerke subcontract, as explained to us, would meet the United States requirements and standards. Mr. Nagelkerke explained and demonstrated that he was entirely familiar with American and international standards for electrical installations, pointing out that he was a member of the International Committee on Rules for Marine Electrical Installations.

In summary, it may be said that we felt that the estimates presented by Wilton and its subcontractors were carefully prepared. It was stated that the staff of the Wilton yard devoted some 7 weeks in preparing the general estimate, and the subcontractors, in turn, devoted several weeks to their respective estimates. We discussed with Wilton and the subcontractors the various items going into the estimates, and with increases for certain items (i. e., the cost of elevators, lifeboats, and side-port cargo gear) and reductions for

other items also noted (i. e., one extra propeller and four topping winches). We are satisfied that the Wilton estimate, subject to certain adjustments to be referred to, represents the fair and reasonable estimate of the base cost, before giving effect to escalation, of constructing the two Export ships in the Wilton yard in 1948. It has been pointed out already that this estimate is not greatly at variance with the estimate presented by our staff prior to our February 1952 report, but where the differences exist we believe that the Wilton estimate is more to be relied upon because its estimates of cost, both of material and labor, in substantially all instances were based upon actual invoices and transaction prices. Furthermore, the persons presenting the figures were not only working in the field of Netherlands costs and practices with which they were intimately familiar but were subject to questioning and cross-questioning by us and our experts who participated in the review. Due to unusual circumstances which may not again be repeated, the information developed as a result of our personal visit to the Netherlands is more reliable than that heretofore gathered. As we said at page 57 of our February 1952 report: "The staff of the former Maritime Commission and the present staff were confronted with the fundamental problems of properly evaluating foreign costs, with the handicapping knowledge that the sources of information divulged much of it, if at all, reluctantly and usually anonymously."

The Wilton estimate made no deduction for the cost of the four national-defense features incorporated in the ship's plans for which the Government pays the entire costs, i. e., increased speed, additional evaporator capacity, additional generator capacity, and dual enginerooms, all referred to in our February 1952 report. Nor does the Wilton bid take into consideration the cost of certain miscellaneous items for the completed ship which are provided by the owner and not by the shipyard, such as bidding plans and specifications, owner's inspection, interior decoration, owner's outfitting of linen, silver, and glassware, etc., referred to in our prior report. Adjustments for these items are considered hereafter.

The information obtained at the Wilton yard showed clearly the extra cost in florins for aluminum lifeboats and the deductions that should be made for the propeller and topping winches improperly included. The figures which appear below do not correspond exactly with those submitted by Wilton because those were bare figures of the cost of labor and material without including general charges for insurance and over-all profit. As stated above, the Wilton estimate did not include any figure for side-port cargo gear, and the elevator estimate was admittedly low because the type, size, and speed of the

elevators and the number of decks and doors served were apparently not completely taken into account. For these two items we have, therefore, reverted to our staff estimate of the Netherlands cost of these items.

Export has argued that additions should not be made to the Wilton estimate, except perhaps for the cost of the side-port cargo gear, because of the fact that in a number of other areas Wilton's figures were said to be on the generous side, particularly in use of f.1.15 per hour instead of f.1.08 per hour for yard labor; also because the cost of certain propeller brackets and rudders was based on a slightly higher material cost per kilo than was paid by the yard for similar items contemporaneously installed on the *Rijndam*, and because the electrical subcontractor's estimate was based on a slightly different and presumably more costly method of installation than was required by the specifications. As to the hourly rate of labor, the f.1.15 rate was consciously included by the Wilton estimators as fair and reasonable, and we do not think it should be disturbed. As to the other items that are said to be on the high side, there is no definite basis in the record for making any deduction. Where a definite basis exists as in the case of the extra propeller and extra topping winches, we think the deductions are proper and we have given weight to them. The following table gives our revised fair and reasonable estimate of the shipyard cost of constructing each of the two Export ships in the Netherlands, based on our studies at the Wilton shipyard, all expressed in Dutch florins.

Wilton-Fijenoord's estimate for a single ship			f.41. 306. 403
Adjustments to Wilton-Fijenoord estimate:			
Add for lifeboats—steel to aluminum (W.-F. estimate of extra cost)	f.81. 600		
Add for side-port cargo gear per F. M. B. 1952 estimate	456, 490		
(1) Add for elevators (difference F. M. B. estimate from W.-F. estimate)	503. 300		
		f.1. 041. 390	
Deduct for 1 extra propeller	63. 800		
(2) Deduct for 4 topping winches	26. 700		
		90. 500	
(3) Net addition to W.-F. estimate			950. 890
(4) Net W.-F. estimate after adjustments			42. 257. 293

(5) Deduct for national-defense features 3.06 percent[1] of (4), this being the percentage of United States shipyard bid $23,415,000, represented by United States estimate for national-defense features ($715,325)	f.1. 293. 331
(6) Net after national-defense deductions	40. 963. 962
(7) Deduct 1 percent for 2-ship estimate (to cover 2 percent reduction for second ship)	409. 639
(8) Net shipyard estimate for each of 2 ships	40. 554. 323

[1] 3.06 percent is the ratio of estimated dollar cost of national-defense features ($715,325) to the Bethlehem bid for the entire ship before escalation ($23,415,000). Wilton did not estimate the cost of such features, and we are using the same percentage figure for the purpose of calculating the cost in florins.

As already indicated, we have now heard additional testimony on the question of foreign exchange. Under section 502 (a) of the Merchant Marine Act, 1936 (the Act), the sales price of the *Constitution* and the *Independence* by the Government to the purchaser must be "at a price corresponding to the estimated cost, as determined by the Commission", and under section 502 (b) "The amount of the 'construction-differential subsidy' may * * * not exceed the excess of the bid of the shipbuilder * * * over the fair and reasonable estimate of cost, as determined by the Commission, of the construction of the proposed vessel if it were constructed * * * in a foreign shipbuilding center * * *." To redetermine the sales price and make the necessary comparison between the American cost and the foreign estimated cost, we must convert our estimate in florins so as to be expressed in dollars. In our earlier report this conversion was made at the so-called "official" rate of $0.3775 without adjustment for disparity between the "official" and so-called "free" rate.

Export takes the position that by reason of the additional evidence now before us "it is clear" that such a conversion "does not produce a fair and reasonable comparison of the cost of constructing the ships in the Netherlands and the United States." Mr. Slater, president of Export, stated during the course of our August hearings in the Netherlands:

> The price of money is just as important to a determination of the fair and reasonable estimate of the cost of constructing these ships as the price of steel or any other product used in their construction.

We said in our earlier report (p. 228):

> * * * the whole objective of Title V is to permit the purchase of the American ship by the American operator at the *closest possible approximation* to the actual dollar price that it would have cost him had the ship been built foreign. If Export had actually contracted for these ships with a Netherlands shipyard, and would have had the opportunity to contract in dollars at an appreciable

discount because of impending devaluation *or had been able to provide for progress payments to be made in guilders during the life of the construction contracts*, it would in fact have had the benefit of a substantial reduction in dollar cost. Consequently, to the extent that devaluation could have been reasonably foreseen and turned to the advantage of a purchaser in Export's supposed position, the Board in making its redetermination of the vessel sales prices in 1951 may make adjustments to obtain the benefit of potential devaluation which a prudent businessman would or should have made as of August 1948. [Emphasis now supplied.]

In 1945, in the case of *Barr* v. *United States*, 324 U. S. 83, the Supreme Court had occasion to consider whether the "official" or the "free" rate of exchange should be applied to the British value of goods imported into this country for the purpose of assessing ad valorem duties under the Tariff Act of 1930. The Tariff Act required that the value of the foreign currency should under applicable conditions be "the buying rate for cable transfers payable in the foreign currency so to be converted; and shall be determined by the Federal Reserve Bank of New York and certified daily to the Secretary of the Treasury." At the outbreak of the second World War the British Government took over some control of dealings in foreign exchange and designated certain authorized dealers in foreign currencies, and prescribed that beginning January 8, 1940, British pounds were to be sold by them at the rate of $4.035. When the goods were imported in 1940 the Federal Reserve Bank certified to the Secretary of the Treasury two rates for the pound sterling, one, the official rate at $4.035, and the other, the free rate at $3.475. The Customs assessed duties at the official rate, and this was set aside by the Court, which said, page 90:

We may assume that the dual or multiple exchange rates which have emerged were not in contemplation when the 1930 Act was passed.

At page 91:

Congress could, of course, choose any standard of valuation, for the purposes of the assessment and collection of duties. But Congress in this situation endeavored to provide a flexible and realistic, not an arbitrary, standard. * * * The language of section 522 (c) read against the background of these statutes indicates to us that Congress undertook to provide in each case the rate which gives the *closest approximation* to the value in dollars of the imported merchandise. [Emphasis supplied.]

At page 93:

But this result is criticized on the ground that it interferes with the control of foreign exchange, which fiscal function has been entrusted to the Secretary (of the Treasury) not to the Federal Reserve Bank of New York. It hardly need be pointed out in reply, however, that our decision, like section 522 (c), is concerned only with the assessment and collection of duties upon imports through the use of a formula which Congress designed.

And at page 94:

We think that the use of the "official" rate of exchange in assessing and collecting duties upon these imports transcended the authority of the collector and of the Secretary and that the "free" rate of exchange certified by the Federal Reserve Bank of New York should have been used.

It appears from the opinion in the case cited that in 1940 British pounds were quoted and were readily purchasable at the "free" rate in the New York market. But as to conditions in 1948, we said (p. 235), based on the only testimony before us at the time of our earlier report,

In no case were we able to discover any conclusive evidence that substantial business transactions were conducted in a manner which avoided the effect of the various governmental regulations establishing official rates of exchange.

The conclusion reached in our prior report to make the conversion from florins to dollars at the official rate was the necessary consequence of the absence of substantial and convincing evidence before us at that time justifying the use of any other rate. The evidence now before us clearly indicates that the former record was by no means complete. In fact, we now have evidence indicating that substantial business transactions with the Netherlands were conducted at other than the so-called "official" rate, and that such transactions have involved ship construction. The evidence also makes it clear that the devaluation of Netherlands currency was widely discussed and confidently forecast in this country well before August 1948.

The unbalanced state of trade after World War II and the general shortage of dollars at that time in European countries, especially in England and the Netherlands, is a matter of common knowledge. In September 1949 both countries mentioned, as well as several others, devalued their currencies in terms of dollars by about 30 percent. The florin before devaluation was officially quoted at $0.3775; after devaluation, at $0.2631. The record now before us, consisting of many official Netherlands Government press releases as well as the testimony of men experienced in foreign exchange transactions, makes clear several general conditions existing in August 1948 having a very direct effect on foreign exchange values.

First, as stated above, there existed in the Netherlands, as in Europe generally, a serious dollar shortage. The United States had granted temporary economic aid to Europe for several years after the close of World War II, and in 1948 Congress entered on a long-term policy of economic assistance to European countries, including the Netherlands, under the Economic Cooperation Act of 1948 (E. C. A.). Indeed, as early as April 1948, the Netherlands Minister of Finance in

a Government note on foreign exchange, set forth an 8-point program including "Encouragement of export to the dollar area by every means including a plan which will place a certain percentage of the profits in foreign exchange at the disposal of exporters."

Second, there was at this time the widespread use of "transferable" sterling credits as a medium of international exchange. By "transferable" sterling is meant credit balances in pounds sterling with London banks in the names of nationals of certain non-British countries, including Greece and the Netherlands. Under British regulations effective in 1948, these credits were freely transferable between nationals of any country in the special group and were also transferable to the account of British nationals, as might be required for all purposes including the payment of debts owing from these countries to British creditors. In August 1948 "transferable" sterling was bought and sold in the leading financial centers of the world, including New York, in very large quantities at prices that varied from day to day. We have records of quotations from actual transactions in transferable sterling with quotations for every month from August 1948 through devaluation in September 1949. During this period the prices ranged from $3.33 to $3.04 per pound. The going price of $3.33 on August 11, 1948, was approximately 18 percent below the "official" United States-British exchange rate for sterling of $4.03. Holders of American dollars needing credits to pay balances in florins in the Netherlands were able to buy "transferable" sterling at the discount indicated and to convert this into florins at the "official" British-Netherlands exchange rate, thus saving substantially over the cost of converting dollars into florins at the "official" United States-Netherlands rate. In the case of a new export transaction involving the Netherlands, it is our understanding that this method would require the approval of the Netherlands authorities who controlled export licenses or permits for Netherlands products. However, it has been impossible for us to determine what their specific decision might then have been regarding the financing of a vessel transaction of this sort.

Third, there was all through 1948 and until September 1949, when devaluation actually took place, a general opinion among financial experts of all countries that adjustments in currency exchange rates were necessary and that such adjustments were not far off. The Secretary of the Treasury of the United States, acting in the capacity of Chairman, International Advisory Counsel on International Monetary and Financial Problems, in a letter to Hon. John Davis Lodge, dated February 10, 1948, stated that before currency rates of the members of the International Monetary Fund could be maintained at stable levels from which the market rates of exchange would deviate only

within a narrow margin, "there will undoubtedly have to be devaluations of some of the currencies of the countries involved in the European Recovery Program." [2]

The International Monetary Fund in its report dated April 22, 1948, to the Economic and Social Council of the United Nations, of its study on the problem of exchange rates, included among its conclusions the following:

> Exchange rates in a number of countries will have to be changed in the near future because they are interfering with the flow of exports. In some instances a change in parity is overdue but has had to be delayed so that other measures may be taken at the same time.[3]

It was a matter of common knowledge in the spring of 1948 that devaluation of the Netherlands florin, as well as the pound sterling to which it was and is economically tied, was a clear probability which might well have occurred long prior to September 1949.

As above stated, the purpose of the Act is to permit the purchase of an American-built ship by an American operator at the closest approximation of the actual dollar price which the ship would cost had it been built in a foreign yard. This is our guiding principle in fixing our fair and reasonable estimate of the foreign cost, in dollars, of the ships here under consideration. We are now in possession of evidence which is convincing to us that a buyer with dollars in 1948 would have been able to arrange for the construction of vessels such as the *Constitution* and the *Independence* in the Netherlands at a price in dollars substantially below the price which would have been required if the "official" dollar-florin exchange rate in effect during August 1948 had been applied.

We base our conclusions in this regard upon the entire record in this case, including the testimony of Mr. Fred Meer, manager of the foreign exchange department of Hayden, Stone & Co., a well-known private banking firm established in 1892, which has for many years been engaged as principal in foreign exchange transactions in New York, and the testimony of Mr. Herbert Mann, a London shipping expert whose long-standing relations with the Netherlands shipping, shipbuilding, and banking interests have been of the closest, and whose firm has represented Export since 1932. Our conclusions are also supported by testimony of Mr. Manuel Kulukundis, an experienced shipowner and operator, as to actual ship transactions which will be described in detail.

---

[2] Quoted in 94 *Congressional Record,* part 9, 80th Cong., 2d sess., A 1095, February 24, 1948, and reported in the Wall Street Journal, February 26, 1948.

[3] Reported in Wall Street Journal, April 30, 1948.

Mr. Meer expressed the opinion that the Netherlands authorities, represented primarily by the Nederlandsche Bank, would have been willing to agree in August 1948 to accept dollars for sufficient florins to pay for the construction of the two hypothetical ships in a Netherlands shipyard, beginning August 1948, at a discount agreed to at the time the construction contract was made, of somewhere from 15 percent to 32 percent below the then existing "official" rate. He felt this discount would have been granted because that bank was then offering discounts of that order to obtain dollars for its sterling and other soft currency. His opinion was based upon exchange transactions either participated in by his firm or the details of which were known to him, involving substantial exports from the Netherlands to this country in which discounts of the order referred to had in fact been obtained by the American importers. Mr. Meer stated that he believed his firm through its Netherlands connections would have been able to close such an agreement with the Netherlands authorities for the construction of ships in 1948.

Mr. Mann's opinion was to the same effect. He pointed to many reasons why a large ship construction contract would have aided the Netherlands economy and would have provided strong inducements for substantial exchange concessions from the Netherlands authorities. While Mr. Mann stated that he was not able to reveal specific transactions effected during the period, he was "well aware of the circumstances under which they were arranged." Mr. Mann expressed the opinion that in 1948 a discount between 10 percent and 25 percent below "official" rates could have been obtained (later estimated by him at from 20 percent to 25 percent).

Mr. Meer, whose firm had, between August 1948 and December 1951 (the hypothetical period of construction of the two ships in the Netherlands yard), sold over 15,000,000 pounds sterling of "transferable" credits, also testified as to the actual cost of such credits in United States dollars if purchased when the successive florin installment payments on the ships had become due. These computations, however, even though based on actual transactions in "transferable" sterling, do not take into consideration such conditions, if any, as the Netherlands authorities might have imposed for its use in the Netherlands for exportable ships.

Of more weight than the opinion evidence referred to is the evidence presented to us of actual arrangements made by buyers from the dollar area for the construction of ships in the Netherlands for discount florins. Mr. Kulukundis, whose offices are in New York, testified that he, with certain associates, entered into a contract for the construction of a 24,000-d. w. t. tanker by a leading Netherlands

shipyard. This contract was received in evidence, and provided for payment of 50 percent of the florin contract price in installments during construction, and 50 percent upon delivery, these timing provisions being tantamount to partial but substantial interest-free financing and unusually favorable to the purchaser. More important was the provision regarding exchange, as follows:

Payments to be made 50 percent in sterling and 50 percent in dollars. The rotation of the currency to be at purchaser's option.

That provision, on its face, is somewhat inconsistent with the contract purchase price expressed entirely in florins. Mr. Kulukundis explained this to mean that 50 percent of the total florin price must be derived from dollar exchange at the official rate, and 50 percent from sterling exchange. He further explained that his negotiations as to exchange as well as other matters were with the shipyard, and that he was told point blank that unless 50 percent of the cost was provided by dollar exchange, no export license would be forthcoming. He continued that the yard dealt with its Government to obtain this export license. The permission in the contract to use sterling to purchase up to 50 percent of the Netherlands currency gave the purchaser the benefit of an exchange discount. Mr. Kulukundis testified:

Now, in the circumstances, we can go to the market and buy sterling and this, of course, we had in mind when we made this contract, that we would be able to get the discount on the dollar. I mean our dollar costs in buying the sterling in the open market—sterling that would be transferable.

The date of the Kulukundis contract was April 14, 1951, well after devaluation, but even after devaluation British "transferable" sterling credits were obtainable at a discount below the official rate of $2.80 per pound, although the discount in 1951 was not nearly as great as in 1948.

Mr. Kulukundis computed that his savings by reason of the exchange discount on sterling will amount to about 5 or 6 percent of the entire cost of the ship. He also estimated additional saving of about 5 percent on the ship's cost due to use of dollar-purchased florins for half the ship's cost, as well as an additional 2½ to 3 percent due to the delayed payment of the purchase price. All the foregoing applied, of course, to Mr. Kulukundis' 1951 contract. He explained that the saving from exchange discount would have been much greater in 1948. He said:

The savings would have been much greater because then the price of the guilder, and sterling for that matter, was different. The same mechanics worked then. The ultimate cost in dollars would have been by so much less, because of the cheaper price we would be getting in sterling.

Mr. Kulukundis also referred to a contract made by a colleague of his in 1950 for the construction of two tankers in a Dutch yard where the entire price was paid in florins derived from "transferable" sterling exchange and even more generous credit terms arranged.

The particulars of another ship construction contract made in early 1950 for the construction of two 4,000-ton freighters in the Netherlands for Zim Israel Navigation Co. Limited were also introduced in evidence in a letter from the managing director of that company to Mr. Slater of Export. It was explained:

1. Our agreements for the building of two ships involved the payment, during building, of 50 percent of the price in dollars and 50 percent in florins, the latter being provided by a group of Dutch Banks by way of loan secured by mortgage.

As far as concerned the dollars we had to provide, it was agreed that we should receive a "bonus" and the amount of the "bonus" was fixed in advance. It amounted to 14.96 percent over the official rate of exchange in relation to the whole sum of dollars transferred by us. The operation was carried out in this way: out of our first dollar remittance, sufficient dollars were converted at the "free" rate of exchange to produce the total "bonus" due to us; the balance of our remittance and all subsequent remittances were converted at the official rate of exchange.

* * * * * * *

b. As stated above, 50 percent of the florins were obtained from dollar conversions. The rates of conversion were (i) official rate 3.795 florins per $1 and (ii) "free" rate, 6.308 florins per $1.[4]

* * * * * * *

d. The Dutch authorities agreed to the arrangement whereby the "bonus" was granted for the dollar conversion, and this of course, played its part in inducing us to build our ships in Dutch shipyards.

The evidence as to the existence of actual contracts permitting ship purchasers, even after the 1949 devaluation, to pay dollars for the ships in amounts substantially less than would have been required had the shipyards' florin prices been converted at the "official" rate of exchange is substantial corroboration of the opinions of the experts that similar and even more favorable arrangements could have been made in 1948.

Exchange concessions alone, after devaluation, on the contracts which came to our attention, ranged from 5 percent to 7 percent of the entire cost of construction. Additional concessions also obtained on the same transactions have already been referred to. What might have been obtained in August 1948 is problematical, with estimates running on exchange alone from 10 percent to 32 percent. As previously stated, transferable sterling available for transfer to the credit of Netherlands

[4] These rates were in effect in early 1950 well after the September 1949 devaluation.

nationals and by them convertible into florins was purchasable in large amounts in August 1948 at a discount of about 18 percent.

From the foregoing we are convinced, as already stated, that as of August 1948 substantial concessions from the official dollar-florin exchange rate could have been obtained, and that no fair and reasonable estimate of the cost of construction of the Export vessels in a Netherlands yard can be reached without due regard to this fact. The practical difficulty that faces us is to determine what precise discount would give to the florin its fair and reasonable purchasing value for ships constructed in the Netherlands in terms of the United States dollar.

The evidence before us makes it clear that in August 1948 there were such obvious warnings of impending devaluation that any prudent businessman would have been aware of the folly of converting at once his entire purchase price from dollars to florins at the official rate to provide for progress payments needed over the succeeding 3 years.

Under section 705 of the Act the determination must be made as of the date of the American construction contract (August 1948). The estimates made to us of the discount that could have been obtained from the official exchange rate at that time vary from 10 percent to 32 percent, but, for reasons already explained, we are unable to conclude from that evidence that the fair and reasonable figure is at either extreme, or halfway between.

We believe that from the evidence of circumstances that have taken place since 1948 we can determine with some precision what a fair and reasonable estimate of the discount should then have been.

The concessions obtainable in 1948 gave the basis for estimating the true value of the florin, and also gave a forecast in 1948 of a value that would in due course be officially recognized. By reference to what actually occurred, as will be hereafter explained, we are able to say that an allowance equal to a discount of 19½ percent from the official August 1948 dollar exchange rate for florins to be used for ship construction would have been conservative, fair and reasonable, and would also have in 1948 produced the total number of florins for ship construction purposes that the dollars would actually have produced if converted when needed for progress payments.

As to progress payments, we find from the record that the usual requirements of the Wilton yard on two ships such as we are here considering, if contracted for in that yard on August 11, 1948, would have provided that 40 percent of the Netherlands price of the first ship would have been payable before the September 1949 devaluation date, and 30 percent of the price of the second ship would thus have been payable before devaluation. Taking both ships together, an average

of 35 percent of their combined Netherlands price thus would have been payable before devaluation and 65 percent after devaluation. A purchaser with dollars, by the use of usual exchange facilities and without recourse to any special treatment, would have been able to convert 35 percent of the total florin cost of the two ships at $0.3775 to the florin and 65 percent at $0.2631 to the florin. His actual dollar cost of meeting the shipyard progress payments in the Netherlands of each ship, if averaged, would, therefore, have been $12,293,638, representing a discount of 19½ percent as shown below:

(1) The Netherlands estimate of f.40.554.323 converted into dollars at the August 1948 official rate of $0.3775 florins to the dollar amounts to		$15, 309, 257
(2) 35 percent of f.40,554.323 at $0.3775 equals	$5, 358, 240	
(3) 65 percent of f.40.554.323 at $0.2631 equals	6, 935, 398	
(4) Netherlands estimate converted to dollars as required to meet progress payments	12, 293, 638	12, 293, 638
(5) Difference (1) minus (4) equals		3, 015, 619
(6) Percentage—(5) equals 19½% of (1)		

It thus appears that an allowance of 19½ percent from the 1948 official exchange rate produces the number of dollars which would have been required to meet the progress payments when they actually would have become due and thus would in August 1948 have been a fair and reasonable, as well as an accurate, estimate of the total number of dollars needed to make the necessary progress payments to the Netherlands yard. The accuracy, and hence the fairness, of such an estimate in August 1948 would have been supported by future events. Of course, we are required to make our fair and reasonable estimate of the foreign-construction cost, including the dollar cost of florins, as of the date of the construction contract, but, as developed below, we are not now limited to evidence then available.

As already stated, we have accepted basically the estimate of the 1948 florin cost of the vessels from the Wilton yard based on facts and prices now known. In many details this 1948 florin cost was based on records, indices, and other evidence not in existence in 1948, when and insofar as such evidence was relevant to disclose the cost as of 1948. Similarly, we believe it is entirely proper and, in this case necessary, to use such evidence as is now in existence to assist us in determining the extent of the difference between the 1948 official dollar value of ship-purchasing florins and their real value. It is clear that to make a fair and reasonable "redetermination" in 1952 of a "determination" made in 1948 without the use of such evidence would be unrealistic in the extreme. By the use of the recorded actual change

in official exchange rates after 1948, we are able to fix a fair and reasonable estimate of the realistic dollar value of florins in 1948.

The "after the fact" evidence which we have thus used was, of course, not available to the Commission in 1948 nor will similar evidence be available to us in making original estimates in the future. What consideration, if any, may be given to the whole problem of foreign currency in cases requiring our original determination of construction-differential subsidy rates will depend upon the facts and evidence available when the cases are presented.

We conclude, therefore, that the fair and reasonable estimate of the base foreign shipyard cost, before escalation, of each of these vessels, less national-defense features, as of August 1948, was $12,293,638.

Wilton supplied no figure as to the Netherlands cost of the following miscellaneous items already mentioned. We have taken the estimated foreign construction cost of these items from our staff estimate (exhibit 23–B), wherein the Netherlands estimated costs were converted to dollars at the 1948 official rate (1 florin equals $0.3775).

Item	Cost
(a) Bidding plans and specifications	$100, 250
(b) Inspection	15, 350
(c) Interior decorator	122, 750
(d) Owner's outfit	560, 000
	798, 350

Export argues that the cost of the owner's outfit on the ship (item (d) above) should be one-half the American cost of $560,000. In support of its position Export has forwarded to us, since the hearings, a table showing the 1952 Belgian prices of certain glassware and table linen and the 1952 American cost of the same items. A comparison of the 1952 figures shows the Belgian cost to be approximately one-half the American cost. The Belgian cost is supported by two letters of Gimble Brothers, Brussels, indicating the present Belgian prices, and a statement of Export's counsel as to the current American costs. From these, Export argues that the foreign estimated cost of its entire owner's outfit is not over 50 percent of what Export actually paid. However, the information supplied to us by the staff showed that the cost of this outfit in the foreign market in 1948 was substantially 100 percent of the American cost, and we should also point out that the total cost to Export of glassware and silverware is not quite one-third of the total spent for owner's outfit. We have no possible basis to assume that the ratio on other items of owner's outfit would be the same as the ratio on silver and linen, and even as to these items, we are not in a position to be governed by the unsupported statements in letters which are so much at variance with the information developed by our

staff. As stated above, however, the dollar estimates were taken from florins converted at the 1948 official rate. If, however, the same realistic value had been given to the florin cost of these items which we have used for converting Netherlands shipyard costs, instead of the 1948 "official" value, their dollar cost would have shown the same 19½ percent reduction. It can be argued that some of these items could have been timed as to the date of purchase and the exchange rate that should apply. The same rate for all of these items as for the ship as a whole is fair. Accordingly, these items will be included in our estimate of foreign-construction cost at $642,672 to reflect this consideration.

There remains the question of the cost of extras and escalation to be added to the base sale price. Under the original contract of sale to Export, the base sale price was subject to adjustment for increases or decreases for extras and for escalation. Export in that contract agreed to pay a percentage of these additional costs, based on the ratio between the Commission's estimate of foreign cost and the Bethlehem bid subject to escalation.

It will be recalled that Bethlehem submitted two bids for the construction of these ships, (a) the price of $23,415,000, subject to escalation, and (b) an alternative price of $26,113,000, not subject to escalation. Export argues that any estimate of the foreign construction cost which we make based on the Wilton estimate should, when converted to dollars, be compared with the Bethlehem fixed-price bid and not the Bethlehem bid subject to escalation. Export makes this argument on the ground that the Wilton witnesses testified that any estimate prepared by their staff (as was done for us in this case) was never raised by the company directors, but was often lowered in order to get a contract. Export made this argument in spite of testimony of the directors of the Wilton yard that they were unable to say whether their yard in 1948 would have been willing to enter into a contract to build the two ships at the submitted estimate without provision for escalation, already referred to. This last-mentioned testimony is inconsistent with a conclusion that the Wilton estimate would necessarily have been reduced by the directors, and is only consistent with a conclusion that it might have been reduced in terms of a basic bid, but might also have been increased by the addition of an escalation clause. Under the circumstances, we believe that the Wilton estimate which we are using for our guidance for foreign shipyard costs must be compared with the Bethlehem bid subject to escalation.

The cost of extras chargeable against the *Independence* is $576,834, and the cost of extras chargeable against the *Constitution* is $630,765. The escalation for labor and material so far chargeable against the

Independence is $1,455,000 [5] and so far chargeable against the *Constitution* is $2,140,000.[5]

The following computation may now be made for each ship:

Bethlehem bid subject to escalation		$23,415,000
Less national-defense features (exhibit 23–B)		715,325
Bethlehem net bid		$22,699,675
Reestimated foreign shipyard construction cost less national-defense features (base sale price to Export)		$12,293,638
Ratio foreign cost to U. S. cost	percent	54.16
Rate of subsidy	do	45.84

	Independence	*Constitution*
Foreign shipyard cost	[6] $12,293,638	[6] $12,293,638
Foreign cost miscellaneous items	642,672	642,672
Subtotal	[7] 12,936,310	[7] 12,936,310
Export's share United States cost of extras (54.16 percent)	312,413	341,622
Export's share United States cost escalation (54.16 percent)	[8] 788,028	[8] 1,159,024
Sales price to Export	14,036,751	14,436,956

[6] This figure corresponds with the Commission's 1948 base price of $11,956,285.

[7] This figure corresponds with our base price including miscellaneous items of $17,308,000 set forth in our report of February 20, 1952.

[8] These figures may be adjusted to conform with escalation as finally determined.

CONCLUSION

We accordingly modify the conclusions set forth in our report dated February 20, 1952, and, for the reasons herein explained, adopt as the fair and reasonable estimate of the foreign-construction costs of the *Independence* and *Constitution*, together with Export's share of extras and escalation to date, the following:

Independence, $14,036,751.

Constitution, $14,436,956.

(Sgd.) A. J. WILLIAMS,
Secretary.

Adm. E. L. Cochrane (USN Ret.), prior to his resignation as chairman, Federal Maritime Board, on October 1, 1952, participated in the hearings before the Federal Maritime Board and in the deliberations of the Board. Subsequent to that date Admiral Cochrane has furnished very valuable advice and assistance to the Board in arriving at its conclusions, and, while not participating in the final decision, he has advised the Board that he concurs therein.

[5] The figures for escalation may be subject to further adjustment.

688-650 O - 63 - 21

FEDERAL MARITIME BOARD

No. S-41

THE OCEANIC STEAMSHIP COMPANY—APPLICATION FOR OPERATING-DIFFERENTIAL SUBSIDY FOR "MARINE PHOENIX," TRADE ROUTE 27.

Submitted June 1, 1953. Decided June 16, 1953

Application of The Oceanic Steamship Company for operating-differential subsidy for the *SS Marine Phoenix* on Trade Route No. 27 from January 1947 to August 1948 denied because the necessary statutory findings under section 601 (a) of the Merchant Marine Act, 1936, have not been, and cannot now be, made.

Alvin J. Rockwell and *Brobeck, Phleger & Harrison* for The Oceanic Steamship Company.
John H. Dougherty for the Board.

REPORT OF THE BOARD

On September 28, 1951, we entered into a modified contract with The Oceanic Steamship Company (Oceanic) by which we agreed to grant an operating-differential subsidy for a freight service on Trade Route No. 27 between United States Pacific coast ports and ports in Australia and New Zealand. The contract, made pursuant to statutory findings, provided for from 10 to 13 subsidized freighter sailings a year, and was retroactive to January 1, 1947. The contract, among other things, reserved the question of subsidy for the austerity passenger ship *Marine Phoenix* for later determination under article I-11 (f), which provided:

The Operator hereby agrees that it will accept and be finally bound by the ultimate decision of the Board as to whether any operating-differential subsidy payments shall be made with respect to Operator's prior operation of the chartered vessel *SS Marine Phoenix* in the Australian service on Trade Route 27.

Oceanic frankly states that it claims no contractual commitment from the Government for a subsidy for the vessel, but urges that the vessel

was operated by Oceanic with the expectation that subsidy would be allowed. For an understanding of the situation, some background statement is necessary.

The first operating-differential subsidy agreement was made with Oceanic in December 1937 and covered the operation (on this route) of two large combination passenger and freight vessels, the *Mariposa* and *Monterey*. This operation continued until 1942, when the service was suspended and the vessels were taken over by the Government for war service. In the latter half of 1946, the vessels were redelivered to Oceanic and were put into a shipyard for restoration and modernization, looking to their return to service on the route.

Meanwhile, in May 1946, the Maritime Commission (the Commission) released its report on essential foreign trade routes, which recommended that Trade Route No. 27 should include (1) a passenger and freight service requiring two special passenger-cargo type vessels, and (2) a separate freight service requiring certain approved-type freighters. In December 1946 and again in October 1947, the Commission made the necessary findings approving the subsidy application of Oceanic for the freight service. No such findings or approvals were made with respect to any combination passenger and freight vessels on the route. Oceanic has, since January 1947, operated its freighter service upon the assurance derived from the Commission's action, although, as stated above, no formal subsidy contract was entered into until September 1951.

Appreciating that there was need for passenger service on the route and realizing that the *Mariposa* and *Monterey* would not be ready for a year or so, Oceanic applied to the War Shipping Administration in 1946 for authority to operate Government vessels in the passenger service under general agency. This was refused because of the Administration's policy to restore all shipping operations to private operation as promptly as possible. Oceanic then applied to charter a Government vessel and, in December 1946, secured the *Marine Phoenix*, which was then put into the passenger service on the route.

The *Marine Phoenix* is a C–4 type vessel used as a troopship during the war, on which certain minimum postwar alterations were made to enable her better to carry commercial passengers. This vessel is similar in type to the *Marine Lynx* and *Marine Adder*, chartered to the American President Lines at about the same time, which were referred to in *American President Lines, Ltd.—Subsidy, Route 29*, 4 F. M. B. 51. The *Marine Phoenix* carried a very limited amount of cargo and had space for approximately 550 passengers in rooms for 6 to 12 occupants and in large dormitory areas holding as many as 80 passengers. The accommodations were austere and in no way

comparable to the accommodations offered on the *Mariposa* and *Monterey* prior to the war. Up to her last return voyage in August 1948, she carried her full passenger capacity, but in her operation without subsidy Oceanic lost on six round voyages in 1947 a total of approximately $168,000, and on five round voyages in 1948, a total of approximately $128,000.

Oceanic contends that its operation of the *Marine Phoenix* was performed in accordance with all requirements necessary to qualify for subsidy, and that for this reason, it incurred certain expenses which it might otherwise have avoided. At one time, in the middle of 1947, Oceanic requested authority from the Commission to withdraw the *Marine Phoenix* from Trade Route No. 27 service for two special trips to the Hawaiian Islands for its affiliate Matson Navigation Company. The request for some reason referred to withdrawing a vessel from the "subsidized service to Australia" and the Government's reply also refers to "the effective operating-differential subsidy agreement." As indicated above, there was no subsidy agreement then covering the *Marine Phoenix* and no determination by the Commission that any would be approved. Nevertheless, Oceanic points to this correspondence as an indication that both the company and the Government considered that the vessel was being operated with the expectation that she would eventually receive subsidy.

During the period of the *Marine Phoenix's* operation, there were three foreign-flag operators carrying some passengers on the route. The Carpenter Line operated two combination vessels having a capacity of 48 passengers each, and the P. A. D. Line had, among its vessels, one in this trade with a capacity for 20 passengers. The foreign-flag passenger carryings amounted to about 4.9 percent of the total in 1947 and 7.8 percent in 1948. On the other hand, foreign-flag vessels carried 67.5 percent of the cargo on the route in 1947 and 56 percent of the cargo in the first 6 months of 1948.

In March 1948, Oceanic wrote to the Commission advising that the reconversion of the *Mariposa* and *Monterey* had to be stopped and future disposition of the vessels was uncertain. Oceanic pointed out that operation of the *Marine Phoenix* had not been profitable and that the Governments of Australia and New Zealand were imposing stringent restrictions on travel in order to conserve exchange. It continued:

> The makeshift character of accommodations with which the *Phoenix* is equipped do not justify any increase in fare while the fixed expenses of operation resist any tendency to decline.

The company accordingly advised that it would terminate the charter for the vessel on May 4, 1948. At the request of the Australian Gov-

ernment, however, Oceanic agreed to operate the vessel for two additional voyages, and, in August 1948, again wrote the Commission advising that the charter of the *Marine Phoenix* was being terminated at the conclusion of her then voyage, and said:

> The accommodations furnished on this vessel are of an emergency type and cannot attract passengers in competition with accommodations on a regular passenger liner such as the *Aorangi*, operated by the Canadian-Australasian Line, which is returning to service this month after two years' reconversion in an Australian yard.

The *Aorangi* mentioned in this letter had been reconverted after the war and was put into operation in August 1948 under the Australian flag. Oceanic recognized that she would offer facilities quite superior to those available on the *Marine Phoenix* and would make it difficult for the *Marine Phoenix* to get any passenger business. The *Aorangi* continued to render passenger service on this route until May 1953.

Section 601 (a) of the Merchant Marine Act, 1936, provides, among other things, that no application for operating-differential subsidy shall be approved unless a determination is made that (1) the operation of the vessel or vessels involved is required to meet foreign-flag competition and to promote the foreign commerce of the United States, and (2) the applicant owns, or can and will build or purchase, a vessel or vessels of the size, type, speed, and number, and with the proper equipment required to enable him to operate and maintain the service in such manner as may be necessary to meet competitive conditions, and to promote the foreign commerce. These determinations have never been made by either the Commission or by us with respect to any postwar operation of a passenger-freight service by Oceanic.

Oceanic urges, however, that, while the *Marine Phoenix* was not a suitable passenger vessel for the route, it was, at the time it was put into service, the best-equipped, safest, and most suitable vessel *then available*, and that we should therefore make the necessary statutory findings. We cannot find that the operation of the *Marine Phoenix* was required to meet foreign-flag competition and to promote the foreign commerce of the United States. This vessel was placed into service as a temporary measure to meet an emergency situation, and, as we pointed out in *American President Lines, Ltd.—Subsidy, Route 29, supra*, vessels of the type of the *Marine Phoenix* are not suitable for the transportation of commercial passengers. We are also unable to make the finding that Oceanic owns, or can and will build or purchase, a vessel or vessels of the required size, type, speed, and number. Oceanic voluntarily discontinued the operation of the *Marine Phoe-*

nix as soon as the *Aorangi* began operations. Admittedly the *Marine Phoenix* was unable to meet the competitive conditions which that foreign-flag vessel created. Oceanic has made no showing of its ability or willingness to acquire a suitable passenger vessel or vessels and to operate and maintain the service in such a manner as is necessary to meet competitive conditions.

For the reasons set forth above, the application of Oceanic for subsidy on the *Marine Phoenix* must be denied.

By the Board.

(Sgd.) A. J. WILLIAMS,
Secretary.

FEDERAL MARITIME BOARD

No. 717

PHILIP R. CONSOLO

v.

GRACE LINE INC.

Submitted May 21, 1953. Decided June 23, 1953

Respondent found to be a common carrier of bananas from Ecuador to United States Atlantic ports, and its method of contracting all of its refrigerated space to three shippers, to the exclusion of complainant, found to be unjustly discriminatory in violation of sections 14 and 16 of the Shipping Act. 1916.

George F. Galland and *Robert N. Kharasch* for complainant.

Parker McCollester and *John R. Mahoney* for respondent.

Roscoe H. Hupper, *Burton H. White*, and *Harold B. Finn* appearing specially.

Joseph A. Klausner for the Board.

REPORT OF THE BOARD

BY THE BOARD:

Exceptions to the examiner's recommended decision were filed by respondent, and the matter was argued orally before the Vice Chairman. Our findings and conclusions agree generally with those recommended by the examiner. Exceptions and recommended findings not discussed in this report nor reflected in our findings or conclusions have been given consideration and found not justified.

Complainant is engaged in the business of shipping bananas from Ecuador and Caribbean areas to the United States. Respondent operates subsidized freighter and combination ship services on Trade Route No. 2, including service from Ecuador to the United States. The complaint alleges that respondent has excluded complainant from the Ecuadorian banana trade by refusing to allot him refrigerated space on respondent's vessels. The complaint further alleges that

this refrigerated space has been and continues to be fully committed under long-term contracts to three other banana shippers, and that respondent's refusal to carry complainant's bananas, while carrying bananas for others, is an unjust discrimination in violation of sections 14, 15, and 16 of the Shipping Act, 1916 (hereinafter sometimes referred to as "the Act"), a violation of the conference agreement covering this trade, to which respondent is a member, a violation of the Sherman Anti-Trust Act, and a violation of section 601 (b) of the Merchant Marine Act, 1936. Respondent claims that it is a contract carrier and not a common carrier of bananas in this trade, although it admits being a common carrier in other respects.

Complainant demands an order requiring that respondent allot to him 40,000 cubic feet per week of refrigerated space, and pay him reparation. The question of reparation has been deferred.

The examiner found respondent to be a common carrier of bananas from Ecuador to United States Atlantic ports, and he found respondent's method of contracting all of its refrigerated space to three banana shippers under long-term contracts, to the exclusion of complainant, to be in violation of sections 14, 15, and 16 of the Act. The examiner recommended that respondent should be required to rearrange its contractual commitments with other banana shippers and to allot to complainant the space requested for a period of one year. He found that the record failed to sustain a violation of the Sherman Anti-Trust Act, and the allegation of a violation of section 601 (b) of the Merchant Marine Act, 1936, was stricken by him upon respondent's motion; since no exceptions were taken to us on these latter rulings, only the alleged violations of the Shipping Act will require further discussion.

The primary issue now before us is whether respondent is legally authorized to enter into private contracts committing its available refrigerated space for indefinite periods in the future, to the exclusion of complainant.

We make the following findings of fact:

1. Respondent's corporate charter authorizes it generally to engage in the shipping business and to enter into agreements of every kind.

2. Respondent operates on Trade Route No. 2, northbound and southbound, between New York and North Atlantic ports and the west coast of South America, including ports in Chile, Peru, and Ecuador. Respondent operates six combination passenger-freight vessels on a weekly service and three freight vessels on a fortnightly service, all making calls northbound at one or more ports in Ecuador.

Each of respondent's vessels on the route has, in addition to space for general cargo, refrigerated compartments suitable for carrying bananas. The combination vessels have six compartments of approximately 20,000 cubic feet capacity each, and the freighters have four compartments of approximately 23,000 cubic feet capacity each. Respondent is the only United States-flag operator offering a regular common-carrier berth service on the route. There are a number of competitive foreign lines, of which the Chilean Line, advertising 15 sailings a year with refrigerated space, is the most important. Respondent has held itself out as a common carrier on this route in the transportation of passengers, general cargo, and refrigerated cargo both northbound and southbound, but respondent contends that it has not held itself out as, and is not, a common carrier of bananas northbound from Ecuador to the United States.

3. Respondent holds an operating-differential subsidy contract covering all of its vessels on the route. Respondent has also received certain construction subsidies for vessels it operates on the route. Respondent, in its applications for construction and operating subsidies under the Merchant Marine Act, 1936, represented that it was an established operator on Trade Route No. 2, calling at several ports in Ecuador, that it provided regular service, and that homeward cargo to New York consisted largely of such cargo as copper, coffee, produce, and bananas. The subsidy contracts recite that the vessels to be subsidized are of the type required to enable the operator to meet competitive conditions and to promote foreign commerce of the United States. The operating-subsidy contract provides that respondent will make a specified number of sailings on the Trade Route No. 2 berth service, and it obligates respondent to obtain our approval before entering into any agreement applicable to the subsidized route which provides for any pooling, allotting of sailings, traffic, or area, or "which restricts or attempts to restrict the volume, scope, frequency, or coverage of any such subsidized service." No approval for any commitments of respondent's refrigerated space has been obtained.

4. Respondent is a party to two conference agreements on the route, both approved by us or our predecessors. Agreement No. 3302 covers northbound commerce from Colombia and Ecuador to the United States, which respondent signed as a "common carried by water". The members of that conference agree not to discriminate unjustly against any shipper or consignee. Respondent contends that, since bananas are considered a specialty, they do not come within the scope of this conference agreement. Respondent is also a member of Conference Agreement No. 7890, covering northbound cargo from Chile and Peru

to the United States. Both conferences have authority to fix transportation rates.

5. Under the Ecuadorian Conference (No. 3302), the tariff to U. S. Atlantic ports shows the following items:

Fruits, fresh, under refrigeration, subject to special arrangements of individual carriers.

General Cargo N. O. S. (not otherwise specified).

The conference tariff also publishes specific rates for fruit, with or without refrigeration, from Ecuador to Panama Canal ports on Trade Route No. 2. The tariff issued by the Chile and Peru Conference (No. 7890), not applicable, of course, to transportation of bananas from Ecuador, but, nevertheless, on the same trade route, provides tariffs for refrigerator fresh fruits, followed by specification of various types of fruits such as apples, but not including bananas, and an item of "fresh fruits, N. O. S." and also "refrigerator cargo, N. O. S.". Bananas are not imported from Chile or Peru, but respondent's ships operating southbound on Trade Route No. 2 carry bananas from Ecuador to Chile on a contract basis with no specific amount of space reserved, the shippers receiving notice of space available 12 days before ship's arrival at the banana loading port. The movement consists primarily of "rejects" and very little moves under refrigeration.

6. Respondent's bill of lading applicable to cargo from Ecuador indicates that respondent will carry green fruits and other refrigerator cargo, but stipulates that to obtain refrigeration the shipper must request such service in writing. The bill of lading also states that the ship is not equipped to carry live animals, birds, or fish and "the carrier does not hold itself out as prepared to transport them."

7. Respondent carries Chilean fruit under refrigeration northbound as a common carrier. Like bananas, this fruit is perishable, but it can be temporarily stored at port of origin in shoreside refrigerated facilities if shipping space is lacking, and it can be carried mixed as to types in the same compartment. Respondent makes preliminary inquiry as far in advance as possible to ascertain how much Chilean fruit will move, and makes advance bookings both of such fruit and general cargo.

8. In one case, but not on this route, respondent shipped pipe in practically full shiploads on a common carrier basis on a forward booking contract extending over a period of 9 months.

9. There are various special requirements for the carriage of bananas. Bananas are cut when green and begin to ripen immediately and must be loaded in the vessel's refrigerated compartments

within 2 to 4 days after cutting. They are highly perishable, and unlike Chilean fruits, for instance, cannot be stored under refrigeration at the port of origin if shut out. Bananas give off a gas, particularly riper bananas and those of poor quality and condition, which will hasten the ripening of other bananas stowed in the same compartment. Bananas in different conditions require different refrigeration. Hence, it is desirable to stow in the same compartment bananas of uniform grade, quality, and condition. Once stowed they must be kept under rigid temperature control, instructions for which are given by the shipper. Banana stems stowed in the same compartment are separated by lots placed in individual bins where they are braced and held upright so as to distribute the weight. It is possible for banana shipments of two or more shippers to be carried in the same compartment if they are of uniform grade and condition. This may involve risk of claims, however, if one lot is damaged due to the ripening of other lots. Moreover, such mingling in the same compartment may cause delay and confusion at port of discharge, where bananas are placed directly in trucks or rail cars. In any event, it has been the custom of respondent to allot a single compartment to no more than one banana shipper.

10. The inception of special contracts for shipping bananas from Ecuador resulted from the desire of respondent in the early 1930's to utilize more fully its northbound refrigerated space. Respondent was advised by engineers of United Fruit Company to make extensive alterations in the refrigeration facilities on its combination vessels. After making such alterations, respondent signed a contract with United Fruit giving that company the exclusive use of the improved refrigerated space for a 6-year period from April 1934. This contractual relation has continued, except during the war, the present contract expiring in July 1954. In April 1947, United Fruit released to respondent one compartment on each combination ship, subject to recall by United Fruit on 60 days' notice. This released compartment was then committed by respondent to one I. B. Joselow, subject to cancellation on 60 days' notice. The commitment with Joselow has been from time to time extended, most recently under a 2-year contract ending July 1954. In 1948, when the three freighters were placed in the trade, their refrigerated compartments were committed to Joselow under contracts which now run until July 5, 1953. Joselow assigned his rights to the space on the freighters to Cia. Frutera Sud Americana, which agreed to purchase bananas from Joselow or a company controlled by him. In 1949, respondent added two additional compartments to each of its combination vessels and committed these directly to Cia. Frutera under contracts which now run to June

30, 1954. These space contracts impose on the shipper the obligation to pay a minimum amount for the space whether used or not; to pay freight on outturn weight; to load, stow, and unload; to furnish refrigeration instructions; and to release certain space for the seasonal movement of Chilean fruit. Bills of lading are issued, but these are subject to the terms of the space contracts. Respondent has the right to cancel all except United Fruit's contracts upon 60–120 days' notice, and United Fruit has the right to suspend shipments on 30 days' notice.

11. Complainant has been engaged in the banana business, sometimes with his brother Charles R. Consolo, until just prior to the hearing in this proceeding in January 1952. He imported bananas from Ecuador to Florida in 1944 or 1945, using chartered corvettes, but refrigeration equipment on these ships broke down on several occasions, and their use was discontinued. Being unable to obtain other space from Ecuador at satisfactory rates, he imported bananas from the Caribbean area until early 1952. Complainant testified that Ecuador is the only open market in which "independents", like himself, can purchase bananas suitable for sale in this country in any quantity. Complainant and his brother Charles R. Consolo, under different corporate names, made a series of requests for space from respondent for the carriage of bananas from Eucador to the United States, by phone, letter, and through intermediaries beginning in 1947 up to 1951 when the complaint was filed. Complainant never called at respondent's New York office personally, but did ask for an appointment and was told that there was no need for an appointment because there was no space available. Respondent advised Charles Consolo in 1947 by letter that they were unable to offer space, but that in the event of a change "we will be pleased to get in touch with you." One month before the filing of the complaint, complainant's attorney notified respondent that Consolo required 40,000–50,000 feet of refrigerated space per sailing, and requested a fair and prompt allotment of space for the shipment of bananas from Guayaquil, Ecuador, to the east coast of the United States. Respondent replied that all space was committed under contracts with various shippers, the first contract to expire August 1952, and said that if complainant so desired, respondent would get in touch with him prior to the contract expiration so that respondent could give consideration to any contractual proposal which complainant wished to make along with similar proposals from others. After this proceeding started, complainant's attorney on April 11, 1952, again wrote respondent for advice as to how complainant should proceed to get space. Respondent offered no advice, and a month later complainant made an offer in writing for 40,000 cubic feet per week of refrigerated space for bananas from Ecuador to New York at $35 per ton, and this offer was

declined by respondent. No comparison can be made between the rate of $35 a ton proposed by complainant and the rates accorded to the present contract shippers, since respondent has refused to produce the rates in their contracts notwithstanding that it was directed to do so by subpena from the examiner.

12. Complainant testified that he had ability to buy from Ecuador 10,000 stems of bananas weekly, requiring 40,000 cubic feet of space, and that growers and agents in Ecuador had offered to sell him bananas in ample quantities, but that before arranging to buy or sell bananas, he would need some assurance of continuity of space. He testified that if he could obtain assurance of space from respondent, he would be willing to pay an agreed amount whether he used the space or not. Complainant testified that he had not made and could not make any commitments to buy bananas because of lack of transportation.

DISCUSSION

As above stated, respondent admits that it operates combination vessels and freighters generally as common carriers on Trade Route No. 2 between Ecuador and the United States, but denies that it has in the past or present held itself out as a common carrier to carry bananas to the United States. It argues that its banana contracts are private arrangements and beyond the reach of the Act and our jurisdiction. Complainant argues that the record shows that respondent has held itself out as a common carrier of bananas as well as other commodities, and that, in any event, even an express denial of such "holding out" by respondent as to a single commodity is, under the circumstances, ineffective to give it the status of a private carrier of such commodity. Complainant contends that if a common carrier may by its own declaration exclude some commodities from common carriage status it will in this manner be able to discriminate unfairly between shippers and avoid common carrier regulations under the Act.

Complainant argues that the following circumstances show that respondent actually holds itself out as a common carrier of bananas in the trade: (a) respondent's corporate charter authorizes it to engage in a common carrier shipping business; (b) respondent's common carrier membership in conferences which are authorized to fix rates and are given protection under section 15 of the Act; (c) the conference tariffs to which respondent is a party, which provide for the carriage of fresh fruit under refrigeration between Ecuador and the United States, and which also provide for certain handling charges for bananas when carried to the west coast of the United States; (d) respondent's bill of lading provisions denying any holding out to carry certain commodities (live animals, etc.) but making no such

denial as to bananas; (e) the fact that respondent actually carries bananas southbound from Ecuador on its Trade Route No. 2 vessels without long-term commitments as to space; (f) the correspondence of respondent already mentioned in connection with applications for northbound banana space; (g) respondent's status as the recipient of operating-diffierential subsidy from the United States Government for operation of a berth service with combination and freighter vessels on Trade Route No. 2, and the contract undertakings of respondent already mentioned in connection therewith. While some of the circumstances mentioned are consistent with the maintenance of a common-carrier service on the route, they are not inconsistent with the type of service which respondent admits it furnishes between Ecuador and the United States, i. e., a common-carrier service for commodities generally and a contract or private-carrier service for bananas—if, in fact, a common carrier of commodities generally is legally authorized to make exceptions under the circumstances here disclosed.

The term "common carrier" is not defined in the Act, but the legislative history indicates that the person to be regulated is the "common carrier" at common law. *Agreement No. 7620*, 2 U. S. M. C. 749 at 752 (1945). In *The Wildenfels*, 161 Fed. 864 (C. C. A. 2d, 1908), the court said, p. 866:

> According to all the authorities, the essential characteristics of the common carrier are that he holds himself out as such to the world; that he undertakes generally, and for all persons indifferently, to carry goods and deliver them, for hire; and that his public profession of his employment to be such that, if he refuse, without some just ground, to carry goods for any one, in the course of his employment and for a reasonable and customary price, he will be liable to an action.

Respondent admits that it has undertaken to carry general cargo from Ecuador to the United States for all persons indifferently, and has for many years done so on its combination and freighter vessels. We think this admitted fact is determinative of this proceeding and that, in spite of special arrangements of whatever sort, respondent may not lawfully assume the status of a contract carrier to any shipper on its common carrier vessels, or grant to any shipper on such vessel special rates, special privileges, or other special advantages not accorded to all persons indifferently. Respondent has made a holding out to the shipping public to carry cargoes generally on these ships (subject to certain limitations as to specific items not carried at all). It may not on these same ships designate certain items of cargo or certain categories of shippers for special or privileged treatment. To permit such special treatment would be to allow the discrimination which the Act by sections 14 (4) and 16 prohibits.

We are aware of the cases which hold that a carrier may be a common carrier and a private carrier at the same time, provided different vessels are used. In *Transp. by Mendez & Co., Inc., between U. S. and Puerto Rico*, 2 U. S. M. C. 717, 721 (1944), the Maritime Commission said:

> A carrier may be both a common and a contract carrier, not, however, on one vessel on the same voyage.

Separate vessel operation was also presumably the case in *Puerto Rican Rates*, 2 U. S. M. C. 117, 126 (1939). We are also aware of cases where the capacity of a ship or other facility is divided between two or three contract shippers without any holding out to carry for all persons indifferently. *New York Marine Co.* v. *Buffalo Barge Towing Corp.*, 2 U. S. M. C. 216 (1939); *American Range Lines. Inc., Contract Carrier Application*, 260 I. C. C. 362 (1944); *Union Sulphur Co., Inc., Contract Carrier Application*, 260 I. C. C. 749 (1946). We find it unnecessary in this proceeding to consider the requirements as to proprietary cargo of the carrier transported on its own common-carrier vessels where its common-carrier obligations toward the shipping public are respected.

The rule that a carrier which holds out its vessel or other facility to the public generally as a common carrier may not make special arrangements for transportation on the same vessel has been announced by the Maritime Commission in the *Mendez* case, *supra*, and also in *Agreements 6210, etc.*, 2 U. S. M. C. 166 (1939), where the Commission disapproved an agreement permitting a carrier to transport paper for a dominant shipper at one rate and for other shippers on the same vessel at a different rate. The Commission said at p. 170:

> It is contended that no provision of the law permits us to condemn dual operation as a common and as a contract carrier on the same vessel on the same voyage, and that even if such power does exist, this case is not one where it should be exercised. Suffice it to say that although section 16 of the Shipping Act, 1916, does not apply to contract carriers in the coastwise trade, nevertheless, where a carrier subject to our jurisdiction attempts to operate in the above-described manner, we may order the removal of any violation of that section resulting from the operation of the contract portion. Compare *West-Bound Intercoastal Rates to Vancouver*, 1 U. S. M. C. 770, 773, 774. We find that the facts of this case do result in undue preference and prejudice, and consequently, agreement 6210–C will not be approved. See *Southern Pacific Terminal Co.* v. *I. C. C.*, 219 U. S. 498. Coastwise will be required to remove the violation thus found to exist.

In *The City of Dunkirk*, 10 F. 2d. 609 (S. D. N. Y., 1925), a carrier of cocoanut oil attempted to avoid liability for loss on the ground of a special exculpatory provision in its contract of carriage which would not have been permitted to a common carrier. The court, holding

that the vessel was a common carrier as to the cocoanut oil and that the terms of the special agreement were invalid, said, page 611:

> I see no ground whatever for holding, on the evidence, that the vessel was other than a common carrier. The case is very different from a case where the whole vessel is chartered. The *City of Dunkirk* was a general ship taking cargo at various points from various shippers and issuing bills of lading to the several shippers.

In *Gage* v. *Tirrell*, 9 Allen 299 (1864), common-carrier liability was imposed on a vessel in spite of special contract provisions with the shipper, and in that case the Supreme Judicial Court of Massachusetts said at page 302:

> The ship was therefore a general ship; that is, she was employed in the transportation of merchandise for persons generally. This fact is decisive of the character of the contract into which the parties entered, and of the nature of the liability which the defendants assumed under it. They were common carriers.

In *Hubert* v. *Public Service Commission*, 118 Pa. Super. 128 (1935), the court said:

> We have no disagreement with decisions holding that the same person may be engaged in one line of business as a common carrier and in another line of business as a private carrier. * * * Our own cases recognize this * * * But we refuse to extend or apply this ruling to the use of the same facilities, at the same time, in both common carrier and private carrier transportation.

In *Heuer Truck Lines* v. *Brownlee*, 239 Iowa 267 (1948), the court said:

> "The same facilities cannot be used at the same time in both common carrier and private carrier transportation."

See also *Waterman* v. *Stockholms*, 3 U. S. M. C. 131 (1949), where a carrier accepted fruit of certain shippers but declined fruit of other shippers, claiming it was a private carrier as to fruit. This argument was rejected and the carrier held to be a common carrier as to all.

Respondent argues that the distinctions between common carriers and private carriers set out in the judicial decisions relate to common carrier liability for loss and damage to cargo and are not applicable to a regulatory proceeding of the instant type. We believe that 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 that the judicial definition of the term "common carrier" is the one which we are required to observe. Respondent argues that the decisions of the Commission in the *Mendez* case, *supra*, and in *Agreements 6210, etc.*, *supra*, are not binding in this case because the type of discrimination which there existed could not exist here. Respondent points out that in both of those cases the carrier attempted to act

both as a common carrier and a private carrier for the same commodity on the same vessel, and that the difference in rates which the carrier charged created in those cases clear discrimination. Respondent contends that in this case such discrimination does not exist because its vessels carried no bananas to the United States except those carried under special contract. But this is not a valid distinction. In the cases cited, the discrimination arose because of a difference in rate, whereas here the discrimination arises because of the acceptance of cargo from one shipper and exclusion of cargo from another. In both cases the common carrier's duty to treat all shippers alike was violated.

Respondent further contends that it, in no event, violated any common-carrier duty because complainant, in fact, never offered any bananas for shipment. It is clear that after the positive statements of respondent that it would provide no space, the tendering of bananas by complainant would have been a futile and idle act, and, under the circumstances, was legally unnecessary. *Atlantic Coast Line* v. *Geraty*, 166 Fed. 10 (C. C. A. 4th, 1908).

Finally, respondent argues that the problems peculiar to the banana trade demonstrate that it is *sui generis*, and that it is impossible for respondent to hold its service out to the public because the special circumstances require the carriage of bananas under private contract. The needs of particular shippers, however, will never justify an unjust discrimination where available space is insufficient to meet the demands of all. Where, as here, compartments for bananas are at a premium, some reasonable arrangement for booking considerably in advance of shipment would appear to be reasonable, similar to advance booking of passenger staterooms where the demand exceeds the supply, or similar to the advance booking conducted by respondent in the carriage of bananas from Ecuador to Chile and in the carriage of northbound Chilean fruit. As pointed out by respondent, if more goods are tendered for transportation than the carrier's facilities can accommodate, a common carrier must apportion its facilities ratably among all shippers desiring them. *Penn. R. R. Co.* v. *Puritan Coal Co.*, 237 U. S. 121 (1915). The carrier may not satisfy one shipper in full, thereby disqualifying itself from meeting the demands of others.

We find that there is no justification for respondent's continuous renewal of space contracts with other banana shippers to the exclusion of complainant, nor is there anything inherent in the shipment of bananas which precludes respondent from offering its space on equitable terms which would take fair account of the necessities of the commerce and the needs of individual shippers. Complainant has

688- 650 O - 63 - 22

repeatedly demanded refrigerated space over a period of years and respondent has refused these demands. The record shows that complainant's demand for 40,000 cubic feet of refrigerator space per week was made in good faith to meet his legitimate business requirements.

CONCLUSIONS

On the basis of the facts adduced in the record, we conclude that the contracts under which the present banana shippers have been favored by respondent constitute unjust discrimination in violation of sections 14 (4) and 16 of the Act. Under the circumstances, no determination is necessary under section 15 of the Act. Respondent will be required to cancel its private contracts for the carriage of bananas from Ecuador to the United States, and to prorate available space under forward booking arrangements reasonable for the banana trade. These arrangements necessarily will be made on terms of equality as to rates and conditions and may be made for periods not exceeding six months in advance, which we find to be the limit of reasonableness for forward booking under these circumstances. Such forward booking arrangements may be subject to renewal or modification reasonably in advance of expiration in the light of changing demands and conditions. Because of the past benefits derived by the present banana shippers by the use of space assigned to them as the result of the unjust discrimination against complainant heretofore mentioned, the present shippers shall be deferred in the assignment of space by respondent for the first booking period so as to permit the assignment of 40,000 cubic feet per week to complainant for that period. The booking of suitable space for subsequent booking periods shall be made ratably among bona fide applicants on usual common carrier principles.

Although this decision does not turn on respondent's operating-differential subsidy contract, we believe that the contract clearly contemplates a berth service operation. The clause of that contract, already mentioned, by which respondent has bound itself not to enter into any agreement restricting the coverage of its subsidized services without our permission certainly places some limitation upon any conversion of a subsidized service from a common-carrier operation to a private or contract-carrier operation.

No order will be entered at this time. Within 30 days after the serving of this report, complainant may submit an appropriate order, on matters other than reparation, for our approval, after 7 days' advance service upon respondent. Hearing on the question of reparation will be set by the examiner.

(Sgd.) A. J. WILLIAMS,
Secretary.

Order

At a Session of the FEDERAL MARITIME BOARD, held at its office in Washington, D. C., on the 3d day of September A. D. 1953

No. 717

Philip R. Consolo

v.

Grace Line Inc.

No order having been submitted for our approval pursuant to permission granted in our report of June 23, 1953, and the following documents having since that date been filed in this case:

(a) Petition of Compania Frutera Sud Americana to intervene;

(b) Petition of Irving B. Joselow to intervene;

(c) Petition of complainant objecting to our finding that a period not exceeding six months be the limit of reasonableness for forward booking, and asking to take additional evidence relative thereto; also setting forth advice that United Fruit Company, one of respondent's banana shippers mentioned in the report, had surrendered all its space on respondent's ships, and that complainant and respondent had thereupon entered into two contracts assuring to complainant sufficient space to meet all its needs for banana shipments, such contracts running for two years from July 15, 1953, and being subject to termination at such time as any order entered in this proceeding in accordance with our report of June 23, 1953, should become final;

(d) Notice of complainant that it had released respondent from all liability for reparation claimed in this proceeding;

(e) Petition of respondent (1) consenting to the taking of additional evidence relative to the duration of a proper booking period, (2) asking that our report of June 23, 1953, be reconsidered, alleging error in our finding that respondent was a common carrier, or, in the alternative, asking that the report be withdrawn;

(f) Reply of counsel for the Board to complainant's petition (c) recommending (1) that this proceeding be discontinued with-

out final order on the ground that all aspects of the controversy between the parties have been terminated by their agreements, and (2) that the Board undertake a separate investigation as to the lawfulness of respondent's space contracts referred to in complainant's petition (c);

(g) Reply of counsel for complainant to recommendation of Board counsel that an investigation be made as to the lawfulness of respondent's space contracts; and

It appearing, That the complaint filed in this proceeding has been satisfied and that there is no longer any matter in controversy between the parties, and that there is no occasion for further proceedings in this case;

It is ordered, That the petitions above mentioned, (a), (b), (c), and (e), be, and the same are hereby denied; and

It is further ordered, That this proceeding be, and it is hereby, discontinued; and

It is further ordered, That the papers in the case be referred to the Maritime Administrator for his information and for such action as he may deem appropriate in connection with the administration of respondent's operating-differential subsidy contract pursuant to Reorganization Plan No. 21 of 1950.

By the Board.

(Sgd.) A. J. WILLIAMS,
Secretary.

FEDERAL MARITIME BOARD

No. S-34

BLOOMFIELD STEAMSHIP COMPANY—APPLICATION FOR OPERATING-DIFFERENTIAL SUBSIDY ON TRADE ROUTE NO. 13, SERVICE 1, AND TRADE ROUTE NO. 21, SERVICE 5

Submitted April 24, 1953. Decided June 30, 1953

An operating-differential subsidy with respect to vessels to be operated by Bloomfield Steamship Company on both Trade Route No. 13, Service 1, and Trade Route No. 21, Service 5, would involve service which would be in addition to existing services within the meaning of section 605 (c) of the Merchant Marine Act, 1936.

The service already provided by vessels of United States registry on both Trade Route No. 13, Service 1, and Trade Route No. 21, Service 5, is inadequate, and, in the accomplishment of the purposes and policies of the Act, additional vessels should be operated thereon.

The provisions of section 605 (c) of the Act do not interpose a bar to the granting to applicant of an operating-differential subsidy contract covering the operation of cargo vessels on Trade Route No. 13, Service 1, and Trade Route No. 21, Service 5.

All further questions with respect to the application for operating-differential subsidy are expressly reserved for future determination.

Paul D. Page, Jr., *George A. Butler*, and *Malcolm R. Wilkey* for Bloomfield Steamship Company.

Joseph M. Rault, *Odell Kominers*, and *Wright Morrow* for Lykes Bros. Steamship Co., Inc., *Sterling F. Stoudenmire, Jr.*, for Waterman Steamship Corporation, and *Nuel D. Belnap* and *Richard J. Hardy* for Jordan River Line, Inc., and others, interveners.

Max E. Halpern, *Joseph A. Klausner*, and *Edward Aptaker* for the Board.

REPORT OF THE BOARD*

Exceptions to the recommended decision of the examiner were filed by interveners, and the matter was argued orally before us. Our

*See Report of Board on Reargument. 4 F. M. B. 349.

findings are in substantial agreement with those of the examiner. Exceptions and requested findings not discussed in this report nor reflected in our findings or conclusions have been given consideration and are overruled.

This is a proceeding under section 605 (c) of the Merchant Marine Act, 1936 (the Act), concerning the application of Bloomfield Steamship Company (Bloomfield) for operating-differential subsidy for the operation of freight vessels on Trade Route No. 13, Service 1, and Trade Route No. 21, Service 5. Lykes Bros. Steamship Co., Inc. (Lykes), intervened, opposing the application with respect to both routes; Waterman Steamship Corporation (Waterman) intervened, opposing only as to operations on Trade Route No. 21, Service 5.

Our present determinations are confined to the single issue of whether section 605 (c) of the Act interposes a bar to our approval of an operating-differential subsidy contract with applicant covering either or both of the routes presently involved. Section 605 (c) provides in part as follows:

(1) No contract shall be made under this title with respect to a vessel to be operated on a service, route, or line served by citizens of the United States which would be in addition to the existing service, or services, unless the Commission shall determine after proper hearing of all parties that the service already provided by vessels of United States registry in such service, route, or line is inadequate, and that in the accomplishment of the purposes and policy of this Act additional vessels should be operated thereon; and
(2) no contract shall be made with respect to a vessel operated or to be operated in a service, route, or line served by two or more citizens of the United States with vessels of United States registry, if the Commission shall determine the effect of such a contract would be to give undue advantage or be unduly prejudicial, as between citizens of the United States, in the operation of vessels in competitive services, routes, or lines, unless following public hearing, due notice of which shall be given to each line serving the route, the Commission shall find that it is necessary to enter into such contract in order to provide adequate service by vessels of United States registry. (Paragraphing supplied.)

The first part of this section provides that no contract shall be made with an applicant for a service which would be in addition to the existing service unless the existing United States-flag service on the route is inadequate and unless the purposes and policy of the Act require additional vessels. The second part of the section applies if the effect of making a contract with an applicant would be to give undue advantage or would be unduly prejudicial as between citizens of the United States competing on the route, and interposes a bar unless a subsidy is necessary to provide adequate United States-flag service.

The examiner has found that applicant's services on both routes as proposed for subsidy would be in addition to existing services

thereon, that existing United States-flag service on each route was inadequate, and that the policy and purposes of the Act require additional United States-flag vessels. He stated that it was not shown that the effect of a contract with applicant would be to give undue advantage or be unduly prejudicial as between citizens of the United States.

No exceptions were filed to the finding of the examiner that applicant's proposed services on both routes would be in addition to existing services thereon. In connection with this issue, a brief statement of Bloomfield's past operations on the routes is desirable.

Bloomfield purchased five Victory-type and three Liberty-type vessels and began operations on both routes in 1951. On Trade Route No. 13, although Bloomfield made 11 sailings from three Gulf ports between April 7, 1951, and August 8, 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 three export shippers were served. On Trade Route No. 21/5, Bloomfield made 19 sailings between October 17, 1951, and August 30, 1952, and on all but one of these sailings over 8,000 tons of either bulk grain or bulk sulphur was carried, leaving little space for other shipments. On the other hand, applicant's proposed services on both routes, if a subsidy is granted, would have to be substantially superior to his past operations in the type of vessels 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. We agree with the examiner's finding on the statutory issue of "the existing service;" we shall, therefore, proceed to consider the evidence presented as it bears on the other statutory issues, taking up each route separately.

TRADE ROUTE NO. 13, SERVICE 1

Trade Route No. 13, Service 1, covers freighter service generally between United States Gulf ports and the Mediterranean area.[1] Lykes, operating a subsidized service on this route, intervened in opposition to the application. States Marine Corporation and Isthmian Steamship Company also operate United States-flag berth services on the route without subsidy, but neither of these operators

[1] The itinerary is described in the Report of the United States Maritime Commission on Essential Foreign Trade Routes (1949) as follows:

Between a United States Gulf port or ports and a port or ports in Spain and/or Portugal and/or the Mediterranean and/or the Black Sea, with the privilege of calling at Casablanca, Spanish Morocco, and at ports in the United States South Atlantic, south of Norfolk, and at ports in the West Indies and Mexico.

intervened at any stage of the proceeding. Waterman initiated a liner service on the route in 1948, but discontinued it in 1950 shortly after the outbreak of Korean hostilities; Waterman does not oppose a subsidy to applicant on Trade Route No. 13.

During the five prewar years, 1936 to 1940 inclusive, the aggregate volume of exports moving over Trade Route No. 13, including exports from privilege ports in the South Atlantic area, was approximately 600,000 tons per year; the volume of imports ranged from 89,000 tons in 1937 to 27,000 tons in 1940. Italy was the major destination for exports, followed in order by France, Spain, and Greece. During this period, cotton, petroleum products, phosphate, scrap iron, and sulphur were the major commodities exported on liner vessels.

In the postwar years, the export movement from the Gulf alone over this route has increased more than fourfold. Imports are of only minor significance in the over-all picture. Our consideration may, therefore, be directed to the export movement, which is by far the predominant movement on the route.

The following Bureau of Census statistics,[2] introduced by Lykes, show the postwar export movement of goods transported by both liner and tramps on the route from the Gulf, with a breakdown between liner-type and tramp-type commodities and United States-flag participation in this total movement:

TABLE A (13)

Year	Total exports (tons)	Commodities				Total exports carried by United States flag (percent)
		Liner-type	Percent	Tramp-type	Percent	
1948	2,740,000	781,000	29	1,959,000	71	71
1949	2,371,000	812,000	34	1,559,000	66	52
1950	2,153,000	592,000	28	1,561,000	72	35
1951	2,388,000	614,000	26	1,774,000	74	51

Commodities such as grain, sulphur, coal, phosphate rock, and oil seed, which to a large extent move in bulk on tramp vessels, have been referred to by Lykes as "tramp-type commodities." Other items are referred to by Lykes as "liner-type commodities." It is significant that much tramp-type cargo moves on liners as nucleus and filler cargo. Exports from the privilege South Atlantic ports of call, not included in the above statistics, have been small as compared with the total exports on the route, ranging from a high of 10.5

[2] Census statistics exclude military and "in transit" cargoes which are included in Maritime Administration statistics referred to in the examiner's report.

percent of the total on the route in 1947 to a low of 2.3 percent in 1950 and 4.6 percent in 1951.

It is evident that the great increase in exports postwar is in large part the result of our foreign-aid programs and the concomitant exportation of relief and rehabilitation cargoes. This movement has involved great quantities of tramp-type commodities carried on both liners and tramps.

The principal liner-type commodities which have moved outbound during the postwar years are cotton, petroleum products, wheat flour, and cargo NOS. With the exception of wheat flour, all of these commodities moved in substantial volume in the prewar years. The large movement of wheat flour has been a postwar phenomenon, and it has been mostly financed by United States funds.

The principal tramp-type commodities during the years from 1948 to 1951 have been grains, sulphur, and phosphate rock. The movement of grains has been the most substantial, averaging over 1,200,000 tons for each year. The movements of sulphur and phosphate rock, although not entirely uniform for each year, have averaged approximately 100,000 tons for each commodity. There was an extremely heavy movement of coal during 1947 and 1948, but this commodity has now ceased to move.

Italy has continued its historic position of being the predominant receiver of United States exports to the Mediterranean area, but France and Spain have been passed by Greece. Yugoslavia, Turkey, and Levantine countries, which were of minor prewar importance, have become the destinations of very substantial traffic movements.

During the years from 1948 to 1951, liner participation in the total Trade Route No. 13 export movement from the Gulf, and United States-flag participation therein, as shown by census statistics, were as follows:

TABLE B (13)

Year	Total exports (tons)	Liner carryings (tons)	Liner carryings by commodities				Liner exports carried by United States flag (percent) [3]
			Liner-type	Percent	Tramp-type	Percent	
1948	2,740,000	891,000	606,000	68	285,000	32	75
1949	2,371,000	1,148,000	691,000	60	457,000	40	67
1950	2,153,000	875,000	512,000	59	363,000	41	54
1951	2,388,000	810,000	445,000	55	365,000	45	46

[3] Maritime Administration figures show slightly different percentages of liner carryings by United States-flag vessels as follows: 1950, 57.1 percent; 1951, 49.3 percent.

It should be noted that from 1948 to 1951 the tramp-type commodities carried on liner vessels show a steady increase percentagewise from 32 percent to 45 percent.

Lykes is the only subsidized United States operator on either of the routes presently involved. This carrier owns and operates a fleet of 54 vessels, 51 C type and 3 Victory type. Under the terms of its operating-differential subsidy contract, Lykes operates six subsidized berth services out of the Gulf, and it may use its vessels interchangeably on the several services.[4] Its contract provides for a minimum of 24 and a maximum of 48 sailings annually on Trade Route No. 13. Lykes is the principal operator in this trade. Its postwar sailings on the route may be summarized as follows:

TABLE C (13)

Year	Owned vessels		Chartered vessels	Total
	Subsidized	Nonsubsidized		
1947	38	3	72	113
1948	48		61	109
1949	39		32	71
1950	40		2	42
1951	32	5	14	51

The record shows that there were abnormal movements on both Trade Routes Nos. 13 and 21/5 in postwar years due to the necessity of cargoes for feeding and rehabilitating the peoples of Europe and the Mediterranean area, and later, due to Korean, Indian grain, and European coal programs. Lykes met these abnormal needs by chartering Government vessels, and after the abnormal needs were met it returned to its traditional policy of using only its owned ships. In each of the postwar years Lykes has performed substantially more than the minimum 24 berth sailings with owned ships on Trade Route No. 13 required under its contract, and has sailed substantially full on all its outbound voyages.

The other two United States-flag berth operators on this route, States Marine and Isthmian, did not intervene. The complete post-

[4] The six subsidized berth services of Lykes provide for minimum and maximum sailings as follows:

Line	Trade route	Minimum	Maximum
A	19 (Caribbean)	76	108
B-1	21/4 (United Kingdom west coast)	100	146
B-2	21/5 (Continent)		
C	13 (Mediterranean)	24	48
D	22 (Orient)	20	24
E	15-B (South Africa)	8	13

war traffic statistics for each operator are, consequently, not available in this record. States Marine owns 20 vessels: 5 C2's, 5 Victorys, and 10 Libertys; and for operation on this and other routes habitually charters many privately owned vessels. It operates in a number of trades and has maintained a service on Trade Route No. 13 since 1947. It ordinarily operates on the outbound portion of the route only. States Marine operations on Trade Route No. 13 for the years 1948, 1950, and 1951 are shown in the following table:

TABLE D (13)

	Total sailings	Owned	Chartered	Cargo	
				Commercial	Military
1948	11	n. a.	n. a.	90, 559	3, 600
1950	30	12	18	144, 292	50, 531
1951	12	4	8	80, 066	9, 358

States Marine's average commercial and military carryings per vessel of Trade Route No. 13 cargo for the years 1950 and 1951 amounted to 6,768. In 1950, seven of its sailings with owned ships were made with Libertys, and in 1951, 11 of its total of 12 sailings were made with Libertys.

Isthmian, with a large fleet of C3-type vessels, in addition to numerous other services; operates from Gulf and Atlantic ports to the Persian Gulf, and carries some cargo from the Gulf to Beirut, Haifa, and Alexandria, which are ports on Trade Route No. 13. In 1948, 1950, and 1951, Trade Route No. 13 cargo carried by this operator amounted to only 9,711 tons, 22,431 tons and 14,170 tons, respectively, and over these years averaged about 1,000 tons per sailing with respect to destinations on the route.

The foreign-flag competition on this route is substantial and effective. The major foreign-flag competition is provided by three operators, who, together, made 51 sailings a year in 1950 and 1951. The record indicates that foreign-flag lines are aided by such practices of instructed routings, currency restrictions, and other means employed by their countries to force cargo to move on vessels of their own flags. The evidence shows, however, that United States-flag vessels in liner service have sailed substantially full, in the postwar years, but their percentage of carryings has steadily dropped, and that their relative participation in the trade could not have been materially increased unless more United States-flag capacity had been provided.

TRADE ROUTE NO. 21, SERVICE 5

Trade Route No. 21, Service 5, covers freighter service between United States Gulf ports, west of Gulfport, Miss., and ports on the east coast of the United Kingdom and continental Europe.[5] Lykes and Waterman are the only carriers intervening in opposition to the application for subsidy on this route. States Marine also operates a United States-flag berth service on the route, but, as already stated, did not intervene.

During the prewar years from 1936 to 1938, the export and import movement on the entire Trade Route No. 21 [6] and the total export and import movement on Service 5 thereof were as follows:

TABLE E (21)

Year	Exports		Imports	
	Total T. R. 21	Service 5	Total T. R. 21	Service 5
1936	2,740,000	1,154,000	461,000	246,000
1937	3,926,000	1,934,000	548,000	270,000
1938	5,554,000	2,865,000	390,000	205,000

Following the outbreak of the European war in 1939, American vessels were barred from trading on the route, and statistics for 1939 and 1940 are of little value and have not been included. The increased export movement in 1937 and 1938 was occasioned primarily by the movement of wheat and coarse grains from the United States, resulting from a crop failure in Argentina. The United Kingdom and Germany were the destinations for approximately 60 percent of the total exports on the entire route, with the Netherlands, France, Belgium, and the Baltic-Scandinavian area receiving the balance. The import movement originated principally in Belgium, Germany, the Netherlands, and the Baltic-Scandinavian area. Cotton and lumber were the principal liner-type export commodities that moved during this period, aggregating more than 50 percent of the entire export movement of liner-type commodities.

[5] The itinerary of Service 5 is defined in the Report of the *United States Maritime Commission* on Essential Foreign Trade Routes (1949) as follows:

Between a United States Gulf port or ports (west of but not including Gulfport, Mississippi) and a port or ports on the East Coast of United Kingdom and/or a port or ports in Continental Europe (north of and including Bordeaux) including Baltic and Scandinavian ports, with privilege of calling at Tampa, Port Tampa, Boca Grande, and at ports in the West Indies and Mexico.

[6] Trade Route No. 21 includes, in addition to Service 5, Services 1, 2, and 3 from east Gulf ports to United Kingdom and Continent, and Service 4 from west Gulf ports to west coast of United Kingdom.

As in the case of Trade Route No. 13, the export movement is by far larger and more important than the import movement, and our analysis may be confined to the export movement. The export movement on the route has increased substantially since the Second World War. Census statistics, introduced by Lykes, show the total postwar export movement from the Gulf on all services of Trade Route No. 21, and the postwar export movement on Service 5 thereof, with a breakdown between liner-type and tramp-type commodities and United States-flag participation in this total Service 5 movement, to be as follows:

TABLE F (21)

Year	Entire Trade Route 21 (tons)	Total Service 5 only (tons)	Commodities—Service 5 only				Service 5 export carried by United States flag (percent)
			Liner-type	Percent	Tramp-type	Percent	
1948	4,734,000	3,380,000	1,379,000	41	2,001,000	59	36
1949	4,960,000	3,690,000	1,393,000	38	2,297,000	62	28
1950	4,707,000	3,424,000	923,000	27	2,501,000	73	40
1951	6,831,000	4,605,000	912,000	20	3,693,000	80	44

During these postwar years, the export movement from the privilege ports decreased sharply as compared with the prewar period. Whereas prewar exports from privilege ports in the Tampa area ranged from a low of 495,000 tons in 1937 to a high of 688,000 tons in 1938, postwar exports from the privilege ports have ranged from a low of 102,000 tons in 1947 to a high of 346,000 tons in 1949. Postwar exports from the privilege ports have not accounted for more than 8 percent of the total exports on Service 5, and a substantial portion of these exports has moved via tramp vessels.

As in the case of Trade Route No. 13, it is evident that the great increase in exports is in large part the result of our foreign-aid programs and the concomitant exportation of relief and rehabilitation cargoes. This movement has involved the carriage of great quantities of tramp-type commodities. Whereas the movement of liner-type commodities has decreased from 1,379,000 tons in 1948 to 912,000 tons in 1951, the movement of tramp-type commodities has increased from 2,001,000 tons in 1948 to 3,693,000 tons in 1951.

The principal liner-type commodities which have moved during the postwar years are cotton, petroleum products, wheat flour, fodder and feed, carbon black, and cargo NOS. Lumber, which was a principal prewar commodity, has not moved in significant volume in the postwar years. The movement of petroleum products, wheat flour, and fodder and feed, on the other hand, has been substantially larger in the postwar period than in the prewar period. Carbon black, the average yearly prewar movement of which amounted to 35,000 tons,

did not move during the years from 1947 to 1950, but 63,000 tons of this commodity were exported in 1951. The movement of wheat flour on this route, while substantial, has not accounted for as significant a portion of the total movement on the route during the post war years as on Trade Route No. 13.

The principal tramp-type commodities during the postwar period have been grains, sulphur, and oil seed. The movement of grains has been most substantial, averaging over 2,000,000 tons for each year. The movement of sulphur has averaged approximately 290,000 tons for each year. Oil seed has moved in smaller volume, ranging from a low of 7,000 tons in 1947 to a high of 144,000 tons in 1950. There was an extremely heavy movement of coal during 1947, but this commodity has now ceased to move. As in the case of Trade Route No. 13, it is manifest that the large movement of these tramp-type commodities is due primarily to our relief and rehabilitation efforts in connection with our foreign-aid programs.

France, the Netherlands, the Baltic and Scandinavian countries, and Holland have, during the postwar period, been the principal destinations of the export movement on Service 5. The export movement to the east coast of the United Kingdom has been substantially smaller than the movement to each of those other areas.

During the years 1948 to 1951, *liner* participation in the total export movement on Service 5 from the Gulf and United States-flag participation therein, as shown by the census statistics furnished by Lykes, were as follows:

TABLE G (21)

Year	Service 5 exports (tons)	Liner carryings (tons)	Liner carryings by commodities				Liner exports carried by United States flag (percent) [7]
			Liner-type	Percent	Tramp-type	Percent	
1948	3,380,000	1,601,000	1,214,000	76	387,000	24	48
1949	3,690,000	2,003,000	1,217,000	61	786,000	39	40
1950	3,424,000	1,733,000	861,000	50	872,000	50	46
1951	4,605,000	1,957,000	859,000	44	1,098,000	56	45

On this route also, tramp-type commodities carried by liners increased percentagewise over the period from 24 percent to 56 percent.

As in the case of Trade Route No. 13, Lykes is the principal operator in this trade. Its operating-differential subsidy contract provides for a minimum of 100 and a maximum of 146 sailings annually on

[7] Maritime Administration figures show slightly different percentage of liner carryings by United States-flag vessels as follows: 1950, 46.8 percent; 1951, 47.8 percent.

Services 4 and 5. The contract does not establish separate minima and maxima for the two services, but Lykes has allocated from 18 to 26 sailings to Service 4,[8] and from 82 to 120 sailings to Service 5. The postwar sailings of Lykes on Service 5 may be summarized as follows:

TABLE H (21)

Year	Owned vessels		Chartered vessels	Total
	Subsidized	Nonsubsidized		
1947	88		110	198
1948	86	2	65	153
1949	85	1	18	104
1950	79		2	81
1951	79	12	7	98

Lykes has sailed substantially full on all of its outbound voyages during the postwar years. It has chartered Government-owned vessels to meet the peak loads, as already explained.

Waterman owns 43 C–2 type vessels, which operate on a number of routes in addition to Trade Route No. 21. This intervener inaugurated a service on Service 5 of Trade Route No. 21 in 1946, and it has operated thereon continually. Waterman provides comprehensive coverage to all major ports on Service 5, with the exception of those on the east coast of the United Kingdom and in Scandinavia.[9] Waterman calls regularly at Mobile on outbound sailings, where it loads approximately 20 percent of all its outbound carryings. Mobile is the home port of the Waterman fleet, although not on Service 5 of Trade Route No. 21. On occasion, Waterman tops off with cargo loaded at Atlantic ports; this practice, rare in 1950 and 1951, became more frequent in 1952.

During the years 1948, 1950, and 1951, Waterman made 24, 20, and 28 outbound sailings, respectively, on this service. Waterman has operated successfully in this service in every postwar year. It contemplates not less than two sailings per month in the service as its long-range average.

States Marine has operated a service on Trade Route No. 21 at least since 1948. States Marine operations on this route for the years 1948, 1950, and 1951 are shown in the following table:

[8] Service 4 of Trade Route No. 21 is between the Gulf (west of Gulfport, Miss.) and the west coast of the United Kingdom, with the privilege of calling at Irish ports, Tampa, Port Tampa, Boca Grande, and ports in the West Indies and Mexico.

[9] With respect to Scandinavian cargo, the evidence shows that Scandinavian consignees, by instructions favoring Scandinavian vessels, effectively prevent United States-flag carriers from successfully competing for such cargo.

TABLE J (21)

Year	Total sailings	Owned	Chartered	Cargo (tons)	
				Commercial	Military
1948	20			146,435	24,937
1950	27	10	17	166,911	14,591
1951	15	8	7	88,723	4,360

The average carrying per vessel in 1950 and 1951 of Trade Route 21/5 cargo was 6,540 tons, and in addition some cargo was carried between ports not on Service 5. Of 10 sailings with owned vessels in 1950, four were with Libertys, and of 8 sailings similarly made in 1952, 7 were with Libertys. The sailings of this operator have been irregularly spaced.

Foreign-flag competition on this service is effective and substantial, and in recent years has increased. The present conference foreign-flag competition is provided by seven lines. In 1950, these lines made a total of 206 sailings, and in 1951, a total of 221 sailings. In addition, there has been some competition from nonconference berth operators. As in the case of Trade Route No. 13, the evidence shows that it is a common practice for foreign consignees to instruct routings by way of foreign-flag vessels. Waterman and Lykes contend that the foreign-flag competition is, in fact, so effective that the introduction of a new United States-flag operator into the trade will not result in greater United States-flag participation in the traffic but will only dilute the traffic already carried on United States-flag vessels. The evidence shows, however, that United States-flag vessels have been sailing substantially full during each of the postwar years of record.

DISCUSSION

It being established that the application of Bloomfield is for an operating subsidy covering vessels which will be in addition to the existing services, no contract can be entered into unless the record shows to our satisfaction under the first part of section 605 (c) of the Act that the service already provided by vessels of United States registry on each route is inadequate, and that in the accomplishment of the purposes and policy of the Act additional vessels are required. It is conceded in this case that if the United States-flag services are shown to be inadequate on the routes, no remaining issue needs to be decided under the second part of section 605 (c). Even if under that paragraph the effect of 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, still the making of a contract would, under the prior finding of inadequacy, be necessary to provide the adequate United States-flag service contemplated by the Act. Thus the issues to be determined are whether the United States-flag services on the routes are inadequate and whether the purposes and policy of the Act require additional vessels thereon.

Section 101 of the Act declares that it is necessary for the national defense and development of the foreign and domestic commerce of the United States that this country shall have a merchant marine which is

> sufficient to carry its domestic water-borne commerce and a substantial portion of the water-borne export and import foreign commerce of the United States.

The legislative history of the Act establishes that Congress meant by "substantial" more than half of the water-borne foreign commerce of the United States.[10] The final report of the Committee on Interstate and Foreign Commerce in 1951 (Senate Report No. 2494, 81st Congress, 2d Session, p. 29) restates the same idea.

> A further declaration of policy which the Committee sees need of reaffirmation at this time is that which prays for a merchant marine sufficient to carry "a substantial portion of the water-borne export and import foreign commerce of the United States." The term "substantial portion" has at times been interpreted to imply something more than half of the water-borne commerce.

Title VI of the Act contemplates the making of operating-differential subsidies for vessels of the size, type, and speed required to meet foreign-flag competition on essential trade routes in the foreign commerce of the United States. Thus the 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. The standard of adequacy must be consistent with the realities of each particular route and with the purposes of the Act. Furthermore, adequacy of United States-flag service under section 605 (c) is not necessarily determined exclusively by the mathematical percentage of cargo capable of being carried in United States-flag vessels. The type, size, and speed of the vessels, the regularity, frequency, and probable permanence of the service, and the relative

[10] Early drafts of the Act provided that the United States should have a merchant marine capable of carrying "at least one half of our foreign commerce." See H. R. 7521, S 2582, H R. 8555, 74th Cong. 1st Sess. Under recommendations of the State and Post Office Departments, the relevant language was changed to "a substantial portion" of our foreign commerce. See S. 3500, Committee Print of March 3, 1936, 74th Cong, 2nd Sess. Discussion of the meaning of "a substantial portion" makes it clear United States-flag participation in our foreign trade should be a minimum of 50 percent. See Senate Hearings on S. 3500, March 9, 1936, p. 12; 80th Cong Rec. 10076

688-650 O - 63 - 23

importance of export to import trade on a route are among the various matters that must be taken into consideration. In view of these considerations, and in view of the increasing effectiveness of foreign competition, we conclude that on each of the routes herein discussed the United States-flag service must be deemed inadequate unless dependable United States-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.

As has been stated, the liner vessels on both these routes are, and for some years have been, carrying not only general cargo of liner-type commodities, but substantial amounts of bulk commodities frequently carried by tramps. Liner vessels on the routes are relying more and more on this tramp-type cargo to fill up their available space. Some distinction has been made between such cargo used as a "nucleus" and such cargo used as "filler" for space unused up to a short time before sailing. Whether used as "nucleus" or as "filler", this tramp-type cargo along with liner-type cargo constitutes what the liners on the route may reasonably expect to carry.

The most valuable guide to measure adequacy of service in the future is necessarily 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. Before analyzing the statistics of past sailings and carryings as they bear on adequacy of service, we refer briefly to the opinion evidence of two economist witnesses. The witness produced by applicant expressed a sanguine view as to future commerce on Trade Routes Nos. 13 and 21/5, and the belief that the economic vitality and political freedom of this country are too closely tied with the well-being of the countries in Europe and the Mediterranean area to permit the United States to cut off all trade with those areas except for cash on the barrelhead. He pointed out that trade prospects of the Gulf region had been enhanced because of the shift by western Europe to the United States to fill many basic needs heretofore supplied by other countries. The other economist witness, presented by Lykes, took a much more conservative view as to the future trade between this country and western Europe, which he thought would suffer further declines as emphasis was placed on more military and less economic aid. Much of the testimony of both witnesses was, of course, speculative and cannot alone be the basis of our findings in this case.

The chief traffic officer of Lykes submitted certain traffic projections for both routes here under discussion, covering forecasts as to expected movements of liner-type commodities only. These pro-

jections are based on the experience and information available to Lykes and broken down by commodities. These were deemed reasonable by Waterman, insofar as they concerned Trade Route No. 21. Board counsel commented on their conservation and pointed out that the estimate for Trade Route No. 13 contemplates a drastic decline in export traffic from 1950 and 1951 levels. The Lykes' projection for liner-type commodities on Trade Route No. 13 was for an annual movement not exceeding 400,000 tons, and on Trade Route No. 21, Service 5, for an annual movement not exceeding 1,000,000 tons.

Counsel for the Board presented a computation based on the testimony of Lykes' economic witness to the effect that bulk or tramp-type commodities which might be expected for liner movement on Service 5 of Trade Route No. 21 would amount to 617,000 tons per year, consisting of 493,000 tons of grain, 60,000 tons of sulphur, and 64,000 tons of phosphate rock. These figures represent drops of 35 percent, 50 percent, and 40 percent in the liner carryings of grain, sulphur, and phosphate rock from the 3-year average from 1949 to 1951. Similarly, Board counsel estimated that liner vessels on Trade Route No. 13 might be expected to carry 235,000 tons of tramp-type commodities a year, consisting of 167,000 tons of grain, 30,000 tons of sulphur, and 38,000 tons of phosphate rock.

The statistics of record indicate several methods of estimating the future movement of cargo on each route which may reasonably be expected to move on liner vessels, including the following:

A. An estimate based on the actual liner carryings for the last two full years of record, i. e., 1950 and 1951;

B. An estimate based on Lykes' forecast of liner-type commodities plus Board counsel's estimate for tramp-type commodities.

Although submitting no specific traffic forecasts, Bloomfield would seem to adopt the first method. We believe that a forecast based on the first method is perhaps overly optimistic, since it relies entirely on the 1950 and 1951 movements and fails to consider possible changes from those levels. The second method adopts the conservative liner-type traffic estimates of Lykes, and the estimates of Board counsel for the liner movement of tramp-type commodities, the latter being based on the opinion of Lykes' economist witness as to the volume of future commodity movements. We believe that the forecast of tramp-type commodities to be moved in liner vessels presented by Board counsel is on the low side since this forecast fails to give consideration to the increasing proportions of tramp-type cargo carried by liners. During the years 1950 and 1951, the tramp-type commodities carried by liner vessels on Trade Route No. 13 amounted on the average to 43 percent

of the total liner-carried cargoes, and on Service 5 of Trade Route No. 21, for the same years, amounted on the average to 53 percent of the total liner-carried cargoes. The amount of tramp-type commodities that can reasonably be expected to move on liner vessels depends on many factors other than the mere volume of the movement of such commodities, such as rates, general marketing practices and conditions, and the disposition and employment of tramp vessels. These factors, as well as the economic factors which may depress the movement of tramp-type commodities, are not susceptible of precise measurement. Nevertheless, we find that it is reasonable to assume that tramp-type commodities will continue to be available in the foreseeable future on both routes herein discussed, in sufficient volume to allow liner vessels to carry tramp-type commodities in at least the respective ratios prevailing over the period of 1950 and 1951 as set forth above. Consequently, we find that a reasonable estimate of liner carryings on each route may be made in a third method by applying these ratios to compute the movement of tramp-type commodities and by accepting the conservative forecast of Lykes for the movement of liner-type commodities.

We apply the traffic statistics of record for Trade Route No. 13 to the three methods of estimating outlined above, as follows:

CARGO ESTIMATES FOR TRADE ROUTE NO. 13

	Total	50 percent of total
Method A		
Average total liner carryings for 1950 and 1951, exclusive of military, in-transit, and privilege port cargo	842,000	421,250
Method B		
Lykes' forecast for liner-type commodities (400,000 tons) plus Board counsel's estimate for tramp-type commodities (235,000 tons)	635,000	317,500
Method C		
Lykes' forecast for liner-type commodities (400,000 tons) plus 43/57ths of this forecast (300,000 tons) for tramp-type commodities	700,000	350,000

As stated above, we find Method C to be the most reliable, and accordingly, based on the record before us, we find 700,000 tons to be the prospective annual future movement by liner vessels on Trade Route No. 13. The evidence shows that tramp-type commodities carried by liners on each route are increasing percentagewise, thus making our estimate on the conservative side, particularly with respect to tramp-type commodities.

Turning now to the estimated carrying capacity of United States-flag vessels regularly operating on the route, we believe it is reasonable

to count on Lykes for 39 sailings, which is the average of its 1950–1951 subsidized and unsubsidized sailings with owned ships. We have not computed the estimate of Lykes' future sailings at the minimum in the subsidy contract of 24, or at the maximum in the subsidy contract of 48 on this route, but have taken the average of actual sailings with owned vessels. We have not included in this estimate Lykes' chartered vessels operating during these years as on the record these were employed to meet peak demands, whereas the estimate of cargo to be carried is based on conservative estimates of normal rather than peak carryings. The record shows that during 1950 and 1951 the average carryings of Lykes' subsidized vessels for both commercial and military cargo on this route were 6,413 tons. Accordingly, we take 6,400 tons as an average full load for ships used by Lykes on this route. This figure is comparable to the estimate of Lykes' traffic officer, who testified that the average carrying of fully loaded C2-type vessels on this route was between 6,000 and 7,000 tons, and the average carrying of a fully loaded C1-type vessel, approximately 5,500 tons.

We have estimated the capacity of Isthmian for Trade Route No. 13 cargo at its average carryings of such cargo during the years 1950 and 1951. In estimating the capacity of States Marine, we have not included sailings made with chartered vessels, since we believe that for the purpose of establishing adequacy of service under the Act, a chartered operation does not provide the type of adequate, permanent, regular, and frequent service contemplated by the Act. We have, therefore, estimated that States Marine may be counted on for eight sailings per year with its owned vessels, carrying approximately the same amount of Trade Route No. 13 cargo carried by all vessels operated by it during the years 1950 and 1951.

Liner carrying capacity estimate for Trade Route No. 13

	Capacity (tons)
The estimated carryings of Lykes, figured at 39 sailings with owned ships carrying 6,400 tons per ship	249, 600
The estimated carryings of Isthmian to the three ports on the route at which it calls, based on the average carryings of Isthmian to these destinations for the years 1950 and 1951	18, 000
The estimated carryings of States Marine, figured at eight sailings with owned ships carrying 6,768 tons per ship, based on the average sailings with its owned ships and the average carryings of all vessels operated by it on the route during the years 1950 and 1951	54, 000
Total	321, 600

We now apply the traffic statistics of record for Trade Route No. 21/5 to the same three methods of estimating:

CARGO ESTIMATES FOR TRADE ROUTE NO. 21/5

	Total	50 percent of total
Method A		
Average total liner carryings for 1950 and 1951, exclusive of military, in-transit, and privilege port cargo	1,845,000	922,500
Method B		
Lykes' forecast for liner-type commodities (1,000,000 tons) plus Board Counsel's estimate for tramp-type commodities (617,000 tons)	1,617,000	808,500
Method C		
Lykes' forecast for liner-type commodities (1,000,000 tons) plus 53/47ths of this forecast (1,127,500) for tramp-type commodities	2,127,500	1,063,750

Turning to the estimated carrying capacity of United States-flag vessels on Trade Route No. 21/5, we believe it reasonable to count on Lykes for 85 sailings per year, being the average number made during the years 1950 and 1951 with owned vessels. We estimate the carrying capacity of each vessel in this trade at 7,575 tons, being the actual average of all Lykes' loadings on its subsidized sailings in this trade for the 2 years mentioned. We believe it reasonable to count on Waterman for 24 sailings a year, being Waterman's estimate for future operations on the route. We estimate the loading of each Waterman vessel from ports on the route at 6,500 tons, being less than Lykes' estimated capacity per vessel because of Waterman's traditional policy of loading of substantial cargo at Mobile, which is not a port on this route. We estimate States Marine's average sailings on the route at nine, being its average with owned vessels for the years 1950 and 1951. The average loadings of all States Marine's vessels, both owned and chartered, for the years 1950 and 1951 amount to 6,540 tons, which we use as the basis for our estimate of its capacity.

Liner carrying capacity estimate for Trade Route No. 21/5

	Capacity (tons)
The estimated carryings of Lykes, figured at 85 sailings with owned ships carrying 7,575 tons per ship	644,000
The estimated carryings of Waterman, based on 24 sailings a year carrying 6,500 tons per ship	156,000
The estimated carryings of States Marine, figured at 9 sailings with owned ships carrying 6,540 tons per ship	59,000
Total	859,000

The foregoing estimates indicate that the liner service on each route is insufficient to carry 50 percent of the cargo which may be expected to be carried in liner vessels in the future. As to the past, the 1951

United States-flag liner carryings on Trade Route No. 13 were only 46 percent of the total liner exports reported in the census figures introduced by Lykes, and 49.3 percent in the Maritime Administration figures. Similarly, the 1951 United States-flag liner carryings on Trade Route No. 21 were only 45 percent of the total liner-carried exports according to census figures, and 47.8 percent according to Maritime Administration figures. Thus, in the last full year for which figures are of record, the actual United States-flag liner carryings on each route were less than 50 percent of the total, but what is more important is the adverse trend over the last four-year period, which shows increasing foreign-flag carryings at the expense of United States-flag vessels.

Lykes argues that United States-flag vessels presently operating on the routes are carrying all the liner cargo that is available to vessels of this country, and that additional vessels will merely dilute the United States carryings and not attract cargo from foreign competitors. This is an argument to which we cannot agree, particularly since the record shows that all United States-flag sailings have in the recent past been fully loaded without capacity for added cargo, and that some United States-flag vessels now on the routes are inferior in type and speed to the new ships placed in competition with them by foreign operators. If Bloomfield should qualify for a subsidy, he would, of course, be required to operate vessels of approved type, size, and speed on regular and approved schedules.

It may be pointed out that the estimates of probable liner cargo have been put on the low or conservative side, and the estimates of United States-flag vessels to carry such cargo have included not only vessels definitely committed to the trade routes in question and qualified to meet the foreign-flag competition thereon but also marginal vessels. Even with such treatment, the estimated cargo to be carried, based on 1950–51 records, exceeds the reasonably expected available capacity. It is perhaps questionable whether the small carryings per vessel of Isthmian to destinations on Trade Route No. 13 is more or less incidental to Isthmian's main interest as a carrier to the Persian Gulf, but we have not eliminated Isthmian from the list of operators actively engaged in meeting foreign-flag competition on Trade Route No. 13. We have included in our estimate of available capacity an allowance for Lykes' non-subsidized owned vessels operated on both trade routes, although non-subsidized operation on the routes is something which Lykes is not committed to in the future. The capacity of States Marine's Libertys and Victorys has also been included in the estimate of available tonnage on both routes.

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. Additional reasons have already been set forth in the foregoing discussion, including increasing effectiveness of foreign-flag competition and the desirability of adding to the United States-flag fleet on the routes more vessels that will fully meet the strict requirements of a subsidized service.

The findings which we make in this case of inadequacy of United States-flag liner service on Trade Routes Nos. 13 and 21/5 result in the conclusion that section 605 (c) of the Act does not interpose a bar to the granting of an operating-differential subsidy contract to the applicant for operation on both routes. Our conclusions herein are not tantamount to a finding that the applicant is entitled to a subsidy contract on either route or for any number of sailings, for such a conclusion can be reached only after the necessary administrative study and action required under section 601 and various other provisions of the Act.

CONCLUSIONS

The Board therefore concludes that:

1. An operating-differential subsidy with respect to vessels to be operated by applicant Bloomfield Steamship Company on both Trade Route No. 13, Service 1, and Trade Route No. 21, Service 5, would involve service which would be in addition to existing services within the meaning of section 605 (c) of the Merchant Marine Act, 1936.

2. The service already provided by vessels of United States registry on both Trade Route No. 13, Service 1, and Trade Route No. 21, Service 5, is inadequate, and, in the accomplishment of the purposes and policies of the Act, additional vessels should be operated thereon.

3. The provisions of section 605 (c) of the Act do not interpose a bar to the granting to applicant Bloomfield Steamship Company of an operating-differential subsidy contract covering the operation of cargo vessels on Trade Route No. 13, Service 1, and Trade Route No. 21, Service 5.

4. All further questions with respect to the application of Bloomfield Steamship Company for operating-differential subsidy are expressly reserved for future determination.

(Sgd.) A. J. WILLIAMS,
Secretary.

FEDERAL MARITIME BOARD

Nos. M-11, M-27, M-32, M-14, M-50, M-9, M-10, M-27, M-57, M-60

Annual Review of Bareboat Charters of Government-Owned, War-Built, Dry-Cargo Vessels, 1953, Under Public Law 591, Eighty-first Congress

Report of the Board

In accordance with section 3 (e) (1) of the Merchant Ship Sales Act of 1946, as amended, an annual review has been made of the bareboat charters of Government-owned, war-built, dry-cargo vessels recommended for use by the United States-flag operators during the period from June 30, 1952, to June 30, 1953, inclusive.

On the basis of the foregoing review, the Board tentatively has found that conditions exist justifying the continuance of each of the following charters under the conditions previously certified by the Board:

Charterer	Vessel	Docket No.	Date vessel delivered
Alaska Steamship Company	Coastal Monarch	M-11	8- 9-48
	Sailors Splice	M-11	4-27-49
	Coastal Rambler	M-11	8-18-48
	Lucidor	M-11	12-16-48
	Palisana	M-11	12-16-48
	Flemish Knot	M-11	7-26-48
	Square Knot	M-11	7- 6-48
	Square Sinnet	M-11	8- 1-48
	Ring Splice	M-11	1-14-49
American President Lines, Ltd	Lightning	M-27	4-16-51
	Shooting Star	M-32	5-23-51
Luckenbach Steamship Company, Inc	Pine Bluff Victory	M-14	3-28-51
	Wayne Victory	M-14	4-23-51
	Red Oak Victory	M-50	2-11-52
Grace Line, Inc	Coastal Nomad	M- 9	12-23-46
	Coastal Adventurer	M- 9	1-21-47
	Anchor Hitch	M- 9	1- 3-47
Pacific Far East Line, Inc	Contest	M-10	4-27-47
	Flying Dragon	M-10	5- 8-47
	Surprise	M-10	12-20-48
	Trade Wind	M-10	1-20-49
	Fleetwood	M-10	12-27-48
	Flying Scud	M-10	12-10-48
	Sea Serpent	M-27	3-28-51

Notice of the foregoing tentative findings was served on all interested parties and was published in the Federal Register on July 18, 1953, and interested parties were granted fifteen (15) days from the date of such publication to request a hearing concerning such tentative findings made with respect to any of the above charters by filing written objections thereto or for other good cause shown. No objections or requests for hearing were filed.

FINDINGS, CERTIFICATION, AND RECOMMENDATION

On the basis of evidence considered by the Board, it is hereby certified to the Secretary of Commerce that conditions exist justifying the continuance of the charters listed above, upon the conditions originally certified by the Board.

By order of the Board.

(Sgd.) A. J. WILLIAMS,
Secretary.

AUGUST 17, 1953.

FEDERAL MARITIME BOARD

No. S-40

AMERICAN PRESIDENT LINES, LTD.—DETERMINATION OF FINAL SUBSIDY RATES FOR 1949 AND 1950

Submitted August 14, 1953. Decided September 3, 1953

The principle of including repatriation as an item of foreign wage costs with respect to the operating-differential subsidy wage rates for the Trade Route No. 29 and Round-the-World Services of American President Lines, Ltd., for the years 1949 and 1950, found to be authorized by law and to be fair and reasonable and in the public interest.

The computation of Norwegian repatriation costs for crews employed in these services should be recalculated to give effect to the applicable provisions of Norwegian law, but in other respects the computation of Norwegian repatriation costs as previously made by the staff found to be fair and reasonable and in the public interest.

The computation of wage costs for the year 1950 of combination vessels operated under the Panama flag in these services, as recomputed in the monthly amount of $15,170, found to be fair and reasonable and in the public interest.

Warner W. Gardner and *Alfred L. Scanlan* for American President Lines, Ltd.

Max E. Halpern, *Edward Aptaker*, and *Thomas Lisi* for the Board.

REPORT OF THE BOARD

BY THE BOARD:

No exceptions were filed to the recommended decision of the Vice Chairman, who sat as the presiding officer at the hearing in this proceeding. Our conclusions agree with those recommended by the Vice Chairman, whose recommended decision we adopt and make a part hereof.* Requested findings of American President Lines, Ltd. (the Operator), not discussed in this report nor reflected in our findings and conclusions have been given consideration and are denied.

This proceeding arises under section 606 (1) of the Merchant Marine Act, 1936 (the Act). Following a staff study of costs of wages of the Operator and of its foreign competitors, we adopted tentative operating-differential subsidy rates under section 603 (b) of the Act for the

*See Appendix.

years 1949 and 1950, with respect to the Operator's Trans-Pacific Service (Trade Route No. 29) and Round-the-World Service. The Operator objected to the rates as tentatively adopted, and an exchange of correspondence took place, but no mutual agreement was reached. The matter was thereafter set for hearing pursuant to section 606 (1) of the Act, at the request of the Operator.

Upon the whole record we find (1) that the principle of including repatriation as an item of foreign wage costs with respect to the operating-differential subsidy wage rates for the years 1949 and 1950 is authorized by law and is fair and reasonable and in the public interest, (2) that the computation of Norwegian repatriation costs for crews should be recalculated to give effect to the applicable provisions of Norwegian law, but in other respects the computation of Norwegian repatriation costs as heretofore made by the staff is fair and reasonable and in the public interest, and (3) that the computation of wage costs for the year 1950 of combination vessels operated under the Panama flag, as recomputed in the monthly amount of $15,170, is fair and reasonable and in the public interest.

Vice Chairman Williams took no part in this decision.

(Sgd.) A. J. WILLIAMS,
Secretary.

ORDER

At a Session of the FEDERAL MARITIME BOARD, held at its office in Washington, D. C., on the 3d day of September A. D. 1953

No. S–40

AMERICAN PRESIDENT LINES, LTD.—DETERMINATION OF FINAL SUBSIDY RATES FOR 1949 AND 1950

Whereas, on February 17, 1953, the Board issued certain *orders nisi* containing its findings and determinations concerning final subsidy rates for wages of officers and crews of the subsidized cargo and combination vessels operated by American President Lines, Ltd., during the years 1949 and 1950 on Trade Route No. 29–F and in the Round-the-World Service, and such rates having been objected to by American President Lines, Ltd., and a hearing having been requested, pursuant to section 606 (1) of the Merchant Marine Act, 1936, by American President Lines, Ltd.; and

It appearing that such hearing and full investigation of the matters involved has been had, and the Board having, on the date hereof, made and filed its report thereon containing its findings and conclusions, which report is hereby referred to and made a part hereof;

It is ordered, 1. That the following schedule of operating-differential subsidy rates for wages of officers and crews for incorporation into the operating-differential subsidy agreement of American President Lines, Ltd., Contract No. FMB–12, effective for approved voyages of the vessels thereby covered which commenced on or after January 1, 1949, be, and they are hereby, made final:

Service	Vessel type	Wages of officers and crews (including payments required by law to assure old-age pensions, unemployment insurance, or similar benefits) (percent of United States cost)
Trade Route No. 29–F Trans-Pacific	C–3 Cargo	67.23
Round-the-World	C–3 Cargo	68.53
	Victory	66.17
	C–4F Cargo	69.14
	Monroe/Polk (Comb.)	70.55

2. That the following schedule of operating-differential subsidy rates for wages of officers and crews for incorporation into the operating-differential subsidy agreement of American President Lines, Ltd., Contract No. FMB–12, effective for approved voyages of the vessels thereby covered, which voyages commenced on or after January 1, 1950, be, and they are hereby, made final:

Service	Vessel type	Wages of officers and crews (including payments required by law to assure old-age pensions, unemployment insurance, or similar benefits) (percent of United States cost)
Trade Route No. 29-F Trans-Pacific	Cargo	74.48
Round-the-World	Cargo	75.29
	Monroe/Polk (Comb.)	71.76

3. That the other findings and determinations contained in the said *orders nisi* issued on February 17, 1953, be, and they are hereby, made final.

BY THE BOARD.

(Sgd.) A. J. WILLIAMS,
Secretary.

APPENDIX

FEDERAL MARITIME BOARD

DOCKET NO. S-40

AMERICAN PRESIDENT LINES, LTD.—DETERMINATION OF FINAL SUBSIDY RATES FOR 1949 AND 1950

RECOMMENDED DECISION OF ROBERT W. WILLIAMS, MEMBER OF THE FEDERAL MARITIME BOARD AND PRESIDING OFFICER

The Board and the American President Lines, Ltd. (the Operator), were unable to reach an agreement as to the readjustment proposed by the Board in the rate for operating-differential subsidy for wages for the years 1949 and 1950 on the Operator's Trans-Pacific Service (Trade Route No. 29) and the Operator's Round-the-World Service. This recommended decision is made after hearing accorded the operator pursuant to section 606 (1) of the Merchant Marine Act, 1936 (the Act) and the Administrative Procedure Act.

The Board, after considering staff memoranda and taking the testimony of staff officers, heretofore tentatively established differential rates for the operator's wage expenses on the two services. The Operator filed objections.

Section 603 (b) of the Act, under which the Board acted in adopting tentative rates, provides:

> . . . the operating-differential subsidy *shall not exceed the excess* of the fair and reasonable cost of . . . wages . . . in the operation under United States registry of the vessel . . . covered by the contract, over the estimated fair and reasonable cost of the same item[s] of expense . . . if such vessel . . . were operated under the registry of a foreign country whose vessels are substantial competitors of the vessel . . . covered by the contract. [Emphasis supplied.]

The Operator's American-flag wage costs were compared with the estimated wage costs of the foreign-flag competition on the lines and the following subsidy rates [1] for wages were then established:

[1] Under the Operator's contract these percentage rates of the Operator's American-wage costs are paid to it by the Government as part of its operating-differential subsidy.

	1949	1950
Trade Route No. 29—Cargo ships	65.32	73.14
Round-the-World—Cargo ships	68.34	75.11
Round-the-World—Combination ships	70.55	71.10

Section 606 (1) of the Act provides that, in case of disagreement, the Board is authorized, after proper hearing, to

> determine the facts and make such readjustment in the amount of such future payments as it may determine to be fair and reasonable and in the public interest.

The Operator now raises three issues with respect to the 1949 and 1950 wage differentials.

The wage costs of foreign-flag competitors were estimated at too high a level and the subsidy rate was too low,

(1) because the Board improperly included the estimated cost of repatriating foreign crews on both services;

(2) because even if any foreign repatriation cost was properly included in the foreign wage cost, the amount thereof was overstated with respect to both services; and

(3) because the Board erroneously overestimated the wage costs of the Panama-flag competition in computing the wage differential for the Operator's Round-the-World combination vessel service in 1950.

FACTS RELATING TO ISSUES NOS. 1 AND 2 ON FOREIGN REPATRIATION COSTS

1. The obligation of repatriation is the foreign operator's obligation to transport members of his crew to the home country. Personnel so transported are entitled to wages and subsistence en route, thus making time in transit an important factor. Correlative to the obligation to repatriate crews is the practical necessity on the part of the foreign operator to furnish replacements for his vessels. Such replacements may be recruited from qualified personnel when available at ports from which crew members are repatriated, or may be sent from home. When replaced from home, the cost is borne entirely by the operator. No statistics are available to show the foreign operators' experience in recruiting locally, nor is there evidence to determine whether foreign operators' costs for replacement are greater or less than their costs for repatriation where the obligation of repatriation exists.

2. The Norwegian, Danish, and British competitors of the Operator have repatriation obligations on one or both of the routes here involved. The actual cost of crew repatriation incurred by the Danish competitor for the years 1951 and 1952 was taken as representative of its repatriation costs for 1949 and 1950 and included in estimating Danish wage costs for 1949 and 1950. The British competition in-

cluded some vessels manned by mixed crews as well as some manned by all white crews. No satisfactory information as to the rights of mixed crews to repatriation was available, and their repatriation was excluded in the estimate of British wage costs. British crew members were found to be eligible for repatriation at the end of two years of consecutive service. British competition occurred only on the Operator's Round-the-World Service, and the expense of repatriating white members of British crews from Marseilles to London was divided by twenty-four and the result taken as the estimated monthly expense for British repatriation.

The Operator has objected to the inclusion of any amount for either Danish or British repatriation in the wage differentials involved, but does not question the method of computation. On the other hand, the Operator objects both to the inclusion of repatriation expense under the Norwegian flag as a matter of principle, and also the method of computation. More detailed findings with respect to repatriation of the Norwegian flag are therefore necessary.

3. The obligation of a Norwegian operator to furnish repatriation for officers, including radio officers and chief stewards, is based upon the collective bargaining agreement in force, which, in the years 1949 and 1950, required the operator to pay the full cost of repatriation after two years of service.

4. The obligation of the Norwegian operator to furnish repatriation to other members of the crew is based on the Norwegian Merchant Seamen's Act, section 25 (a), which provides for repatriation once in three years for vessels trading in the Pacific, and once in two years for vessels touching European and Mediterranean ports. Under the Norwegian law, the operator is required to pay one-third of the expense, the seaman and the Norwegian State contributing the balance in equal shares. The Norwegian law does not prevent the operator from assuming the seaman's one-third of the cost, but there is no evidence of any such practice.

5. The officer or crew member on the Norwegian vessel loses his right to repatriation if he fails to serve out the full period indicated or if he elects not to go home, and, in such case, the Norwegian operator is under no alternative obligation to pay cash. If a seaman falls sick, his cost of travel is paid by the owner's P. & I. underwriters, and if he obtains a working passage home at his current wages, he is entitled to nothing further. Repatriation applies only to Norwegian citizens sailing on Norwegian vessels. Norwegian-flag operators are permitted to employ non-Norwegian crews, and these have no repatriation rights.

688-650 - O - 63 - 24

6. The Norwegian-flag lines competing with both services of the Operator do not ordinarily return to Norway. In estimating the Norwegian wage cost for cargo vessels, the Board, following the staff's recommendation, included $1,208 per month in 1949 and $1,163 per month in 1950 for the cost of repatriating officers and crews in reaching the Trans-Pacific differential rate, and $216 and $210, respectively, for repatriation costs in reaching the Round-the-World rate. Norwegian repatriation for both officers and crew was in this computation assumed to occur every two years. Thus the full cost of repatriating the entire crew was divided by twenty-four to reflect the pro rata monthly expense to produce the figures set forth above.

7. In estimating the foreign wage cost the staff of the Board took the position that the total cost of replacement as well as repatriation should be considered as a wage factor for the foreign operators. The staff had no precise figures as to the cost of replacement, but in computing the cost of repatriation for the Norwegian competition in the manner above set forth it was stated that the cost of replacement would be a compensating factor to offset any overstatement in assigning to repatriation alone the cost of travel of the full ship's complement at two year intervals although, as explained above, there was a lesser statutory obligation upon the Norwegian operator.

DISCUSSION OF ISSUES NOS. 1 AND 2

The Operator argues on principle that the Board lacks any authority to include foreign repatriation charges in estimating foreign-flag wage costs, claiming that repatriation costs are not and cannot be considered as wages, and that to include them as such unduly swells the estimate of foreign-flag wage costs, thus violating the principle of parity required by section 603 (b) of the Act as effectively as if the estimates of the Operator's American-flag wages were unduly reduced.

There are two answers to this argument. In the first place, the Board must have some latitude in the interpretation of what is to be included in the statutory words "fair and reasonable cost of wages." Wages as defined in Webster's New International Dictionary, Second Edition, are

> That which is pledged or paid for work or other services.

The Board, in comparing American operators' fair and reasonable costs for wages with similar costs of foreign operators, has adopted the practice of including not only payments made directly to the seaman employed, such as basic wages and overtime, but also payments made to government and other funds and insurance plans which redound to the employee's benefit, such as Social Security payments

under American laws, and health, unemployment, pension, and social provisions under foreign laws. It is believed that the Board may properly include within the term "fair and reasonable cost of wages" 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." The definition does not, however, include gratuities which are not bargained for and which are purely voluntary on the part of an employer. The cost of the foreign operator to repatriate his officers or crew, whether an obligation arising from a bargaining agreement or from a statutory provision, is a cost which we feel may well come within the broad definition of wages. This interpretation was formally adopted by the Board with respect to the period prior to January 1, 1951, when the Board on June 10, 1953, determined to:

Approve the inclusion of repatriation as an item of foreign wage costs with respect to differential subsidy wage rates applicable to voyages commencing prior to January 1, 1951.

It does not follow from what has been said that an interpretation once given by the Board must necessarily remain unchanged. Any different interpretation which the Board adopted with respect to this matter for rates for voyages commencing on and after January 1, 1951, is, of course, not involved in this case and need not be here discussed.

In the second place, even if foreign repatriation costs may not be deemed to fall within the broad definition of the term "wages", the subsidy rates and amounts to be awarded to the operator as tentatively determined are still rates and amounts which, under the statute, the Board is authorized to award, for section 603(b) only requires that the amount of subsidy "shall not exceed" parity. It does not require that the amount awarded to the Operator be exactly, or not less than, parity. Under no interpretation of the word "wage", as used in the section of the Act referred to, does the inclusion of foreign repatriation costs result in an award that would give to the Operator in this case a sum that would exceed parity.

Coming next to the method used by the staff in computing foreign repatriation costs, the Operator does not attack the method used for estimating Danish and British costs, but concentrates on the method of computing Norwegian repatriation costs, and here we think a modification should be made. The tentative subsidy rates were based on figures which charged the Norwegian competitor with the full cost of repatriating all crew as well as officers every two years, whereas under

the applicable law, the Norwegian operator is responsible for the payment of only one-third of the cost of crew repatriation. Furthermore, the computation failed to make due allowance for the fact that crews on vessels operating in Pacific waters are entitled to repatriation only after three years of consecutive service and not two years. The Board should direct that the calculation of Norwegian repatriation costs should be revised to give effect to the provisions of law applicable to crews, confirming the use of the one-way airplane fare without wage or sustenance allowance during the trip home, as the cheapest means of repatriation. Such a figure will result in a reasonable estimate of the Norwegian operator's maximum liability for repatriation. Any reduction in actual cost to the Norwegian operator below this figure, due to the factors set forth in Finding of Fact No. 5, is not subject to any exact calculation and is offset by the cost of replacement which is actual but equally difficult of precise estimation.

FACTS RELATING TO ISSUE NO. 3 ON PANAMA-FLAG WAGE COMPUTATION.

The remaining differences arise in connection with the computation of estimated wage cost for the Panama-flag competition for combination vessels on the Round-the-World Service in 1950. It does not involve 1949 rates on any vessels or 1950 rates on cargo vessels, since none of these had Panama-flag competition.

8. The Panama-flag competition was furnished by the Home Line, operated by the Italian firm of Fratelli Cosulich, whose operating office is in Genoa. In estimating the base-wage costs of the Home Line the staff treated this operation as virtually equivalent to an Italian line. After recomputation, the Panama base wage was computed as identical with the Italian base wage. Furthermore, since the Home Line crews were recruited in Italy, the staff assumed that the various social benefits [2] which an Italian operator was obliged to contribute for the benefit of its crew would apply equally to Italian crews sailing under the Panama flag. On the other hand, the staff had direct information to the effect that the overtime allowance to crews under the Panama flag was 42 percent of base wages as against 86 percent under the Italian flag. As the result of these assumptions and this information, the staff's computation showed a total estimated wage cost under the Panama flag 17.05 percent below that under the Italian flag for 1950.

[2] *Social Benefits:* These social benefits are separately described as (1) disability, old-age pensions, and supplement; (2) tuberculosis, unemployment, marriage, and birth grants; (3) family allowance, supplementary social insurance, and solidarity fund; (4) industrial accident and sickness insurance; (5) non-occupational sickness insurance; (6) housing allowance; and (7) supplementary contributions.

DISCUSSION OF ISSUE NO. 3

The Operator, complaining that even this computation set Panama wage cost at too high a level, submitted in evidence certain letters and cables received directly from Fratelli Cosulich, comparing the Home Line's Panama-flag wage and social benefit costs for 1950 with costs for operating an identical vessel under the Italian flag. From these, the isolated costs of social benefits actually incurred under the Panama flag appeared to be less than similar costs under the Italian flag. But from these it also appeared that the total wages, including both "take home" items and social benefits for 1950, were only 10.73 percent lower under the Panama flag than under the Italian flag. Thus, the over-all differential in favor of the Panama flag of 10.73 percent was less favorable to the operator than the over-all differential in favor of the Panama flag of 17.05 percent as computed by our staff.

If we are to give the Operator the benefit of the information which he obtained from Fratelli Cosulich with respect to the lower costs for social benefits under the Panama flag, he should, in fairness, also be charged with the higher overtime costs reflected in the Cosulich statement. This case shows the inherent difficulties which the staff and the Board are faced with in making exact estimates of the various elements that go into various foreign-flag competitors' cost of the various subsidized lines. The information submitted by the Operator in this case does not exactly correspond with, and is, therefore, not exactly comparable with, the information available to the staff. We are not willing to disturb the staff's computation in one detail because of the Cosulich letter without giving effect to all information in that letter, which would, of course, be less favorable to the Operator than the computation now made by the staff. Accordingly, we believe that the staff's corrected computation of Panama wages, amounting to $15,170 per month, as compared with the Italian $18,289, should be confirmed.

RECOMMENDATIONS TO THE BOARD

The Board should find:

1. That the principle of including repatriation as an item of foreign wage costs with respect to the operating-differential subsidy wage rates for the years 1949 and 1950 is authorized by law and is fair and reasonable and in the public interest.

2. That the computation of Norwegian repatriation costs for crews should be recalculated to give effect to the applicable provisions of Norwegian law, but in other respects the computation of Norwegian

repatriation costs as heretofore made by the staff is fair and reasonable and in the public interest.

3. That the computation of wage costs for the year 1950 of combination vessels operated under the Panama flag, as recomputed in the monthly amount of $15,170, is fair and reasonable and in the public interest.

4. That the Operator's requested findings 1, 4, 5, 10, 11, 12, 14, 20, 21, 22, 23, 24 should be made, and requested findings 2, 3, 6, 7, 8, 9, 13, 15, 16, 17, 18, 19, 25, 26 should be denied.

FEDERAL MARITIME BOARD

No. S-39

Farrell Lines Incorporated—Determination of Final Subsidy Rates for 1949

Submitted September 22, 1953. Decided October 2, 1953

Case remanded to examiner to afford parties an opportunity to obtain and offer further evidence.

Harold B. Finn for Farrell Lines Incorporated.
Thomas Lisi and *Edward Aptaker* for the Board.

Report of the Board

By the Board:

Farrell Lines Incorporated (the Operator) was unable to reach an agreement with us as to the rate of operating-differential subsidy for subsistence of officers and crews for the year 1949 upon the Operator's South and East African Service, Trade Route No. 15A. After considering staff memoranda and hearing testimony from staff members, we tentatively determined by interlocutory order dated February 17, 1953, that the Operator was not entitled to subsidy for subsistence on the service. The Operator filed objections and a statement, and thereafter a hearing was held before an examiner pursuant to section 606 (1) of the Merchant Marine Act, 1936 (the Act). The examiner recommended approval of our tentative findings, and the Operator excepted. We find it necessary to remand the case for further evidence.

Section 603 (b) of the Act, under which we acted in making the tentative determination regarding rates, provides:

. . . the operating-differential subsidy shall not exceed the excess of the fair and reasonable cost of . . . subsistence of officers and crews, . . . in the operation under United States registry of the vessel . . . covered by the contract, over the estimated fair and reasonable cost of the same items of expense . . . if such

vessel . . . were operated under the registry of a foreign country whose vessels are substantial competitors of the vessel . . . covered by the contract.

The Operator's American-flag subsistence costs were compared with the estimated subsistence costs of the foreign-flag competitors on the route, and the following determination was tentatively made:

Type of vessel	Subsidy for subsistence of officers and crews (percent of United States cost)	Effective for approved voyages commencing on and after—
C2-S-B1	0.0	Jan. 1, 1949
C3-S-BH2	0.0	Do.

Section 606 (1) of the Act provides that, in case of disagreement, the Board is authorized, after proper hearing, to

determine the facts and make such readjustment in the amount of . . . future payments as it may determine to be fair and reasonable and in the public interest.

A similar provision is contained in the Operator's subsidy agreement.

The Operator's exceptions to the examiner's report assigned the following errors:

1. He erroneously placed on the Operator the burden of proof to show that the tentative rate proposed by the Board was not fair and reasonable and in the public interest;

2. He failed to make findings of fact regarding domestic and foreign subsistence costs on which the Board could base a readjustment of subsidy rates for 1949;

3. He failed to consider the controverted issues of fact and law raised in the Operator's statement;

4. He failed to determine what changes had occurred since the date of the Operator's original contract of April 23, 1940;

5. He failed to find fair and reasonable meal-day costs applicable to the Operator's vessels as operated under the American flag and as if operated under a competing foreign flag, and the difference between them;

6. He erroneously recommended that the Board's tentative rate of zero percent be adopted.

Exception 1—Burden of Proof. The hearing ordered by section 606 (1) of the Act is to determine what, if any, readjustment in the amount of the pre-existing subsidy shall be made. The section provides that such a readjustment may be made not more frequently than once a year at the instance of the Board or the Operator. In this case, the rate for the prior year was also zero percent. Although our staff

reviewed this prior rate before the Operator made formal request for readjustment, the controversy arises because the Operator is not satisfied to have the prior year's rate continue in 1949. The tentative rate constitutes our offer for a rate for 1949. When an operator fails within the time limit of our tentative order to show cause to the contrary, the tentative rate becomes final by mutual agreement. Where, however, as in this case, an operator makes seasonable objections and the case is set for hearing, the issues become the statutory issues under section 606 (1) of the Act, and whichever party (Board or operator) is the one moving for a readjustment of the prior year's rate, has the burden of proof on the statutory issues. Here the Operator seeks upward revision of the prior year's rate, and, for this reason, the burden is upon it.

Exceptions 2, 3, 5, and 6—The Necessary Facts. The examiner set forth in detail the method by which the staff recommended the zero percent rate which we tentatively adopted for 1949. The separate computation of the staff for both C–2 vessels and C–3 vessels is contained in his report, which, in each case, showed a negative rate, i. e., that the foreign costs were, in fact, higher than the American costs for subsistence, and that, therefore, there was no excess American cost to be subsidized by the Government pursuant to section 603 (b) of the Act. The staff computation for C–2 cargo vessels is set forth below, showing comparison between United States-flag meal-day cost and meal-day cost under the flags of foreign operators offering competition on the route:

C–2 CARGO VESSELS

	Flag—			
	United States	United Kingdom (mixed crew)	United Kingdom (white crew)	Union of South Africa
Complement	50	82	44	48
Officers and white crew		22		
Nonwhite crew		60		
Subsistence cost per meal day	$1.54	$0.855	$1.315	$2.274
Officers and white crew		$1.315		
Nonwhite crew		$0.686		
Subsistence cost per vessel day	$77 00	$70.09	$57.86	$109.15
Differential in dollars		$6.91	$19.14	−$32.15
Unweighted differential ... percent		8.97	24.86	−41.75
Competition weight factor ... percent		47.91	22.19	29.9
Weighted differential ... percent		4.30	5.52	−12.48
Composite weighted differential ... percent		−2.66		

The computation was made pursuant to the Manual of General Procedures for Determining Operating Differential Subsidy Rates (the Manual), a manual adopted by the Board on September 26, 1951, designed to simplify methods of cost data collection and computation

without sacrificing any of the essential data necessary to comply adequately with the Act. It was adopted only after consultation with Government agencies interested and with representatives of the various subsidized lines. Pursuant to these procedures, foreign-flag competition on the route in the year in question was determined according to the tons of cargo carried by vessels of each foreign flag, and in the computation above was shown under "Competition weight factor" to be as follows:

	Percent
United Kingdom (using mixed crews)	47.91
United Kingdom (using all white crews)	22.19
Union of South Africa	29.9
Total	100.0

The differential for subsistence (United States versus foreign) per vessel day for each foreign flag was multiplied by the competition factor described above, to provide a weighted differential for each foreign competing flag. The combination of the three weighted differentials, in this case +4.30 percent, +5.52 percent, and −12.48 percent, made the composite weighted differential of −2.66 percent. In effect this was a finding that the United States-flag subsistence cost was 2.66 percent lower than the cost of subsistence on the foreign-flag competing vessels, weighted in accordance with their respective carryings. This −2.66 percent differential supported the staff's zero percent rate as recommended. Farrell's chief objection is to the inclusion of the figure of $2.274 as the meal-day cost on competing vessels under the South African flag during the year in question. This rate was derived from the actual experience of three vessels operated under the flag of the Union of South Africa for the year 1949, as reported to the staff. The Operator says that while a South African-flag competitor may have reported meal-day costs, these should not be adopted as the basis of computing the fair and reasonable cost of subsistence of vessels under that flag. In short, the Operator urges that actual costs are not the same thing as estimated fair and reasonable costs which the Act refers to. Furthermore, the Operator urges that the estimate of foreign costs should be based on an estimate of what they would be if Farrell and not a foreign operator operated the vessel under the foreign flag.

The cost comparison is, of course, between the subsidized ship as operated by Farrell under the American flag and as if the same vessel were operated under the foreign flag. But neither the statute nor the Manual contemplates an estimate based on hypothetical operation by Farrell under the foreign flag. Subsidy rates for subsistence as well as wages and other items are based on a comparison of the Ameri-

can operator's costs with the foreign competitor's cost for the same ship. The Manual, Part Three, expressly so provides:

IV. C. *Foreign Meal-Day Cost—Primary Method of Computation*

Wherever possible a meal-day cost of the competitive foreign operators shall be developed by the Board with as many of the following details as practicable: name of vessel; name of operator; flag of vessel; trade route or voyage itinerary; period covered by meal-day cost; number of voyages.

The Board shall determine in each case the period for which the most adequate foreign information is available on subsistence costs, and may index retrospectively and prospectively for years during which less adequate information is available * * *.

D. *Foreign Meal-day Costs—Secondary Method of Computation*

Whenever the evidence is inadequate to support a meal-day cost for a particular foreign competitor by the primary method of computation, the Board may adjust the most comparable * * *.

A factual basis for the foreign-cost estimate can be derived from the foreign competitor's actual experience, whereas a speculation only can be derived from an estimate of the American operator's costs on the assumption that it sailed under a foreign flag.

The operator introduced evidence of South African food price lists for 1949, which tended to show that a substantial part of a vessel's subsistence requirements could be purchased in South Africa at prices 23.6 percent less than in the United States. From this, the Operator argued that all stores could be bought by Farrell in South Africa at the same percentage below United States prices if Farrell were operating under the South African flag, and, in such case, its meal-day costs for 1949 would have been $1.17 per man. Such a computation falls into the error already indicated, and also fails to give effect to the undisputed testimony that the actual practice of the South African competitor in 1949 was to buy 60 percent of subsistence stores in the United States and 40 percent in South African ports.

The estimated meal-day cost of $2.274, on which the recommended rate is based, was reported to the staff as the meal-day cost of South African-flag vessels competing on the route. This cost appears to be approximately 50 percent greater than the actual meal-day cost of the Operator's American-flag vessels which purchased all of their stores in the United States. The extent of this difference suggests that the South African figure should be subjected to careful scrutiny. The record shows that the figure was derived from a written report from an informed and reliable source showing the average meal-day cost of the one South African-flag operator on the route for the period from August 1, 1947, to April 30, 1950, to be 125 units of the local currency. Another written report from the same source, dated approximately 2 months earlier, stated the average meal-day cost of

the same operator for the same ships from January 1, 1948, to December 31, 1951, to be only 85 units of the same local currency. It appears that after April 30, 1950, the South African operator's route was changed so as to include British ports, and that an average meal-day cost after April 30, 1950, was only 66 units of local currency. The staff's computations, set forth above, are based on the meal-day cost of 125 units. No reconciliation of this average meal-day cost with the much lower average meal-day cost of 85 units is apparent to the Board, nor was any effort toward a reconciliation of the two figures or a verification of either made by counsel. The level of the South African food prices indicated by the price lists introduced by the Operator, together with the conflict between the two figures reported to be the South African average meal-day cost, throws substantial doubt on the staff's figure of $2.274 per day, derived exclusively from the report showing the meal-day cost to be 125 units of the local currency. The Board feels that the difference between the two figures should be cleared up before a final decision is made. Accordingly, the case is referred back to the examiner to afford the parties an opportunity to obtain and offer further evidence on this point.

Exception 4—Changes since 1940. Since the Operator by its resumption contract dated as of January 1, 1947, accepted the zero subsistence rate for 1948, and agreed that such rate would not be reviewed until as of January 1, 1949, any changes occurring between April 23, 1940, and January 1, 1949, are not material.

An order will be entered remanding the case for further proceeding.

Chairman Rothschild, being absent, did not take part in this decision.

Order

At a Session of the FEDERAL MARITIME BOARD, held at its office in Washington, D. C., on the 2d day of October A. D. 1953

No. S-39

Farrell Lines Incorporated—Determination of Final Subsidy Rates for 1949

The Board, on the date hereof, having made and entered of record its report in this proceeding, which report is hereby referred to and made a part hereof;

It is ordered, That the case be, and it is hereby, remanded to the examiner for the purposes stated in said report.

By the Board.

(Sgd.) A. J. Williams,
Secretary.

FEDERAL MARITIME BOARD

No. 707

THE HUBER MANUFACTURING COMPANY

v.

N. V. STOOMVAART MAATSCHAPPIJ "NEDERLAND" ET AL [1]

Submitted November 10, 1953. Decided November 13, 1953

Complainant not shown to have suffered damage due to alleged unjust discrimination on rates for transportation of road rollers from United States Atlantic ports to Indonesia, and not entitled to reparation under sections 16 and 17 of the Shipping Act, 1916.

Paul L. Glasener and *Oliver L. Onion* for complainant.
Cletus Keating and *David Dawson* for respondents.

REPORT OF THE BOARD

BY THE BOARD:

The complaint filed December 13, 1950, alleged that respondents' tariff rates for the transportation of road rollers and accessories from United States Atlantic and Gulf ports to Indonesia were unduly and unreasonably preferential, prejudicial, and disadvantageous, in violation of section 16 of the Shipping Act, 1916 (the Act), and unjustly discriminatory and prejudicial in violation of section 17 of the Act. Complainant demanded entry of a cease and desist order and reparation of $2,210.24, with interest.

The case was originally submitted to the examiner upon a stipulation of facts. In his original report the examiner recommended that reparation be recovered from respondents N. V. Stoomvaart Maatschappij "Nederland" (Nederland) and Ocean Steam Ship Company, Ltd. (Ocean), and that the complaint should be dismissed as to the other respondents. Deletion of one of the tariff rates by

[1] Koninklijke Rotterdamsche Lloyd, N. V. (formerly known as N. V. Rotterdamsche Lloyd); N. V. Nederlandsch-Amerikaansche Stoomvart-Maatschappij Holland-Amerika Lijn; The Ocean Steam Ship Company, Ltd.; The China Mutual Steam Navigation Co., Ltd.; Funch, Edye & Co., Inc.; and Strachan Shipping Company.

respondents on October 1, 1951, made the issuance of a cease and desist order unnecessary.

Exceptions were filed by the two respondents mentioned, and the matter was argued orally before us in September 1952. During the course of argument it appeared that some facts which were deemed material to a decision were not contained in the pleadings or stipulation of evidence, and, accordingly, permission was granted to complainant to take further testimony on such facts. Before completing the record complainant moved to amend the complaint to bring in additional parties respondent, and this motion was heard by the Board and denied on the ground that more than the 2 years prescribed in section 22 of the Act had elapsed between the date of the alleged cause of action and the motion to bring in new parties.

The examiner's supplemental report, based on the amended record, found that respondents did not charge complainant a higher rate for the transportation of road rollers than was charged to other shippers of the same articles, and that the rate charged did not subject complainant to unreasonable prejudice and was not unjustly discriminatory, and, accordingly, recommended that the complaint be dismissed. We agree with the examiner's conclusions.

We find from the record:

1. Complainant manufactures and sells road rollers and other road-building equipment. Respondents are common carriers by water from United States Atlantic and Gulf ports to Indonesia, and are members of the Atlantic and Gulf–Dutch East Indies Conference. During the period when the shipments hereinafter referred to were made, the conference had on file its Freight Tariff No. 10, which included the following two items:

1782 Road Making Implements and Parts, N. O. S. viz:

	Contract rate
* * * * Road Rollers	$37.00

1425 Oil Producing and Refining Machinery, Materials and Supplies, viz:

	Contract rate
* * * * Rollers, Road	$33.00

2. Item No. 1782 was the original tariff provision covering the transportation of road rollers. Item No. 1425 was added by the conference so as to retain the business of an oil company which was making large shipments of oil producing machinery from the United States for use on its Indonesian properties. The said oil company had a European subsidiary which purchased oil producing machinery in Europe which it shipped directly to Indonesia. The quantity of such articles which the oil company would continue to purchase in the United States was

reported to the conference to depend on how the total cost from the United States, including ocean freight, compared with the costs from Europe. The oil company informed the conference that unless certain adjustments in rates were adopted by the conference, including the insertion of Item No. 1425, it would cease to ship on conference vessels. The conference decided that it could not afford the possible loss of revenue, and, accordingly, acceded to the request and adopted Tariff Item No. 1425.

3. Between October 6, 1948, and March 4, 1949, complainant shipped on respondents' vessels ten consignments of road rollers from New York and Savannah to Indonesia. During this entire period the $33.00 rate covered by Item No. 1425 was in effect for oil producing and refining machinery, materials, and supplies, including road rollers, if such articles were shipped for use in oil producing or refining and were designated by the shipper as oil-producing machinery. None of complainant's shipments above mentioned were so described in the applicable bills of lading nor did complainant ever claim that its shipments were shipped for use in oil producing or refining. Accordingly, complainant's shipments were charged and paid the higher rate specified in Item No. 1782.

4. Complainant made two shipments prior to December 13, 1948, more than 2 years prior to the filing of the complaint in this case, and eight shipments on and after that date, the last shipment being made March 4, 1949. The difference between the freight actually collected by respondents under Item No. 1782 and the amount complainant would have paid if it had been charged the lower rate provided in Item No. 1425 was $2,210.24 on all shipments above mentioned, and $2,103.04 on shipments made on and after December 13, 1948, the latter amount arising $1,468.14 from shipments on vessels of Nederland and $634.90 on vessels of Ocean.

5. The records of respondents show that between September 15, 1948, and October 1, 1951, when the lower rate was discontinued, 29 shipments of road rollers and road roller parts and accessories were made on respondents' vessels from U. S. Atlantic and Gulf ports to Indonesia, including complainant's 10 shipments, and the said 29 shipments consisted of 50 road rollers and several cases of parts and accessories. All of these 29 shipments moved under the higher rate provided by Item No. 1782, and none of said shipments moved under the lower rate provided by Item No. 1425. Each shipper was charged freight at the same rate per ton and no adjustment in freight rates has been made on any of said shipments. One of the 29 shipments was made by an oil company but not the oil company at whose instance Item No. 1425 was adopted by respondents.

688-650 O - 63 - 25

Before concluding the case before the examiner, complainant filed a motion to permit the taking of evidence from officials of the Bureau of the Census and from nonrespondent members of the conference as to any shipments made by the particular oil company for whom the lower rate on road rollers was established under Item No. 1425. Such evidence was not covered by our earlier permission. Complainant contended that such evidence might show that the respondent conference members could be held responsible for the acts of nonrespondent members by reason of common membership in the conference. After oral argument we denied this motion, holding that any such additional evidence would not concern shipments made on any vessels of any of the respondents in the case and could not be relevant to issues raised by the complaint.

POSITIONS OF THE PARTIES

Complainant takes the position that the road rollers shipped by it under Item No. 1782 were in all respects identical with road rollers described in Item No. 1425 taking the lower rate, and, therefore, complainant was entitled to the lower rate, and that respondents in charging the higher rate subjected complainant to undue prejudice and unjust discrimination in violation of the Act. Complainant does not now urge the entry of any cease and desist order nor does it urge the award of reparation for the two shipments made more than 2 years prior to the filing of the complaint.[2] It claims to be entitled to reparation on the remaining eight shipments in the amount of $2,103.04, with interest.

Respondents claim that no case of unreasonable prejudice or unjust discrimination is made out by complainant because respondents accorded no different or better treatment to any competing shipper.

DISCUSSION

Section 16, First, of the Act declares it unlawful for any common carrier within the purview thereof, directly or indirectly,

> To make or give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever, or to subject any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

Section 17 of the Act provides:

> That no common carrier by water in foreign commerce shall demand, charge, or collect any rate, fare or charge which is unjustly discriminatory between shippers * * *.

[2] See section 22 of Act; also *Plomb Tool Co.* v. *American-Hawaiian Steamship Co.*, 2 U. S. M. C. 523.

It will be seen that the language of section 16, First, makes it a violation to give any undue preference *to any particular person* or to subject *any particular person* to any undue or unreasonable prejudice. The undue preference and the undue prejudice mentioned in this section is always a relative matter, that is, the preferring of one person to another or the deferring of one person to another. To constitute a violation of this section there must always be two persons given unequal treatment by the carrier or other person subject to the Act, for any unjust discrimination when found to exist may be cured by raising the low rate as well as lowering the high rate or bringing both rates to a common point, and likewise under section 17 there must be unequal treatment between competing shippers or ports to constitute a violation. Here complainant paid the higher of two rates, but no other shipper received any lower rate or better treatment. Complainant was, therefore, not treated worse than a competitor, and respondents have, therefore, not been guilty of the statutory violations mentioned in the complaint.

As we pointed out in the case of *Afghan-Amer. Trading Co., Inc.* v. *Isbrandtsen Co., Inc.*, 3 F. M. B. 622:

> Since it is stipulated that no other shipper paid lower rates than were charged complainant in this case, there is no showing of undue prejudice in violation of section 16 of the Act or of unjust discrimination in violation of section 17 of the Act.

In *United Nations et al.* v. *Hellenic Lines Limited et al.*, 3 F. M. B. 781, we said:

> . . . there is no evidence of a competitive shipper of cotton who received from respondent a different rate from that actually charged complainant. Under the circumstances, it must follow in this case, as in the *Afghan* case, that there has been no showing of any violation of the Act, . . .

In *Port of New York Authority* v. *Ab Svenska et al.*, 4 F. M. B. 202, we said:

> In order to sustain the charge of unjust discrimination, under these provisions of the Shipping Act, complainant must prove (1) that the preferred port, cargo, or shipper is actually competitive with complainant, (2) that the discrimination complained of is the proximate cause of injury to complainant, and (3) that such discrimination is undue, unreasonable, or unjust. *Phila. Ocean Traffic Bureau* v. *Export S. S. Corp.*, 1 U. S. S. B. 538, 541 (1936); *H. Kramer & Co.*, v. *Inland Waterways Corp. et al.*, 1 U. S. M. C. 630, 633 (1937).

We have carefully examined the authorities referred to us in complainant's briefs and we do not find the holdings therein in any way inconsistent with the conclusions above set forth.

CONCLUSIONS

Under the facts and circumstances in this case, we conclude that the rate for the transportation of road rollers from United States Atlantic ports to Indonesia charged by respondents against complainant did not result in undue or unreasonable preference or advantage to any person, and did not subject complainant to any undue or unreasonable prejudice or disadvantage in violation of section 16 of the Act, nor were such rates unjustly discriminatory or prejudicial to complainant in violation of section 17 of the Act.

An order will be entered dismissing the complaint.

ORDER

At a Session of the FEDERAL MARITIME BOARD, held at its office in Washington, D. C., on the 13th day of November A. D. 1953

No. 707

THE HUBER MANUFACTURING COMPANY

v.

N. V. STOOMVAART MAATSCHAPPIJ "NEDERLAND" ET AL.

This case being at issue upon complaint and answer on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Board, on the date hereof, having made and entered of record a report stating its conclusions, decision, and findings thereon, which report is hereby referred to and made a part hereof;

It is ordered, That the complaint be, and it is hereby, dismissed.

By the Board.

(SEAL) (Sgd.) A. J. WILLIAMS,
Secretary.

FEDERAL MARITIME BOARD

No. S-34

Bloomfield Steamship Company—Application for Operating-Differential Subsidy on Trade Route No. 13, Service 1, and Trade Route No. 21, Service 5

Submitted November 3, 1953. Decided November 18, 1953

On reargument, conclusion in prior report, 4 F. M. B. 305—that service already provided by vessels of United States registry on Trade Route No. 13, Service 1, is inadequate, and, in the accomplishment of the purposes and policies of the Merchant Marine Act, 1936, additional vessels should be operated thereon—reversed.

The provisions of section 605 (c) of the Act interpose a bar to the granting to Bloomfield Steamship Company of an operating-differential subsidy contract covering the operation of cargo vessels on Trade Route No. 13, Service 1.

Paul D. Page, Jr., and *Malcolm R. Wilkey* for Bloomfield Steamship Company.

Joseph M. Rault and *Odell Kominers* for Lykes Bros. Steamship Co., Inc., and *Sterling F. Stoudenmire, Jr.*, for Waterman Steamship Corporation, interveners.

Edward Aptaker for the Board.

Report of the Board on Reargument

Interveners Lykes Bros. Steamship Co., Inc., and Waterman Steamship Corporation petitioned to reopen this proceeding to take further evidence and to present reargument on our decision of June 30, 1953 (4 F. M. B. 305). We denied the petition to reopen but granted reargument.

We adhere to our earlier decision as to Trade Route No. 21, Service 5, and modify it as to Trade Route No. 13, Service 1.

As pointed out in our earlier report, the issue before us is whether section 605 (c) of the Merchant Marine Act, 1936 (the Act), interposes a bar to our approval of an operating-differential subsidy contract with applicant covering either or both of the routes presently involved. Section 605 (c) provides in part as follows:

No contract shall be made under this title with respect to a vessel to be operated on a service, route, or line served by citizens of the United States which would be in addition to the existing service, or services, unless the Commission shall determine after proper hearing of all parties that the service already provided by vessels of United States registry in such service, route, or line is inadequate, and that in the accomplishment of the purposes and policy of this Act additional vessels should be operated thereon ; and

no contract shall be made with respect to a vessel operated or to be operated in a service, route, or line served by two or more citizens of the United States with vessels of United States registry, if the Commission shall determine the effect of such a contract would be to give undue advantage or be unduly prejudicial, as between citizens of the United States, in the operation of vessels in competitive services, routes, or lines, unless following public hearing, due notice of which shall be given to each line serving the route, the Commission shall find that it is necessary to enter into such contract in order to provide adequate service by vessels of United States registry. [Paragraphing supplied.]

Our earlier report concluded that applicant's proposed services on both routes would be in addition to existing services thereon, that on each of the trade routes involved the United States-flag service was inadequate and that additional vessels should be operated thereon to accomplish the purposes and policies of the Act, and that therefore section 605 (c) of the Act did not impose a bar to the granting of an operating-differential subsidy contract to applicant for operation on either route.

Our basic approach now to the application is substantially the same as the approach taken in the earlier report; but our present judgment is that with respect to Trade Route No. 13, Service 1, it has not been shown that the service already provided by vessels of United States registry is inadequate and that additional vessels are required to be operated thereon to accomplish the purposes and policies of the Act. In consequence, we find that section 605 (c) of the Act interposes a bar to the granting of an operating-differential subsidy contract to applicant for operation on Trade Route No. 13, Service 1.

In view of the fact that our conclusions differ from those of the earlier report on the effect of section 605 (c) on Bloomfield's application for subsidy for operation on Trade Route No. 13, Service 1, we now briefly review the determinative facts and estimates as to that service.

1. The Trade Route No. 13, Service 1, itinerary is described in the Report of the United States Maritime Commission on Essential Foreign Trade Routes (1949) as follows:

Between a United States Gulf port or ports and a port or ports in Spain and/or Portugal and/or the Mediterranean and/or the Black Sea, with the privilege of calling at Casablanca, Spanish Morocco, and at ports in the United States South Atlantic, south of Norfolk, and at ports in the West Indies and Mexico.

2. United States-flag participation in liner exports from the Gulf in general have, since 1948, averaged around 60 percent. In 1948 it was 75 percent; in 1949, 67 percent; in 1950, 54 percent; and in 1951, 46 percent, as shown by Census Bureau statistics in the record.

3. The cargo that will be available for movement by liner vessels on Trade Route No. 13 is estimated to be 700,000 tons annually. This estimate is based on Lykes' projection of 400,000 tons of liner-type commodities (which includes cargo from South Atlantic privilege ports) plus 43/57ths of this forecast (300,000 tons) for tramp-type commodities estimated to be available for movement on liner vessels.

4. Total annual estimated liner capacity of Isthmian Steamship Co. is 18,000 tons, based on 18 annual sailings at an average lift of 1,000 tons per vessel.

5. Total annual estimated liner capacity of States Marine Lines is 54,000 tons, based on eight annual sailings of owned vessels, each carrying approximately the same average amount of Trade Route No. 13 cargo as was carried by the vessels operated by States Marine during the years 1950 and 1951.

6. Total annual estimated liner capacity for Lykes is 273,000 tons. We estimate that Lykes will provide 39 sailings per year on this route, at an average carrying capacity of at least 7,000 tons per sailing. This figure is greater than the 6,400 tons per sailing estimated in the earlier report. Because our earlier 6,400-ton estimate was based upon data which excluded traffic originating at the privilege ports, we now correct that estimate so as to assign to Lykes a future vessel capacity reflective of the average amount of cargo actually carried in 1950 and 1951, whether originating at the principal ports or at the privilege ports.[1]

7. Total amount estimated liner capacity of all United States-flag operators presently on Trade Route No. 13 is 345,000 tons.

DISCUSSION

From our findings it will be seen that the estimated annual liner capacity of United States-flag operators on the route, 345,000 tons, amounts to 49 percent of the estimated total liner cargo available annually, 700,000 tons. The determinative question before us is whether, in the words of the statute, "* * * the service already provided

[1] Inclusion of privilege port capacity of Lykes' vessels on Trade Route No. 21, Service 5, increases total annual estimated liner capacity of all United States-flag operators on that route from 859,000 tons to 887,600 tons. The resulting increase in estimated United States-flag liner vessel participation, however, amounts to only 0.35 percent, and this is not sufficient to change our decision with respect to future adequacy of United States-flag service on that route.

by vessels of United States registry in such service, route, or line is inadequate, and that in the accomplishment of the purposes and policy of this Act additional vessels should be operated thereon * * *." Put in terms of the estimates we have considered, the questions are whether 49 percent participation in carryings on Trade Route No. 13, Service 1, is inadequate, and whether additional vessels should be operated thereon for the period of the proposed contract.

Section 101 of the Act declares that it is necessary for the national defense and development of the foreign and domestic commerce of the United States that this country shall have a merchant marine which is

> sufficient to carry its domestic water-borne commerce and a substantial portion of the water-borne export and import foreign commerce of the United States * * *.

The earlier decision of the Board held that "substantial portion" was intended by the Congress to mean more than half of the water-borne foreign commerce of the United States. Our present judgment is that while 50 percent participation by vessels of United States registry in our total foreign commerce was intended by Congress to be a generally desirable goal, Congress never intended to establish 50 percent as an absolute level below which we, in the exercise of our discretion, might never descend in determining adequacy for any particular trade route under the Act.

The award of subsidy is a function inherently stamped with the exercise of discretion, and to follow rigid mathematical formulae alone would largely frustrate the application of our independent judgment as contemplated by the Legislature.

This view is supported by the Act's pattern with regard to our study of individual trade routes. It is true that the Declaration of Policy in Title I establishes as a goal that we have a merchant marine sufficient to carry a "substantial portion" of the water-borne foreign commerce of the United States, and that for "diplomatic reasons" alone this language was adopted in place of the 50-percent standard set forth in earlier drafts of the bill.[2] But it is clear that this goal was intended as a general guide with respect to the over-all participation of United States-flag vessels, and that other controlling considerations ought to be specifically invoked when we deal with individual trade routes. Thus, section 211 (a) enjoins, in determining essential services, routes, and lines, consideration of, among other things, the number of sailings and types of vessels that should be employed in such lines, and any other facts and conditions that a prudent business-

[2] H. R. 7521, S. 2582, H. R. 8555, 75th Cong., 1st Sess. See 80 Cong. Rec. 10076.

man would consider when dealing with his own business. In determining whether service is adequate on a particular trade route, this and other provisions of Titles II and VI place their principal emphasis upon the needs of the specific trade route under consideration. Had there been the intention to extend an absolute mathematical standard to specific trade routes, Congress could well have found the necessary language, as it has done in subsequent legislation.[3] Not unmindful of the general goal established in Title I, we consider it our duty to exercise our own discretion in fixing the appropriate level of participation reasonably to be sought by means of the operating-differential subsidy program in respect of any particular trade route.

Turning to Trade Route No. 13, we are impressed with the margin of possible error inherent in estimating future capacities and traffic. There has been no such showing as would convince us that service is inadequate and that in the accomplishment of the purposes and policy of the Act additional vessels should be operated on Trade Route No. 13.

By declining to find inadequacy of service here, we do not mean to establish that under other circumstances we would be unable to reach a different conclusion where a similar estimate of United States-flag participation was made. The question of adequacy must be resolved on the basis of the particular facts in each case.

CONCLUSIONS

We therefore conclude:

1. The service already provided by vessels of United States registry on Trade Route No. 13, Service 1, is adequate, and additional vessels need not be operated thereon to accomplish the purposes and policies of the Act.

2. The provisions of section 605 (c) of the Act interpose a bar to the granting to applicant, Bloomfield Steamship Company, of an operating-differential subsidy contract covering the operation of cargo vessels on Trade Route No. 13, Service 1.

In all other respects, we adopt the findings and conclusions set forth in the earlier report of the Board in this case.

By the Board.

(Sgd.) A. J. WILLIAMS,
Secretary.

[3] In the Economic Cooperation Act of 1948, as amended (Act of April 3, 1948, c. 169, Title I, 62 Stat. 137, as amended by Act of April 19, 1949, c. 77, 63 Stat. 50), there is the express requirement that not less than 50 percent of selected cargoes move overseas in United States-flag vessels.

WILLIAMS, *Vice Chairman*, dissenting:

I adhere to the decision of the Board on June 30, 1953, for the reasons therein set forth. While Lykes' projection of 400,000 tons of liner-type cargo on the route is said to include privilege port cargo, *actual* carryings on the route of liner-type cargo *exclusive* of privilege port cargo ran, 1948, 781,000 tons; 1949, 812,000 tons; 1950, 592,000 tons; 1951, 614,000 tons, or an actual average, *exclusive* of privilege port cargo, for 1950 and 1951 of 603,000 tons. The actual average carryings for the latest two years available, *exclusive* of privilege port cargo, being 50 percent greater than Lykes' estimate, *inclusive* of such cargo, it is deemed that a fair estimate of Lykes' capacity can only be made (as the Board originally made it) by excluding Lykes' privilege port capacity.

FEDERAL MARITIME BOARD

No. 724

CONTRACT RATES—NORTH ATLANTIC CONTINENTAL FREIGHT CONFERENCE ET AL.[1]

Submitted September 21, 1953. Decided January 6, 1954

A differential of 10 percent between contract and noncontract rates proposed by North Atlantic Continental Freight Conference and its members for a dual-rate exclusive-patronage system on general cargo in liner service in the trade from United States North Atlantic ports to ports in Belgium, Holland, and Germany (excluding German Baltic ports) is, under the circumstances disclosed by the record of this case, not arbitrary or unreasonable or unjustly discriminatory and is not in violation of the Shipping Act, 1916.

Roscoe H. Hupper, *Burton H. White*, and *Elliott B. Nixon* for respondents.

John J. O'Connor, Sr., and *John J. O'Connor, Jr.*, for Isbrandtsen Company, Inc., *Edward Knuff* for Department of Justice, *Henry A. Cockrum* for Secretary of Agriculture, and *Stephen F. Dunn*, *C. D. Williams*, and *S. W. Earnshaw* for Secretary of Commerce, interveners.

Max E. Halpern and *Joseph A. Klausner* for the Board.

REPORT OF THE BOARD

BY THE BOARD:

This proceeding arises out of our order of investigation, dated September 19, 1952 (amended October 3, 1952), in which we proposed to determine whether the differential between contract and non-

---

[1] A/S J. Ludwig Mowinckels Rederi (Cosmopolitan Line), Black Diamond Steamship Corporation, Compagnie Generale, Transatlantique, Compagnie Maritime Belge, S. A. Compagnie Maritime Congolaise S. C. R. L. (Joint Service), The Cunard Steam-Ship Company Limited (Cunard White Star), Ellerman's Wilson Line, Ltd. (Wilson Line), Home Lines Inc. (Home Lines), (A. P. Moller-Maersk Line)—Joint Service of Dampskibsselskabet af 1912 A/S and A/S Dampskibsselskabet Svendborg, N. V. Nederlandsch-Amerikaansche Stoomvaart-Maatschappij "Holland-Amerika Lijn," South Atlantic Steamship Line, Inc., United States Lines Company (United States Lines), and Waterman Steamship Corporation.

At the present time, the conference also includes the Fjell Line—Joint Service of Atkieselkapet Lukesfjell, Atkieselkapet Dovrefjell, Atkieselkapet Falkefjell, Atkieselkapet Rudolf. This line was admitted to the Conference after institution of these proceedings.

contract rates of an exclusive-patronage contract and dual-rate system sought to be instituted by respondent ocean carriers in the eastbound North Atlantic trade is arbitrary and unreasonable, and the rates therefore unjustly discriminatory, in violation of the Shipping Act, 1916 (the Act). Isbrandtsen Company, Inc., the Department of Justice, the Secretary of Agriculture, and the Secretary of Commerce (Isbrandtsen, Justice, Agriculture, Commerce) intervened, and hearings were held in New York and Washington. The examiner has recommended that the proposed differential of 10 percent be found reasonable and not arbitrary, and, therefore, not unjustly discriminatory, and the interveners have excepted. We agree, in general, with the result recommended by the examiner.

The controversy between the respondents on the one hand and the interveners on the other hand began some 5 years ago and is reviewed in part in *Isbrandtsen Co.* v. *N. Atlantic Continental Frt. Conf. et al.*, 3 F. M. B. 235 (Docket 684). The background may be summarized as follows:

On October 1, 1948, respondents advised shippers in the trade that the carriers proposed to reinstate the exclusive-patronage contract and dual-rate system which had been in use in the trade prior to World War II. Isbrandtsen brought suit in the United States District Court for the Southern District of New York seeking an injunction and an order to set aside certain rulings of our predecessor, the United States Maritime Commission, which purported to authorize the dual-rate system. The District Court granted a temporary injunction to preserve the status quo and directed Isbrandtsen to file a complaint before us to challenge the validity of the system. This complaint was filed, and, after due proceedings, we issued our report in Docket 684 upholding the system and finding at p. 247:

> 3. The use of the dual rate system by the two conferences and their members is not unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or betwen exporters from the United States and their foreign competitors, and does not operate to the detriment of the commerce of the United States, and is not in violation of the Shipping Act, 1916, * * *.

Our order in Docket 684 was appealed to the District Court by Isbrandtsen, who urged that the dual-rate system was unlawful *per se* because in violation of section 14 (Third) of the Act. The court declined to find that the system could under no circumstances be valid, but granted a permanent injunction against the system on a point not argued before us, holding that the differential between the contract and noncontract rates offered to shippers had been arbitrarily deter-

mined and was therefore based on unreasoned conduct and so was unreasonable and unjustly discriminatory.[2]

In July 1952 we instituted a rule-making proceeding to provide machinery for securing information from conferences of ocean carriers as to the circumstances and justification for the use of dual rates and the basis for the amount of any differential between contract and noncontract rates to be charged. Before our rule-making proceeding had been completed and a rule promulgated,[3] respondents announced their intention to institute a new exclusive-patronage dual-rate system effective October 1, 1952.

Our order of investigation, issued as above stated on September 19, 1952, initiated these proceedings, and by our report filed September 29, 1952 (*Contract Rates—North Atlantic Cont'l Frt. Conf.*, 4 F. M. B. 98), we in effect directed the respondent carriers to defer the institution of the dual-rate system until the conclusion of these proceedings. Our order of September 19, 1952, as amended on October 3, 1952, outlined the scope of the investigation to embrace only the issue of "whether the differential in the rates of the proposed system is arbitrary and unreasonable and therefore unjustly discriminatory." The determination in each case of the kind here involved must depend on the special facts of such case and, accordingly, we set forth below our findings of material facts in this case.

FINDINGS OF FACT

1. Respondent North Atlantic Continental Freight Conference is a voluntary association of the 12 other named respondents who are bound together under Conference Agreement No. 4490, approved August 24, 1935, and subsequently modified by amendments, all approved pursuant to section 15 of the Act. This conference and its predecessors on the trade route have been in existence for about 100 years.

2. Intervener Isbrandtsen is a United States corporation owned by United States citizens, which operates owned United States-flag vessels on several United States trade routes and has operated a number of chartered vessels on various trade routes both under United States flag and foreign flags. In 1952 Isbrandtsen operated five United States-flag vessels on the trade route here under consideration. Isbrandtsen operates on this and other routes as a nonconference carrier and is not interested in joining the respondent conference.

[2] *Isbrandtsen* v. *United States*, 96 F. Supp. 883 (1951), affirmed by an equally divided Supreme Court *sub nom. A/S J. Ludwig Mowinckels Rederi et al.* v. *Isbrandtsen Co., Inc., et al.*, 342 U. S. 950 (1952).

[3] Our General Order 76 was issued November 10, 1952.

3. The conference agreement relates to general cargo in liner service in the trade from United States North Atlantic ports—Portland, Maine/Hampton Roads range—to ports in Belgium, Holland, and Germany (excluding German Baltic ports). The agreement provides that the members may establish by unanimous vote uniform rates, and expressly authorizes the dual-rate system with exclusive-patronage contracts with shippers. The agreement also provides for the admission to the conference of any other carriers who may provide a regular service in the trade covered by the conference agreement.

4. The new dual-rate contract proposed to be offered by the respondent lines to shippers is in general form similar to the prior contract of the same conference referred to in Docket 684, at page 238. The new contract provides that the contracting merchant will ship by vessels of the conference carriers all commodities which the merchant may ship during specific periods, excluding, however, bulk cargoes, household goods, explosives, hay, livestock, precious metals, or human remains. The carrier agrees that the rate to be paid by contracting shippers shall be 10 percent below the applicable conference rate existing when the contract is signed, with benefit to the shipper of any further reductions made by the conference. The contract is to run for an initial period not exceeding 3 months and continue in force for successive periods of 6 months unless either party gives 60 days' prior notice of termination. The carrier agrees not to increase the contract rates in any contract period unless it gives at least 75 days' notice before the expiration of the contract period, and if the conference and the merchant do not agree to such increase, by the end of the current contract period, the contract terminates. The carrier agrees to transport all commodities which the merchant tenders and agrees to maintain adequate service. The merchant agrees to make application for space as early as practicable before sailing dates, and if the conference carrier cannot reserve space within 3 days after the application, on a vessel sailing within 15 days of the desired time, the merchant is free to make other arrangements. The contract expressly provides:

These contract rates are deemed reasonable and made commercially possible in contemplation of savings expected by the Carriers from assurance of the Merchant's patronage.

Inasmuch as the Conference is open to all Carriers providing a regular service in the trade specified * * * any additional Carriers which shall become members of said Conference shall thereupon thereby automatically become parties to this Contract and the Merchant shall have thereupon the right to avail of their services under this contract.

5. Of the 12 conference lines in the trade, 5 are relatively active [4] and 7 carry less than 5 percent of the liner-type cargo.[5] Nonconference carriers operating in the trade number six, of whom three are relatively active [6] and three are not.[7] Only one of the nonconference lines, Isbrandtsen, has intervened in this case.

6. The amount of general export cargo in long tons carried by liner services on the route and the number of eastbound sailings on the route for the years 1948 to 1952 are set forth in the following table:

TABLE I—*General Cargo Liner Carryings and Sailings on the Route*

Year	1,000 tons	Conference	Nonconference	Total sailings	Conference sailings	Nonconference sailings
		Percent	*Percent*		*Percent*	*Percent*
1948	1,485	76	24	621	89	11
1949	----------	66	34	642	84	16
1950	1,812	57	43	613	80	20
1951	2,590	74	26	559	83	17
1952	[1] 990	[2] 66	[2] 34	[3] 688	[3] 79	[3] 21

[1] January–June 1952 only.
[2] Percentage figures based on 9 months' statistics for conference lines and 11 months for nonconference lines.
[3] Estimated for full year, based on statistics mentioned in footnote 2.

From the foregoing table and other evidence in the case, we find that the total general cargo carryings by liner services on the route increased between 1948 and 1951 and dropped off in 1952. The percentage of conference participation dropped from 76 percent in 1948 to an estimated 66 percent in 1952, and conversely, nonconference participation increased by a corresponding percentage. The conference sailings showed a percentage decrease during the period. In each year the nonconference percentage of sailings was less than the nonconference percentage of cargo carried.

7. Forecasts made by the Acting Director of the International Economic Analysis Division of the Office of International Trade, Department of Commerce, who presented an economic summary of Europe for the past several years, indicated that during 1952 American exports to Europe would, if anything, probably increase to a small extent; that the European countries would be in a better dollar position; and that some of the fiscal and other restrictions on imports in Europe probably would be eased; that the volume of military cargo would remain about the same or increase; that the offshore military procurement program of the United States, whereby this country buys for dollars products

[4] Black Diamond, U. S. Lines, Waterman, Belgian Line, Holland-America.
[5] Maersk, Home Line, Cosmopolitan, French Line, Cunard, Ellerman's Wilson
[6] Meyer Line, Hamburg American, and North German Lloyd carried, on liner service, approximately 90 percent of the total cargo carried on liner services by the independents.
[7] States Marine, Isbrandtsen, U. S. Navigation.

688-650 O - 63 - 26

of foreign factories, would place more dollars in the hands of the European countries, especially Belgium; and that economic aid to Europe would probably not decline to any great extent. The witness pointed out that Germany, Belgium, and the Netherlands were probably in better fiscal condition than any other country.

8. Nonconference rates are in general around 10 percent lower than conference rates. On most important commodities moving in the trade, one nonconference line's rates were between 7.5 percent and 15.1 percent below conference rates, and on 225 out of about 1,500 commodities these rates were almost exactly 10 percent below conference rates and on 1,464 rate listings were 9.88 percent below conference rates.

9. After the issuance of our order of September 29, 1952, above referred to, barring dual rates by the conference, the conference made effective on October 1, 1952, a single schedule of rates 10 percent below its rates previously in effect, thus giving to all shippers the lower contract rate proposed under the dual-rate system.

10. The rates of nonconference carriers in the trade are generally lower than conference rates, usually by about 10 percent. When the conference lowered its rates on October 1, 1952, the nonconference carriers followed with reductions to place their rates at a level generally about 10 percent below the new conference rates.

11. The nonconference carriers, in order to secure business, pay brokers double the brokerage fees paid by the conference carriers.

12. The conference is open for membership, in accordance with article 9 of the conference agreement, to any common carrier "who has been regularly engaged as such common carrier in the trade covered by this Agreement or who furnishes evidence of ability and intention in good faith to institute and maintain a regular service * * *" None of the nonconference carriers in the trade has applied for membership in the conference. New members of the conference would be entitled to all privileges of existing conference members, including the benefit of article 2 of the proposed shipper contract that "The Merchant agrees to ship by vessels of the Conference Carriers with equitable division of shipments among them * * *"

13. Nonconference carriers have operated in this trade in the past, and intervener Isbrandtsen or its predecessor in interest was in the trade as a nonconference operator prior to World War II, at which time the conference maintained the exclusive-patronage dual-rate system covering a substantial number of commodities and involving a differential of approximately 20 percent. At such time prior to World War II, nonconference operators carried commodities covered by the conference dual rates.

14. Before the conference announced its intention to institute the proposed dual-rate system with a 10 percent differential, a special committee of representatives of conference members was appointed, including representatives of 4 out of the 5 active lines, to consider the form of dual-rate contract and the amount of differential between contract and noncontract rates. This committee held 15 meetings (sometimes in conjunction with representatives of every member of the conference) on April 25, May 8, 19, 21, and 27, June 9, 13, and 26, July 8, 9, 17, and 18, and August 6, 11, and 26, 1952. The minutes of the meetings of this committee, which resulted in the adoption of the form of contract and the determination of a 10 percent differential between contract and noncontract rates, were placed in the record. The more important deliberations and determinations made by the committee include:

(a) On April 25, 1952, the committee agreed:

That, the fundamental purposes of conference are:
To promote and develop American foreign commerce.
To stabilize rates and competitive practices so as to provide and encourage regular and dependable sailings and services.
To maintain harmony among the regular established Lines.
That, the objective of Conference is to prevent self destruction among the regular established Carriers by adoption of uniform stabilized rates * * *.
That, the regular established steamship Lines * * * develop a policy of self regulation for the industry which, from time to time, may be threatened with self destruction by rate wars, uncontrolled competition and/or competitive methods or practices. * * *.
That, Conference is open to all carriers to join and any new member automatically becomes a party to all contracts.

The general feeling of the committee was recorded that any new merchant's rate agreement be clear-cut, concise, and should employ sound rate-making principles.

The minutes of May 8, 1952, set forth that the contract form formerly used by the conference [8] should be revised and improved, and that the contract rates should reflect reasonable and lawful concessions from the conference noncontract rates as established from time to time, and that the lower rates and also the differentials between rates should be fair and reasonable, nonretaliatory and noncoercive, and not unfair or unjustly discriminatory, and should in all other respects conform to the provisions of the Act. These minutes show that it was agreed that the contract-rate practice and the agreements thereunder should take into consideration all relevant factors, including without limitation the advantage both to carriers and shippers of such contracts and dual-rate system for the benefit of a stabilizing effect upon rates, in contrast with the detriments to trade and commerce produced by widespread destruction or irresponsible rate cutting.

[8] Referred to in Docket 684

The minutes disclosed that nonconference operators in the trade have customarily carried general cargo at rates 10 percent below the existing conference tariff rates, and that it was agreed that if nonconference lines could attract cargo from conference lines at a level 10 percent below conference rates, the conference might be able to regain this cargo by the same measure of reduction; also that it was thought that a contract reduction of more than 10 percent would be unwarranted in view of mounting costs, and that a lesser reduction might not interest merchants, and that a 10-percent discount would undoubtedly result in increased shipments and would offset reduced earnings.

The minutes of May 19, 1952, disclose consideration of conference rates and the rates of two nonconference carriers, Isbrandtsen and Meyer, on a list of 26 representative commodities in the trade. Except for 1 item (cotton seed pulp), the discount of Isbrandtsen ran from 7.5 percent to 15.1 percent under conference rates, and in 19 of the 26 items the discount was between 9 percent and 11 percent. Similarly, the rates of Meyer, except for the item of cotton seed pulp, showed a discount from 9.1 percent to 12.5 percent under conference rates, and 22 of the 26 items showed a discount of between 9 percent and 10.3 percent. These minutes recorded the following:

It was thought that while it would be difficult, if not impossible, to estimate with any degree of accuracy the benefit resulting to the carriers from a contract with any individual shipper, there are definite and clear benefits to the conference carriers resulting from the collective assurance of the continued and exclusive patronage of a wide range of shippers interested in the transportation of many commodities.

The employment of some well-known economist was suggested to advise on the differential discount, but it was decided that the survey of this feature could more properly be conducted, in the first instance at least, by the member lines collectively, based on their experience and judgment.

It was pointed out that exclusive patronage of shippers gave the carriers better assurance of cargoes and the prospect of better distribution of cargoes throughout bad times as well as good, providing some insurance against loss. The committee agreed that "the dollar benefit or the amount of the per unit cost reduction is for many obvious reasons difficult of precise determination, but it was the best judgment of those present, based on their past experience, that the saving could be safely calculated to amount to at least 10 percent, which could be passed on to shippers by way of discount from the basic rates."

Minutes of May 20, 1952: With regard to the differential discount, it was pointed out that precise standards, such as railroad fares and

charges, public utilities rates, etc., where the rate levels are related to matters of investments, valuation, reasonable return, etc., are not controlling in ocean transportation.

Minutes of May 27, 1952: It was agreed that certain items of cargoes should be eliminated from the dual-rate contracts.

Minutes of June 13, 1952: The details regarding the form of the dual-rate contract were discussed. Virtual agreement was reached that the differential or exclusive-patronage agreement should be 10 percent.

Minutes of July 18, 1952: The committee considered the desirability of employment of experienced and competent economists to review the committee's record of the factors substantiating the proposed differential for the exclusive-patronage contract.

Minutes of August 6, 1952: The committee determined to invite Professors Rosenthal, Trumbower, and Henry for consultation regarding differential discount spread.

Minutes of August 11, 1952: The committee met with Professors Trumbower and Henry. Professor Trumbower expressed the belief that it was impossible to arrive at a mathematical formula for the discount; that there would be benefits to both merchants and carriers under a dual-rate contract; that such a contract induces rate stability and carriers would have more assurance of better loads, a factor more important to ocean shipping than to railroads where freight cars can be added or taken off. Professor Trumbower stated the discount should be somewhere between 10 percent and 20 percent, and that 10 percent would be a good inducement to merchants for contracts.

Professor Henry stated that the differential must be something that would attract business, but not unreasonably high. He indicated that a differential of 12 percent to 12½ percent should survive objections.

It was pointed out that the principal nonconference lines quoted rates 10 percent less than the conference established rates to induce merchants to ship by nonconference lines, and that, accordingly, a 10 percent differential in the proposed exclusive-patronage contract should recoup some of the business lost by the undercutting of nonconference lines.

15. The chairman of the conference as well as representatives of a number of the conference lines, including members of the special committee, testified at the proceeding, including Mr. C. R. Andrews, conference chairman, Mr. T. C. Hopkins of the Cosmopolitan Line, Mr. Ib Alvin of the Maersk Line, Mr. C. E. Kenick of the Cunard Line, Mr. P. E. McIntyre of the United States Lines, and Mr. W. B.

Garner of Waterman Steamship Corp. In addition to the expressions recorded in the committee meetings, one or more of the conference witnesses testified that in their opinion:

A 10-percent differential left a reasonable choice with the merchant as to whether he would or would not sign a contract.

A 10-percent differential was small enough to avoid disastrous losses and would recoup business lost to nonconference lines.

That since the nonconference lines had obtained a considerable volume of business by quoting rates 10 percent under conference rates, a similar differential would regain at least some part of this business, provided there was a contract with the shipper.

That additional cargo would be drawn to the conference lines by exclusive-patronage contracts which would make up loss of revenue due to the 10-percent differential.

16. Mr. W. B. Garner of Waterman, which is one of the five active lines in the trade, stated that, in his judgment, volume, value, care in handling, and risk were relevant in establishing basic rates, but not factors to be considered in establishing a differential. Mr. Garner pointed out that the sole purpose of a conference is to stabilize rates, and he felt that a shipper's agreement to patronize only the conference vesseles was worth at least 10 percent to the conference lines, and that a lesser figure was not much of an inducement to the shipper to help in rate stabilization. Mr. Garner felt that the 10-percent differential was reasonable because about as little, based on common fair business judgment, as the conference could offer to the shipper to induce him to sign the contract.

17. The two experts consulted by the conference, Mr. Henry Trumbower, retired professor of transportation at the University of Wisconsin and at one time chairman of the Wisconsin Public Utilities Commission, and Mr. Morris Rosenthal, a professor and lecturer on transportation at Columbia University and the president of a large United States importing company, also testified. Mr. Trumbower, although not basing his opinion on statistics or data, stated that on general principles applicable to ascertaining reasonableness, the 10-percent differential as proposed by the conference was reasonable. He said the standards of reasonableness which he applied were based on the effect of the differential upon the carriers' earnings in business and the extent to which the shippers would benefit by signing the contract. In his judgment the problem was whether the differential imposed any undue burden on interests of both shipper and carrier. The differential, in his judgment, must be enough to attract business. On the other hand, it should not be so great as to be a weapon against shippers who refuse to sign. Mr. Rosenthal, relying

upon his business judgment and without statistical data, testified that in his opinion a reasonable spread for the route under discussion would be from 10 to 15 percent. He said that in approaching the problem he sought to find a fair base for shippers which would make shippers feel warranted in signing an exclusive patronage contract and not breaking it. Mr. Rosenthal had experience with many conferences serving different parts of the world, and those with dual-rate systems have differentials in effect ranging between 10 and 20 percent. He felt that the concept of the differential was a matter of business judgment as to what was practical and fair.

18. The various witnesses for the conference agreed generally that the purpose of the dual-rate system was to promote stability of ocean rates and prevent rate-cutting practices, and, if established, would do so.

19. We find from the evidence that the conference determined that dual rates should be adopted generally to promote stability of rates, and that the determination of the differential in this case was made after considerable deliberation and with expert advice, and the 10-percent differential was selected by the conference, based on the business judgment of its members, as being (1) no larger than was necessary to induce shippers to sign and abide by contracts for stabilized rates; (2) not so great as to be coercive to shippers to prevent them from patronizing nonconference lines if they so desired, in view of the general practice of nonconference carriers to set rates at approximately 10 percent below lowest conference rates; and (3) not so great as to cause loss of revenue to conference carriers which would be crippling to their business operations.

20. Witnesses for nonconformance lines explained that their rates are usually lower than conference rates and that their rates are set on a basis to earn a profit and get the business. A number of these witnesses stated that the amount of reduction of their respective nonconference rates below conference levels depended on good judgment and a number agreed that the nonconference rates of their lines were about 10 percent lower than conference rates. Isbrandtsen produced two shipper witnesses who were exporters of petroleum products from Philadelphia. They were familiar with the dual-rate system, and both said that the 10-percent differential proposed by the conference was unjustly discriminatory to shippers. One of these witnesses stated further that he was against any differential and felt that the entire conference system was discriminatory. He agreed that the guarantee of a stable rate over a 6-month period was useful to shippers and that the 6-month period was a reasonable period of time. The other shipper, exporting approximately 150 tons a month, stated that there were

about three conference vessels to each nonconference vessel on the route calling at Philadelphia, and that he could so arrange his shipments to ship 75 percent or possibly all his shipments on nonconference vessels, and with nonconference rates 10 percent below prospective contract rates and 20 percent below prospective noncontract rates, he would not sign a conference contract but would hold himself free to use nonconference ships.

POSITIONS OF THE PARTIES

Interveners Justice and Agriculture take the position that the differential here involved is discriminatory because all dual-rate systems are discriminatory and retaliatory and therefore unlawful *per se* in violation of section 14 (Third) of the Act. Furthermore, Justice urges that the Board is without power to approve the proposed dual-rate system since the system is in violation of the Act, as aforesaid, and the Board's statutory power to approve agreements under section 15 of the Act is limited to such agreements as are not violative of the statute. Both of these interveners urge that the proposed contract system should be disapproved by the Board on these grounds. Commerce intervened generally.

Intervener Isbrandtsen does not attack the respondent conference as such. It argues that the differential proposed by the conference is unreasonable, arbitrary, and unjustly discriminatory for a number of reasons which may be summarized as follows:

(a) Because the dual-rate system of which the differential is a part violates section 14 (Third) of the Act and constitutes retaliation;

(b) Because there is no difference in the service performed for the contract shipper and noncontract shipper, and no transportation justification for the differential;

(c) Because the differential was not adopted by reference to any adequately determined principle or standard;

(d) Because the differential and the exclusive-patronage contract of which it is a part is coercive against shippers;

(e) Because the differential and the exclusive patronage contract of which it is a part is intended to and would be effective to put the nonconference carriers out of business and create a monopoly for the conference carriers.

Counsel for respondents urges that the differential has been determined, after careful deliberation and study by men of experience in the field of shipping, at a figure carefully calculated not to be coercive or punitive upon shippers nor confiscatory to carriers, yet suf-

ficiently large to meet nonconference competition, to induce shippers to enter into and keep agreements permitting the carriers to maintain stability of the rate system, and is, therefore, not unjustly discriminatory or otherwise unlawful.

Counsel for the Board takes the position that a differential may be justified if there is a difference in the cost of the respective services or their values or may be justified by some other transportation condition, but urges that the examiner's report fails to find any such justification or to indicate his inability to do so. He argues, therefore, that the case should be remanded to the examiner for further study and report.

DISCUSSION

Respondents have in the recent past charged uniform rates. The nonconference lines have quoted rates lower than the conference, and in the 5-year period 1948 to 1952, inclusive, have increased their percentage of export carryings on the route from 24 percent to 34 percent at the expense of the conference. The conference lines appear to be facing continuing diminution of cargoes and, in our judgment, the possibility of the withdrawal of members from conference membership to engage in a battle for survival. Stable and dependable rates, regular sailings, and the possibility of "forward trading" by merchants is jeopardized, but during the period mentioned there have not been violent and frequent rate changes typical of an all-out competitive struggle for existence. The nonconference lines suggest that the dual-rate system is not necessary to insure stability of rates or service to the public, claiming that they themselves, without such system, maintain uniform and stable rates and service. Such stability no doubt exists as long as the conference lines allow themselves to be underquoted and refrain from taking active competitive steps, but the threat of rate disorganization cannot be overlooked.

Congress well understood the problem here presented when the Act was passed. As we pointed out in Docket 684, at p. 237:

> . . . Congress, as is well known, has chosen to approve a policy of regulated monopoly rather than cutthroat competition. Section 15 of the Act recognized carrier agreements
>
> "fixing or regulating transportation rates . . . ; controlling, regulating, preventing, or destroying competition;" . . .;

and at p. 238:

> . . . The reasons which led to the adoption of this congressional policy are set forth in full in the Alexander Committee Report, H. R. Doc. 805, 63d Cong., 2d Sess., which was issued prior to the Shipping Act, 1916, and on which the latter was largely patterned. The Committee recognized that conditions of ocean transportation were such as to permit recurrent rate wars, which disorganized

service, impaired its quality, permitted discrimination against small shippers, discouraged "forward trading" by merchants, and ultimately resulted in monopoly through the process of extermination or absorption of the weaker units by the stronger (Report 295–303; 416), and stated, p. 416;

"It is the view of the Committee that open competition can not be assured for any length of time by ordering existing agreements terminated,"

and further observed, p. 298:

> the conference system largely results in placing rates outside the influence of competition.

Congress thus by section 15 of the Act authorized ocean carriers to combine their efforts and regulate their rates, and the carriers were given exemption from the penalties of the antitrust laws if their agreements met with our approval. The control thus given to us over conference carriers in foreign trade is an extension of a well understood domestic transportation policy, which, through the laws passed over the years since the original Interstate Commerce Act of 1887, has replaced cutthroat competition with regulation, securing stability of rates and dependability of service. By the Transportation Act of 1920, the Interstate Commerce Commission was given authority to establish minimum as well as maximum rates in domestic commerce in order to prevent rate fluctuation and competitive practice which was not deemed beneficial to the shipping public. Representative Esch, speaking before the House Committee of the Whole, stated (58 Cong. Rec. 8309):

> You know the story—you can read it upon every mile of every inland waterway of the United States—how the water carrier started, and the rail carrier paralleled the river bank and made a rate so low that the water carrier had to abandon its line and its route, and after such abandonment the rail carrier raised the rate and the public was no better off and was, in fact, worse off than before.

In foreign as in domestic commerce agreements between carriers resulting in elimination of competition are not permitted without government regulation. We have, as is well known, complete power to approve and disapprove new or existing conference agreements so that we may see to it that these agreements and the conference actions from time to time taken under them are not unjustly discriminatory or unfair and do not operate to the detriment of the commerce of the United States or violate the law.[9] The inquiry in this case as to whether the proposed conference differential is arbitrary or unreason-

---

[9] See our report in this case dated September 29, 1952 (referred to supra, p. 357). Also *Contract Routing Restrictions*, 2 U. S. M. C. 220, at 227. Also order of October 7, 1953, in *Docket No. 743, Trans-Pacific Freight Conference of Japan*.

able and therefore unjustly discriminatory was undertaken pursuant to this regulatory authority.

We first take up the arguments of Justice and Agriculture and the corresponding argument of Isbrandtsen that the system violates section 14 (Third) of the Act, and that therefore both the system and the differential are unjustly discriminatory. This argument raises issues outside the scope of this investigation, instituted, as above stated, to determine only whether the *differential* is arbitrary and unreasonable and therefore unjustly discriminatory. The issues in this investigation may not be broadened to include the issues raised by Justice and Agriculture, and the section 14 (Third) issue raised by Isbrandtsen. Interested parties are entitled to raise these issues by appropriate plenary proceedings, and, as the parties know, a plenary proceeding is now pending before us, known as Docket No. 725, *The Secretary of Agriculture of the United States* v. *North Atlantic Continental Freight Conference et al.*

We next take up the argument of Board counsel that there is no difference in cost or value of the service rendered, or in any transportation or traffic condition which will prevent the differential here proposed from being unjustly discriminatory. It is suggested that some statistical forecast should be made to determine the transportation effect which the differential would have upon the carryings of the respective carriers, and to indicate among other things whether the conference carriers' loss of revenue from a contract rate would be offset by sufficient additional business to make up the difference. We do not think dependable forecasts can be made in this area, and even if attempted, would throw little additional light on the over-all effect of the differential upon the commerce of the United States as a whole, including the small as well as the large shippers and the nonconference as well as the conference carriers. And for reasons indicated in earlier reports, the regulative agency cannot well postpone a decision as to the validity of the differential until statistics are gathered after a trial period.

In any event we do not think that the answer to the problem, as suggested by Board counsel, lies in statistics. A guide to the principles which we must here follow with respect to the differential is to be found in the analysis of a dual-rate system made by the Supreme Court in *Swayne & Hoyt, Ltd.* v. *U. S.*, 300 U. S. 297. The court there pointed out that whether a discrimination in rates was in the last analysis undue or unreasonable was a matter peculiarly within the judgment of the administrative body charged with responsibility, saying that such body, after considering all the facts and circumstances

affecting the traffic, must determine whether the advantages will outweigh the disadvantages. And we understand that the court had in mind the advantages or disadvantages to the public economy as a whole and not to any separate element thereof. The court said, p. 304:

> Whether a discrimination in rates or services of a carrier is undue or unreasonable has always been regarded as peculiarly a question committed to the judgment of the administrative body, based upon an appreciation of all the facts and circumstances affecting the traffic.
>
> *　*　*　*　*　*　*
>
> In determining whether the present discrimination was undue or unreasonable the Secretary was called upon to ascertain whether its effect was to exclude other carriers from the traffic, and if so, whether, as appellants urge, it operated to secure stability of rates with consequent stability of service, and, so far as either effect was found to ensue, to weigh the disadvantages of the former against the advantages of the latter.

With such general guidance we approach the consideration of whether the differential proposed in this case is or is not unjustly discriminatory. We can start with the premise that under *some* circumstances, and with *some* percentage differential a dual-rate system may be valid. Such a possibility is implied in the opinion of the Supreme Court in *Swayne & Hoyt, Ltd.* v. *U. S.*, *supra.* Furthermore, our holding to that effect in Docket 684 was not set aside by the court in *Isbrandtsen* v. *United States*, *supra*, where the court said, p. 885:

> For the purpose of this decision we shall assume that, as the Board contends, in some circumstances, the Board may, pursuant to 46 U. S. C. 814, approve a conference agreement containing such a provision (i. e., dual-rate provisions).[10]

The issue is thus narrowed to whether the 10 percent differential is unjustly discriminatory.

To make the general rule outlined by the Supreme Court more specific, we believe that the validity of any differential proposed for a dual-rate system must, after consideration of all the facts, be judged in the light of the same considerations which section 15 of the Act

---

[10] See also footnote 3 to the opinion in *Swayne & Hoyt, Ltd.* v. *U. S.*, *supra.*

[3] The report of the House Committee on Merchant Marine & Fisheries, H. R. Doc. 805, 63d Cong., 2d Sess. (1914), recommended (p. 307) the prohibition of deferred rebates, adopted in section 14 of the Shipping Act, because it operated to tie shippers to a group of lines for successive periods, and because the system "is unnecessary to secure excellence and regularity of service, a considerable number of conferences being operated today without this feature." See, e. g., pp. 103–105, 200 The Committee recognized that the exclusive contract system does not necessarily tie up the shipper as completely as "deferred rebates," since it does not place him in "continual dependence" on the carrier by forcing his exclusive patronage for one contract period under threats of forfeit of differentials accumulated during a previous contract period. Accordingly, the Committee did not condemn the contract system completely. Cf. *W. T. Rawleigh Co.* v. *Stoomvaart*, 1 U. S. S. B. 285.

sets up for judging the validity of carrier agreements submitted to us for approval. By section 15, if a proposed agreement between carriers is unjustly discriminatory or unfair as betweeen carriers, shippers, etc., or if it operates to the detriment of the commerce of the United States, or if it is in violation of the Act, it may be disapproved; if it does not transgress these standards it may be approved. And while the differential of a dual-rate system may appear to be *prima facie* discriminatory, we believe that in a case such as this it will not be *unjustly* discriminatory unless it also violates the standards which section 15 of the Act establishes, that is, unless it is unfair as between carriers, or unfair as between shippers or the other groups mentioned in the Act, or unless it operates to the detriment of the commerce of the United States, or unless it is in violation of the Act.

We will therefore consider in detail the possible unfairness of the differential as between carriers (in this case between intervener Isbrandtsen and other nonconference carriers, on the one hand, and respondent conference carriers, on the other hand, including the charge of monopoly) and possible unfairness as between shippers, including exporters and importers (represented by those paying the low conference rate, on the one hand, and those denied the low conference rate, on the other hand, including the charge of coercion). There is no charge that the differential involves unfairness between ports or between exporters from the United States and their foreign competitors, or that the differential as such and apart from the system violates any provision of the Act. In the last analysis, the question of fairness or unfairness to carriers or shippers or to any other class of persons must be weighed in the light of all the circumstances and with a view to determining whether the differential proposed is beneficial or detrimental to the commerce of the United States and to our economy as a whole.

The minutes of the conference committee showed that the conference, in selecting the differential, had in mind the public interest as well as the business needs of the conference. The committee adopted certain guiding principles, including a statement that the differentials between the rates should be "fair and reasonable, nonretaliatory and noncoercive, and not unfair or unjustly discriminatory", and further, that the dual rate practice should take into consideration all relevant factors, including advantages both to carriers and shippers, in order to promote a stabilizing effect upon rates in contrast with the detriments to trade and commerce produced by destructive rate cutting.

Of course, the validity of the differential cannot depend upon the mere declarations of its proponents, and, accordingly, we pass from

the expressed motives of the conference to the arguments of the interveners that the differential is unfair as between shippers because coercive, and unfair as between carriers because monopolistic.

Regarding the charge of unfairness as between shippers, here called coercion, Isbrandtsen's counsel explained what he means by coercion, stating that the conference has more sailings than the nonconference competitors so that the big shippers have to go to the conference to get service, and so, according to the argument, the conference has "the whip hand over them, and that is the coercion we are talking about, and that proves our case."

When related to a dual-rate contract of the type here involved, however, effective for a period of not over 6 months, we do not think that a differential, generally comparable to the percentage by which substantial and effective nonconference competitors are under-quoting conference rates, amounts to coercion, or that such a differential is unjustly discriminatory or unfair between shippers.

Every competitive act which is an inducement to shippers is not necessarily a coercive measure against them. The Alexander Committee, already referred to, considered the pre-1916 carrier practices and outlawed deferred rebates as coercive because they kept the shippers continuously tied to the conference for successive periods of exclusive-patronage agreements. The inducement to a shipper becomes coercive upon him if it unduly forces his original choice, or places unreasonable restrictions upon his subsequent freedom to choose any carrier that he may later prefer. The nonconference offer of a rate 10 percent below the conference rate is an inducement to shippers and not a coercion, although it also may be compelling upon them, and shippers, or some of them, may have to arrange their shipment dates so that they can take advantage of such lower rates. Similarly, the conference rate with a 10-percent differential for 6 months of exclusive patronage is an inducement, but if the period is not too long or the differential not too high, it is an inducement only and not a coercion. The shipper thereafter is under no compulsion to enter into a conference agreement for a successive period, and at the end of the period for which he originally signs he is free to weigh the relative inducements of all competitors seeking his business.

Under the conditions disclosed by this record, the agreement proposed by the conference carriers not to increase rates for a period of 6 months is in the interest of the commerce of the United States for it promotes forward trading and is a stabilizing influence on rates and service. Even nonconference shippers agree that such a carrier un-

dertaking works to shippers' advantage and that the period is reasonable. If a 6 months' period under the conditions here described is a desirable restriction on the carrier's freedom of action, we believe that a corresponding restriction upon the shipper, binding him to give his exclusive patronage, does not hold him for too long a period, nor is it for that reason coercive. The length of the period during which the carrier may be able to guarantee against increased rates depends in a real sense upon assurance to the carrier that during that period he will receive some dependable volume of traffic.

In our judgment, the amount of the differential here proposed cannot under the conditions here described be said to be coercive so as unduly to force a shipper to contract or to tie the contracting shipper to the conference beyond the agreed 6 months' period, or to deprive him of complete freedom of choice. Conference witnesses have testified that a 10-percent differential is about as low as will be effective to attract shippers to their lines. It is to the carrier's advantage, of course, whether he be a conference or a nonconference carrier, to give as small an inducement as possible to attract shipper customers. In the trade here involved the nonconference carriers offer an inducement of a differential about 10 percent below conference rates, and this nonconference practice is perhaps some confirmation of the conference's contention as to what is commercially expedient. If the conference dual-rate percentage were far in excess of the nonconference competitive differential, we might well find it excessive, unnecessary, or unjustly discriminatory as having a tendency to force the shipper to an original contract or to tie him to the conference for successive periods. Where, as here, the shipper may, on the one hand, use nonconference as well as conference carriers and ship part of his exports at about 10 percent below and part at about 10 percent above the conference contract rate, or, on the other hand, use only the conference carriers and ship all his exports at the intermediate contract rate, he has a reasonable freedom of choice, and, in our judgment, is coerced neither for nor against making contracts with the conference.

Next, regarding alleged unfairness between carriers, Isbrandtsen's counsel argues that the differential is unjustly discriminatory because it is intended to and will have the effect of putting the nonconference carriers out of business and creating a monopoly. We think that the differential proposed by the conference cannot be said to be intended to drive competitors out of business. We believe that the primary intent of the proposers of the system and the differential is, as already stated by the conference committee, "to stabilize rates and competitive practices so as to provide and encourage regular and dependable

sailings and service." If the conference's intent had been to eliminate its nonconference competitors, it would hardly have included in its basic agreement a provision for the admission of nonconference members offering regular service in the trade, nor included in the proposed shipper agreement a provision that new lines joining the conference should automatically become parties to all existing conference shipper contracts. Nor do we think that the introduction of a dual-rate system with a 10-percent differential will have the effect of putting the nonconference carriers out of business. The nonconference lines over the past 5 years have in this trade shown every sign of health and vigor. They have not only attracted increasing cargoes by offering lower rates, as already pointed out, but also by offering to brokers double the fees paid by conference lines. As already stated, the proposed 10-percent differential is not so high in the circumstances of this case as to take away from the shipper a reasonable choice, and hence, in our judgment, not so high as to impair unreasonably the ability of the nonconference carriers to continue successfully in business. While our decision does not rest thereon, our views in this regard are perhaps supported by the fact that our records show that Isbrandtsen has for a number of years continued its operation on one or more other trade routes against conference lines where a dual-rate system is in force with a differential as great or greater than the 10 percent here involved.

In summary, we find that the differential proposed by the conference was adopted after due deliberation and consideration of relevant factors and cannot be said to have been determined arbitrarily or to be based on unreasoned conduct. If there are disadvantages to the 10-percent differential, we believe, as already indicated, there are also clear advantages tending to promote and strengthen the commerce of the United States, and, in our judgment, the advantages clearly outweigh the disadvantages.

CONCLUSION

The differential of 10 percent between contract and noncontract rates proposed by respondent conference for a dual-rate exclusive-patronage system is, under the circumstances disclosed by the record of this case, not arbitrary or unreasonable, nor unjustly discriminatory, and is not in violation of the Act.

Nothing in this report shall be deemed to relieve the respondent conference from full compliance with the provisions of General Order 76, referred to in footnote 3.

An order will be entered discontinuing the proceeding.

FEDERAL MARITIME BOARD

ORDER

At a Session of the FEDERAL MARITIME BOARD, held at its office in Washington, D. C., on the 6th day of January A. D. 1954

No. 724

CONTRACT RATES—NORTH ATLANTIC CONTINENTAL FREIGHT CONFERENCE ET AL.

This proceeding, instituted by the Board on its own motion by order of September 19, 1952 (amended October 3, 1952), having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Board, on the date hereof, having made and entered of record a report containing its conclusions and decision thereon, which report is hereby referred to and made a part hereof;

It is ordered, That this proceeding be, and it is hereby, discontinued.

By the Board.

(Sgd.) A. J. WILLIAMS,
Secretary.

688-650 O - 63 - 27

FEDERAL MARITIME BOARD

No. 737

GALVESTON CHAMBER OF COMMERCE, CITY OF GALVESTON, AND THE BOARD OF TRUSTEES OF GALVESTON WHARVES [1]

v.

SAGUENAY TERMINALS, LIMITED, ALUMINUM COMPANY OF CANADA, LIMITED, ALCOA STEAMSHIP COMPANY, INC., AND THE ALUMINUM COMPANY OF AMERICA [2]

Submitted January 5, 1954. Decided February 3, 1954

Respondent Saguenay Terminals, Limited, found not to be a common carrier in the operation of its vessels in the trades from British Guiana to United States Atlantic and Gulf ports, and therefore not subject to regulation under the Shipping Act, 1916, as to that operation.

E. H. Thornton and *F. G. Robinson* for complainants.

Thomas K. Roche for respondents Saguenay Terminals, Limited, and Aluminum Company of Canada, Limited, *R. D. Weeks* for respondent Alcoa Steamship Company, Inc., and *Thos. D. Jolly* and *William K. Unverzagt* for respondent Aluminum Company of America.

REPORT OF THE BOARD

BY THE BOARD:

This case arose on complaint that respondent Saguenay Terminals, Limited (Saguenay), is a common carrier by water; that Saguenay has contracted to carry bauxite ore from British Guiana to Galveston,

---

[1] The Galveston Chamber of Commerce is a Texas corporation devoted to the protection and welfare of its members, who are businessmen and firms of the city of Galveston. The city of Galveston is a municipality of the State of Texas and owns the Galveston Wharves. The Board of Trustees of Galveston Wharves controls and operates water front port facilities in the city of Galveston.

[2] Aluminum Company of Canada, Limited, Alcoa Steamship Company, Inc., and Aluminum Company of America, all denied that they had any interest in or relation to the facts complained of. No evidence was presented in support of any violation of the Shipping Act, 1916, by any of these respondents, and the complaint as to them will therefore be dismissed without further consideration.

Texas, Mobile, Alabama, and New York, N. Y., at rates that are (1) unduly prejudicial to the port of Galveston, in violation of section 16 of the Shipping Act, 1916 (the Act), and (2) unjustly discriminatory in violation of section 17 of the Act; and that the contract of carriage is unjustly discriminatory as between Mobile and New York on the one hand and the port of Galveston on the other, in contravention of section 15 of the Act.

The case has been conducted under Rule 11 of the Board's Rules of Practice and Procedure (18 F. R. 3716 *et seq.*), which provides that on consent of the parties a case may be presented on written memoranda of facts and argument. The examiner has issued a recommended decision recommending that the complaint be dismissed as to all respondents. Complainants have excepted to the recommended decision, and Saguenay has replied to the exception. No party has requested oral argument and none has been had. We agree with the examiner's conclusions.

The record shows that the facts on which the dispute arose are as follows:

1. On March 12, 1953, Saguenay executed a contract with the United States of America, represented by General Services Administration (GSA), under which it agreed to furnish to GSA ocean transportation for a large quantity of refractory grade bauxite from Mackenzie, British Guiana, to United States Atlantic and Gulf ports. The Government agreed to pay $6.95 per ton to New York, $7.45 per ton to Mobile, and $7.65 per ton to Galveston and other west Gulf of Mexico ports. The contract provides that Saguenay will accept cargoes varying from 4,000 to 10,000 long tons. It incorporates by reference all the essential terms and conditions of the Voyage Charter Party Form designated "WARSHIPVOY," revised August 15, 1944, and provides that Saguenay shall issue negotiable on-board bills of lading for each shipment, showing the appropriate government agency as consignee and shipper. The contract makes no reference to the ultimate destination of cargoes after unloading.

2. Saguenay owns 11 vessels and in August 1953 had 50 additional vessels under charter. All of these vessels are operated primarily under private contracts of carriage, and for the most part are engaged in the transportation of bauxite from British Guiana for aluminum smelters in eastern Canada and the United States.

3. Saguenay also operates as a common carrier and carries general cargo on the following services: (a) from eastern Canadian ports to West Indies and Caribbean basin ports; (b) from United Kingdom and European ports to West Indies and Caribbean basin ports; and (c) between eastern Canadian ports and west coast of North America

ports, touching at Caribbean basin ports. Saguenay carries no general cargo from Caribbean basin ports, including ports in British Guiana, to ports on the Atlantic or Gulf coasts of the United States.

4. Saguenay carries, out of the Caribbean, raw materials in bulk cargoes for its parent company, Aluminum Company of Canada, Limited, and associates, and sometimes for others. Saguenay neither advertises for nor solicits cargo out of the Caribbean. Vessels carrying general cargo into the Caribbean in services (a) and (b) above are always spotted to load bulk cargoes under private contracts going out of the Caribbean, and on such outward voyages do not act as carriers of general cargo.

5. In addition to bauxite, Saguenay occasionally carries out of the Caribbean some other cargoes such as sugar, molasses, and phosphate. These are bulk cargoes, one cargo usually filling a ship, and are always carried under private contracts arranged through brokers on the chartering markets.

POSITIONS OF THE PARTIES

Saguenay argues that it is not a common carrier in any of the trades mentioned in the complaint because it has not held itself out nor has it advertised itself as being ready and willing to carry cargoes for all, nor has it in fact carried cargoes except in bulk and on private contract, and that, therefore, it is not, insofar as the trades mentioned in the complaint are concerned, a common carrier subject to regulation under the Act.

Complainants argue that advertising for and soliciting cargo for the trades here involved are not essential factors in determining common carrier status, and that Saguenay is a common carrier on the trades here involved by virtue of its activities described in the findings of fact above set forth. The essence of complainants' argument is that (1) the term "common carrier" as used in the Act includes all ocean carriers except ferry boats and tramps, and (2) in the alternative, since Saguenay operates as a common carrier in some of its services, it is, therefore, a common carrier in the trades here involved.

DISCUSSION

We think it is clear that Saguenay is not a common carrier in the trades out of the Caribbean to the Atlantic and Gulf ports mentioned in the complaint. Ferry boats on regular routes and ocean tramps, referred to in section 1 of the Act, insofar as they might come within the common-law definition of common carriers, are excluded from those common carriers which are subject to regulation under the Act.

However, and subject to such exception, our power of regulation extends only to common carriers by water as the term is understood at common law. We said recently that

The term "common carrier" is not defined in the Act, but the legislative history indicates that the person to be regulated is the "common carrier" at common law. *Agreement No. 7620* 2 U. S. M. C. 749 at 752 (1945). In *The Wildenfels*, 161 Fed. 864 (C. C. A. 2d, 1908), the court said, p. 866:

> "According to all the authorities, the essential characteristics of the common carrier are that he holds himself out as such to the world; that he undertakes generally, and for all persons indifferently, to carry goods and deliver them, for hire; and that his public profession of his employment to be such that, if he refuse, without some just ground, to carry goods for any one, in the course of his employment and for a reasonable and customary price, he will be liable to an action." [3]

And the Supreme Court in *United States* v. *California*, 297 U. S. 175, 181 (1936), said

Whether a transportation agency is a common carrier depends not upon its corporate charter or declared purpose, but upon what it does.

Application of this standard to the facts of record leads inescapably to the conclusion that Saguenay's services in the trades here involved are not common-carrier services and are therefore not subject to regulation by us under the Act. *New York Marine Co.* v. *Buffalo Barge Towing Corp.*, 2 U. S. M. C. 216, 219 (1939).

The fact that Saguenay held out its vessels to carry general cargo for all persons indifferently on some routes, particularly those designated as (a), (b), and (c) in the foregoing findings of fact, does not mean that Saguenay does, or is required to, make a similar holding out of its other vessels in other trades in which they may be engaged, such as the trades mentioned in the complaint. The common-carrier status attaches to the carrier only for such trade or route as to which it holds itself out to carry for all persons indifferently. In *Transp. By Mendez & Co., Inc., Between U. S. and Puerto Rico*, 2 U. S. M. C. 717, 721 (1944), the Maritime Commission said:

A carrier may be both a common and a contract carrier, not, however, on one vessel on the same voyage.

CONCLUSION

We therefore conclude that respondent Saguenay, in the operation of its vessels in the trades from British Guiana to United States Atlantic and Gulf ports, is not a common carrier by water as that term is used in the Act, and its rates and agreements in such trades are therefore not subject to regulation by us.

An order will be entered dismissing the complaint.

[3] *Philip R. Consolo* v. *Grace Line Inc.*, 4 F. M. B. 293.

ORDER

At a Session of the FEDERAL MARITIME BOARD, held at its office in Washington, D. C., on the 3d day of February A. D. 1954

No. 737

GALVESTON CHAMBER OF COMMERCE, CITY OF GALVESTON, AND THE BOARD OF TRUSTEES OF GALVESTON WHARVES

v.

SAGUENAY TERMINALS, LIMITED, ALUMINUM COMPANY OF CANADA, LIMITED, ALCOA STEAMSHIP COMPANY, INC., AND THE ALUMINUM COMPANY OF AMERICA

This case being at issue upon complaint and answer on file, and having been duly submitted by the parties, and full consideration of the matters and things involved having been had, and the Board, on the date hereof, having made and entered of record a report stating its conclusions, decision, and findings thereon, which report is hereby referred to and made a part hereof;

It is ordered, That the complaint be, and it is hereby, dismissed.

By the Board.

Sgd. A. J. WILLIAMS,
Secretary.

MARITIME ADMINISTRATION

No. S-43

AMERICAN EXPORT LINES, INC.—APPLICATION FOR EXTENSION OF WAIVER UNDER SECTION 804 OF THE MERCHANT MARINE ACT, 1936, AS AMENDED (ITALIAN LINE)

Submitted January 27, 1954. Decided February 15, 1954

Neither special circumstances nor good cause shown to justify waiver of provisions of section 804, Merchant Marine Act, 1936, as amended, to permit American Export Lines, Inc., to act as agent in this country for passenger combination vessels of Italia, Società per Azioni di Navigazione con Sede in Genova.

Gerald B. Brophy and *Carl S. Rowe* for applicant.

John J. O'Connor and *John J. O'Connor, Jr.*, for Isbrandtsen Co., Inc.

Allen C. Dawson and *William D. Mitchell* for the Maritime Administration.

REPORT OF THE MARITIME ADMINISTRATOR

American Export Lines, Inc. (Export), a subsidized operator of combination and cargo vessels on United States Trade Routes Nos. 10 and 18 to and through the Mediterranean, has applied to me to extend until December 31, 1956, a previously granted waiver of the provisions of section 804 of the Merchant Marine Act, 1936, as amended (the Act). Unless so extended, the waiver will expire March 1, 1954.

The waiver sought to be extended is for Export to act as general agent in the United States and Canada for all matters, except brokerage and the solicitation of freight, for the passenger combination vessels operated by Italia, Società per Azioni di Navigazione con Sede in Genova (Italia). Italia is a citizen of Italy and operates Italian-flag passenger combination vessels between Mediterranean ports and North American Atlantic ports.

Isbrandtsen Co., Inc. (Isbrandtsen), a United States citizen which operates steamships under the American and other flags on the route

between United States North Atlantic ports and Mediterranean ports and on other routes throughout the world, has intervened against the application.

Section 804 of the Act provides that

It shall be unlawful for any contractor receiving an operating-differential subsidy under the title VI * * * of this Act * * * directly or indirectly to own, charter, act as agent or broker for, or operate any foreign-flag vessel which competes with any American-flag service determined by the Commission to be essential as provided in section 211 of this Act: *Provided, however,* That under special circumstances and for good cause shown the Commission may, in its discretion, waive the provisions of this section as to any contractor, for a specific period of time * * *.[1]

In order to insure a complete record a public hearing was ordered before an examiner of the Federal Maritime Board. Counsel for Export, Isbrandtsen, and the Maritime Administration appeared at such hearing. The examiner has issued a recommended decision recommending that the waiver be extended. Oral argument has been presented, briefs have been filed by all counsel on the issues involved, and the matter has been duly considered.[2] I disagree with the conclusion of the examiner.

The significant facts in the case are as follows:

1. Export has been the general agent for Italia's passenger combination vessels for North America for all matters except solicitation of freight since World War II, pursuant to permission granted from time to time under section 804 waivers given by the Maritime Administrator or the United States Maritime Commission. Export operates the two large passenger combination vessels *Independence* and *Constitution* and four small passenger combination vessels on Trade Route No. 10, under the terms of operating-differential subsidy contract FMB–1. In addition, Export operates a number of cargo vessels on Trade Routes Nos. 10 and 18 under the same contract, as well as a number of unsubsidized cargo vessels on various routes.

2. Italia is a wholly owned subsidiary of Finmare, an Italian company which has interests in a number of Italian ship-operating cor-

[1] By the terms of Reorganization Plan No. 21 of 1950, the Secretary of Commerce succeeded to certain functions of the United States Maritime Commission, including *inter alia,* "the making of all determinations and the taking of all action (other than amending or terminating any subsidy contract), subsequent to entering into any subsidy contract, which are involved in administering such contract * * *." The Secretary of Commerce has authorized the Maritime Administrator to perform such functions by Department of Commerce Department Order No. 117 (Amended).

[2] The two other members of the Federal Maritime Board also considered the examiner's recommended decision and the briefs of counsel and heard the oral argument with me, and, although they have not participated officially as Board members in my decision herein, I am authorized to state that they, as Special Assistants to the Maritime Administrator, fully concur in the result I have reached.

porations. Finmare is substantially financed by an agency of the Government of Italy. Italia operates four passenger combination vessels on liner service between the Mediterranean and United States and Canadian ports, including the new *Andrea Doria* and the well-known *Saturnia*, *Vulcania*, and *Conte Biancamano*. It is for these vessels that Export now acts as general agent.

3. In July of 1949, Export and Italia entered into a reciprocal agency agreement whereby Export was to act as general agent in North America for the passenger combination vessels of Italia, and Italia was to act for Export in certain matters in Italy. This agreement was split into two parts, one relating to Export's agency for Italia requiring a waiver under section 804, and the other relating to Italia's agency for Export requiring no such waiver.

4. The latest effective agreement, covering Export's agency for Italia (requiring the waiver) and authorized by waiver of March 31, 1952, and previous waivers, provides that its purpose is to promote and cultivate transatlantic travel, that Export is to act as general agent for Italia in North America with respect to Italia's passenger vessels, that Export's responsibility is limited to the responsibilities usually attached to the services of general agents, that Export is to receive a per diem fee for days Italia vessels are in North American ports, that Italia is to share the use of pier 84 in New York with Export, that Export is to be compensated for expenses incurred with respect to each voyage of Italia's vessels, that Export's remuneration is to be calculated on the gross eastbound and westbound passenger revenues of Italia which are collected in North America, and that Export's remuneration for freight on Italia's passenger combination vessels is to be 5 percent of gross eastbound freight revenue.

5. The 1952 waiver mentioned above provided that Export might act for Italia in the manner set forth in the agreement just described. The waiver further provided that Export might not engage in brokerage of any kind nor in the solicitation of cargo, that the compensation received by Export for the performance of agency services should be accounted for in determining recapture by the Government under Export's subsidy agreement, that Export should file with the Maritime Administration quarterly reports showing in detail the financial transactions of the agency agreement, that Export might not change the character of the services rendered pursuant to the waiver, that the Maritime Administrator on his own motion might modify and on 90 days' notice cancel the waiver, and that the conditions of use by Italia's vessels of Export's pier in New York should be subject to the approval of the Administrator.

6. The latest effective counter agreement covering Italia's agency for Export provides that Export may use Italia's authorized emigration representatives in Italy to procure and process passengers for the two large passenger ships of Export's fleet, the *Independence* and the *Constitution*, that Export, in general, is to use Italia's representatives in Italy as its agents, but may use its own appointed representatives where it chooses to do so, that with respect to Export representation in Europe outside Italy, Export may use Italia's representatives or may choose its own, that Export and Italia are to coordinate sailings and passenger fares to the "fullest possible extent," that Export and Italia "will develop a common general advertising and publicity plan in North America and Europe but in a manner to conserve the identity of each company."

7. Export and Italia now propose to modify the presently effective agreements described above in certain respects, principally in respect of the compensation to be paid by Italia to Export, and to provide for exclusive representation of Export by Italia in Italy.

8. It appears that Italia's emigration agent organization is the best such organization in Italy, and that it has been and will continue to be to Export's advantage to have Italia's agents soliciting and processing Italian emigrants for Export vessels. To transport emigrants from Italy, a carrier must be represented in Italian villages by Government-licensed agents. Italia has some 1800 such agents in Italy, of which Export uses about 1100. These agents produced for Export: in 1951, 1,332 westbound passengers; in 1952, 2,168; in the first 6 months of 1953, 939. These carryings represent approximately 7 percent of Export's westbound carryings for the years involved. Revenue from passengers produced by Italia's emigration agents in 1952 amounted to a little over 4 percent of Export's estimated gross revenues from operation of the *Independence* and *Constitution*.

Witnesses for both Italia and Export testified that if Export were forced to establish its own emigration agent organization in Italy its emigrant traffic business would decrease sharply.

Witnesses for Export further testified that Export secures some passengers, both eastbound and westbound, because of the association of its name with that of Italia. This is ascribed to the fact that while Italian nationals, as well as Americans of Italian descent, are intensely loyal to Italian-flag vessels, Export, because of its association with Italia, has become acceptable to such persons as a means of travel between Italy and the United States.

9. Italia has acted as agent for Export in Bologna, Florence, Milan, and Turin, in Italy, and in Paris, Vienna, and Zurich. In 1952 and

the first 6 months of 1953, these offices produced respectively, $654,011 and $303,210 in passenger revenue for Export.

10. Italia and Export share the use of pier 84 in New York, and Italia contributes to the expense of renting and operating the pier. In 1952 Italia contributed approximately 25 percent of the costs of operating the pier, and during that year berthed 25 vessels to Export's 29 and carried about 40,000 passengers over the pier as against Export's 44,664.

11. Export's witnesses testified that Export purchases voyage stores for Italia's vessels in New York and, by combining orders for such purchases with its own requirements, is able to secure volume discounts on its own purchases as well as on the purchases made for Italia. The amount of Export's savings on this account were not shown.

12. Both Export and Italia advertise separately in this country, and they also do a relatively small amount of joint advertising. Export handles all advertising for both companies and claims to be able to get reduced lineage rates on all such advertising, but the saving to Export does not appear in the record.

13. Export's net profit (before Federal taxes) for acting as Italia's agent was in 1952, $354,000, and for the first 9 months of 1953, $682,568.

14. Prior to World War II, ocean passenger travel from United States North Atlantic ports to the Mediterranean amounted to approximately 12 percent of total passenger travel from such ports to Europe and the United Kingdom. In 1952, the percentage was 16.4, and for the first 10 months of 1953, it was 17.6. The record does not disclose what the percentages were between 1946 and 1952. The first full year of operation for the *Independence* and *Constitution* was 1952.

15. In the performance of its agency duties for Italia in New York, Export comes in contact with the pursers, masters, and other officials aboard Italia vessels and obtains from them comments of passengers on the service rendered by Italia, thereby obtaining information which Export claims enables it to improve its own efficiency in serving its own passengers.

16. The record does not reveal whether any American-flag carrier has been deprived of a substantial amount of passenger traffic by Export's activities as agent for Italia.[3] Isbrandtsen showed that its ships have accommodations for 12 passengers each, that in a normal year

[3] American President Lines, Ltd., Prudential Steamship Corporation, T. J. Stevenson & Co., Inc., Isthmian Steamship Co., Levant Line, and States Marine Lines, in addition to Isbrandtsen, compete to some extent with Export and Italia, but the nature and extent of such competition is not of record herein.

its total passenger capacity on the route is 312 passengers, and that in 1952 Isbrandsten ships carried 33 passengers to Genoa. However, Isbrandtsen has not been able to provide figures on the total number of passengers lifted by its ships from United States ports in that year for all ports between New York and Genoa, and it further appears that Isbrandtsen's passenger capacity is fully booked now for several months in the future. It was conceded by Isbrandtsen's executive vice president that the passenger service offered by his company is not generally comparable with the service offered by Export or Italia.

17. Export's witnesses testified that, through their friendship and close association with Italia, they had been able to reduce the required stay of Export ships in the port of Naples by 20 hours. Italian regulations provide that each vessel carrying emigrants from Italy must establish a terminus at an Italian port and must lie in such terminus on each voyage for 48 hours. It was a relaxation of this requirement which enabled Export to effect the 20-hour saving.

18. Under proposed modifications to the Italian counteragency agreement, whereby Italia will act as Export's exclusive agent in Italy, Export's witnesses all agreed that Export will save, by reducing its own establishment in Italy, at least as much as it will have to pay Italia to expand its organization.

DISCUSSION

Section 804 of the Act prohibits a subsidized American operator from acting as agent for any foreign-flag vessel which competes with an essential American-flag service. The Maritime Administrator is vested with discretionary power, however, to waive this prohibition when he feels that special circumstances exist and that good cause has been shown that such waiver will promote the purposes and policy of the Act. The legislative history of section 804 shows clearly that Congress did not intend waivers would be granted except for compelling reasons. The circumstances and causes Export has advanced in support of its request for an extension are not, it seems to me, sufficient to justify extension of this special waiver of the statutory prohibition.

Export asserts that the waiver enables it to obtain preference as to passengers that would otherwise move in foreign vessels, citing as examples the Italian emigrants produced by Italia's agents and the Italian-type passengers it carries on its ships. However, emigrants accounted for only slightly over 4 percent of Export's estimated gross revenue from the *Independence* and *Constitution* in 1952, and in my view the emigrant traffic from Italy to the United States depends more on the counter-agreement of Italia to act as agent for Export

than upon Export's representation of Italia, for which a section 804 waiver is required. Nor has Export shown to my satisfaction that Italian-type passengers or passengers produced by Italia offices in Europe patronize Export's vessels as a consequence of the waiver or of circumstances flowing from the waiver. The termination of Export's agency for Italia might not necessarily result in the termination of the counter agency, but even so, it is quite possible that Export's passenger carryings would be increased even if it lost the small number of emigrants produced for it by Italia's agents, if it were free to promote passengers exclusively for its own vessels instead of being obliged (as it is under its agency for Italia) to promote business for Italia.

Export further urges as a special circumstance that it has, by virtue of the waiver, increased its operating efficiency and decreased its operating costs. The financial advantage to Export of obtaining quantity discounts on voyage stores and advertising cannot be large, and in any event, since no figures of actual discounts obtained have been presented for the record, I have no means of weighing this advantage. The financial advantage to Export from spreading pier operating costs over two lines is real and measurable, but I am not convinced that the pier-sharing arrangement necessarily depends upon a section 804 waiver.

Export urges as another special circumstance the receipt of earnings from the agency, as set forth in my findings of fact. However, I regard the receipt of earnings as an ordinary rather than a special circumstance of doing business. It follows that Export's earnings from the agency, unsupported by other special circumstances, cannot be considered in themselves a special circumstance.

An advantage asserted by Export to increase its efficiency and to reduce turnaround, is the reduction of port time in Naples. But not even Export's witnesses were able to state that this advantage was related except in a most tenuous way to the section 804 waiver. I do not consider it so related.

Another circumstance urged by Export in support of its application is that the waiver enables it to more effectively compete with its foreign-flag competitors. Export states that Italia and Export together have offered increasingly effective competition to lines operating between United States North Atlantic ports and northern European ports. This is shown, asserts Export, by the increase after World War II of the percentage of ocean passengers traveling direct to the Mediterranean, described in the findings of fact set forth above. I cannot agree that such increase has been the result of Export's section 804 waiver granted from time to time since the end of the War.

Surely, both Export and Italia are interested in promoting travel direct to the Mediterranean, on a cooperative basis, whether or not Export is Italia's representative in this country. Moreover, I regard it as significant that the first postwar year for which an increase is shown of record is also the first full year of operation for the *Independence* and *Constitution.*

I do not consider the benefit claimed by Export from consultation with officers and crew of Italia's vessels, as to services and facilities, to be weighty enough to justify waiving the provisions of section 804.

Conclusion

I therefore conclude that neither special circumstances nor good cause have been shown which would move me, in the exercise of the discretion entrusted to me, to waive the provisions of section 804 of the Act to permit Export to act as agent in this country for the passenger combination vessels of Italia. In view of the special circumstance, however, that Export is now general agent for Italia in this country, and in order for Export to terminate the arrangement in an orderly way, I will extend the currently effective waiver of the provisions of section 804 until the close of business, June 30, 1954.

By order of the Maritime Administrator.

(Sgd.) A. J. Williams,
Secretary.

FEDERAL MARITIME BOARD

No. 720

INTERCOASTAL STEAMSHIP FREIGHT ASSOCIATION ET AL.[1]

v.

NORTHWEST MARINE TERMINAL ASSOCIATION ET AL.[2]

Submitted July 8, 1953. Decided September 22, 1953

The assessment by certain of the respondents of their tariff service charge against the ship in conection with lumber transported from the States of Oregon and Washington, via the Panama Canal, to Atlantic coast ports, found to be an unjust and unreasonable regulation or practice in violation of section 17 of the Shipping Act, 1916. Cease and desist order entered, and case referred for consideration of reparation.

Erskine B. Wood and *W. M. Carney* for complainants.
Thomas J. White and *Donald E. Leland* for respondents.

REPORT OF THE BOARD

BY THE BOARD:

Complainants, common carriers by water in the intercoastal trade and their association, filed complaint against respondents, terminal operators in the Pacific Northwest area, alleging that the assessment of respondents' tariff service charge, insofar as the charge applies to vessels carrying eastbound intercoastal lumber, violates section 17 of the Shipping Act, 1916 (hereinafter referred to as the Act).[3] A cease and desist order and reparation are demanded.

[1] American-Hawaiian Steamship Company, American President Lines, Ltd., Calmar Steamship Corporation, Isthmian Steamship Company, Luckenbach Steamship Company, Inc., Pope & Talbot, Inc., States Steamship Company, Pacific-Atlantic Steamship Co., United States Lines Company, Waterman Steamship Corporation, and Weyerhaeuser Steamship Company.

[2] Alaska Terminal & Stevedoring Co., Albina Dock Co., Inc., Ames Terminal Co., Arlington Dock Co., Baker Dock Company, Columbia Basin Terminals, The Commission of Public Docks of Portland, Oregon, G & S Handling Co., Interstate Terminals, Olympic Steamship Co., Port of Astoria, Port of Longview, Port of Port Angeles, Port of Seattle, Port of Tacoma, Port of Vancouver, Salmon Terminals, Inc., Shaffer Terminals, Inc., Tait Tidewater Terminals, Virginia Dock & Trading Co., West Coast Terminals, Inc., and Williams, Dimond & Company.

[3] A further allegation that the service charge on lumber subjected complainants to undue and unreasonable prejudice and disadvantage in violation of section 16 of the Act was abandoned after the serving of the examiner's recommended decision.

688-650 O - 63 - 28

The examiner recommended that eight items included in the service charge so applied should be held unjust and unreasonable regulations relating to the receiving, handling, storing, or delivering of property, in violation of section 17 of the Act. Both parties excepted. We agree generally with the examiner.

We find the facts as follows:

1. The service charge complained of was established by respondents' tariffs in 1946 and 1947 to meet increased costs of operation. It applies to all cargo handled through respondents' terminals and is collectible from the ship as distinguished from the cargo.

2. Seattle Terminals Tariff No. 2–C, Item No. 49–1–F, is typical of the tariff provisions imposing the service charge and provides in part as follows:

(A) Except as otherwise provided in individual item, service charge is the charge assessed against ocean vessels, their owners, agents or operators, which load or discharge cargo at the terminals for performing one or more of the following services * * *.

1. Providing terminal facilities.
2. Arranging berth for vessel.
3. Arranging terminal space for cargo.
4. Check cargo.
5. Receive cargo from shippers or connecting lines and give receipts therefor.
6. Deliver cargo to consignees or connecting lines and take receipts therefor.
7. Prepare dock manifests, loading lists, or tags covering cargo loaded aboard vessels.
8. Prepare over, short and damage reports.
9. Order cars, barges or lighters as requested or required by vessels.
10. Give information to shippers and consignees regarding cargo, sailing and arrival dates of vesels, etc.
11. Lighting the terminal.

It is to be noted that the tariff provision quoted shows liability of the vessel for the whole charge even though the terminal performs only one of the services listed. The basic rate set forth in the tariff is charged for cargo unloaded onto the terminal from trucks or railroad cars—one-half of the rate for cargo unloaded from open railroad cars directly into the ship by ship's tackle, and one-quarter of the rate for cargo brought alongside the terminal in barges and unloaded directly into the ship by ship's tackle.

3. In February and March 1952, three of the respondents operating Columbia River terminals, respectively, at Portland, Oregon, Longview, Washington, and Vancouver, Washington, modified their pre-existing tariffs which were similar to the Seattle tariff, above set forth, so that bills for the service charge with respect to intercoastal lumber specified the shippers involved, thus permitting the carriers

to pass the bills on to the shippers for payment direct to the terminal. Complainants do not attack the Columbia River tariffs as revised.

4. Complainants have paid the service charge on intercoastal *general cargo* without protest. They have for the most part declined to pay the charge on intercoastal lumber. Insofar as such charges have been paid, complainants seek to recover the amounts thereof by way of reparation.

5. All eastbound intercoastal lumber moves under complainants' tariffs providing only "tackle to tackle" rates whereby the carriers' responsibility purports not to attach until the lumber is placed under the ship's hook, as appears from Rule L–1 of complainants' Eastbound Freight Tariff No. 2–C, applicable to lumber, which provides in part as follows:

(d) Except as otherwise provided in this tariff, rates named in this section of the tariff apply from end of ship's tackle at loading port to end of ship's tackle at port of discharge. Rates do not include tolls, carloading or car unloading, handling, side wharfage, top wharfage, lighterage, storage, back piling, staking and piling on lighters, any charge prior to the receipt of cargo by vessel's tackle at loading port and/or after leaving vessel's tackle at port of discharge, transfer charges, or other expenses beyond ship's tackle except as otherwise provided for in this tariff. * * *

(e) The term "end of ship's tackle" as used in this tariff means within reach of ship's hook. It does not include any handling or services of any character either by manual or machine power preceding attachment of hook or after release from hook.

6. All eastbound lumber moves on the basis of shipper's load and count. Rule L–12 (b) of the same tariff provides:

Unless cargo is specifically tallied by vessel, each bill of lading shall be claused: "One lot of lumber said to contain ----, Shipper's count, all on board to be delivered."

7. Lumber for intercoastal transportation is assembled in several ways in the Pacific Northwest. About 85 percent of the shipments originate at the larger supplying mills, which are usually located on navigable waters and operate docks of their own. These mills make no charge for berthage or dockage, nor do they assess any service charge against the ship similar to the one under attack. All work connected with delivering lumber to the ship's hook is performed by the regular employees of the supplying mills, and any cost is figured in the overall production cost of the lumber. Respondents' terminals are not used for the shipment of such lumber.

8. The balance of intercoastal lumber shipped from the Pacific Northwest comes from smaller mills usually located inland and without waterside facilities of their own. Here the shipper sends orders to one or more of such mills with instructions to make delivery at a

particular public waterside terminal. In such cases, copies of the purchase orders are sent to the terminal, which thereupon sets up its own records for the receipt and handling of the various parcels of lumber which constitute the shipment, in preparation for eventual delivery to the ship. The greater part of the lumber from such smaller mills is trucked to the terminals; smaller quantities come by rail, and some arrives on barges for loading directly into the ships. Frequently, ship's space has not been booked by the shipper at the time the lumber begins to arrive at the terminal. As a result, lumber sometimes accumulates at the terminal for as long as ninety days before it moves out by ship, the shipper frequently taking no steps to book space until most of the parcels constituting his shipment have been delivered to the terminal.

9. When an entire shipment of lumber is assembled at a public terminal the shipper issues a "line-up" to the carrier stating the number of lots, the order number, the net and gross footage, and the destination. The line-up is used by the carrier to order the cargo alongside for loading, and the carrier's supercarpo issues a mate's receipt therefor. A bill of lading is issued from the mate's receipt and mill manifest or Lumber Inspection Bureau Certificate delivered to the carrier by the shipper.

10. When lumber is unloaded from trucks or railroad cars to a point of rest on the terminal it is checked by the terminal and a receipt given. This checking is done on behalf of the shipper. The checking is not requested by the carrier and the terminal's receipt is not issued on behalf of the carrier. From point of rest the lumber is moved to the ship's tackle as required. This movement, known as "handling", is performed by the terminal for the shipper, and the terminal's charges for handling are paid by the shipper. It is clearly impracticable to have trucks deliver lumber directly under the ship's hook, as such practice would cause delay and confusion. The impracticability of such an operation is conceded by all parties and shipside delivery by trucks is not resorted to.

11. When lumber is shipped to the terminal in open railroad cars for direct unloading under ship's tackle, the ship's supercargo requests the terminal to call in particular cars alongside the ship as needed, sometimes a list of the cars being given and sometimes the request being made orally where only a few cars are involved. The car numbers themselves are obtained by the carrier from the shipper and not from the terminal. The supercargo is not permitted to order cars from the railroad. It is necessary for the terminals to take control of all rail cars entering their premises to avoid confusion, except perhaps

where there are no other lumber operations going on at the time. It is the usual practice, nationally, for terminals to order rail cars in and out.

12. The use of barges (or lighters) for direct transfer of lumber to the ship varies in the different localities. In the Puget Sound area most lumber comes to the ship on barges; a moderate quantity comes this way on the Columbia River; and a small quantity at Portland. The shipper usually makes the arrangements for the use of barges, the ship's supercargo requesting actual delivery alongside ship when needed. The terminal does not take possession of lumber delivered by barge. At times the terminal does not know that barges are being used, the carrier eventually informing the terminal of the quantity loaded by that method to permit the terminal to compute its wharfage charges thereon.

13. Ships using respondents' terminals to load intercoastal lumber pay respondents a "dockage" or "berthage" charge for the use of the berthing space at wharf. Charges for unloading railroad cars or trucks onto the terminal, for storage as well as for "handling" from the place of rest on the dock to the ship's tackle, are paid by the shipper.

14. The separate services included in respondents' tariff service charge are generally self-descriptive, and, except for No. 11, "Lighting the Terminal", have been discussed in the report of the Maritime Commission in *Terminal Rate Increases—Puget Sound Ports*, 3 U. S. M. C. 21, at p. 26. The Commission in that case stated:

> The principal item * * * is checking, which involves the counting and measuring of packages, recording any identifying marks, and making notations as to the apparent condition of the packages.

Here also, the principal expense entering into the service charge is the receiving and checking of cargo from shippers and giving receipts therefor (Items Nos. 4 and 5). Items Nos. 3, 7, 8, and 11 are shown to be incidental thereto. Item No. 1, if not incidental to the receiving and checking of cargo, is a charge for administrative expense or for special services, and, as stated in *Terminal Rate Increases—Puget Sound Ports*, *supra*, page 26, should not be included as a part of the "service charge". Item No. 2 is clearly an administrative expense connected with dockage or berthage, and for like reasons should be eliminated from the "service charge". Item No. 9, so far as it covers "Ordering Cars as Requested by Vessels", is for the benefit of the ship, and will be discussed more in detail later, but the balance of Item No. 9, "Ordering Barges and Lighters," and Item No. 10, "Giving Information to Shippers and Consignees Regarding Cargo Sailing and Arrival Dates of Vessels, etc.", cover services neither requested by nor bene-

ficial to the ship. The ship's supercargo himself orders barges and lighters alongside when lumber is brought in that manner. The ship's own office or agent has all information as to the ship's movements where authoritative information as to ship's movements is available, thus making Item No. 10 of the service charge unnecessary to the ship. It thus appears that, except for part of Item No. 9, "Ordering Cars as Requested by Vessels," the various items of respondents' service charge insofar as they are not disapproved, as above indicated, are essentially connected with the primary service of receiving and checking cargo and giving receipts to the shipper.

DISCUSSION

No issue is raised in this proceeding as to the level or amount of the service charge imposed with respect to the shipment of lumber, nor as to the necessity of the imposition of such charge by respondent terminal operators in order to obtain a fair return on their investment. The issue is solely whether such a service charge may be lawfully imposed by respondents against the carriers. The carriers, relying on their tariff provisions, urge that they have no responsibility for any service to cargo before it is placed under the ship's hook, and that since the various items of respondents' service charge are rendered before the attachment of the ship's hook, the carrier is not responsible. The terminals reply that the evidence in the case clearly shows that it is physically and economically impracticable for the ship to receive lumber at the end of the ship's tackle directly from trucks delivering at the terminal, and hence that the carrier's obligation with respect to receiving the lumber must begin where the trucks put it down on the terminal, i. e., at the point of rest. Respondents argue that under the decisions of our predecessors, carriers are required to receive general cargo at the "point of rest" where it is deposited from trucks or railroad cars, and pay the service charge, and that the same rule is logically applicable to lumber.

In *Terminal Rate Increases—Puget Sound Ports*, *supra*, at page 23, the Maritime Commission said:

It is thus necessary to delineate clearly the obligations of the carrier to the shipper or consignee in performing its transportation. The carrier must furnish a convenient and safe place at which to receive cargo from the shipper and to deliver cargo to the consignee. If this can be done at end of ship's tackle, then it can be so stated and the contracts of carriage may be limited to such service. On the other hand, if such receipt and delivery is impracticable or impossible, the carrier must assume as part of its carrier obligation the cost of moving the cargo to where it can be delivered to the consignee or from where it can be received from the shipper—referred to generally as the place of rest. The carrier cannot

divest itself of this obligation by offering a service which it is not prepared to perform. * * * The carrier's obligations also include the receiving of cargo from shipper and the giving of a receipt therefor, and delivery of cargo to those entitled to it, together with the handling of the necessary papers.

In *Terminal Rate Structure—California Ports*, 3 U. S. M. C. 57, in explaining and approving a formula for the allocation of terminal charges between ship and cargo, the Maritime Commission said at p. 59:

All expenditures were apportioned to vessel and cargo in proportion to the use made of the facilities provided and of the services rendered. The vessel was held responsible to the wharfinger for all usages and services from, but not including, the point of rest on outbound traffic and to, but not including, the point of rest on inbound traffic. All other wharfinger costs were assessed against the cargo. The point of rest is the location at which the inbound cargo is deposited and outbound cargo is picked up by the steamship company.

In applying to general cargo the formula developed in that case, the Commission found that the terminal's service charge was a proper cost to be charged to the vessel. The service charge was described in that case substantially as set forth in respondents' tariff in this case, although not analyzed with the detail set forth in *Terminal Rate Increases—Puget Sound Ports, supra.*

We do not think that respondents' argument is sound because it overlooks an important distinction between the handling of general cargo and the handling of lumber at respondents' terminals. The evidence in this case shows that all lumber passing over the terminals is accepted and carried by the ship without check as to the amount of lumber in the shipment. Whereas the terminal company actually checks the shipper's lumber and gives a receipt therefor, this receipt is shown to be issued for shipper's benefit and not for the carrier. The only receipts given by the carrier are the mate's receipt and the bill of lading, and these are expressly based on the shipper's count. The lumber is never tallied by the vessel. This custom of receiving and loading lumber without checking or tallying by the carrier is, of course, entirely contrary to the carrier's duty and practice in handling general cargo, where an exact check and tally must be made. We refer again to the precise statement, quoted above, from *Terminal Rate Increases—Puget Sound Ports*, where the Commission said:

The carrier's obligations also include the receiving of cargo from shipper and the giving of a receipt therefor, * * * together with the handling of the necessary papers.

This general statement, in our opinion, applies both to general cargo and to lumber, the difference being that the receipt given by the carrier for general cargo includes the carrier's count after checking

and tallying, whereas for lumber it includes the shipper's count only, without any checking or tallying by the carrier. If, as above stated by the Commission in *Terminal Rate Structure—California Ports*, the terminal's expenditures for services are to be apportioned between vessel and cargo "in proportion to the use" made of the facilities or services, and the vessel has no duty to check or issue an exact receipt for lumber, and in fact does not do so, it naturally follows that respondents' service for which the service charge is imposed is not for the use of the vessel in so far as the handling of lumber is concerned. We hold, therefore, that the imposition of the service charge described in this case against complainant carriers with respect to lumber shipments is not a just or reasonable regulation or practice.

Respondents urge nevertheless the reasonableness of a literal application of their service charge tariff which requires the payment of the full charge for performing "one or more" of the services described. The carriers do not except to the examiner's ruling that part of Item No. 9, "Ordering Cars as Requested by Vessels", is a service which the terminal performs for their benefit. The terminal company urges that this alone is sufficient to justify the charge. We have, in *Terminal Rate Increases—Puget Sound Ports*, *supra*, pointed out the importance of uniform and clear definitions of various terminal services, and in *Terminal Rate Structure—California Ports*, *supra*, the formula which we approved divides the costs allocable to vessels into (a) dockage, (b) the services rendered to the vessel under the service charge (which we have heretofore pointed out is principally for receiving and checking cargo from shippers and giving receipts therefor), and (c) furnishing other facilities or labor for the benefit of the vessel. In the interest of uniform and clear definitions, we think the services included in respondents' service charge should be limited to those concerned with or incidental to the receiving and checking of cargo (the principal item going into the service charge). If respondents desire to make a charge against the vessel for ordering railroad cars alongside, it should be set up as a special charge and not included in the service charge.

CONCLUSIONS

Under the circumstances, we find that the imposition of respondents' service charge against complainants with respect to transportation of intercoastal lumber eastbound is an unreasonable regulation or practice relating to the receiving, handling, storing, or delivering of property, in violation of section 17 of the Act, and that respondents should cease and desist from the imposition of such service charge

against complainant carriers with respect to the handling of intercoastal lumber eastbound.

A cease and desist order will be entered, and the case will be referred to the examiner for further proceedings on complainants' claim for reparation, unless the parties agree among themselves as to the amount of reparation due.

ORDER

At a Session of the FEDERAL MARITIME BOARD, held at its office in Washington, D. C., on the 22d day of September A. D. 1953

No. 720

INTERCOASTAL STEAMSHIP FREIGHT ASSOCIATION ET AL.
v.
NORTHWEST MARINE TERMINAL ASSOCIATION ET AL.

This case being at issue upon complaint and answer on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Board, on the date hereof, having made and entered of record a report stating its conclusions, decision, and findings thereon, which report is hereby referred to and made a part hereof;

It is ordered, That the respondents herein be, and they are hereby, notified and required to cease and desist and hereafter to abstain from imposing a service charge as defined herein against complainants with respect to the handling of intercoastal lumber eastbound; and

It is further ordered, That this case be held open for further proceedings on the claims of complainants herein for reparation in accordance with applicable Rules of Procedure.

By the Board.

(Sgd.) A. J. WILLIAMS,
Secretary.

FEDERAL MARITIME BOARD

No. S–48

American President Lines, Ltd., Mississippi Shipping Co., Inc., Moore-McCormack Lines, Inc.—Redetermination of Reconditioning Subsidy.

Staff hearing September 17, 1953. Decided February 4, 1954[1]

Francis T. Greene and *John F. Harrell* for the Board.

Report of the Board

This inquiry has been occasioned as a result of criticisms by the Comptroller General in his Report, dated February 6, 1950, and recommendations of the House Committee on Expenditures in the Executive Departments contained in its Sixth Intermediate Report (H. R. Rep. No. 2104, 81st Congress, 2nd Session (the Hardy Report), of actions of the former Maritime Commission (the Commission) in granting subsidy aid for reconditioning work. The authority for granting subsidy aid for reconstructing or reconditioning merchant vessels of the United States is contained in section 501 (c) of the Merchant Marine Act, 1936 (the Act). In general, the requirements are the same as for the granting of subsidy assistance for the construction of a new vessel, with the additional requirement that aid for reconditioning shall be granted only in exceptional cases and after a thorough study and a formal determination that the proposed reconditioning is consistent with the purposes and policies of the Act.

The Hardy Committee reported that the Commission made the necessary technical finding of "exceptional cases" and "consistency with the purposes and policy of the Act," but questioned the basis therefor. The Committee also questioned the selection of the Netherlands as the foreign shipbuilding center furnishing a fair and representative example for the determination of the estimated foreign cost of the work on some of the vessels, and questioned the calculations upon which the subsidy rates were determined. The amounts allowed as subsidy to the three lines by the Commission under its findings totaled as follows:

[1] As amended May 7, 1954.

American President Lines, Ltd	$608, 214. 00
Mississippi Shipping Co., Inc	753, 854. 22
Moore-McCormack Lines, Inc	542, 805. 00

The three operators here involved agreed to a review and redetermination of the subsidy rates by the Board, subject to their right to submit evidence and comments on their own part and subject to the right of each operator either to accept the redetermined subsidy rate, making proper adjustment with the Government, or rejecting all subsidy resulting from the reconditioning work, and promptly refunding to the Government any amount allowed to the operator under the original award made by the Commission and relinquishing any further claim for subsidy in connection therewith.

All the vessels herein referred to were sold by the Commission to the operators under the Merchant Ship Sales Act of 1946, and under that Act are not subject to repurchase by the Government at their construction cost less depreciation under section 802 of the Merchant Marine Act, but become subject to such provision if the vessels are reconditioned with subsidy aid granted under section 501 (c) of the latter Act. The operators' reservation of the privilege of rejecting the subsidies for reconstruction thus left them free, if they so elect, of the price ceiling set forth in section 802 of the Act.

Recommendations as to new findings in respect to the foreign shipbuilding centers and the rates of subsidy were made to us by our staff on April 16, 1952, as to American President Lines, Ltd. (APL), vessels and on August 8, 1952, as to Moore-McCormack Lines, Inc. (Mormac), vessels, and on July 21, 1953, as to Mississippi Shipping Company, Inc. (Mississippi), vessels; and on September 17, 1953, we heard testimony of various members of the staff in support and explanation of the recommendations referred to. For purposes of comparison, there is below set forth the amounts and rates of subsidy as originally determined by the Commission and as recomputed by our staff and recommended to us.

AMERICAN PRESIDENT LINES, LTD.

Vessel	U. S. M. C.		Recommended		Date of contract	Date work completed
	Base subsidy	Rate	Base subsidy	Rate		
		Percent		*Percent*		
President Van Buren	$118, 000	46. 64	$73, 488	30. 56	Sept. 30, 1948	Mar. 5, 1949
President Harrison	220, 500	38. 31	178, 438	32. 24	Sept. 30, 1948	Apr. 5, 1949
President Johnson	220, 500	38. 31	193, 932	34. 09	Sept. 30, 1948	Mar. 18, 1949

MISSISSIPPI SHIPPING COMPANY, INC.

Vessel	U. S. M. C.		Recommended		Date of contract	Date work completed
	Base subsidy	Rate	Base subsidy	Rate		
Del Alba	$14,815	34.10	$10,570	24.33	Aug. 13, 1946	Dec. 21, 1946
Del Valle	15,677	34.10	11,185	24.33	Dec. 13, 1946	Mar. 10, 1947
Del Santos	18,904	34.10	13,487	24.33	Dec. 13, 1946	Apr. 22, 1947
Del Mundo	17,778	34.10	12,684	24.33	Dec. 13, 1946	June 10, 1947
Del Rio	123,693	41.93	71,773	24.33	Sept. 30, 1948	Feb. 9, 1949
Del Sol	123,693	41.93	71,773	24.33	Sept. 30, 1948	June 23, 1949
Del Oro	123,693	41.93	71,773	24.33	Sept. 30, 1948	July 30, 1949
Del Campo	78,496	35.68	55,106	25.05	Sept. 30, 1948	May 21, 1949
Del Viento	78,496	35.68	55,106	25.05	Sept. 30, 1948	Mar. 17, 1949
Del Monte	78,496	35.68	55,106	25.05	Sept. 30, 1948	Dec. 16, 1948

MOORE-McCORMACK LINES, INC.

Vessel	Base subsidy	Rate	Base subsidy	Rate	Date of contract	Date work completed
Mormacmar	$219,408	35.57	$182,908	29.65	Apr. 25, 1947	Apr. 19, 1948
Mormacrev	189,070	32.23	152,570	26.02	Apr. 25, 1947	Apr. 21, 1948
Mormacsurf	189,070	32.23	152,570	26.02	Apr. 25, 1947	May 27, 1948

The subsidy amounts and rates as recommended by our staff were discussed with the three operators. Mississippi objected to the rates and amounts recommended for the *Del Alba*, *Del Valle*, *Del Santos*, and *Del Mundo* on the ground that the recommended figures were not properly substantiated. All three operators objected to the recommended rates and amounts on the ground that the estimated costs of reconditioning in the foreign shipyard as computed in foreign currency were converted into American dollars at the official rates of exchange prevailing at the times the reconditioning contracts were executed, all of which were prior to September 1949, when the official rate of exchange for the foreign currency was reduced, and not at a lower rate.

REVIEW OF SECTION 501 (C) FINDINGS

The Commission considered the requirements of section 501 (c) of the Act that the proposed reconditioning was exceptional and consistant with the purposes and policy of the Act, on six occasions, and these actions are considered separately. All the vesels here considered were built by the Government for war purposes, and after the war were sold, as above stated, to the respective operators.

A. On January 14, 1947, the Commission reviewed the application of Mississippi for subsidy for reconditioning four C–2 vessels (being the first four vessels named in the Mississippi list above set forth) for use in the trade between New Orleans and the east coast of South America. The additional facilities to be installed included facilities for carrying liquid bulk cargo alternatively with dry cargo in No. 2 lower hold, with facilities for heating oil cargoes to maintain

liquidity. The applicant as early as October 12, 1943, when the vessels were still under construction, had requested that these facilities be installed, but was advised that the vessels were then in an advanced stage of construction and that the changes could not be effected without seriously interrupting the production schedules made necessary by the war. It was brought to the attention of the Commission that the application for subsidy aid made January 3, 1946, on the four vessels was exceptional in view of the fact that the reconditioning work would enable the vessels more fully to meet the needs of the services into which they were to be placed and of the foreign commerce of the United States, and that the performance of the work had been requested in 1943 when the ships were under construction but at that time had been refused.

The Commission determined with respect to the four Mississippi vessels on January 14, 1947, that:

> The case as hereinabove set forth is an exceptional one and that the proposed reconstruction is consistent with the purposes and policy of the Act; * * *.

B. On April 25, 1947, the Commission considered the applications of Mormac dated October 28, November 2, and November 6, 1946, for subsidy and for reconditioning the three C–3 vessels above mentioned to operate on Trade Route No. 1 between United States Atlantic ports and ports on the east coast of South America. The main items of the work included (1) installation of 36,000 cubic feet of cargo refrigeration, (2) building two extra passenger staterooms, (3) installing deep tanks and piping system for transportation of cargo oil, (4) installing special steel lockers, (5) installing Cargocaire system, (6) installing additional cargo gear, including two 10-ton booms and one 30-ton boom. It was brought to the attention of the Commission that these three vessels were used by the Navy during the war for transports and that such reconditioning would enable the vessels more fully to meet the needs of the service in which they were to be employed and of the foreign commerce of the United States. It was also brought to the attention of the Commission that if these ships had been originally constructed for use on the service specified, the facilities now requested would have been included in the original construction. It was further brought to the attention of the Commission that the installation of the facilities would enhance the operating efficiency of the vessels and assist in attracting high-paying cargo and meeting foreign competition. The Commission determined as to these three vessels on April 25, 1947:

The case as herein set forth is an exceptional one and that the proposed reconstructing and reconditioning is consistent with the purposes and policy of the Act; * * *.

C. The Commission on June 13, 1947, considered the application of APL dated February 26, 1947, for subsidy for reconditioning of the three C-3 vessels above mentioned, constructed by the Commission in 1943. The facilities to be installed on each vessel included (1) four king posts with heavy lift booms and appurtenances, (2) air-conditioning or Cargocaire in all cargo holds, (3) special cargo lockers and specie tank, (4) air compressor emergency generator and heating system for tanks carrying cargo oil. It was brought to the attention of the Commission that the facilities were necessary and desirable for commercial operation of the vessels in the transpacific trade routes or round-the-world service of the applicant where the vessels were to be employed. The Commission determined on June 13, 1947:

* * * that a thorough study of the application and surrounding circumstances indicates the case to be an exceptional one justifying a construction-differential subsidy predicated upon estimated foreign costs chargeable to the Applicant as may hereafter be determined, and that the granting of such financial aid is reasonably calculated to carry out effectively the purposes and policy of the Act; * * *

The Commission on June 10, 1948, considered the same operator's supplemental application for reconditioning the three vessels under consideration, dated October 22, 1947, requesting subsidy for the following additional facilities: (5) installation of special cargo oil tanks, (6) relocation of heavy lift boom at No. 2 hatch, and (7) installation of 65,000 cubic feet of cargo refrigeration (later reduced to 58,000 cubic feet) on the *President Harrison* and *President Johnson*, and installation of 10,000 (later reduced to 3,000) additional cubic feet of refrigeration on the *President Van Buren*, all with sliding door access. The Commission on June 10, 1948, determined to

Confirm and expand the findings and determinations set forth in its action of June 13, 1947 that the proposed reconstruction of said vessels * * * for operation in an essential trade route served by vessels of American President Lines, Ltd., is consistent with the purposes and policy of the Act, and that a thorough study of said application, as amended, and the surrounding circumstances indicates the case to be an exceptional one justifying a construction-differential subsidy predicated upon estimated foreign costs chargeable to the Applicant as may hereafter be determined, and that the granting of such financial aid is reasonably calculated to carry out effectively the purposes and policy of the Act; * * *.

On September 30, 1948, the Commission again considered this reconstruction subsidy application, and, after considering bids for the work, ratified and confirmed its prior action.

D. The Commission on July 13, 1948, considered the further application of Mississippi dated July 1, 1947, for subsidy assistance for reconditioning six C–1 vessels, being the last mentioned six vessels on the foregoing Mississippi list, of which the first three, *Del Rio*, *Del Sol*, and *Del Oro*, were to be employed in the service between United States Gulf ports and ports on the west coast of Africa, and the last three mentioned, the *Del Campo*, *Del Viento*, and *Del Monte*, were to be employed between United States Gulf ports and ports on the east coast of South America. The facilities to be installed on all vessels included the installation of Cargocaire system, refrigerated cargo space, additional booms, king posts, and winches. Additional facilities for the vessels to be engaged in the West African trade included installation of facilities for carrying liquid bulk cargo, and for those in the South American trade certain passenger facilities.

It was pointed out to the Commission that the facilities requested would enable the vessels more fully to meet the needs of the services for which they were intended and the foreign commerce of the United States, and that the cases were exceptional since the vessels had been built during the war as standard C–1 vessels without the features specially required to meet the needs of the services.

The Commission found with respect to said ships on July 13, 1948, that:

> The case as herein set forth is an exceptional one and that the proposed reconstructing is consistent with the purposes and policy of the Act.

Various members of the Commission testified before the Hardy Committee as to their understanding of the legislative history of the provisions of the 1936 Act requiring that reconstruction and reconditioning subsidy should be extended only in exceptional cases. They pointed out that this statutory provision passed before the second World War was designed to avoid committing Government funds to the reconstruction of relatively older vessels. They pointed out also that the great construction program of the Government during the war and the transition from war to peace conditions that immediately followed, created exceptional circumstances, and that the installation of the particular facilities referred to in each of these cases under the circumstances of the postwar transition period appeared to them to warrant the statutory finding that they were exceptional cases. It is our view with respect to the C–2 vessels of Mississippi that since the applicant operator actually requested the installation of the desired facilities when the vessels were under construction in wartime (which request was denied) and with respect to all the vessels here involved, since they were built by the Govern-

688-650 O - 63 - 29

ment primarily to meet the war emergency and not designed for the special commercial needs of the services in which they were ultimately to be employed, that there was a reasonable basis on which the Commission could properly have made the findings that applications for reconditioning presented exceptional cases and that such reconditioning was consistent with the purposes and policy of the Act. This conclusion seems especially fortified in view of the provisions of the Act as it read at the time these applications for subsidy were under consideration, that a subsidy should be granted for the construction of a new ship where "the plans and specifications call for a new vessel which will meet the needs of the service, route, or line and the requirements of commerce." It thus appears that if the vessels here involved had not been built for war use but had been originally built for commercial use, the full cost of the vessel, including the facilities here involved, would have been the proper basis for subsidy award under section 501 (a) of the Act.

The determination by the Commission to treat these reconditioning applications as exceptional cases appears to have been expressly within the contemplation of the Congress when section 501 (c) was being enacted. The Congress did not want government subsidy money used to recondition older ships, but indicated that alterations on newly built ships to meet special trade requirements might well be subsidized.

Senator Copeland of New York, Chairman of the Senate Committee on Commerce, speaking on the floor of the Senate in support of his Committee's bill S–2582, said:

> However, as regards reconditioning, let me make emphasis again upon the fact that the bill makes very clear that reconditioning can be done only in exceptional cases. It is the desire of those who have formulated the bill to see to it that we have built up a Merchant Marine of new and modern ships.[2]

In a prior Committee hearing on the same bill, the following colloquy took place between Mr. Walter J. Peterson, representing Pacific coast shipping interests, and Senator Copeland, Chairman of the Committee:

> Mr. PETERSON. Suppose you had a new ship, Senator, a new ship built for a particular trade. There might be reasons why you wanted to change that ship for another trade, while the ship is new, built, perhaps, by Government loans for the foreign trade. If you want to change that ship to meet conditions of another trade, there ought to be some means by which that reconditioning could take place.
>
> The CHAIRMAN. I think you might even go beyond that. I do not know enough about these individual ships to discuss the subject intelligently, but it seems to me that it might happen for one reason or another that the owner of that line

[2] Debate on floor of the Senate, June 27, 1935, 79 Cong. Rec. 10255.

is not prepared to build new ships. I thought there might be put in here at the proper place something like this. I have not settled on the language, but this will give you the spirit of it:

"In exceptional cases, and after thorough study by the Authority in the light of the declared purposes of this Act, the benefits of the Act may be extended to the reconditioning and operation of vessels which for convincing reasons cannot be immediately replaced by new ones."

* * * * * * *

The CHAIRMAN. * * * but I would want it understood that it must be regarded as an exceptional thing, and that it should be so worded that there would be no question that when there was an application for such reconditioning there would have to be abundant reason why it should be done.

Mr. PETERSON. In other words, you would not want to perpetuate an inefficient ship?

The CHAIRMAN. Not at all.[3]

REVIEW OF SELECTION OF REPRESENTATIVE FOREIGN SHIPBUILDING CENTER

The Commission determined that the representative foreign shipbuilding centers for the calculation of the subsidy rates for the vessels under consideration, as of the dates when the various reconstruction and reconditioning contracts were entered into, were as follows:

Operator	Vessels	Date of contract	Shipbuilding cenert
Mississippi	4 C2s	Aug. 13 and Dec. 13, 1946	Sweden.
Moore-McCormack	3 C3s	Apr. 25, 1947	Britain.
Mississippi	6 C1s	Sept. 30, 1948	Netherlands.
American President	3 C3s	Sept. 30, 1948	Netherlands.

Our staff has recommended in connection with the review of the subsidy rates that the Netherlands be approved as the representative foreign shipbuilding center for the computation of reconditioning subsidy rates for all the vessels under consideration. We agree with the staff recommendation in this regard, except with respect to the four C-2 vessels of Mississippi, as to which we believe there is not sufficient evidence on which to base a redetermination of the subsidy rate, as will hereafter be explained more in detail.

With regard to the remaining three groups of vessels for which contracts were let on April 25, 1947, and on September 30, 1948, our staff submitted separate studies supporting the selection of the Netherlands. In each case it was pointed out that the criteria for the selection of

[3] Senate Committee on Commerce, 74th Cong., 1st Sess., Hearings on S. 2582 (3d Committee Print) covering hearings conducted on May 6, 1935. *Merchant Marine Act, 1935; Hearings U. S. Senate, Parts 1–5,* p. 466.

the shipbuilding center on the contract date were the same as those relied upon by the Board in reviewing the sales prices of the *Independence* and *Constitution* (Board's First Report dated February 20, 1952, 4 F. M. B. 216):

1. That the center should have the personnel, facilities, and experience necessary for the work and be regularly engaged in such work;

2. That it have such a political and economic environment as to give reasonable certainty that contractual obligations as to time, quality, and price would be performed;

3. That the center having qualifications 1 and 2 should also be the center where the work would be done at lowest cost.

With these considerations in mind, it was pointed out that the detailed estimates of the work on all the ships showed that materials constituted about two-thirds of the cost and labor one-third. Part of the materials consisted of insulation materials which would have to be imported, so that as to these items there would be no substantial difference in cost in any European country. Steel and much of the hull and deck machinery could be purchased in Great Britain and would be available in other European countries at substantially the same cost as in Great Britain. Such other equipment as was required for the work involved a large amount of labor and, consequently, would be cheapest in the country of the lowest wage rate level.

At the two dates in question there were nine foreign countries where the work might possibly have been done: Germany, Japan, France, Italy, Belgium, Sweden, Denmark, Great Britain, Netherlands.

Germany and Japan were considered at that time unavailable due to unsettled political and economical conditions then prevailing in these two countries, which would have deterred a prudent American operator from placing reconstruction and reconditioning orders in these countries at the time.

Although the French shipyards had been restored to their pre-war capacity by the end of 1947, they could not satisfy the national demand. Since at that time about 38 percent of tonnage under construction for French account was being built in non-French shipyards, they were not considered available for reconstruction work of the type here considered.

In Italy, while the shipyards were technically in a position to do the work, the country was still in an economic and political situation of considerable uncertainty with threats of strikes and industrial

disorders. At this time the shipbuilding costs of Italy were practically the highest in Europe.

Of the remaining countries where the work might have been done, it appears that the comparative levels for the earnings of skilled shipyard labor in the first part of 1947 and for the year 1948 were as follows:

	Belgium	Denmark	Sweden	Britain	Netherlands
1947 (first part)	$0.47	$0.63	$0.67	$0.61	$0.38
1948	[1] 53	74	.78	65	.40

[1] Approximate.

From the above statistics derived from governmental and other authoritative sources, it appears that the Netherlands on both dates had the lowest direct labor costs. Overhead in the Netherlands was reported to be 130 percent of direct labor whereas in the other countries it was somewhat less, although at least 100 percent of direct labor. In any event, the direct labor plus overhead at the appropriate rate shows that the over-all direct and overhead labor costs in the Netherlands was lower than in any of the other available countries. Our review indicates that the Netherlands should have been selected as the representative foreign shipbuilding center for all the ships under consideration excepting the four C–2s of Mississippi not here under consideration.

REVIEW AND REDETERMINATION OF FOREIGN COST FOR MOORE-MCCORMACK LINES, INC., VESSELS—CONTRACT DATED APRIL 25, 1947

The award of subsidy for reconditioning under section 501 (c) of the Act depends, like subsidy for new construction, upon the difference between the domestic cost and the fair and reasonable estimate of cost of the same work performed in the selected foreign shipbuilding center as of the date of the domestic contract. The work here involved was expected to be done and was actually done in a short period of time so that fixed price contracts were made for the work in this country without the need of considering escalation as is customary for construction contracts for new vessels which spread over a much longer period. The contracts for the work on the three vessels of this operator were executed on April 25, 1947. Accordingly, our staff developed an estimate of the Netherlands cost of the reconditioning work as of that date, estimating separately the cost of materials and labor.

In estimating the Netherlands cost of materials used, the staff obtained a detailed breakdown of the successful bid of Bethlehem Steel

Company which performed the work on one of the three vessels of Mormac. The Federal Shipbuilding and Dry Dock Company, which was the successful bidder on the other two vessels, closed down shortly after completing this work, and detailed breakdowns from this yard were not available at the time of our review. In any event, the work on the three vessels was substantially identical and the breakdown of Bethlehem is deemed representative of all. The detailed material items in the Bethlehem breakdown were priced in the Netherlands as of the contract date so far as possible. Approximately 83 percent in value of the material items could be so priced and this showed that the Netherlands cost in florins converted to dollars at the official rate of exchange was 102.2 percent of the United States cost for the same items. The same cost ratio was used for the undocumented items, resulting in an estimated Netherlands cost of material of $276,000 for each vessel as against the Bethlehem cost for the same material of $270,164.

The Bethlehem breakdown also showed the number of man-hours required for the installation of the various material items. While labor in United States yards was at this time more productive than in certain foreign yards in the construction of new vessels by reason of certain specialized construction procedures used in this country, the same is not true for repair or reconditioning jobs such as those here under consideration. By reason of this fact it is deemed that the same number of man-hours would be required to perform the work here under consideration in the Netherlands as in this country. The Bethlehem breakdown showed 135,901 man-hours necessary on each ship, and this computed at the Netherlands rate of $0.38 per hour provides a reasonable estimate of the Netherlands direct labor cost.

The Netherlands overhead charge was estimated at 130 percent of direct labor cost based on reports of our representative in Europe who investigated the matter. This rate of overhead is the same as that used in our review of the Netherlands construction cost of the *Independence* and *Constitution*, already mentioned. Reports from the same source show that the profit of a yard specializing in repair and reconstruction work would run at 10 percent of all other costs, although in the case of other Netherlands yards which took only a small amount of repair and reconstruction work in connection with their main business of new construction, the profit margin was sometimes computed at a higher rate. Under the circumstances here disclosed we deem it fair to use the profit rate customarily used by a yard specializing in the type of work here involved.

From the foregoing, the Netherlands cost of effecting the reconditioning on each of the three vessels of Mormac here involved, con-

verting Dutch florins into United States currency at the official rate of exchange prevailing on the date of the contract, may be summarized as follows:

Material	$276,000
Direct labor (135,901 man-hours×$0.38)	51,600
Overhead at 130 percent of direct labor	67,000
Subtotal	394,600
Profit at 10 percent of subtotal	39,460
Estimated Netherlands base cost	434,060
This is rounded off at	434,000
Comparable United States base cost:	
Mormacmar	586,570
Mormacrey	616,908
Mormacsurf	586,570

REVIEW AND REDETERMINATION OF FOREIGN COST FOR AMERICAN PRESIDENT LINES, LTD., VESSELS—CONTRACT DATED SEPTEMBER 30, 1948

Similarly, in estimating the Netherlands cost of the reconditioning work on the three vessels of APL, the staff obtained a detailed breakdown of the successful bids of Gulf Shipbuilding Company, Mobile, Alabama, which performed the work on these ships. In this case, work on one of the vessels, *President Van Buren*, was substantially less than on the two other vessels, *President Harrison* and *President Johnson*, because the *President Van Buren* was purchased by the operator with 55,000 feet of refrigeration included, whereas the other two vessels were sold without refrigeration, and the installation of such refrigeration substantially increased the reconditioning cost of these two vessels. The difference in work on the three vessels is responsible for a slightly different subsidy rate applicable to each. Approximately 90 percent in value of material items were priced in the Netherlands, showing that the Netherlands material cost was 82 percent of United States material cost and resulting in a Netherlands material cost on the *President Van Buren* of $110,564 and on the *President Harrison* and *President Johnson* of $250,164.

The Gulf breakdown also shows the number of man-hours required for the installation of the material on the various ships. On the *President Van Buren* this was 41,124 man-hours and on the other two vessels was 99,000 man-hours. The Netherlands average hourly rate of $0.40 was used to compute the labor cost in each case and to this were added overhead and profit figures computed in the same manner as in the prior computation of foreign cost of the Mormac vessels, since the same rate for overhead and profit was found to be applicable. Accordingly, the following computations of the estimated Netherlands cost of reconditioning the vessels may be given.

President Van Buren

Material	$110, 564
Direct labor (41,124 man-hours×$0.40)	16, 450
Overhead at 130 percent of direct labor	21, 385
Subtotal	148, 399
Profit at 10 percent of subtotal	14, 840
Estimated Netherlands base cost	163, 239
This is rounded off at	163, 000
Comparable United States base cost	240, 488

President Harrison and President Johnson

Material	$250, 164
Direct labor (99,000 man-hours × $0.40)	39, 600
Overhead at 130 percent of direct labor	51, 500
Subtotal	341, 264
Profit at 10 percent of subtotal	34, 126
Estimated Netherlands base cost	375, 000
This is rounded off at	375, 000
Comparable United States base cost:	
President Harrison	553, 438
President Johnson	568, 932

REVIEW AND REDETERMINATION OF FOREIGN COST FOR MISSISSIPPI SHIPPING COMPANY C-1 VESSELS—CONTRACT DATED SEPTEMBER 30, 1948

As above stated, three of these vessels, of which the *Del Rio* is typical, were to be employed in the West African trade, and three others, of which the *Del Monte* is typical, were to be employed in the South American trade. The reconstruction to be done on the *Del Rio* group was substantially greater than on the *Del Monte* group. The low bidder on all six ships was Bethlehem Steel Company, Sparrows Point, but at the request of the operator the contracts were awarded under section 504 of the Act to Gulf Engineering Company, New Orleans, with the understanding that the operator would assume the difference in cost, and that the subsidy for the reconditioning work would be based on Bethlehem's bid prices for the work. At the time of instituting our review of these foreign construction cost estimates, our staff found that neither Bethlehem nor Gulf had available any breakdown of the bids which either of them had submitted. Accordingly, the staff developed independent detailed estimates of the amount of material and labor required to complete the work on each group

of vessels, and the details of these estimates were priced in the Netherlands in the manner indicated on the jobs already described.

On this basis, the staff was able to price approximately 92 percent in value of the material items estimated to be required for the *Del Rio* group and approximately 93 percent of the materials for the *Del Monte* group. The Netherlands material costs were shown to be 81.4 percent of United States costs for the *Del Rio* group and 79.3 percent for the *Del Monte* group. These cost ratios were used for unpriced items, resulting in total estimated Netherlands material costs of $130,673 for each ship of the *Del Rio* group and $107,318 for each ship of the *Del Monte* group.

The staff estimated a fair and reasonable number of man-hours to do the work on each of the *Del Rio* ships to be 78,547, and on each of the *Del Monte* group, 46,292 man-hours.

The contract date for these vessels being September 30, 1948, the same as for the APL vessels, direct labor, overhead and profit in the Netherlands yard were estimated at the same rates, resulting in the following calculations:

Del Rio, Del Oro, Del Sol

Material	$130, 673
Direct labor (78,547 man-hours×$0.40)	31, 418
Overhead at 130 percent of direct labor	40, 843
Subtotal	202, 934
Profit at 10 percent of subtotal	20, 293
Estimated Netherlands base cost	223, 227
Comparable United States base cost	295, 000

Del Monte, Del Campo, Del Viento

Material	$107, 318
Direct labor (46,292 man-hours×$0.40)	18, 516
Overhead at 130 percent of direct labor	24, 070
Subtotal	149, 904
Profit at 10 percent of subtotal	14, 990
Estimated Netherlands base cost	164, 894
Comparable United States base cost	220, 000

REVIEW OF FOREIGN COST FOR MISSISSIPPI SHIPPING COMPANY C–2 VESSELS

As already stated, the contracts for reconditioning these vessels were made by the Commission in August and December 1946, and considerably antedated the contracts for reconditioning the other

vessels already discussed. The work on these vessels was limited to the installation of facilities for carrying liquid bulk cargo in No. 2 lower hold alternatively with dry cargo, and, as will be seen from the table at the beginning of this report, the subsidy amounts originally allowed by the Commission ranged from $14,815 to $18,904 and involved much less reconditioning work than was involved on the other ships already discussed. As already indicated, the Commission selected Sweden as the representative foreign shipbuilding center for the calculation of the subsidy rates for these vessels and allowed the amounts above indicated on the basis of a subsidy rate of 34.10 percent.

At the time when these reconditioning contracts were made, there was in effect the Joint Resolution of June 11, 1940, authorizing the Commission to estimate foreign construction costs on the basis of conditions existing prior to September 3, 1939. Because domestic costs climbed rapidly while foreign costs were frozen by this Resolution, the Resolution (which remained effective until July 25, 1947) in effect authorized the Commission to grant 50 percent construction subsidies but did not make such action mandatory. The Commission in fixing the subsidy rate for these four vessels did not use the authority granted by the Resolution. The Commission in the winter of 1946–47 had available to it a "Report on the Investigation of Foreign Ship Construction Costs" by Messrs. Van Riper and Rice, which stated:

> * * * If a fair approximation to the answer is acceptable, then we believe we have secured sufficient information to permit the making of an intelligent estimate.

On March 6, 1947, the Chairman of the Commission advised the Senate Committee on the Judiciary that the authority contained in the Resolution should be terminated, and on July 15, 1947, approved a statement advocating the proposed repeal of the Resolution, saying:

> There are some difficulties due to unsettled post-war conditions in obtaining dependable estimates as to the degree of differential existing or which may be expected to exist. The Commission, however, is proceeding to compile the necessary information for determining foreign costs for use in passing on applications for subsidized construction as they come before the Commission.

Our staff, in reviewing the Commission's action in selecting Sweden as the representative shipbuilding center and in computing the subsidy rate of 34.10 percent for the work on these ships, reported to us that:

> * * * information relative to European shipbuilding costs immediately following the war and in 1946, at which time the contracts were awarded on these

vessels, was of little value. All contracts contained generous escalation provisions because of the economic uncertainties involved during this period of readjustment. For this and other reasons a reliable estimate cannot be prepared by this Division, * * *

The staff therefore recommended that, since the work on these four C–2 ships involved installing liquid cargo facilities which were similar to part of the work done on the *Del Rio* group of C–1 ships of the same operator, based on contracts let nearly two years later, in the absence of better information, the Board should fix the subsidy rate of 24.33 percent recommended for the *Del Rio* ships, for the operator's C–2 vessels. This recommendation, of course, involved the selection of the Netherlands as the representative shipbuilding center in 1946, but it appears uncertain whether Netherlands yards were then taking on repair work for foreign account. We were unable to develop for the 1946 period any specific information as to foreign payrolls or wages, nor could we obtain complete information as to the prices of steel and other things that would normally be used in corroborating foreign material prices. Such information as was available did not prove in any definite manner that Sweden was in fact a low-cost shipbuilding center at that time.

The conditions prevailing in foreign countries in the latter part of 1946 were still fluctuating so as to make sound estimates of foreign costs most difficult to obtain. While it is not possible for us to know every element that went into the subsidy determination made by the Commission in January 1947, we are not in a position to offer any valid substitute nor are we in a position to say that the Commission should have made use of the Joint Resolution's 50 percent rate instead of the 34.10 percent rate which the Commission actually used. Accordingly, we do not find any basis for modifying the 34.10 percent subsidy rate on these vessels.

CURRENCY EXCHANGE RATE

As already stated, the foregoing estimated Netherlands reconditioning costs have been calculated by converting prices of material and labor from Netherlands florins into American dollars at the official rate of exchange prevailing at the respective contract dates. The operators, however, insist that a discounted rate should have been used. They rely primarily on our Supplementary Report in *Sales Prices of "Independence" and "Constitution,"* 4 F. M. B. 263, and argue that the same general exchange situation prevailed on the dates of the contracts here involved. APL offers in addition a letter from Messrs. F. Bleibtrau & Company, Inc., of New York, dealers in for-

eign exchange, stating that the dollar cost of establishing large florin credits in the Netherlands in September 1948 was approximately 18 percent below the cost at the official rate.

We do not think that the evidence presented regarding new construction costs and practices in the *Independence-Constitution* case or the additional evidence here presented provides a basis to justify the use, for the reconditioning work here involved, of any except the official rate of exchange. It is not at all certain what conditions the Netherlands authorities might have imposed for the use of credits arranged through "transferable sterling" or in any other manner at less than official rates for repair or reconstruction work on foreign (i. e., United States) ships. The mere possibility of establishing florin credits at less than official rates would give no assurance that such credits could be used to pay for the kind of work here involved.

We said in our first report in the *Independence-Constitution* case, 4 F. M. B. 216, 228:

> If Export had actually contracted for these ships with a Netherlands shipyard, and would have had the opportunity to contract in dollars at an appreciable discount because of impending devaluation or had been able to provide for progress payments to be made in guilders during the life of the construction contracts, it would in fact have had the benefit of a substantial reduction in dollar cost.

There is no evidence either in this or the *Independence-Constitution* case that a Netherlands shipyard would enter into any contract for dollars. In this case, unlike the *Independence-Constitution* case, all reconstruction work on the vessels involved was completed before September 21, 1949, the date of the official devaluation of Netherlands currency, and hence no progress payments would have been delayed until after official devaluation.

It follows that, as recommended by the staff, the subsidy rate should be based on calculations using the official rate of exchange. By comparing the base contract prices with the estimated foreign cost of the same work, we are able to establish the new subsidy rates which in all cases, excepting for the four C–2 vessels of Mississippi, follow the staff recommendation. The application of the new subsidy rates to the United States cost of changes in the contract work gives the total subsidy allowance for the cases here redetermined, all as set forth in the following table:

AMERICAN PRESIDENT LINES, LTD.

Vessel	Base subsidy	Rate	Changes	Total subsidy
		Percent		
President Van Buren	$77,488	32.23	+$12,869	$90,357
President Harrison	178,438	32.24	+12,837	191,311
President Johnson	193,932	34.09	+13,611	207,543

MISSISSIPPI SHIPPING COMPANY, INC.

Vessel	Base subsidy	Rate	Changes	Total subsidy
Del Rio	$71,773	24.33	+$11,162.55	$82,935.55
Del Sol	71,773	24.33	+9,284.18	81,057.18
Del Oro	71,773	24.33	+10,019.85	81,792.85
Del Campo	55,106	25.05	+5,624.75	60,730.75
Del Viento	55,106	25.05	+4,534.93	59,640.93
Del Monte	55,106	25.05	+2,254.50	57,360.50

MOORE-McCORMACK LINES, INC.

Vessel	Base subsidy	Rate	Changes	Total subsidy
Mormacmar	$182,908	29.65	−$10,723	$172,185
Mormacrey	152,570	26.02	−21,580	130,990
Mormacsurf	152,570	26.02	−21,580	130,990

Reference herein to section 802 of the Merchant Marine Act, 1936, as amended, has been made in explanation of the operators' option to reject all subsidy for reconditioning work and is not to be deemed a determination of the extent of the application, if any, of section 802 to the vessels involved, a question not raised or argued before the Board.

The three operators involved will be given thirty days in which to determine whether to accept or reject the redetermined subsidy computations as above set forth.

(Sgd) A. J. WILLIAMS,
Secretary.

FEDERAL MARITIME BOARD

No. S-49

SALES PRICES OF "MARINER" CLASS VESSELS

Staff hearing September 9, 1953. Decided February 18, 1954

Francis T. Greene and *John F. Harrell* for the Board.

REPORT OF THE BOARD

The Maritime Administration, pursuant to authority contained in the Second Supplementary Appropriation Act of 1951, entered into contracts for the construction of 35 fast cargo vessels suitable for use as national auxiliaries, and now known as the "Mariner" class. The preliminary design calling for a 20-knot sustained speed was developed by the Administration in close association with the Department of Defense, and construction was expressly approved by the President on January 10, 1951, as required by the Merchant Marine Act, 1936, as amended, hereafter referred to as the "Act." Five contracts were signed for five ships each on February 7, 1951, followed by two later contracts for five ships each, signed on June 25, 1951, and August 1, 1951, all subject to modification for escalation during the construction period and for changed plans.[1] The contract price of plans and engineering also subject to escalation and changes covered by a separate contract for $1,219,000 is divided among the 35 ships, increasing the cost of each by $34,830.

[1] The shipbuilders' bids on which contract prices were established for all contracts executed on February 7, 1951, were based on December 1950 costs of material and labor, and for all subsequent contracts, on April 1951 costs. The contracts provided for escalation on the contract prices from those months.

TABLE I

Contract date	Yard	Contract price per ship (each of 5 ships)	Plans	Total
Feb. 7, 1951	Newport News SB & DD Co	$7,775,000	$34,830	$7,809,830
Feb. 7, 1951	Ingalls SB Corp	7,898,000	34,830	7,932,830
Feb. 7, 1951	Bethlehem Steel Co., Sparrows Point	7,938,000	34,830	7,972,830
Feb. 7, 1951	Bethlehem Steel Co., Quincy	8,296,000	34,830	8,330,830
Feb. 7, 1951	Sun SB & DD Co	8,399,256	34,830	8,434,086
June 25, 1951	New York SB Co	9,290,000	34,830	9,324,830
Aug. 1, 1951	Bethlehem Steel Co., San Francisco	9,493,000	34,830	9,527,830

The sale of these vessels to American-flag operators is now deemed advisable in keeping with the purpose and policy of the Act. The vessels will thus be economically useful and will be privately maintained so as to be available for requisition in case of national need.

Some of the vessels have not yet been completed and are accordingly available for sale to citizens of the United States, on proper application, for use in foreign commerce pursuant to title V of the Act.

Under section 502 of the Act the cost of national-defense features incorporated in the vessels is paid for in full by the Government. The Board is authorized to sell the vessels at a price corresponding to and not less than the estimated cost, as determined by the Board, of building the vessels, exclusive of such features, in a foreign shipyard. More particularly, section 502 (b) of the Act provides in part as follows:

> The amount of the reduction in selling price which is herein termed "construction differential subsidy" may equal, but not exceed, the excess of the bid of the shipbuilder constructing the proposed vessel (excluding the cost of any features incorporated in the vessel for national-defense uses, which shall be paid by the Commission in addition to the subsidy), over the fair and reasonable estimate of cost, as determined by the Commission, of the construction of the proposed vessel if it were constructed under similar plans and specifications (excluding national-defense features as above provided) in a foreign shipbuilding center which is deemed by the Commission to furnish a fair and representative example for the determination of the estimated foreign cost of construction of vessels of the type proposed to be constructed. The construction differential approved by the Commission shall not exceed 33⅓ per centum of the construction cost of the vessel paid by the Commission (excluding the cost of national-defense features as above provided), except that in cases where the Commission possesses convincing evidence that the actual differential is greater than that percentage, the Commission may approve an allowance not to exceed 50 per centum of such cost * * *.

Others of the Mariners which have been completed and delivered to the United States may be sold to citizens of the United States for use in foreign commerce pursuant to section 705 of the Act. Under this section there must be a competitive sale, and under both title V and section 705 the price for operation in the foreign trade may not be less than the estimated foreign construction cost exclusive of national defense features (determined as of the date the construction contract was executed) less, in the case of sales under section 705, depreciation based on a 20-year life.

Accordingly, we proceed to determine the estimated foreign construction costs of a Mariner, exclusive of the cost of national defense features, as of February 7, 1951, June 25, 1951, and August 1, 1951, which will be the minimum basic prices for Mariner vessels that may be sold for use in foreign commerce.

On June 10, 1952, after consideration of shipbuilding facilities in leading foreign shipbuilding areas, and the relative costs prevailing

therein, we approved the United Kingdom (herein called "Britain") as the foreign shipbuilding center which furnished a fair and representative example for the determination of the estimated foreign cost of construction of the Mariner vessels.

The remaining questions now considered are (1) what are the national-defense features incorporated into the vessels and the cost thereof, and (2) what is the estimated construction cost in Britain of the vessels, excluding national-defense features. We have considered various staff memoranda dealing with these questions, and we heard the testimony of various members of our staff in support thereof.

Considering first the national-defense features, it appears that as early as November 30, 1950, Bethlehem Steel Company, the design agent employed by the Administration for the development of the contract plans and specifications, submitted a list of 20 features in the design, which, apart from speed, were then considered to differ from normal commercial practice for cargo ships. Two of these items were eliminated by the Department of the Navy; one was eliminated by the staff as not a defense feature. Five other items: (e) making gastight boundary bulkheads for midships deckhouse; (f) making changes in ventilating design; (n) increasing deck height between the second and third decks; (o) fitting hold stringers horizontally; and (r) rearranging upper superstructure, were minor and involved no extra cost, thus leaving 12 items for consideration, all of which have been certified by the Secretary of the Navy.

NATIONAL-DEFENSE FEATURES OTHER THAN SPEED

These 12 items (a), (b), (c), (d), (g), (h), (i),[2] (j), (k),[2] (l), (m), and (p), discussed in detail below, appear to be reasonably free from doubt, and, accordingly, we determine that, generally speaking, all these should be paid for by the Government as national-defense features[2] in keeping with the policy heretofore adopted by the Maritime Commission and approved by the Board in its report in *Sales Prices of "Independence" and "Constitution,"* 4 F. M. B. 216, where it said that such features should be paid for as national-defense features "if, and to the extent, such features did not have a commercial utility, or if, and to the extent, their cost was disproportionate to their value for commercial purposes."[3]

[2] The commercial utility of (i) additional generator capacity and (k) additional evaporator capacity on Mariners converted for use as combination passenger-freight vessels is a possible exception to the above determination and is discussed below in Note 5.

[3] See page 223 of the *Independence-Constitution* report, *supra*. See also Minutes of U. S. Maritime Commission, June 10, 1948. This policy was approved by the Comptroller General of the United States in his letter of July 11, 1949, to the President of the Senate, transmitting and approving a special report of his Director of Corporation Audits.

LIST OF NATIONAL-DEFENSE ITEMS

(a) and (h) The vessel to have 25 percent excess shaft horsepower (at Navy rating of machinery) over normal, instead of the usual 10 percent (i. e., to be able to generate by overload a total of 22,000 s. hp. instead of the American Bureau of Shipping overload limit of 19,250 s. hp.). Extra cost of main and auxiliary machinery, feed and fuel pumps, and blowers, in anticipation of additional steam requirements for Navy use. Estimated additional cost, $13,400.

(b) The vessel to be strengthened for navigation in ice by reinforcement of plating, extra frames, strengthening of rudder and tailshaft. Most commercial trade routes pass through no ice area. This feature has no commercial value, except perhaps for a purchaser operating on a specialized route where the feature has a commercial value. Estimated additional cost, $35,300.

(c) Splinter protection in the form of special treatment steel plating for sides and deck of bridge house. This meets a purely military need. Estimated additional cost, $13,800.

(d) Installation of trunks for wartime carrying of degaussing cables through spaces that will be sealed up and become inaccessible upon completion of vessel. Estimated additional cost, $550.[4]

(g) Vital machinery parts to be made shock resistant requiring exclusion of cast iron or semisteel from certain areas to withstand shock anticipated in defense use. This is in addition to requirements of American commercial standards which exclude cast iron for certain sea connections. Estimated additional cost, $23,700.

(i) Installation of two 600-kw. turbo-generator units instead of two 500-kw. turbo-generator units, with piping and valve connections provided for two additional 600-kw. turbo-generator units to be installed in case of naval conversion. The evidence showed that all marine generator installations require one standby unit of the size installed. For ordinary commercial cargo requirements, one 500-kw. unit is ample for ordinary needs with a second 500-kw. unit available as a standby. Additional generating capacity might be desirable in case a commercial operator installed reefer space in addition to 30,254 cubic feet contemplated in the Mariner design. Conversion of the Mariner to a fully refrigerated ship is impracticable as appears from testimony before the Board, and also before the Potter Subcommittee of the Senate Interstate and Foreign Commerce Committee and the Bender Subcommittee of the House Committee on Government Operations in connection with proposed use by the Navy of the Mariner ship in lieu of specially designed fully refrigerated cargo vessel. The

[4] This item eliminated during construction.

modification of the Mariners to increase reefer space without making the ships fully refrigerated is entirely practicable and is being effected in the three Mariners recently set aside for purchase by Pacific Far East Line, Inc. For such an alteration, two 600-kw. units, of which one would serve as a standby, would be insufficient. Two 500-kw. generators with a third 500-kw. as a standby would, however, be sufficient, and since the standby generator must be of the same size as the service generator or generators, two 500-kw. generators are of greater advantage commercially for such a conversion than two 600-kw. units as installed on the Mariners for naval purposes. Estimated additional cost, $40,100.[5]

(j) The lubricating oil system to be operated by pressure in accordance with Navy practice as well as by gravity in accordance with commercial practice. Estimated additional cost, $970.

(k) Two 12,000 g. p. d. low pressure evaporators instead of two 8,000 g. p. d. units which are ample for commercial cargo ship requirements. Estimated additional cost, $13,000.[5]

(l) Increasing fuel oil transfer system to receive and discharge at 2,100 g. p. m. for fueling at sea instead of normal commercial system having capacity of 350 g. p. m. The increased cost covers increased size of pumps and piping. Possible advantage of oversize fuel oil intake to save time in bunkering is deemed entirely disproportionate to any trifling commercial utility. Estimated additional cost, $61,500.

(m) Increased size of firefighting pumps and piping to 1,200 g. p. m. capacity instead of usual 800 g. p. m. capacity. Estimated additional cost, $10,900.

(p) Two 60-ton booms instead of one 30-ton boom customarily carried on freighters. These heavy-lift booms were installed with particular reference to transportation of Army tanks, and while one or more of them might have a possible commercial utility on rare occasions, the extra cost is disproportionate to its value for commercial purposes. Estimated additional cost, $42,700.

Total estimated cost of above national-defense items, using Bethlehem-Quincy estimates of unit costs, $255,920.[6]

By varying the above Bethlehem-Quincy cost of national-defense features in proportion to the variations among the contract prices of the seven yards, the following table is computed to show the estimated cost of national-defense features, other than speed, at each yard, and

[5] A Mariner, if converted to a combination passenger-cargo vessel to carry several hundred passengers, may require for commercial operation all the generator and evaporator capacity actually installed. In case of sale for such conversion, items (i) and (k) cannot be considered national defense features and the computations of this report would have to be modified accordingly.

[6] Subject to modification in case of sale for use in a service where ice strengthening (b), additional generator capacity (i), or additional evaporator capacity (k) has commercial value.

the corresponding net cost at each yard excluding national-defense features other than speed, all computed without escalation.

TABLE II

Yard	Contract price	N. d. f. other than speed	Plans	U. S. cost less n. d. f. other than speed
Newport News	$7, 775, 000	$239, 850	$34, 830	$7, 569, 980
Ingalls	7, 898, 000	243, 640	34, 830	7, 689, 190
Bethlehem, Sparrows Point	7, 938, 000	244, 880	34, 830	7, 727, 950
Bethlehem, Quincy	8, 296, 000	255, 920	34, 830	8, 074, 910
Sun	8, 399, 256	259, 110	34, 830	8, 174, 976
New York	9, 290, 000	286, 580	34, 830	9, 038, 250
Bethlehem, San Francisco	9, 493, 000	292, 850	34, 830	9, 234, 980

SPEED NOT A DEFENSE FEATURE FOR MARINERS USED AS COMBINATION VESSELS

We find that where a Mariner is converted to a combination vessel to operate as a carrier of more than twelve passengers, a sustained speed of 20 knots as a general rule has commercial utility in view of present-day requirements and practices. The extreme importance of time in the transportation of passengers gives a 20-knot speed commercial utility which it does not necessarily have for cargo. We conclude that no national-defense allowance for characteristics in the Mariners designed to produce a sustained speed of 20 knots should be made with respect to any Mariner vessel sold for use as a combination passenger-freight carrier unless a special showing is made with respect to prospective operation on short runs that a lesser speed will provide commercially equivalent service.

SPEED EXCEEDING 18 KNOTS A DEFENSE FEATURE FOR MARINERS USED AS CARGO VESSELS

With respect to Mariners to be used as cargo carriers, the problem of speed is more difficult. The basis of decision, as already indicated, must turn on the extent to which the higher speed does not have a commercial utility, or the extent to which the cost of the higher speed is disproportionate to its value for commercial purposes.

The Director, National Shipping Authority, and the Chief, Office of Ship Construction, have recommended that the cost to provide sustained speed for Mariner cargo vessels in excess of 18 knots should be considered a national-defense feature.

A difference is here noted between sustained speed under ordinary sea conditions, and trial trip or maximum speed under ideal conditions of clean bottom and smooth water. The normal shaft horsepower installed permitting Mariners to maintain a sustained speed of 20

knots is 17,500 s. hp., whereas, for 18 knots, it is 12,000 s. hp.,[7] but such power will, in each case, produce greater speed under trial trip conditions and, of course, even greater speed if the ship is not fully loaded. Speeds of new vessels announced through the press or in trade publications, if given without reference to operating conditions, are therefore not always comparable.

In support of the staff's recommendation supporting an 18-knot sustained speed as the maximum having commercial utility, two estimates were made as to the cost of the additional 2 knots of speed of the Mariner vessels: (1) By extracting the cost of the normal shaft horsepower in excess of 12,000 from the vessel as designed; and (2) by comparing the cost of the Mariner with the cost of a ship designed for commercial purposes only, incorporating the commercial characteristics of the Mariner, and power sufficient only for a sustained speed of 18 knots. It was shown that certain characteristics of hull design of the Mariner, including the lengthening of the ship, were adopted solely to obtain additional speed. The extra cost of such characteristics were shown to be without commercial value in an 18-knot vessel. A comparison of the Mariner with the commercial equivalent vessel as designed by the staff is set forth below:

TABLE III

	Mariner	Commercial equivalent vessel
Length overall	563′-7¾″	529′-0″.
Length between perpendiculars	528′-0″	494′-0″.
Beam, molded	76′-0″	74′-6″.
Depth to main deck	44′-6″	44′-6″.
Load line draft (molded)	29′-9″	29′-9″.
Displacement at load line	21,093 tons	20,330 tons.
Light ship weight	7,626 tons	6,848 tons.
Deadweight (at load line draft)	13,467 tons	13,482 tons.
Scantling draft, molded	31′-6″	31′-6″.
Displacement at scantling draft	22,560 tons	21,750 tons.
Deadweight (at scantling draft)	14,934 tons	14,902 tons.
Bale cubic	736,723 cu. ft	731,617 cu. ft.
Grain cubic	837,305 cu. ft	833,000 cu. ft.
Reefer cubic	30,254 cu. ft	30,373 cu. ft.
Total fuel oil tankage	3,808 tons	3,009 tons.
Cruising radius at design speed (approximate)	18,800 nautical miles	18,800 nautical miles.
Fresh water	257 tons	173 tons.
S. hp., maximum continuous	19,250	13,750.
S. hp., normal	17,500	12,500.
Design speed at 29′-9″ draft	20 knots	18 knots.
Number of passengers	12	12.
Number of crew	53 plus 2	53 plus 2.

The two methods of appraising the cost of national-defense features indicated above produce widely different results, as appears from the following figures derived from Bethlehem-Quincy estimates of unit costs:

[7] 12,000 normal s. hp. gives the Mariner design a sustained speed of 18 knots, whereas 12,500 normal s. hp. is required to do the same for the commercial equivalent design.

TABLE IV.—*U. S. estimated cost of all national-defense features, including 2-knot additional speed*

Method 1: By extraction	[8] $713,020
Method 2: By comparison with commercial equivalent	[9] 1,296,500

We find that the design of the commercial equivalent has all the commercial characteristics of the Mariner and that the differences relate to speed and other national defense features only. We find that the estimates of the United States cost of the commercial equivalent are entirely comparable to the costs of Mariners submitted by the Bethlehem-Quincy shipyard. We find that method 2 provides a realistic method of estimating the cost of incorporating into the Mariner design the national defense features referred to above, including speed in excess of 18 knots.

From a consideration of all relevant matters brought to our attention, we are satisfied of the soundness of the staff recommendation and conclude that a sustained speed higher than 18 knots for a cargo vessel does not have commercial utility, and, in any event, the cost thereof is disproportionate to its value for commercial purposes. Our views are sustained by the speeds of presently operating and projected United States and foreign-flag cargo vessels and other considerations enumerated below.

The following statistics reflect the condition in 1952:

TABLE V.—*Vessels in liner service U. S. foreign trade 1952*

Privately owned United States-flag cargo and combination ships	466
Foreign-flag cargo and combination ships	1,073

Of the 466 United States-flag vessels, a few are combination passenger-cargo vessels not material to this discussion. The newer and faster United States-flag cargo vessels operate on the berth services of the various essential United States foreign trade routes. There were, in 1952, 323 United States-flag C-type vessels operating on the principal foreign services as follows:

---

[8]

Excess cost of 20-knot power plant (exclusive of items (a) and (h)) over 18-knot power plant	$457,100
Excess cost of other national-defense items (including items (a) and (h))	255,920
Total U. S. estimated cost of national-defense features, including 2 knots speed	713,020

[9]

Total U. S. estimated cost of Mariner with national-defense features (see Note 1)	$8,330,830
Less U. S. estimated cost of commercial equivalent at December 1950 prices—$7,244,590 (p. 428) less $210,260 escalation between December 1950 and February 1951	7,034,330
Difference, or U. S. estimated cost of all national defense features by comparison method	1,296,500

TABLE VI.—*United States C-type cargo vessels on principal berth services, 1952*

Type	Sustained speed	Number of ships
C-1	14 to 14½ knots	47
C-2	15 to 15½ knots	175
C-3	16½ knots	98
C-4	17 knots	3
		Total 323

A public announcement was made by one United States operator claiming a speed of 17½ knots for C–3 vessels and by another United States operator claiming 18 knots for C–3 vessels, but official records maintained by the Maritime Administration show speeds for these vessels of 17½ knots when light and 16½ knots when loaded. C–3 type vessels with a speed of 16½ knots are operated for the most part on routes with long runs where speed has relatively greater commercial value. The deadweight and bale capacities of the Mariners differ only slightly from the corresponding capacities of certain of the C–3 type design.

Although we do not have records of the speeds of all 1,073 foreign-flag ships engaged in liner service of United States foreign commerce, we have a record to show that in 1952 there were only 63 foreign-flag vessels engaged in United States foreign commerce with a reported speed of 17 knots or better. Of these 63 so engaged, nine had a sustained speed (i. e., speed capable of being maintained under normal conditions fully loaded) exceeding 18 knots, as follows: Three a sustained speed of 19 knots, and six a sustained speed of 19½ knots. All of these nine were Swedish-flag vessels with large reefer capacity, of which six traded from the west coasts of the United States and Canada to United Kingdom and Scandinavian ports where no United States-flag line is operating, and the remainder operated from Atlantic and Gulf ports to the Baltic. In 1953, two additional 19½-knot Swedish ships were added to this fleet, making in all 11 foreign-flag vessels engaged in United States foreign commerce with a speed of more than 18 knots. Performance records indicate that this indicated "sustained" speed is not always maintained in actual operation. The average speed of all foreign cargo vessels built since 1947 was substantially lower, as follows:

TABLE VII.—*Average speed of recently built foreign-flag vessels*

Year	Number delivered	Average speed
1948	185	14.14 knots.
1949	205	14.34 knots.
1950	199	14.08 knots.
1951	201	14.05 knots.
1952	236	13.87 knots.
1953 (6 months)	108	14.44 knots.

In the United States during the same period, only three ocean-going dry cargo ships were built other than four 16-knot full reefers and the Mariner vessels. These three were delivered in 1951 and had an average design speed of 16.83 knots. No others, except Mariners, are now under construction in the United States.

FOREIGN SHIPS UNDER CONSTRUCTION

A rumor, reported in 1953 in a British shipping publication, suggested that cargo vessels with a speed of 20 knots were under construction in Japan, but the report was denied from authoritative sources in Japan. On the other hand, we have a definite report that as of June 30, 1953, there were five dry cargo vessels under construction in Swedish and British yards having a design speed of 18 knots or better. Four of these will have an 18-knot speed and one a 19-knot speed. These figures, however, do not give consideration to the number of dry cargo vessels also under construction in foreign yards with a design speed of less than 18 knots.

It thus appears that, except for Mariners and the *Schuyler Otis Bland*,[10] there are no dry-cargo freighters in operation under the United States flag or being built in this country with speeds exceeding 18 knots. The average speed of recently built foreign-flag vessels is not over 15 knots. Of the nine foreign-flag ships operating in the United States commerce with speeds over 18 knots, most operate on routes where there is no United States flag competition, and are especially designed with large refrigerated capacity for special trade requirements, and may thus be considered exceptional in the foreign-flag liner fleets which number over 1,000 vessels trading to United States ports.

From a commercial point of view, high speed has value if it attracts more business or if it results in decreased operating costs. It does not appear that even a saving of two or three days on a long voyage which an additional 2-knot speed might make possible would

[10] The *Schuyler Otis Bland*, a prototype cargo carrier capable of 18½ knots sustained speed, was built by the Government, and since her delivery in July 1951 has been operating under bareboat charter or general agency agreement.

necessarily be of consequence to shippers who, under ordinary circumstances, are paid for goods sold at port of shipment against shipping documents, and without waiting for actual delivery abroad. There is testimony in the record that the primary interest of American C. I. F. shippers is to get the price of the product, which in most cases can be done by depositing on-board bills of lading in bank.

As to operating costs, it appears that the port time of a Mariner is substantially the same as that of a C–3 type vessel. The sea operating cost of a C–3 type vessel at 16½ knots is substantially lower than that of a Mariner at either 18 or 20 knots. The per-ton mile cost of a fully loaded Mariner operated at 20 knots is substantially the same as at 18 knots if the voyage is long enough to effect savings of one or more full days, provided fuel is purchased at the lower west coast rate of $1.70 per barrel. If fuel is purchased at the higher east coast rate of $2.40 per barrel, the operating cost of a Mariner at 20 knots is somewhat greater than at 18 knots. On short runs, the saving of part of a day is of little commercial value, for arrival time in port may necessitate delay until the beginning of the succeeding working day for the shore gangs needed to work the ship. Without in any way detracting from the commercial value of good, efficient, regular, and reasonably fast service, it appears that the element of speed by itself as a competitive element in obtaining cargo is today perhaps of less importance than in prewar days. Factors which today are becoming more important in the competition for United States export cargoes stem from the power of foreign importers and governments which control the foreign purchases to direct the routing of cargo by vessels of their choice. It appears that there are probably relatively few cases, except in respect of limited amounts of high value cargo moving mainly in the North Atlantic trades, where speed is a controlling factor in getting the business.

We are aware of certain estimates made by some members of our staff as to desirable speed that are to some extent in variance with the conclusions above set forth. We believe, however, that our conclusions are supported by the seasoned judgment of experts in the field of commercial operations, well qualified to appraise the commercial utility of the element of speed here under consideration.

COMPUTATION OF ESTIMATED BRITISH BASIC COST OF 20-KNOT MARINER AND 18-KNOT COMMERCIAL EQUIVALENT

We start with the United States contract prices on the 20-knot Mariners, including all defense features, set forth in Note 1, and proceed as more particularly set forth below.

First Step: Computation of Estimated British Cost of Mariner (20 Knots), Including National-Defense Features

The staff sent to Britain the plans, specifications, and material requisitions for the major components going into the Mariner as supplied by Bethlehem-Quincy (which company had prepared the plans and had issued all purchase orders for materials going into the vessels), and an effort was made to price each item in the British market. Of the various hull items, British prices were developed on more than 90 percent in value, and on machinery items on approximately 80 percent in value. As to the unpriced hull items, these were included in the British estimate at the ratio of the priced hull items, and similar treatment was given to the unpriced machinery items, based on the ratio of the priced machinery items. To the British estimated cost of all hull and machinery material so derived was added the British cost of labor necessary to construct the ship. The total man hours in an American yard was also taken from the Bethlehem-Quincy bid, and adjusted for differences in subcontracting practices in British yards. Based on information as to the relative productivity of representative British yards which have not all the labor-saving devices available in American yards, it was determined that on the average 18 percent more direct hours would be required in Britain than in the United States to do the same work. The average cost of labor in Britain was found to be $0.461 per hour, so that by multiplying these factors, a British labor cost of the ship was obtained, and the following computation was then possible:

TABLE VIII

Total material	$3, 120, 920	
Cost of insurance during construction	45, 000	
		$3, 165, 920
Labor 1,017,860 hours×1.18×$0.461	553, 700	
Plans and engineering	[1] 13, 560	
		567, 260
Indirect labor, including general administration charges and social charges—30 percent of direct labor		170, 180
		3, 903, 360
Establishment charges, including use of plant and equipment, property taxes, and firm's profit—25 percent of above		975, 840
Total British estimated cost of 20-knot Mariner, including national defense features, Feb. 7, 1951		4, 879, 200
This is rounded off at		4, 879, 000

[1] Itemized separately in this British estimate of cost, since the United States cost of plans and engineering was derived from a separate plans contract and was not in Bethlehem-Quincy ship contract, and, consequently, no allowance for labor or material necessary for producing British plans and engineering was included under those headings in the foregoing British labor and material estimates, which were for ship construction only.

It is to be noted that indirect labor and social charges were estimated at 30 percent, based on information from financial reports of various British shipbuilding companies and also from information derived from cost computations for the construction of a number of tankers then being constructed in Britain. In some the indirect labor and social charges ran as low as 25 percent of direct labor, and in some as high as 35 percent of direct labor, and, accordingly, an intermediate percentage of 30 percent was considered a fair medium. Similarly the basis for establishment charges and firm's profit of 25 percent is based on reports from United States foreign service representatives in Britain, taken from records of British shipyards and also from several large oil companies recently constructing tankers in British shipyards. The staff estimate for February 7, 1951, based on British figures as of that date, is deemed therefore to be as fully documented as is reasonably possible. All estimated British prices herein set forth are subject to escalation for changes in cost of material and labor in Britain during the building period. By applying the British index for materials [11] and the British index for labor [12] to the February 7, 1951, figures, the following three estimates were made of British basic costs of constructing a Mariner ship when built as one of five, and including the national-defense features incorporated in the Mariners (except item (c), special treatment steel for splinter protection), computed at the post-devaluation official rates of exchange prevailing on the dates when the contracts were signed in the United States:

TABLE IX.—*Estimated British cost of 20-knot Mariner, including defense features*

Contract date:	*Cost*
Feb. 7, 1951	$4,879,000
June 25, 1951	5,047,000
Aug. 1, 1951	5,239,000

Second Step: British Cost of 20-Knot Mariner, Excluding National-Defense Features

We next adjusted these costs to exclude costs of national-defense features except speed. The British estimate of the 20-knot Mariner, set forth above, did not include splinter protection. The 12 items of national defense features having an estimated United States cost of $255,920, as set forth above (page 419) were separately priced in

[11] Mechanical Engineering Materials Price Index from British Board of Trade Journal.
[12] Index of Weekly Wage Rates of All Workers (British) from monthly Gazette of British Ministry of Labour.

Britain as of February 7, 1951, and exclusive of splinter protection, had an aggregate British cost on that date of $155,500.[13]

This estimated British cost of national-defense features computed as of February 7, 1951, was adjusted by the same British indices to reflect changes to June 25, 1951, and August 1, 1951, to provide the following British estimated cost of the 20-knot Mariners without the 12 national-defense features referred to.

TABLE XI

Date	Total British cost	N. d. f.	Net British cost
Feb. 7, 1951	$4, 879, 000	$155, 500	$4, 723, 500
June 25, 1951	5, 047, 000	160, 854	4, 886, 000
Aug. 1, 1951	5, 239, 000	166, 974	5, 072, 000

These, then, are the fair and reasonable estimates of basic costs, as determined by us, of construction of the 20-knot Mariners if they had been constructed under similar plans and specifications (excluding national-defense features) in the United Kingdom, and provide the minimum basic prices for the Mariners if sold for use as combination passenger-freight carriers in foreign commerce.

Third Step: Computation of Estimated United States Basic Cost of Commercial Equivalent (18 knots)

The staff next computed an estimate of the basic United States cost of the 18-knot commercial equivalent as of February 7, 1951, based on the Newport News material and labor costs, plus 1/35th of the

[13] The breakdown of this figure follows:

TABLE X

National-defense features	United States	Britain
(a & h) Increased maximum power (Navy rating)	$13, 400	$12, 525
(b) Ice strengthening	35 300	17, 082
(c) Splinter protection (not in British estimate)	13, 800	----------
(d) Degaussing trunks	550	306
(g) Shock resistance	23, 700	31, 726
(i) Turbo generators	40, 100	21, 251
(j) L. O. system	970	500
(k) Evaporators	13, 000	7, 920
(l) F. O. transfer	61, 500	36, 315
(m) Fire system	10, 900	5, 199
(p) Heavy-lift booms	42, 700	22, 673
Total	255, 920	155, 497
Rounded off to	----------	155, 500

estimated cost of plans for the commercial equivalent. Thus computed, the estimated cost of the commercial equivalent and its plans priced at Newport News costs, adjusted to February 7, 1951, was $6,797,990,[14] as is more particularly explained below.

The material cost was, in general, obtained by taking the weight of each of the various material groups going into the design of the commercial equivalent and pricing these as of February 7, 1951, by weight, based on values given by the Newport News company in connection with its original Mariner bid. The foregoing general method was departed from, however, with respect to propulsion machinery, the direct current electric plant, the steering engine, windlass, capstan, and deck winches, since actual estimates for identical equipment had been given by the Newport News company in connection with its bid made over a year earlier to construct the S. S. *Schuyler Otis Bland*, which vessel, however, was actually built in another yard. The *Bland* estimates for these items were corrected for changes of cost due to the time differential and for a five-ship bid instead of a single-ship bid, and for such other variables as were necessary to make the Newport News estimate on *Bland* items in all respects comparable with the February 7, 1951, pricing of the other material items on the Mariners. The labor cost of the commercial equivalent was likewise derived from information in the Newport News bid. From this it was possible to compute the number of man-hours required to fabricate and install a ton of each of the various material groups going into the commercial equivalent, and from such information could be computed the total number of man-hours required to construct the commercial equivalent. From this it was found that 858,720 man-hours would be required to construct the commercial equivalent.

The total United States basic estimate for the commercial equivalent was thus reached as follows:

---

[14] By using the same ratio of differentials between the Newport News contract price on the Mariners and the corresponding Mariner prices of the 6 other yards to compute base prices and making adjustment for escalation, the following estimates of the basic cost of the commercial equivalent vessel in all 7 American yards is projected for the contract dates.

TABLE XII

Date	Yard	Estimated U. S. cost of commercial equivalent	Plans	Total
Feb. 7, 1951	Newport News	$6, 767, 080	$30, 910	$6, 797, 990
Do	Ingalls SB Co	6, 854, 270	30, 910	6, 885, 180
Do	Bethlehem, Sparrows Point	6, 879, 450	30, 910	6, 910, 360
Do	Bethlehem, Quincy	7, 213, 680	30, 910	7, 244, 590
Do	Sun SB & DD Co	7, 311, 550	30, 910	7, 342, 460
June 25, 1951	New York SB Co	7, 836, 170	31, 690	7, 867, 860
Aug. 1, 1951	Bethlehem, San Francisco	7, 976, 860	32, 330	8, 009, 190

TABLE XIII

Estimated U. S. cost of material (December 1950 prices)	$3, 468, 000
Estimated cost of labor—858,720 hours at $1.72 per hour	1, 477, 000
Estimated overhead and profit based on Newport News Mariner bid	1, 620, 000
Subtotal	6, 565, 000
Adjustment to make Newport News bid prices of material and labor effective as of Feb. 7, 1951	[1] 202, 080
Subtotal	6, 767, 080
Estimated cost of plans (December 1950 prices)	29, 410
Adjustment to make plans estimate effective as of Feb. 7, 1951	1, 500
Total United States basic estimate of commercial equivalent as of Feb. 7, 1951	6, 797, 990

[1] This adjustment is necessary because in the Newport News bid material and labor are priced as of December 1950 for escalation purposes.

Fourth Step: Computation of Estimated British Cost of 18-Knot Commercial Equivalent February 7, 1951

In connection with establishing the over-all ratios of British to United States cost of the 20-knot Mariners, the process of pricing the items of materials used in the construction of the Mariner in Britain discloses a ratio of British February 7, 1951, material costs to United States material costs estimated as of December 1950, disclosed by Bethlehem-Quincy bid for the 20-knot Mariners to be 68.07 percent. This material ratio was used to estimate the British material cost of the 18-knot commercial equivalent instead of following the more burdensome method of a second separate British pricing of each component item of material entering into the commercial equivalent.

The United States estimated cost of materials for the commercial equivalent was necessarily based, as already explained, on the Newport News figures, and amounted to $3,468,000. In order to use the 68.07 percent ratio thus developed in connection with British cost to Bethlehem-Quincy American costs of materials, it was necessary to translate the Newport News material costs of the commercial equivalent into Bethlehem-Quincy costs. The estimated cost of the commercial equivalent based on the Bethlehem-Quincy contract price for the Mariners based on December 1950 prices was $7,004,920. We have records to show that the basic cost before escalation of material for the 20-knot Mariners constructed at Bethlehem-Quincy was $4,585,000 out of a total ship's cost of $8,296,000, and we are advised that material costs of vessels of the type here involved vary substantially in proportion to total costs. Applying the ratio between these figures, we have

computed the Bethlehem-Quincy material cost of the commercial equivalent to be $\frac{4585}{8296}$ of $7,004,920, or $3,871,451. Sixty-eight and seven hundredths percent of this figure shows the comparable British material costs of the commercial equivalent to be $2,635,297.

Similarly, we have records to show that the total man-hours required to construct the $8,296,000 20-knot Mariner at Bethlehem-Quincy was 990,500 man-hours. We are advised that man-hours likewise vary substantially in proportion to total costs. Accordingly, for a Bethlehem-Quincy commercial equivalent costing $7,004,920, the necessary man-hours can be reasonably estimated to be $\frac{7004}{8296}$ of 990,500, or 836,352 man-hours. This United States man-hour figure for the commercial equivalent, adjusted for differences in subcontracting practices in British yards, already referred to on page 425, gives a British man-hour figure of 859,435 man-hours. The British estimated cost of plans and engineering for a 20-knot Mariner was $13,560, as set forth on page 426. A proportionate reduction in plan costs for an 18-knot commercial equivalent gives an estimated British cost of plans and engineering of $11,450.

With the British material cost of the commercial equivalent estimated at $2,635,297 and plans estimated at $11,450, and labor estimated at 859,435 man-hours, a reasonable British estimate of the entire commercial equivalent was computed in substantially the same manner used for the British estimate on the 20-knot Mariner set forth on page 426, giving a result of $4,120,000 on February 7, 1951, as follows:

TABLE XIV

Material—68.07 percent of $3,871,451 equals	$2, 635, 297	
Insurance	37, 997	
		$2, 673, 294
Labor—859,435 hours × 1.18 × $0.461 equals	467, 516	
Plans and engineering	11, 450	
Direct labor	478, 966	
Indirect labor, including general administrative charges and social charges—30 percent of direct labor	143, 690	
		622, 656
		$3, 295, 950
Establishment charges, including use of plant and equipment, property taxes, and firm's profit—25 percent of above		823, 987
Total British estimated cost of 18-knot commercial equivalent, Feb. 7, 1951		$4, 119, 937
This is rounded off at		$4, 120, 000

Fifth Step: British Cost of 18-Knot Commercial Equivalent for Later Dates

When once the British estimated cost as of February 7, 1951, was established for the commercial equivalent, the British index of materials and labor already referred to was applied to the February 7, 1951, material and labor costs above set forth and the following British estimated costs were computed for the three contract dates as follows:

TABLE XV

February 7, 1951	$4, 120, 000
June 25, 1951	4, 261, 000
August 1, 1951	4, 424, 000

TABLE XVI.—*Summary of basic cost ratios—British estimated cost to United States actual or estimated cost—and maximum subsidy rates computed as of dates of United States Mariner construction contracts*

Yard	20-knot vessel for passenger-freight combination use—ratio, British : American	Maximum subsidy rate (percent)	18-knot vessel for freighter use—ratio, British : American	Maximum subsidy rate (percent)
Newport News	[1] 4, 723, 500 / 7, 893, 700 = 0. 6053	39. 47	4, 120, 000 / 6, 797, 990 = 0. 6061	39. 39
Ingalls	[1] 4 723 500 / 7, 903 780 = . 5976	40. 24	4, 120, 000 / 6, 885, 180 = . 5984	40. 16
Bethlehem, Sparrows Point	[1] 4 723 500 / 7, 932, 680 = 5954	40. 46	4, 120, 000 / 6, 910, 360 = 5962	40. 38
Bethlehem, Quincy	[1] 4 723, 500 / 8, 316, 300 = . 5680	43. 20	4, 120, 000 / 7, 244, 590 = . 5687	43. 13
Sun	[1] 4. 723, 500 / 8 428, 636 = . 5604	43. 96	4 120, 000 / 7, 342, 460 = . 5611	43. 89
New York	[1] 4 886, 000 / 9, 031, 700 = . 5410	45. 90	4 261, 000 / 7, 867, 860 = . 5416	45. 84
Bethlehem, San Francisco	[1] 5 072, 000 / 9, 193, 950 = . 5517	44. 83	4 424, 000 / 8, 009, 190 = . 5524	44. 76

[1] Since the United States contract price figures, as explained in Note 1, are based on bidders' estimates of December 1950 and April 1951, for contracts executed on Feb. 7, 1951, and on June 25, 1951, and Aug. 1, 1951, respectively, the figures for U S. costs less NDF, set forth in table II, have been re-estimated for use in this table to reflect escalation to the contract dates so as to make them comparable with the British estimates, all of which are based on British prices as of the several contract dates.

TABLE XVII.—*Summary of minimum basic prices for Mariner vessels for use in foreign commerce*

Yard	20-knot vessel for passenger-freight combination use	18-knot vessel for freighter use
Newport News Ingalls SB Co Bethlehem, Sparrows Point Bethlehem, Quincy Sun SB & DD Co	$4, 723, 500	$4, 120, 000
New York SB Co	4, 886, 000	4, 261, 000
Bethlehem, San Francisco	5. 072, 000	4, 424, 000

CHANGES, ESCALATION, ETC.

The foregoing basic minimum prices are subject to adjustment for changes and escalation and the owner's "allowance list", being the cost

of certain Government-furnished ship's outfit such as navigating instruments, flags, steward's outfit, including silver and linen, as well as deck and engine room portable tools and outfit. In the case of sale of a vessel under section 502 of the Act, adjustments will also have to be made for interest; and in case of a sale under section 705 of the Act, adjustment will be required for depreciation. The computation of these items may be made for each vessel when a sale becomes imminent, but certain general principles with regard to the computation of these items may be here set forth. We believe that the items of interest and depreciation raise no serious problem when the sales price has once been established. The various items supplied by the Government have, according to a preliminary estimate furnished us, a value of approximately $35,000 per vessel. No evidence has been presented to us that the cost of these items in Britain is less than the cost at which they will be supplied by this Government to the vessels, and, accordingly, no subsidy allowance will be made with respect to these items.

Any changes in the original contract, plans, and specifications made since the signing of the respective contracts will carry the subsidy rate above set forth in table XVI for the vessel involved, excepting that any increase or decrease in cost of items which have been designated in this report as national-defense features will be entirely for Government account.

The determination of escalation is somewhat more complicated. All the contracts with the American yards provide for a base price to be adjusted upward or downward for changes in costs of materials or labor in accordance with well-recognized United States Government indices, with allowance for certain machinery items in some cases. The estimated British construction costs of the 20-knot Mariner and the commercial equivalent have been computed herein as basic costs as of the American contract dates. We are advised that the British contracting practice is somewhat different from the American practice in that whereas a basic price may be agreed to, escalation is not computed from any established indices. On the contrary, where contracts are not made on a cost-plus basis, British practice appears to be to set forth in the contract the expected disbursement for material items and for labor items and agree that if the cost of material or the cost of labor is increased or decreased from the specified amount during the construction period, an adjustment will be made accordingly. Such an arrangement thus makes British escalation dependent on a post-construction audit of the builder's actual figures, a procedure which does not help us to make the foreign cost estimates required of us under the Act. Where, as here, both the American construction contract and the foreign practice provide for modification of the build-

er's contract price for changes in material and labor costs during construction, and where, as here, we have selected British estimated construction costs as of the dates of the respective United States contracts, some adjustment must be made in British basic costs for escalation if our estimates are to fairly and reasonably represent the total British estimated cost of construction. This conclusion is consistent with the conclusion set forth in our first report in *Sales Prices of "Independence" and "Constitution," supra*, where we said in this connection:

> Section 502 of the Act, particularly when coupled with the authority given under section 207 to "enter into such contracts * * * as may, in its discretion, be necessary," contains sufficient flexibility to permit subsidy determinations to conform to accepted commercial practice in this regard.

In the same report we posed the question as to whether escalation adjustment for the hypothetical ship should be based on changes in foreign shipbuilding costs, or whether the adjustment for administrative convenience might be geared to United States wage and material indices, and we said:

> From a strictly theoretical point of view the escalation clause in a foreign vessel sales contract should be geared to appropriate foreign wage and material indices since the vessel sales price is to be "a price corresponding to the estimated cost * * * of building such vessel in a foreign shipyard."

Our attention has been directed to the "Mechanical Engineering Materials Price Index," giving a weight value to approximately thirty engineering commodities, maintained on a monthly basis by the British Board of Trade, an official British agency. This materials index is regularly published in the British Board of Trade Journal, and, in our judgment, is the best available measure of changes in materials costs which British shipbuilders and their clients would take account of in the post-construction audits which have been described to us.

Our attention has also been directed to the "Index of Average Hourly Earnings of All Workers in the Shipbuilding and Ship Repair Industry," published every 6 months, and the "Index of Weekly Wage Rates of All Workers in the Principal Industries and Services," published every month by the British Ministry of Labour in its monthly Gazette. While the labor rates for the shipbuilding industry are not published monthly, we believe that by interpolation of data from the index of all workers for intermediate periods a satisfactory British wage index for the shipbuilding industry is available for any given month. We agree with the recommendation of our staff that, at least under the circumstances disclosed in this case, the British indices above mentioned reflect more accurately increases or decreases in British costs of material and labor, including indirect labor, social and administrative charges during construction, than could be obtained

688-650 O - 63 - 31

from the application of American indices or from any other reasonably available source. We think the use of the available British indices is more practical than an attempt to discover contemporaneous contracts and audits which might disclose adjustments for British escalation based on actual experience.

The question remains as to the method of application of the British indices, and particularly as to the amounts of labor and material entering into our basic estimated foreign construction cost to which the indices should be applied for each escalation period during the time of construction. Each Mariner constructed in a United States yard may have a different period of construction from every other Mariner, and on any selected date may have progressed toward completion to a different extent. The escalation factors of any particular Mariner accordingly cannot well be used in our estimate of the escalation element entering into the total estimated construction cost of the hypothetical foreign vessel. Accordingly, we believe it fair and reasonable to estimate a single foreign escalation figure to be added to the estimated basic foreign prices above set forth, based on all appropriate escalation factors entering into the computation of United States escalation for each of the three groups of Mariners respectively. This would be accomplished with respect to Mariners contracted for on February 7, 1951, by (1) determining the extent of completion of each such Mariner in each escalation period (except those whose completion as commercial vessels is abandoned), thereby establishing the average percentage of material received for and labor performed on such vessels for each escalation period, and (2) then applying to the British basic costs of such percentage of material and labor for each such escalation period the increase or decrease shown by the British material and labor indices, with due regard for any change in the official rate of currency exchange applicable to each escalation period.

Similar computations would be made for the escalation with respect to Mariners contracted for on June 25, 1951, and on August 1, 1951, respectively. The computation of escalation upon any estimated basic construction cost, as hereinabove set forth, whether involving British or American costs, may be made in the manner above set forth, using the appropriate indices, or, in the alternative, by the use of ratios wherever appropriate.

Since the ratio of British to American escalation does not necessarily follow the ratio above set forth for the basic ship costs, there is a possibility that the total British estimated cost of construction, including extras, escalation, etc., may be less than 50 percent of the actual cost of the 20-knot Mariner or estimated United States cost of construction of the 18-knot commercial equivalent, plus escalation,

extras, etc. In such event, the statutory subsidy limit of 50 percent of total United States cost must prevail and the subsidy award must necessarily be limited to that amount.

(Sgd) A. J. WILLIAMS,
Secretary.

FEDERAL MARITIME BOARD

MARITIME ADMINISTRATION

Docket No. S–36

AMERICAN PRESIDENT LINES, LTD.—APPLICATION FOR PERMISSIONS UNDER SECTION 805 (a), MERCHANT MARINE ACT, 1936, AS AMENDED

Application for permission authorizing certain persons to serve on the board of directors of American President Lines, Ltd., and for a holding company or affiliate of American President Lines, Ltd., to maintain certain relationships with a concern that owns or charters vessels in the domestic intercoastal or coastwise service, granted.

No showing made that grant of such permission will result in unfair competition to any person, firm, or corporation operating exclusively in coastwise or intercoastal service, or that it would be prejudicial to the objects and policy of the Merchant Marine Act, 1936, as amended.

Warner W. Gardner for applicant.

Odell Kominers for Luckenbach Steamship Company, Inc., and *Alan F. Wohlstetter* and *William I. Denning* for Pacific-Atlantic Steamship Co., interveners.

John Mason for the Board and the Maritime Administrator.

REPORT OF THE BOARD AND THE MARITIME ADMINISTRATOR

BY THE BOARD AND THE MARITIME ADMINISTRATOR:

American President Lines, Ltd. (hereinafter referred to as "APL"), has applied to the Board and the Maritime Administrator for written permissions under section 805 (a) of the Merchant Marine Act, 1936, as amended (hereinafter called "the Act"), for certain persons to serve on its board of directors and for a holding company or affiliate to maintain certain relationships with a concern that owns or charters vessels in the domestic intercoastal or coastwise service.

Luckenbach Steamship Company, Inc., Luckenbach Gulf Steamship Company, Inc.,[1] and Pacific-Atlantic Steamship Co. have intervened, and applicant and interveners have been heard on the issues raised.

[1] States Marine Company of Delaware purchased Luckenbach Gulf in its entirety, after Luckenbach had filed its petition to intervene, but States has not appeared or participated actively in this case.

Section 805 (a) of the Act provides that:

> It shall be unlawful to award or pay any subsidy to any contractor under authority of title VI of this Act * * * if said contractor * * * or any holding company, subsidiary, affiliate, or associate of such contractor * * * or any officer, director, agent, or executive thereof, directly or indirectly, shall own, operate, or charter any vessel or vessels engaged in the domestic intercoastal or coastwise service, or own any pecuniary interest, directly or indirectly, in any person or concern that owns, charters, or operates any vessel or vessels in the domestic intercoastal or coastwise service, without the written permission of the Commission. * * * The Commission shall not grant any such application if the Commission finds it will result in unfair competition to any person, firm, or corporation operating exclusively in the coastwise or intercoastal service or that it would be prejudicial to the objects and policy of this Act * * *.

APL is a contractor under authority of title VI of the Act [2] and has applied for permission authorizing the following relationships:

Ralph K. Davies is an officer and director of APL. He is a substantial shareholder of American Independent Oil Co. (hereinafter called "Aminoil"). Aminoil is the sole owner of all the capital stock of Independent Tankships, Inc. (hereinafter called "Tankships"). Tankships owns six T2 tankers, some of which at one time or another have engaged in the intercoastal or coastwise carriage of petroleum products.

O. W. March is a director of APL and owns 0.65 percent of the common stock of Signal Oil and Gas Co., which owns 15.08 percent of the common stock of Aminoil, the owner of Tankships.

Russell H. Green is a director of APL and owns some of the stock of Signal Oil and Gas Co., a stockholder of Aminoil, the owner of Tankships.

Samuel B. Mosher is not now a director of APL, but he was on its board of directors from March 19, 1951, to June 10, 1953, and it is anticipated that he will return to the board at some future time. Mr. Mosher owns 18.4 percent of the common stock of Signal Oil and Gas Co., which, as pointed out above, is a shareholder in Aminoil, the owner of Tankships.

Signal Oil and Gas Co. owns 46.1 percent of the voting stock and about 33.6 percent of the total stock equity of APL. Signal Oil and Gas Co. owns 15.08 percent of the common stock of Aminoil, the owner of Tankships.

The above described relationships have existed for a number of years, and it is for these relationships as they have existed in the past and as they may exist in the future that APL has requested permission under section 805 (a).

---

[2] APL holds operating-differential subsidy contract No. FMB-12.

In addition to the facts as set forth above, the following facts bear on the determination of this case:

(1) APL is the successor in interest to the former Dollar Steamship Line, Inc., Ltd.,[3] a steamship company which, between August 15, 1938, and October 28, 1952, was owned principally by the United States. In March of 1948, the United States voted its stock to put Mr. Davies on the board of directors. Mr. Davies was then, as he is now, a shareholder in Aminoil, which at that time, as now, owned Tankships.

(2) Mr. Mosher was put on the board by the United States in March of 1951. He was then, as now, a shareholder of Signal Oil and Gas Co., which owns stock in Aminoil, the owner of Tankships.

(3) When the United States sold its APL stock on October 28, 1952, it knew that the purchaser intended to sell "about 50 percent" of such stock to Signal Oil and Gas Co.

(4) Tankships received its corporate charter in October 1947. It secured and has owned since 1948 six ocean-going tankers: *Birch Coulie*, *Fort Fetterman*, *Pine Ridge*, *Powder River*, *Quemado Lake*, and *Spirit of Liberty*.

The first five of the foregoing tankers were let under 5-year bareboat charters to Esso Shipping Company at dates between January 30, 1948, and February 17, 1948. While Tankships had no interest in or control over the use to which the vessels were put under bareboat charter, it appears, in fact, that all five vessels were in the Gulf/Atlantic trade or in the foreign trade.

Since termination of the Esso charters in 1953, these five vessels have all been under voyage charters in the foreign, coastwise, and intercoastal trades. There have been only two intercoastal voyages by these ships, each carrying casing-head gasoline, Gulf to California.

The *Spirit of Liberty*, since its acquisition by Tankships in June 1948, has been on consecutive or single voyage charters. From June 1948 to October 1950, the charter voyages were in the coastwise or intercoastal trade; in October 1950, the ship was let on a 2-year voyage charter in the foreign trade. In November and December 1952, the ship was let on single voyage charters for Gulf to North of Hatteras liftings. Since January 1953, the ship has been under a 19-month consecutive charter which permits world-wide trading but the ship is expected to operate mostly coastwise. Since its acquisition by Tankships, the ship has made eleven intercoastal voyages, carrying fuel oil eastbound or casing-head gasoline westbound.

[3] The name of the company was changed to American President Lines, Ltd., in August 1938.

(5) Interveners operate dry cargo ships in the intercoastal trade; such ships have deep tanks in which are carried from time to time lubricating oil, vegetable oils, fatty oils, and detergents.

POSITIONS OF THE PARTIES

All parties agree that the vessels of Tankships have never carried any cargo in competition with interveners. APL is willing to commit Tankships never to carry any lubricating oils, vegetable oils (including coconut), fatty oils (including tallow), or detergents. Pacific-Atlantic would not object to our granting section 805 (a) permission, limiting Tankships' vessels, however, from carrying any of the above-named cargoes. Luckenbach agrees that it does not object to such limited permission directed toward the future, but it does object to any permission covering past activities, whether limited or not.

APL argues, despite the fact it has filed the application herein, that section 805 (a) does not apply to the relationships above described because Tankships' vessels have never engaged in a regular service. Additionally, APL urges that the relationships are too remote to be reached by section 805 (a). APL urges in the alternative that written permission has already been granted for the relationships because of the written proxies given by the Maritime Commission to put Messrs. Davies and Mosher on APL's board of directors. The defect of lack of opportunity for hearing under section 805 (a), says APL, has been cured by these proceedings, and the former permission can now be ratified. As a final alternative, APL submits that full permission can now be granted because no showing has been made that Tankships' vessels have offered any competition—much less unfair competition—to any intercoastal or coastwise operator.

APL, accordingly, moves (1) for a declaratory order that section 805 (a) is inapplicable here, or, in the alternative, (2) for a declaratory order that the written permission required by section 805 (a) has already been granted in the Maritime Commission proxies putting Messrs. Davies and Mosher on APL's directorate, or, in the alternative, (3) that full permission be granted now, both retrospectively and prospectively.

Luckenbach takes the position that section 805 (a) is applicable to any intercoastal or coastwise voyage and therefore reaches the operations of Tankships, and that the relationships between APL and Tankships, however remote, are nevertheless within the terms of the statute. Luckenbach concedes that Tankships' vessels have never competed with its vessels for any cargo, and concedes further that we have power to grant the requested permission for the past, up to the

time the application was filed herein. Luckenbach asserts, however, that APL has been in willful violation of section 805 ever since the application was filed.

Pacific-Atlantic generally joins in Luckenbach's position, except that it has no objection to the grant of permission if limited, as stated above, against Tankships' carrying lubricating oils, vegetable oils, fatty oils, or detergents.

Counsel for the Board argue that while the relationships described above are remote, they are, nevertheless, within the scope of the statute. He says, however, that section 805 (a) is not self-executing, does not relate to the past, and that any past activity which may come within section 805 can only be reached under section 805 (f). Under that section, violations of section 805 must be shown to have been willful.

DISCUSSION

In the administration of section 805 (a), we are alert to insure that the concern expressed by Congress for the protection of coastwise and intercoastal operators is given full effect. In *Am. Pres. Lines, Ltd.—Unsubsidized Operation, Route 17*, 3 F. M. B.-M. A. 457, we said at page 470 that

> The great importance to our merchant marine of its domestic fleet * * * should prompt us to resolve all doubts against activities of subsidized companies whose operations might tend to impede the development of domestic transportation by sea.

We are ready to resolve all doubts in favor of the intercoastal operators in this case, but we have not been presented with evidence indicating that vessels of Tankships have engaged in unfair competition with intercoastal operators or that such operations have been or would be prejudicial to the objects and policy of the Act (if such operations in the future are limited as described above).

The vessels of Tankships have made only thirteen intercoastal voyages, on none of which has any cargo been carried that was competitive with the operations of any intervener herein. There has been no suggestion that any Tankships operation has deprived any intercoastal or coastwise operator of cargo which they need, or have the capacity to carry, or to which they are fundamentally entitled.

Turning next to the particular contentions of the parties and especially to the motions of APL, we deny the motion for a declaratory order that section 805 (a) is not applicable here. Our predecessors have applied the section even where only two episodic intercoastal

voyages were involved,[4] and we believe that *a fortiori* the section is applicable to the operations of Tankships. Nor are the APL-Tankships relationships too remote for the statute. They are within the clear meaning of the statute, which speaks in terms of ownership of vessels or pecuniary interests, "directly or indirectly".

APL's second motion, for a declaratory order that the requisite statutory permission has already been granted, is also denied. Section 805 (a) calls for "the written permission of the Commission", and in view of Congress' concern for intercoastal and coastwise operators and in view of the mandatory requirement for hearing on section 805 (a) issues, we take it that we cannot impute the force of statutory permission to proxies, given by the Maritime Commission without the benefit of the hearing we have had herein.

We will, however, grant APL's third motion that the applied-for permission be granted now, retrospectively and prospectively, upon condition that Tankships' vessels shall not carry any lubricating oils, fatty oils, vegetable oils, or detergents.

As stated above, all parties have agreed that such limited permission may be granted for the future. Further, we have not been presented with either facts or argument against the granting of permission for the past up to the date of the filing of the application herein, or to the effect that such permission would be prejudicial to the objects and policy of the Act.

With respect to the period since the filing of the application, during which the application has been before us, Luckenbach urges that APL has willfully continued the relationships without permission, and has therefore violated section 805 (f). If this contention had any validity it would mean that a subsidized operator could never file application under section 805 (a) without entering upon a violation of section 805 (f), unless section 805 (a) permissions were forthcoming instantly upon filing the application. As a matter of practical administration, of course, that is not possible. Nor do we suppose Congress intended such a result, for the statute contains provision for interventions against applications and for a mandatory hearing on such interventions. Accordingly, our retrospective permission will apply not only up to the filing of the application herein, but also to the period between such filing and the date of our order herein.

An appropriate order will be entered.

[4] *Lykes Bros. Steamship Company, Inc.—Application Under Section 805 (a), etc.*, 2 U. S. M. C. 349.

ORDER

At a Session of the FEDERAL MARITIME BOARD, held at its office in Washington, D. C., on the 14th day of April A. D. 1954

No. S-36

AMERICAN PRESIDENT LINES, LTD.—APPLICATION FOR PERMISSIONS UNDER SECTION 805 (a), MERCHANT MARINE ACT, 1936, AS AMENDED

It appearing, That American President Lines, Ltd., has applied to the Board and the Maritime Administrator for written permission authorizing the following relationships:

(1) For Ralph K. Davies to act as an officer and director of American President Lines, Ltd.;

(2) For O. W. March, Russell H. Green, and Samuel B. Mosher to act as directors of American President Lines, Ltd.; and

(3) For Signal Oil and Gas Co. to be a holding company, subsidiary, affiliate, or associate of American President Lines, Ltd.; and

It further appearing, That Luckenbach Steamship Company, Inc., Luckenbach Gulf Steamship Company, Inc., and Pacific-Atlantic Steamship Co., have intervened against such application, and

The Board and the Maritime Administrator having heard the applicant and the interveners on said application:

It is ordered, That written permission as required by section 805 (a) of the Merchant Marine Act, 1936, as amended, be, and it is hereby, granted, authorizing the existence of the relationships above described, retrospectively and prospectively, subject to the condition that none of the vessels owned, operated, or chartered by Independent Tankships, Inc., shall, after the date of this order, carry any lubricating oils, or vegetable oils (including coconut), or fatty oils (including tallow), or detergents, in the domestic intercoastal service.

By order of the Board.

This order is concurred in and adopted by the Maritime Administrator.

[SEAL] (Sgd.) GEO. A. VIEHMANN,
Assistant Secretary.

FEDERAL MARITIME BOARD
MARITIME ADMINISTRATION

No. S-38

ISBRANDTSEN CO., INC.

v.

AMERICAN EXPORT LINES, INC.

Submitted May 3, 1954. Decided May 13, 1954

Isbrandtsen Co., Inc., not found to operate as a common carrier by water exclusively employing vessels registered under the laws of the United States on Trade Route 18 from and to a United States port or ports.

Participation by American Export Lines, Inc., with other common carriers by water, in cotton freight agreements for exclusive carriage of Egyptian cotton from Egypt to India and Pakistan, not found to be unjustly discriminatory or unfair within the meaning of section 810 of Merchant Marine Act, 1936, as amended, or of section II–18 (b) of the operating-differential subsidy agreement between American Export Lines, Inc., and the United States.

American Export Lines, Inc., not shown to have failed to cooperate with other American-flag companies in the development of the American-flag merchant marine as a whole in violation of section II–3 of the operating-differential subsidy agreement between American Export Lines, Inc., and the United States.

Participation by American Export Lines, Inc., without approval of the United States, in cotton freight agreements for exclusive carriage of Egyptian cotton from Egypt to India and Pakistan found not in violation of section II–18 (c) of the operating-differential subsidy agreement between American Export Lines, Inc., and the United States.

John J. O'Connor and *John J. O'Connor, Jr.*, for Isbrandtsen Co., Inc.

Gerald B. Brophy, *Carl S. Rowe*, and *Francis E. Koch* for American Export Lines, Inc.

Richard W. Kurrus as Public Counsel.

REPORT OF THE BOARD AND THE MARITIME ADMINISTRATOR

BY THE BOARD AND THE MARITIME ADMINISTRATOR:

Exceptions to the examiner's recommended decision have been filed by all parties and the matter has been argued orally before the Board

and the Administrator.[1] We agree with the result recommended by the examiner. Exceptions and recommended findings not discussed in this report nor reflected in our findings or conclusions have been given consideration and found not related to material issues or not supported by evidence.

Complainant (hereinafter called "Isbrandtsen") maintains a United States-flag round-the-world common-carrier service running eastbound from United States North Atlantic ports through the Mediterranean Sea and the Indian Ocean and thence across the Pacific and back to United States North Atlantic ports, and offers to transport freight from Alexandria, Egypt, to ports in India and Pakistan. Respondent (hereinafter called "Export") operates a United States-flag common-carrier service, and receives an operating-differential subsidy under a contract with the United States for service between United States Atlantic ports and ports in the Mediterranean Sea, India, Pakistan, Ceylon, and Burma, on essential trade route No. 18, and likewise offers to transport freight from Alexandria to ports in India and Pakistan.

Isbrandtsen alleges that Export and 29 American and foreign steamship lines made two annual agreements with members of the Alexandria Cotton Exporters Association (who are the shippers of substantially all the cotton moving from Alexandria to India and Pakistan) for the transportation of all their cotton destined to India and Pakistan, and that Export's action pursuant to such agreements has effectively excluded Isbrandtsen from participating in the transportation of such cotton, and is unjustly discriminatory and unfair to Isbrandtsen because in violation of section 810 of the Merchant Marine Act, 1936 (hereinafter called the "1936 Act"), and in violation of certain provisions of respondent's operating-differential subsidy agreement. Isbrandtsen demands the discontinuance of subsidy payments by the United States to Export and the termination of Export's subsidy agreement.

Section 810 of the 1936 Act reads as follows:

It shall be unlawful for any contractor receiving an operating-differential subsidy under title VI or for any charterer of vessels under title VII of this Act, to continue as a party to or to conform to any agreement with another carrier or carriers by water, or to engage in any practice in concert with another carrier or carriers by water, which is unjustly discriminatory or unfair to any other citizen of the United States who operates a common carrier by water exclusively employing vessels registered under the laws of the United States on any established trade route from and to a United States port or ports.

[1] Board members Williams and Upton heard oral argument. Maritime Administrator Rothschild has reviewed the record of the argument, and he participates in this decision as Administrator.

No payment or subsidy of any kind shall be paid directly or indirectly out of funds of the United States or any agency of the United States to any contractor or charterer who shall violate this section. Any person who shall be injured in his business or property by reason of anything forbidden by this section may sue therefor in any district court of the United States in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

Sections II–3, II–18 (b), and II–18 (c) of Export's subsidy agreement, relied on by Isbrandtsen, read as follows:

II–3. *Development of American-flag Merchant Marine.* The Operator shall cooperate with the Commission and with other American-flag companies in the development of the American-flag merchant marine as a whole and, wherever practicable, the Operator shall favor American-flag companies in transshipping cargo, in selecting foreign and domestic agents or other representatives, in the rental of terminal and other facilities, and in related matters.

II–18 (b) The Operator agrees not to continue as a party to or to conform to any agreement with another carrier or carriers by water, or to engage in any practice in concert with another carrier or carriers by water, which is unjustly discriminatory or unfair to any other citizen of the United States who operates a common carrier by water exclusively employing vessels registered under the laws of the United States on any established trade route from and to a United States port or ports.

II–18 (c) Before obligating itself otherwise than conditionally upon approval of the Commission, after the date of execution of this agreement, under any agreement applicable to the subsidized service(s), route(s) or line(s) which provides for any pooling or apportioning of earnings, losses or traffic, or any allotting or distribution of sailings, traffic or area, or which restricts or attempts to restrict the volume, scope, frequency, or coverage of any such subsidized service(s), route(s) or line(s), the Operator shall obtain the Commission's approval thereof under this agreement, in addition to any approval required under any other provision of law. In granting or withholding such approval, the Commission shall consider whether such agreement contravenes, or may reasonably be expected to operate at any time so as to contravene the purposes, policy, or provisions of the Act.

In the event the Operator is at the date of execution hereof a party to any agreement of the type described above, it shall promptly so advise the Commission. If the Commission at any time finds, after notice and opportunity to the Operator to be heard, that any such existing agreement, or any such agreement executed after execution of this agreement, whether or not previously approved under Section 15, Shipping Act, 1916, or hereunder, contravenes or may reasonably be expected to operate at any time so as to contravene the purposes, policy, or provisions of the Act, the Operator shall take such lawful action as the Commission may require to amend, modify, terminate or withdraw from such agreement.

If upon review of such existing agreements, the rights of withdrawal therein provided are found by the Commission to be unreasonably restrictive as to time, cause therefor, or otherwise, the Operator shall cooperate with the Commission in securing such revision thereof as the Commission shall require.

Sections II–21 (f), II–30 (b), (e), and (f), and II–31 of the subsidy agreement, also relied on by Isbrandtsen, provide for discontinuance of subsidy payments for violations of section II–18 (b) and define events of default, and provide for the termination of the subsidy agreement in case of the happening of events of default so defined.

Export filed a motion to dismiss the complaint on the following grounds:

1. No provision of law or of Export's operating-differential subsidy agreement confers upon Isbrandtsen any right to initiate a proceeding for any violation of section 810 of the 1936 Act;
2. Isbrandtsen fails to allege that it is one of the class for whose protection section 810 of the 1936 Act is designed and without whom there can be no violation of that section;
3. Section 810 of the 1936 Act confers no jurisdiction on the Board with respect to commerce between points in foreign countries as set forth in the complaint; and
4. Export's action under the cotton agreements violated no statute but was actually in accordance with the policy of Congress expressed in section 14a of the Shipping Act, 1916 (hereinafter called the "1916 Act").

We denied the motion to dismiss, without at that time deciding the issues raised by the motion, and ordered the case to proceed "to afford complainant an opportunity to prove such alleged violations and to afford respondent an opportunity to rebut the charges made." Export accordingly answered, denying any violation of the 1936 Act or of its operating-differential subsidy agreement, and the case was heard by the examiner, who recommended that Export's participation in the cotton transportation agreements should be held not unjustly discriminatory or unfair to Isbrandtsen in violation of section 810 of the 1936 Act, and that such participation should be held not a violation of the sections of Export's subsidy agreement relied upon. Accordingly, the examiner recommended that the complaint be dismissed.

We make the following findings of fact:

1. Isbrandtsen is a corporation organized under the laws of the State of New York, all of the officers, directors, and stockholders being citizens of the United States, and is a citizen of the United States within the meaning of section 2 of the 1916 Act. Isbrandtsen has, since 1949, operated a common carrier liner service with United States-flag vessels providing fortnightly sailings eastbound on a round-the-world route, including calls at Alexandria, Bombay, India, and Karachi, Pakistan. The carriage of cotton from Alexandria to

India and Pakistan can make an important contribution to the over-all success of this service. Isbrandtsen also operates other services in the foreign commerce of the United States with foreign-flag vessels, notably from Gulf and South Atlantic ports to continental European ports, from the Gulf to Central American ports, and from North Atlantic ports to Colombia and Peru. Isbrandtsen's first carriage of cotton in the trade here involved was in October 1952, and up to November 24, 1952, on three voyages of its regularly scheduled vessels carried slightly over 3,700 bales from Alexandria to India and Pakistan. Isbrandtsen has never become a member of any steamship conference in any trade or been a party to any agreement in this trade. It is the only nonconference carrier in the trade. It publishes no tariff of rates on cotton moving from Alexandria to India and Pakistan, preferring to negotiate rates directly with the shippers.

2. Cotton is substantially the only commodity exported from Egypt to India and Pakistan, and in recent years about 150,000 bales or 37,500 tons have moved each year. The shipping season extends from the first of each September through August of the following year.

3. Apart from Isbrandtsen's limited participation, there have been since 1952 thirty steamship lines handling this eastbound cotton movement from Egypt, including two United States-flag lines, Egyptian-flag, and other foreign-flag lines. Steamship lines participating in this cotton movement, other than Isbrandtsen, have since World War II made it a practice before the beginning of each cotton season to present a single cotton freight rate from Egypt to India and Pakistan to the Alexandria Cotton Exporters Association (hereinafter called "the Association"), the rate to be effective for the season. The Association comprises substantially all the shippers of Egyptian cotton in the trade. When the rate for a given shipping season is arrived at, a written agreement is drawn up and signed by all of the individual participating carriers and all of the shippers of cotton. These agreements, known as cotton freight agreements, vary from year to year. The carriers, parties to the agreements, are generally referred to as conference carriers, although, unlike many steamship conferences known in the United States, they do not maintain a separate office with a salaried staff. A chairman and a secretary are appointed, and meetings are held in Egypt in the office of one of the carriers. Memoranda issued by the carriers show the heading "Egypt-India/Pakistan Cotton Conference". The carriers, parties to the agreements in issue, will hereinafter be called "conference carriers", or, as a unit, the "conference".

4. Export has been a member of the conference since the season beginning September 1946, excepting that, because certain features

of the agreement proposed for the 1948–1949 season were unacceptable to it, Export did not sign the cotton freight agreement that year, and during that year did not participate in the carriage of Egyptian cotton to India and Pakistan. From September 1949 through August 1953, Export transported 66,974 bales of cotton in the trade, from which it realized a total freight revenue of about $350,000. Export has had no objection to Isbrandtsen sharing in the carriage of cotton from Alexandria to India and Pakistan on equal terms with the other carriers in that trade.

5. The cotton freight agreement to cover the year beginning September 1, 1952, was signed November 24, 1952, and the cotton freight agreement for the year beginning September 1, 1953, was signed on September 7, 1953. These two cotton freight agreements constitute the basis of the complaint in this case. Both provide:

(a) That the conference members would provide sufficient tonnage to insure regular and quick transportation of all Egyptian cotton to named ports in India and Pakistan;

(b) That the freight rates of 170 shillings per 1,000 kilos in the 1952 agreement, and 155 shillings per 1,000 kilos in the 1953 agreement, were each subject to a rebate of 30 shillings per 1,000 kilos, and that payment of such rebate to a shipper was conditioned upon such shipper having shipped all his cotton during the respective seasons on vessels of conference members, and that payment of the rebate was to be made after the expiration of the agreement and within 30 days from presentation by the claimants of a statement proving their rights thereto (except that 90 percent of any rebate accumulated during any month was to be payable within 30 days of each elapsed month).

(c) That the conference members would not quote or charge a rate lower than the agreed rate on cotton in the trade to any person not a party to the agreement, and that conference members would have the privilege of admitting other shipowners to the benefits and obligations of the agreement; and

(d) That the Association members would, during the effective period of the agreement, agree to ship their cotton exclusively on vessels owned, controlled, or nominated by conference members and on no other vessels except with the consent of the conference members.

6. The 1952 agreement, although by its terms declared to commence to operate from September 1, 1952, was not signed until November 24, 1952, and was not fully effective until the date of signature. Isbrandtsen was not a party to either the 1952 or 1953 cotton freight agreement, did not apply to be a party to either, and has carried no cotton in the trade since November 24, 1952.

7. In the summer of 1953, during the course of negotiations for the 1953 cotton freight agreement, the conference originally proposed a freight rate of 170 shillings per 1,000 kilos, less a rebate of 30 shillings. Isbrandtsen offered to the Association a freight rate of 120 shillings per 1,000 kilos. On July 13, 1953, after the conference members had learned of Isbrandtsen's offer, they prepared a memorandum pointing out that the conference lines provided a large number of sailings to seven ports in India and Pakistan, whereas Isbrandtsen offered only two sailings per month and only to three Indian and Pakistani ports.[2] The memorandum also stated that the conference lines would not be willing to help Isbrandtsen meet his carrying obligations should he secure the cotton trade to India and Pakistan. In the course of negotiations the Egyptian Government became interested in the situation, with the result that when a rate of 155 shillings less a 30 shilling rebate was finally offered by the conference lines, the Egyptian Government suggested that Isbrandtsen either be admitted to participation in the cotton freight agreement or that he be allocated 5 or 10 percent of the trade as an independent operator. When the conference invited Isbrandtsen to apply for membership, Isbrandtsen replied that it was "out of the question" for Isbrandtsen to become a member of any conference. Isbrandtsen also rejected the suggested participation on a fixed percentage basis. Before Export was aware of Isbrandtsen's formal refusal to apply for conference membership, Export advised the conference secretary that it "would welcome the admission of this line [Isbrandtsen] in the conference."

POSITION OF THE BOARD AND ADMINISTRATOR

This is an unusual proceeding in that Isbrandtsen makes no charge of any violation of the 1916 Act and has therefore no statutory right to file a complaint for relief under that Act. Isbrandtsen has no statutory right as a taxpayer or competitor to intervene in statutory or contractual relations between the United States and a United States-flag subsidized operator. Under the 1936 Act and under Reorganization Plan No. 21 of 1950, 46 U. S. C. A. § 1111 note, the Board has authority to make, amend, and terminate operating-subsidy agreements, and the Maritime Administrator, acting for the Secretary of Commerce, has authority to take all actions to administer such agreements when once made. The Board, prior to executing the operating-differential subsidy agreement with Export, made all necessary findings under title VI of the 1936 Act with respect to Export's

[2] Most Egyptian cotton in the trade moves to the three ports at which Isbrandtsen calls.

operation on Trade Route No. 18, including the determinations (1) that the operation of Export's vessls in such service was required to meet foreign-flag competition and to promote the foreign commerce of the United States; (2) that Export owned or could and would build or purchase vessels of the size, type, speed, and number required to enable it to operate and maintain the service in such manner as might be necessary to meet competitive conditions and promote foreign commerce; (3) that Export possessed the ability, experience, financial resources, and other qualifications necessary to enable it to conduct the proposed operations of the vessels to meet competitive conditions and promote foreign commerce; and (4) that the granting of the subsidy aid was reasonably calculated to carry out effectively the purposes and policy of the 1936 Act.

Isbrandtsen demands discontinuance of subsidy payments to Export and termination of Export's subsidy agreement because of alleged damage and injury to complainant. We do not approach the case from the point of view of Isbrandtsen's claim of alleged injury but review the evidence and arguments presented by the respective parties to determine whether reason exists to modify or terminate the present operating-differential subsidy agreement with Export.

EXPORT'S MOTION TO DISMISS

Export renewed its motion to dismiss at the close of the hearing, and while we agree that this proceeding should be discontinued on the merits, we may comment on the grounds for dismissal above set forth, as follows:

With regard to the first, third, and fourth grounds for dismissal, it may be said that under section 214 of the 1936 Act the Maritime Commission had full power to conduct any investigations necessary or proper in carrying out the provisions of the 1936 Act. The Board and the Administrator, who have jointly considered this matter, have between them all the statutory powers of the Maritime Commission, and their determination to proceed with the matter is fully authorized by section 214 and Rule 10 (a) (formerly section 201.111) of their Rules of Practice and Procedure. The defect in the complaint charged in the second ground for dismissal was cured by amendment.

POSITIONS OF THE PARTIES

Isbrandtsen asserts and Export denies (1) that complainant is a "citizen of the United States," and (2) that Isbrandtsen "operates as a common carrier by water exclusively employing vessels registered

under the laws of the United States on any established trade route" so as to bring Isbrandtsen within the language of section 810 of the 1936 Act and of section II–18 (b) of the subsidy agreement. Isbrandtsen asserts and Export denies (3) that Export's action with respect to the 1952 and 1953 cotton freight agreements involved practices which are "unjustly discriminatory or unfair", within the language of the same sections. Isbrandtsen charges and Export denies (4) that Export's joining with 29 other carriers to move the Egyptian cotton on conference terms and thereby excluding Isbrandtsen unless it agreed to such terms, was failure to "cooperate with other American-flag companies in the development of the American-flag merchant marine as a whole", within the language of section II–3 of the subsidy agreement. Isbrandtsen and public counsel charge and Export denies (5) that the cotton freight agreements do or may "restrict or attempt to restrict the volume, scope, frequency, or coverage of the subsidized service" of Export within the language of section II–18 (c) of the subsidy agreement, and Export's participation in the agreements without approval violates its subsidy agreement. Export urges as separate defenses (6) that its action in participating in the cotton freight agreements is consistent with public policy as expressed in section 14a of the 1916 Act, and (7) that in any event no domestic or foreign commerce of the United States is involved in the carriage of cotton between Egypt and India and Pakistan, and that, therefore, neither the Board nor the Administrator is authorized to inquire into Export's actions with regard thereto.

DISCUSSION OF ISSUES

The examiner found that Isbrandtsen is a citizen of the United States. There is undisputed testimony that all officers, directors, and stockholders of Isbrandtsen, a New York corporation, are citizens of the United States, and this brings Isbrandtsen within the definition of the term under section 905 (c) of the 1936 Act and section 2 of the 1916 Act.

The examiner found that Isbrandtsen is a common carrier by water exclusively employing United States-flag vessels on Trade Route No. 18 between United States ports and India and Pakistan. The examiner recommended that operation by Isbrandtsen of foreign-flag vessels on other trade routes should not be held to be inconsistent with a finding that it operates exclusively with United States-flag vessels "on any established trade route" within the language of section 810. Export, however, urges strongly that if, as here admitted, Isbrandtsen operates with foreign-flag vessels on any established

trade route from or to a United States port, it cannot be operating exclusively with United States-flag vesesls, and can therefore have no standing under the section. The exact meaning of the word "any" in the statute is far from clear, and the legislative history of section 810, which was added to the law by amendment on the floor of the Senate, throws no light on the subject. It may very well be that Congress intended to give the protection of the section only to United States-flag carriers operating no lines or services under foreign flag, but we do not think it is necessary for us to speculate on this point in this proceeding, for, as the examiner pointed out, Isbrandtsen's witnesses testified that Isbrandtsen might have operated one or more foreign-flag ships as tramps over the trade route here involved (Trade Route No. 18) in addition to United States-flag vessels on Isbrandtsen's regular fortnightly service.

Isbrandtsen's witness, speaking of the area covered by Isbrandtsen's regular round-the-world sailings, said:

Q. You haven't chartered a vessel for any special sailing into that area since 1949?

A. It is possible that we have had such sailings in there since 1949. The reason that I put it that way is that it was something that wouldn't come under my particular authority, and I am not as familiar with it, or as close to it, as I am with the line ships.

Q. Is it possible that those special sailings since 1949, under charter by Isbrandtsen, were ships of foreign registry?

A. They might possibly have been.

Q. So actually, every week there might be a vessel chartered by Isbrandtsen, of foreign registry, that have not fitted into your schedule pattern, that may, nevertheless, be operating over some parts of the route which you have described. That's correct, isn't it?

A. It could be."

Furthermore, it appears that the so-called tramp or "special sailings" of Isbrandtsen are not limited to private charters but operate as common carriers.

Q. What are special sailings, the term you are using?

A. Well, we distinguish those apart from our line vessels to the extent that they may actually start off with what we would call a semi-charter parcel of cargo. That would be a vessel that would be offered a parcel of cargo that would exceed ordinary liner vessels' cargoes and not be quite sufficient to complete or fill a charter vessel, but with that part of cargo in there, we would then use that as a base to complete it with additional cargo.

In the light of this record we cannot find that Isbrandtsen is operating as a common carrier even on Trade Route No. 18 *exclusively* with United States-flag vessels. The word "exclusively" clearly denotes every kind of operation whether regular fortnightly sailings or "special sailings." While a decision on this point is sufficient to dis-

pose of charges of violation of section 810 of the 1936 Act and section II–18 (b) of the subsidy agreement, we rely also on other grounds which we think are equally important.

Is Export's action in relation to the cotton freight agreement in any event unjustly discriminatory or unfair to Isbrandtsen even if the latter could come within the terms of the section? Isbrandtsen contends that the words "unjustly discriminatory or unfair", as applied to carriers' practices and as used in section 810 and in the subsidy agreement, are words of art which necessarily include the giving of deferred rebates or engaging in any of the other unfair practices defined in section 14 of the 1916 Act. Isbrandtsen asserts that under the cotton freight agreements, Export granted and agreed to grant deferred rebates. But it must be borne in mind that the unfair practices proscribed by section 14 of the 1916 Act relate to transportation to or from ports of the United States whereas the situation in this case involves transportation solely between foreign ports.

It is not clear that every practice deemed unfair by lines or conferences transporting to or from United States ports is necessarily unfair if practiced by lines or conferences in trades between foreign ports. Section 14 of the 1916 Act makes unlawful the payment of a deferred rebate in connection with transportation to or from a United States port, and no conference agreement of lines in such a trade permitting a deferred rebate in such transportation would be approved under section 15 of that Act. However, section 14a of the Act not only does not make it unlawful for a United States-flag vessel trading between foreign ports to give deferred rebates, but provides that if a United States-flag operator applies for admission to a conference engaged in transportation between foreign ports and is excluded, even though such conference grants deferred rebates or engages in other practices designated as unfair by section 14, then the foreign-flag members of the conference excluding the United States-flag operator from membership are to be penalized by refusal of the right to enter their ships in any port of the United States.

Section 14a, which was added to the 1916 Act by amendment on June 5, 1920, was aimed to put United States-flag vessels operating *between foreign ports*, in competition with foreign-flag ships, on a par with their foreign competitors who were then using the deferred rebate system to hold their shippers. The report of the House Committee on Merchant Marine and Fisheries (H. R. Report No. 1026, 66th Congress, 2d Session) accompanying the bill which was to become section 14a of the 1916 Act, referring to deferred rebates and other practices defined as unfair for common carriers operating to and from United States ports by section 14 of the 1916 Act, declared:

Our vessels being prohibited such practices by section 14 were placed at a disadvantage, so it was thought proper to prepare additional legislation which is contained in section 14a, the provisions of which allow our ships to enter any such combination of interest between foreign ports, and requires foreign lines or owners to allow our ships to enter on equal terms, the penalty of such refusal being the exclusion of the ships of such lines and owners from our ports while such practices are continued.

* * * * * * *

It was thought advisable by the committee to give our ships an equal chance in these trades upon foreign routes, and for us as far as possible to require for them fair and equal treatment.

Thus it appears that under section 14, as to transportation to and from American ports, fair treatment excludes deferred rebates, while under section 14a, as to transportation between foreign ports, fair treatment does not exclude deferred rebates but requires for the United States-flag shipowner the right to join foreign conferences on equal terms.

We do not think that Congress, when it passed section 810 of the 1936 Act, intended in any way to repeal or modify the effect of section 14a of the 1916 Act. Senator O'Mahoney, who on the floor of the Senate offered the amendment which became section 810 of the 1936 Act, after quoting section 14a of the 1916 Act relating to transportation between foreign ports, said (Congressional Record, Volume 80, p. 10076):

It is represented, on apparently good authority, that American citizens operating such lines have applied for admission to conferences of which foreign lines are members, and have been denied that admission. Without the amendment which is proposed, therefore, we should have the anomalous condition that the United States would be in the position of paying a subsidy to an American line which was in truth and in fact engaged in a conspiracy with foreign lines to discriminate against another American line. This amendment will, I think, obviate that very unwise and improper and unjustifiable condition.

* * * * * * *

I am told that the Shipping Board in the past has not enforced the law which so clearly provides that American lines, on application, are entitled to admission to any conference. A closed combination of this kind is indefensible, and surely should not be supported by the Treasury of the United States.

It seems clear that the discrimination which Senator O'Mahoney referred to in his amendment and in his discussion, quoted above, means unjust discrimination or unfair treatment in excluding a United States-flag line from a conference operating between foreign ports and does not mean deferred rebates. It follows that Export, by participation in the cotton freight agreements permitting deferred rebates, has not been shown to have been a party to or conformed to an agreement or to have engaged in a practice which is unjustly dis-

criminatory or unfair within the meaning of section 810 of the Act or section II–18 (b) of the subsidy agreement.

With respect to Export's alleged failure to cooperate with Isbrandtsen and consequent violation of section II–3 of the subsidy agreement, it may be said that Export made it clear that it had no objection to the admission of Isbrandtsen to the conference on equal terms with other members, and had no objection to the participation of Isbrandtsen in the carriage of cotton from Alexandria to India and Pakistan on equal terms with the other conference members. In fact, Isbrandtsen was invited by conference members to submit an application for membership in August 1953, and in reply Isbrandtsen pointed out—"The principles on which Isbrandtsen operates are 'independence' and no ties with the conferences or 'dual rate' systems." We do not believe that under the circumstances of this case the cooperation referred to in section II–3 of the subsidy agreement requires more than offering to Isbrandtsen an opportunity to join the conference "upon equal terms with all other parties thereto." We do not find evidence in this case that Export has violated section II–3 of the subsidy agreement.

We have examined the cotton freight agreements of 1952 and 1953, offered in evidence, and are unable to agree that they have the effect of restricting or attempting to restrict the volume, scope, frequency, or coverage of Export's subsidized service on Trade Route No. 18 or that they may reasonably be expected to contravene the purposes or policy of the 1936 Act. We do not find that such agreements need approval under section II–18 (c) of the subsidy agreement or that the evidence shows any violation of that section. Under the circumstances, we find it unnecessary to pass on the two separate defenses relied on by Export, being Nos. 6 and 7 in the list above set forth.

The proceeding will be discontinued.

An appropriate order will be entered.

ORDER

At a Session of the FEDERAL MARITIME BOARD, held at its office in Washington, D. C., on the 13th day of May A. D. 1954

No. S-38

ISBRANDTSEN CO., INC.

v.

AMERICAN EXPORT LINES, INC.

It appearing, That Isbrandtsen Co., Inc., has complained of alleged violation by American Export Lines, Inc., of section 810 of the Merchant Marine Act, 1936, and of the operating-differential subsidy agreement between American Export Lines, Inc., and the United States; and

It further appearing, That American Export Lines, Inc., has denied the existence of the alleged violations complained of; and

The Board and Maritime Administrator having duly heard the parties and having fully investigated the matters and things involved and having, on the date hereof, made and entered a report stating their conclusions, decision, and findings thereon, which report is hereby referred to and made a part hereof:

It is ordered, That this proceeding be, and it is hereby, discontinued.

By order of the Board.

This order is concurred in and adopted by the Maritime Administrator.

[SEAL] (Sgd.) GEO. A. VIEHMANN,
Assistant Secretary.

FEDERAL MARITIME BOARD

No. S-23

Lykes Bros. Steamship Co., Inc.—Application for Increase in Maximum Number of Subsidized Sailings on Line D (Lykes Orient Line), Trade Route No. 22

Submitted May 10, 1954. Decided May 13, 1954

Unsubsidized operation of Lykes Bros. Steamship Co., Inc., in its Line D Service on Trade Route No. 22 found to be, apart from calls to Indonesia-Malaya, an existing service to the extent of 24 sailings per annum.

Effect of granting application of Lykes Bros. Steamship Co., Inc., for increase from 24 to 48 subsidized sailings per annum in its Line D Service on Trade Route No. 22 (apart from calls to Indonesia-Malaya) would not be to give undue advantage or be unduly prejudicial as between citizens of the United States.

Section 605 (c), Merchant Marine Act, 1936, does not interpose a bar to the grant of application of Lykes Bros. Steamship Co., Inc., for increase of number of subsidized sailings in its Line D Service on Trade Route 22, except insofar as such application seeks an increase in the maximum number of calls at Indonesia-Malaya.

Present service to Indonesia-Malaya from United States Gulf ports by vessels of United States registry not found inadequate, and it is not necessary to award subsidy for increased number of calls at Indonesia-Malaya to provide adequate service by vessels of United States registry.

Section 605 (c) of the Merchant Marine Act, 1936, does interpose a bar to the grant of application of Lykes Bros. Steamship Co., Inc., for increase in maximum number of calls at Indonesia-Malaya ports.

Frank J. Zito, *Odell Kominers*, and *Joseph M. Rault* for Lykes Bros. Steamship Co., Inc.

Francis H. Inge and *Sterling F. Stoudenmire, Jr.*, for Waterman Steamship Corporation, intervener, and *John T. Carpenter*, *William G. Dorsch*, *Dale Miller*, *Mitchell C. Cunningham*, *John Lee Gainey*, *John C. White*, *Robert A. Nesbitt*, *F. H. Fredericks*, *George C. Whitney*, and *Lachlen Macleay* for various other interveners.[1]

[1] None of the interveners except Waterman Steamship Corporation participated herein on further hearing.

Harold J. Carroll, representing Rubber Manufacturers Association, Inc., as *amicus curiae.*

Allen C. Dawson and *Alan F. Wohlstetter* as Public Counsel.

SUPPLEMENTAL REPORT OF THE BOARD

BY THE BOARD:

This is a proceeding under section 605 (c) of the Merchant Marine Act, 1936 (hereinafter called "the Act"), instituted to determine whether that section interposes a bar to the application of Lykes Bros. Steamship Co., Inc. (hereinafter called "Lykes"), for an increase from 24 to 48 per annum in the maximum number of subsidized sailings in its Line D Service on Trade Route 22, with an increase from 12 to 24 per annum in the number of such sailings that may include calls at ports in Indonesia-Malaya.[2]

In our first report in this proceeding, 4 F. M. B. 153 (1953), we found that the unsubsidized operation of Lykes in its Line D Service was to some extent an "existing service" within the meaning of section 605 (c) of the Act. We remanded the case to the examiner to take further evidence and to make a further recommended decision in the light thereof, as to the extent to which Lykes has maintained an existing service as well as on the full question whether section 605 (c) of the Act interposes a bar to our amending our subsidy contract with Lykes.

The examiner has recommended, and we agree, (1) that section 605 (c) of the Act does not interpose a bar to the grant of the

[2] The following description of Service 1 of Trade Route No. 22, appearing on page 23 of "Essential Foreign Trade Routes of the American Merchant Marine" (1949), describes in full Lykes' Line D:

Between a United States Gulf port or ports, via the Panama Canal, to a port or ports in Japan, China, the Philippine Islands, Hong Kong, French Indo-China, Siam (Thailand), the Netherland East Indies, Straits Settlements (including the Malay States); with the privilege of calling at ports in the Hawaiian Islands, U. S. S. R.-in-Asia, Manchuria, Korea and Formosa, also ports in Mexico and the West Indies for the loading and/or discharging of cargo to or from foreign ports on the route, and with the privilege of calling at United States Atlantic ports homeward with sugar, copra and liquid cargo in bulk loaded at ports not in the Netherlands East Indies or Straits Settlements (including the Malay States), provided that in the absence of specific authority of the Commission to the contrary, vessels calling at the Netherlands East Indies or Straits Settlements (including the Malay States), shall return to United States Gulf ports for unloading cargoes destined for such ports before proceeding to United States Atlantic ports, with the privilege (subject to cancellation by the Commission on 60 days' notice to the operator) of calling at the following islands in the Pacific area (such privilege not to be considered as a modification of the above route description): Caroline Islands, Marianas Islands, Palau Island, Marshall Islands, Okinawa Islands, Admiralty Islands, Marcus Island, Wake Island, Gilbert Islands, Sakhalin Island (southern half).

Sailing frequency: 20 to 24 sailings per year.*

*Subject to the stipulation that a minimum of seven (7) and a maximum of twelve (12) sailings per annum shall include ports in the Netherlands East Indies and Straits Settlements (including the Malay States).

application herein for an increase in the maximum number of Lykes' subsidized sailings in its Line D Service, except insofar as Lykes seeks subsidy for an increased number of calls at Indonesia-Malaya, and (2) that section 605 (c) of the Act does interpose a bar to the grant of the application herein insofar as it seeks an increase in the number of authorized calls at Indonesia-Malaya.

Lykes, Public Counsel, and intervener Waterman Steamship Corporation (hereinafter called "Waterman") have filed exceptions to the recommended decision, and the matter has been argued orally. Contentions of the parties or requested findings not dealt with in this supplemental report have been given consideration and found not related to material issues or not supported by the evidence.

Section 605 (c) of the Act presents us with the following issues: First, whether the operations for which Lykes seeks subsidy would be in addition to the existing service or services; second, if so, whether the service already provided by United States-flag vessels is inadequate and additional vessels should be operated in the service involved to accomplish the purposes and policy of the Act; third, if the service sought to be subsidized would not be in addition to the existing service or services, whether the effect of awarding the subsidy sought by Lykes would be to give undue advantage or be unduly prejudicial as between citizens of the United States; and fourth, if so, whether the award of subsidy is necessary in order to provide adequate service by vessels of United States registry.

We make the following findings of fact:

1. Lykes operates exclusively from Gulf ports outbound and principally to Gulf ports inbound, and provides four outbound sailings per month. These are spaced through the month to accommodate shippers who make their sales on the basis of first-half-of-month and second-half-of-month sailings. Japan is the first country at which each of the four monthly sailings call. One vessel in each half of the month then calls at Korea, Formosa, and the Philippines to discharge and to load for the Gulf or North Atlantic or both. These two vessels or either of them may call at other nearby areas as conditions warrant. The other first-half-of-month vessel normally proceeds from Japan to Indonesia-Malaya (via the Philippines if necessary) to discharge and load. The other second-half-of-month vessel has recently returned home directly from Japan in ballast. This vessel at one time proceeded from Japan to Indonesia for bauxite or to the Philippines for sugar, but neither of these commodities has been carried by Lykes in the recent past.

2. The number of outbound sailings made by Lykes in its Line D Service in each of the 8 years from 1946 to 1953, inclusive, is shown in the following table:

TABLE I

Year:	*Number of sailings*
1946	63
1947	67
1948	73
1949	55
1950	42
	Average 1946–1950: 60 sailings per annum
1951	48
1952	50
1953 (first 9 months)	37

Twenty-four of the sailings for each of the above years were subsidized; the remainder were unsubsidized. All of the sailings after 1949 were made in liner service. Beginning in 1948, twelve sailings each year included calls at Indonesia-Malaya.

3. Lykes' sailings in excess of 24 per annum were made without subsidy under temporary permission given from time to time by the U. S. Maritime Commission or the Maritime Administration pursuant to Article I-2(d) of Lykes' operating-differential subsidy contract.

4. The unusually low number of sailings (42) made by Lykes in 1950 was due in part to Lykes having chartered out some of its vessels to the United States for use to Korea, and in part to delay in obtaining permission from the Maritime Administration to make two unsubsidized sailings in additon to two subsidized sailings during each of the last three months of 1950.

5. In 1951 and 1952 the vessels employed by Lykes in its Line D Service sailed over 99 percent full and over 85 percent down. Lykes' service has been profitable.

6. Waterman owns 40 C–2 vessels operating in various trades. During the period 1946–48, Waterman maintained separate services from Gulf ports to the Far East and from North Atlantic ports to the Far East. At the present time Waterman operates from North Atlantic, Gulf, and, occasionally, Pacific ports to Japan and Korea, returning to Atlantic ports via Hawaii. The calls at Atlantic ports were made to discharge inbound cargo and to obtain military cargo, although commercial cargo is accepted if tendered. Waterman's carryings from United States to Japan and Korea consist largely of military cargo. Waterman also has served the Philippines in addition to Japan and Korea, but it does not do so now.

7. The sailing frequency of Waterman vessels from the Gulf to Far East is about two per month. Waterman has been operating profit-

ably on Trade Route 22. In 1951 and 1952, the cargo on Waterman vessels on the route, including cargo lifted at North Atlantic, Gulf, and Pacific ports, averaged per sailing over 80 percent of the deadweight capacity and slightly under 95 percent of the cubic capacity of the vessels.

8. States Marine Corporation in 1951 made 40 outbound sailings on Trade Route 22, 19 of which were made with owned vessels (5 C–2's, 7 Victorys, 7 Libertys) and 21 of which were made with chartered vessels. In 1952 it made 60 outbound sailings on the route, 28 with owned vessels (8 C–2's, 10 Victorys, 10 Libertys) and 32 with chartered vessels. Its average lift per vessel from the Gulf in 1951 and 1952 was about 7,650 tons.

9. Isthmian Steamship Company employs mainly owned vessels (C-type) on Trade Route 22. In 1951 it made six outbound sailings on the route, and in 1952, fourteen outbound sailings. Isthmian carried 15,006 tons of liner cargo outbound on Trade Route 22 in 1951 (including 13,445 tons to Indonesia-Malaya). In 1952 it carried 13,665 tons of liner cargo outbound (including 7,239 tons to Indonesia-Malaya).

10. Foreign-flag lines operating on Trade Route 22 made 112 outbound sailings in 1952 and about 122 such sailings in the first eight months of 1953.

11. In 1950 the total movement of commercial cargo from Gulf ports to Indonesia-Malaya amounted to 134,795 tons (109,894 tons liner and 24,901 tons nonliner). In 1951 the movement declined to 131,649 tons (121,538 tons liner and 10,111 tons nonliner). In 1952 it declined still further to 113,927 tons (all liner). The movement of this cargo in the first six months of 1953 was 63,000 tons (46,000 tons liner and 17,000 tons nonliner). United States-flag lines carried about 31 percent of such cargo, Lykes carrying about 29,000 tons, or 25 percent, and Isthmian Steamship Company carrying about 6 percent.

12. The inbound movement from Indonesia-Malaya to the Gulf averaged in 1949 and 1950 more than 600,000 tons, nearly 500,000 tons of which was bauxite shipped to the Gulf for stockpiling. In 1951 the volume of inbound cargo declined to 408,969 tons (291,249 liner tons and 117,720 nonliner tons). In 1952, when the bauxite movement had ceased, the inbound movement declined to 70,424 tons (all liner). In the first six months of 1953, inbound traffic amounted to 41,000 tons (all liner).

13. The inbound movement from Indonesia-Malaya to the Gulf is mainly rubber. Shipments of this commodity constituted 68,515 tons of the 81,813 tons of cargo other than bauxite that moved in 1950. Lykes in 1952 carried about 53 percent of the rubber moving, and is

the only carrier providing direct service from Indonesia-Malaya to the Gulf at the present time.

14. Approximately 100 percent of the military-controlled cargo moving outward from the Gulf is shipped via United States-flag lines. The Military Sea Transportation Service allocates this cargo among United States-flag operators according to the number of sailings each offers. Thus, Lykes, making twice as many sailings as Waterman, is allocated twice as much military-controlled cargo as Waterman.

We will discuss first the facts and issues as they relate to Lykes' Line D Service, except for the proposed additional calls at Indonesia-Malaya.

EXISTING SERVICE ISSUE (FAR EAST)

Positions of the Parties

Lykes urges that it maintains an existing service to the Far East (except with respect to calls at Indonesia-Malaya), at least to the extent for which it seeks additional subsidy. In this connection, Lykes points to the fact that for five years immediately preceding filing its application herein, it averaged 60 sailings per annum. Waterman contends here, as it contended at the time of our first report, that Lykes has an existing service to the Far East only to the extent of its 24 subsidized sailings per annum, and that any additional sailings cannot be deemed part of an "existing" service since such sailings were made under temporary permissions granted because of abnormal circumstances. We have already rejected Waterman's contention on this point, both in our first report and by denying Waterman's petition for reconsideration of our first report. But Waterman urges that in any case Lykes cannot be said to maintain an existing service to the extent of any more than 36 sailings per annum. In this connection, Waterman points out that the fourth vessel dispatched by Lykes from the Gulf each month returns home in ballast, and that a ship in ballast cannot be said to be providing service. Lykes maintains that this fourth vessel provides existing service in that it (1) sails full from the Gulf and (2) offers space in the Far East for inbound cargo, and that the existence or non-existence of service may not be determined by whether or not the service is availed of.

Waterman urges further that in any case Lykes' existing service to the Far East cannot amount to any more than 42 sailings per annum, because that is the number of sailings made by Lykes in the year immediately preceding the filing of the application herein. But Lykes points out that 1950 was an abnormal year in that extraordinary de-

mands were made upon it by the Government for vessels to Korea and that for the 5 years preceding the filing of the application Lykes has averaged 60 sailings per annum.

Discussion

As pointed out above, we have already ruled that the temporary nature of the permissions under which Lykes operated more than 24 vessels in its Line D Service does not affect the question whether such sailings constitute an existing service within the meaning of section 605 (c) of the Act. This question is discussed fully in our first report herein, and we do not feel it necessary to elaborate further now.

With respect to Waterman's contention that the fourth monthly sailing of Lykes is not an existing service because it returns home in ballast, we agree with Lykes that whether or not a service offered is availed of by shippers is not determinative of the existence of such service. Accordingly, we find that the fourth sailing constitutes part of the existing service provided by Lykes in its Line D Service.

Nor are we willing to limit ourselves in determining the extent of Lykes' existing service to the service provided in the year immediately preceding the filing of the application, or in any other particular year. Rather, we take account of the service provided by Lykes over a period of years, and in this case where the average number of sailings made by Lykes for the five years preceding the filing of its application is well above 48, we have no hesitation in finding that Lykes has provided an existing service to the Far East at least to the extent of 48 sailings per annum.

ADEQUACY OF UNITED STATES FLAG SERVICE (FAR EAST)

In view of our finding that Lykes provides existing service, at least to the extent of the service which it seeks to have subsidized, we are not at this point required to examine into the issue of adequacy of service provided by vessels of United States registry.

UNDUE ADVANTAGE AND UNDUE PREJUDICE (FAR EAST)

Positions of the Parties

Waterman urges that any grant of subsidy constitutes undue advantage to the grantee and undue prejudice to competing citizens of the United States, and further, that undue advantage and prejudice would exist in this case because an award of subsidy would entitle Lykes to twice as much military-controlled cargo as Waterman under the Military Sea Transportation Service system of allocating such cargo.

688-650 O - 63 - 33

Lykes and Public Counsel contend that while it is true that the grant of a subsidy always gives rise to prejudices and advantages, nevertheless, it is only those prejudices and advantages which are undue that will bar grant of a subsidy. Lykes and Public Counsel contend that Waterman has not shown any special advantage to Lykes or prejudice to itself which could be characterized undue or which was beyond the contemplation of Congress when it provided for the award of subsidies in title VI of the Act. They point out that Lykes obtains twice as much military-controlled cargo as Waterman, not because Lykes is subsidized, but rather, because Lykes provides approximately twice as many sailings as Waterman. Lykes puts forward the caveat that if Waterman in this case is held to have shown undue advantage and prejudice, then any unsubsidized operator, competitive with an applicant for subsidy, could make such a showing, and the Board would be unable to award subsidy to any applicant.

Discussion

We have said that any evidence on whether an award of subsidy would give undue advantage or be unduly prejudicial as between citizens of the United States should come from parties claiming undue prejudice under section 605 (c) of the Act (*Grace Line Inc.—Subsidy, Route 4*, 3 F. M. B. 731, 737 (1952)). Waterman has not argued here that it will be prejudiced in any respect other than in respect of (1) its position as an unsubsidized operator in competition with a subsidized operator and (2) its position as compared with Lykes' position in securing allocations of Military Sea Transportation Service controlled cargo.

The first type of prejudice is not undue as it was contemplated by the Act, and the second is not a consequence of Waterman being unsubsidized, but, rather, is a consequence of the number of sailings Waterman and Lykes make on the trade route. Waterman is free to make as many or as few sailings as it chooses. The sailings that have been made by Lykes in excess of the number of sailings made by Waterman have, in the past, been unsubsidized.

Apart from calls to Indonesia-Malaya, we are unable to find that grant of the application herein would give undue advantage or be unduly prejudicial as between citizens of the United States. Consideration of adequacy of service therefore is not required by the Act.

PROPOSED ADDITIONAL CALLS AT INDONESIA-MALAYA

Waterman, Public Counsel, and the examiner have all taken the position that Lykes does not maintain an existing service to Indonesia-Malaya to any greater extent than the service it provides under its

operating-differential subsidy contract. Lykes does not except to this, but maintains that the service to Indonesia-Malaya is inadequate, and in the accomplishment of the purposes and policy of the Act additional vessels should be operated to and from Indonesia-Malaya.

Positions of the Parties (Indonesia-Malaya)

Lykes takes the position generally that Waterman has no standing to raise any issues under section 605 (c) of the Act with respect to Lykes' calls at Indonesia-Malaya because Waterman does not serve that area. Waterman asserts that it does have standing to raise such issues because a subsidy to Lykes for Indonesia-Malaya calls would be a "springboard to subsidized additional sailings to Japan and the Far East destinations."

Lykes asserts that, in any event, the 31 percent United States-flag participation in the movement of outbound cargo from the Gulf to Indonesia-Malaya is inadequate, being substantially less than 50 percent. Lykes asserts that this low level of United States-flag participation is due primarily to the fact that Lykes, offering only one sailing per month, is competitive for only half the cargo, i. e., that part moving in the first half of each month. If Lykes were able to compete for all the cargo by offering two sailings per month, it could, presumably, double its present participation of 25 percent of the total movement. Thus, with Isthmian's carryings, the minimum adequacy standard of 50 percent United States-flag participation would be met.

With respect to the inbound service, Lykes asserts that even though it carries about half the cargo moving from Indonesia-Malaya to the Gulf, the service it provides is inadequate because not frequent enough to fill the needs of rubber importers in the area served by Lykes. Lykes also fears that a foreign-flag operator may institute a direct Indonesia-Malaya Gulf service and wishes to anticipate and forestall that possibility in the interest of prudent business judgment and benefit to the commerce of the United States.

Waterman takes the position that the inbound service provided by vessels of United States registry from Indonesia-Malaya to the Gulf is adequate, amounting as it does to participation in approximately half the cargo moving.

Rubber Manufacturers Association, Inc., appearing as *amicus curiae*, urges that Lykes be authorized to make 12 additional calls per annum at Indonesia-Malaya, pointing out that Lykes maintains the only direct service from that area to the Gulf and that, because of the importance of speedy transit time to importers of crude rubber, two calls per month rather than the one call now provided would better serve the interests of the rubber manufacturers.

Discussion (Indonesia-Malaya)

While it is true that we have interpreted the will of Congress as expressed in section 101 of the Act that 50 percent participation by United States-flag operators in cargo moving in the foreign commerce of the United States is the goal to be sought in achieving the purposes and policy of the Act, we have never said that United States-flag service on every trade route must provide capacity to carry 50 percent of the cargo moving on that route. Much less are we willing to say that 50 percent participation is the standard of adequacy for United States-flag vessel participation in cargo moving over a particular part of an essential foreign trade route. In this case, where an additional 25 percent participation by Lykes would amount to increased carryings of only about 29,000 tons a year, or an average of about 2,400 tons of Indonesia-Malaya cargo for each of the twelve additional sailings sought, we are not justified in finding that United States-flag service from the Gulf to Indonesia-Malaya is inadequate, and, in any case, we cannot find that additional vessels should be operated from the Gulf to Indonesia-Malaya in accomplishment of the purposes and policy of the Act.

With respect to Lykes' contention that the inbound service from Indonesia-Malaya is inadequate because not frequent enough, despite the fact that Lykes is carrying about half the traffic in rubber, which is the main commodity, we are not convinced that the infrequency of direct sailings is alone enough to render the service provided by vessels of United States registry inadequate. In this connection and in connection with the apprehension expressed by Lykes that foreign-flag operators may invade the route, and while our decision does not turn on this point, we are impressed to some extent with the fact that Lykes has not applied to the Maritime Administrator for permission to make additional unsubsidized sailings from Indonesia-Malaya to the Gulf.

Our conclusions herein are not tantamount to a finding that Lykes is entitled to a subsidy for an increased number of sailings on Trade Route 22, for such a conclusion can be reached only after the necessary administrative study and action required under section 601 and various other provisions of the Act.

CONCLUSIONS

We therefore conclude that:

(1) Section 605 (c) of the Act does not interpose a bar to the grant of Lykes' application for an increase in the number of its subsidized sailings in its Line D Service on Trade Route 22, except insofar as it

seeks an increase in the maximum number of calls at Indonesia-Malaya; and

(2) Section 605 (c) of the Act does interpose a bar to the grant of Lykes' application insofar as it seeks an increase in the maximum number of subsidized calls at Indonesia-Malaya ports.

By the Board.

(Sgd.) GEO. A. VIEHMANN,
Assistant Secretary.

MARITIME ADMINISTRATION

No. S–45

GRACE LINE INC.—APPLICATION FOR RENEWAL OF WAIVERS UNDER SECTION 804 OF THE MERCHANT MARINE ACT, 1936, AS AMENDED

Submitted July 22, 1954. Decided August 12, 1954

Special circumstances and good cause shown justifying continuance of waivers under section 804, Merchant Marine Act, 1936, as amended, to permit affiliates of Grace Line Inc. to solicit cargo and passengers in this hemisphere for vessels of Rederiaktiebolaget Nordstjernan (Johnson Line).

W. F. Cogswell, *E. Russell Lutz*, *John T. Cahill*, and *Frederick P. Warne* for Grace Line Inc.

John Mason as Public Counsel.

REPORT OF THE MARITIME ADMINISTRATOR

BY THE ADMINISTRATOR:

This proceeding was instituted by order of the Maritime Administrator dated November 19, 1953, setting for hearing before an examiner of the Federal Maritime Board the question whether the provisions of section 804 of the Merchant Marine Act, 1936, as amended (hereinafter "the Act"), ought to be waived to permit affiliates of Grace Line Inc. (hereinafter "Grace Line") in this hemisphere to solicit cargo and passengers for vessels of Rederiaktiebolaget Nordstjernan (hereinafter "Johnson Line"). Section 804 of the Act provides in part:

> It shall be unlawful for any contractor receiving an operating-differential subsidy under title VI * * * of this Act * * * directly or indirectly to own, charter, act as agent or broker for, or operate any foreign-flag vessel which competes with any American-flag service determined by the Commission to be essential as provided in section 211 of this Act: *Provided, however*, That under special circumstances and for good cause shown the Commission may, in its discretion, waive the provisions of this section as to any contractor, for a specific period of time * * *.[1]

[1] By virtue of Reorganization Plan No. 21 of 1950 and of Department of Commerce Department Order No. 117 (Amended), the Maritime Administrator has succeeded to the functions of the United States Maritime Commission under this section of the Act.

Public hearings were had before the examiner, participated in by Grace Line and by Public Counsel. The examiner has recommended the conclusion that special circumstances and good cause justifying continuance of the waivers have not been shown. Counsel have filed briefs, oral argument has been presented, and the matter has been duly considered.[2] I have concluded that section 804 ought to be waived to permit Grace Line's affiliates in this hemisphere to solicit cargo and passengers for vessels of Johnson Line.

The facts upon which I have based my decision are:

1. Grace Line is a wholly owned subsidiary of W. R. Grace & Co., a Connecticut corporation. Grace Line operates a number of subsidized services between the United States and Central America, the Caribbean, and South America. It is also part owner of Gulf & South American Steamship Co., Inc., which operates between United States Gulf ports and the west coast of South America.

Grace Line's services are principally four:

(a) U. S. Atlantic via the Panama Canal to the west coast of South America on Trade Route No. 2, with weekly sailings of passenger-freight ships and fortnightly sailings of C–2 freighters;

(b) U. S. Atlantic to Netherlands West Indies and north coasts of Venezuela and Colombia on Trade Route No. 4, with weekly sailings of the passenger-freight ships *Santa Rosa* and *Santa Paula*, C–2 passenger-freight ships, and C–2 freighters;

(c) U. S. Pacific to ports on the west coasts of Central and South America on Trade Route No. 25, with fortnightly sailings of C–2 freighters;

(d) West coast of North America via the west coast of Central America and the Panama Canal Zone to the north coasts of Colombia and Venezeula, with monthly sailings of chartered freighters.

In addition, Grace Line employs one ship in feeder service between the west coast of Central America and the Panama Canal Zone.

2. Johnson Line is a Swedish corporation and operates vessels between Baltic Ports-Antwerp and the Americas. The North Pacific service of Johnson Line operates via Curacao, La Guaira, Cartagena, and the Panama Canal Zone to the west coasts of Central and North America and return. Johnson Line's South Pacific service operates via La Guaira-Puerto Cabello, Curacao, and the Panama Canal Zone to ports on the west coast of South America and return. The North Pacific service is operated on a fortnightly sailing schedule with eight modern ships especially designed for the trade, with large reefer

---

[2] The Vice Chairman of the Federal Maritime Board, as a Special Assistant to the Maritime Administrator, has considered this case with the Administrator and concurs in the result.

capacity and speed of 19½ knots. The South Pacific service also provides fortnightly sailings with six modern ships having a speed of from 16 to 17 knots.

3. On the Pacific coast of the United States, on the west coast of Central America, in the Panama Canal Zone, in Colombia, and on the west coast of South America are various companies which are entirely or largely owned by W. R. Grace & Co. These affiliates of Grace Line act as husbanding and soliciting agents for vessels of Grace Line and for vessels of Johnson Line. These Grace Line affiliates have acted as agents for Johnson Line's North Pacific service vessels since 1914. They also represented vessels of the South Pacific service from 1914 to 1921, at which time that service was discontinued. The South Pacific service was resumed in 1936. A Chilean line, Compania Chilean Navigacion Interoceania (hereafter "C. C. N. I."), was given the agency. Immediately after the war, in 1946, Grace Line and Johnson Line commenced negotiations looking to resumption of Grace Line's affiliates' representation of Johnson Line's South Pacific service. The agency was placed in the hands of Grace Line's affiliates in 1952.

4. Both Grace Line and Johnson Line have at one time or another been members or affiliates of the European-South Pacific Magellan Conference which establishes rates for traffic moving between Europe and the west coast of South America (except for Buenaventura and Ecuadorian ports). Before World War II (except, apparently, for a 1- or 2-year period in 1936 and/or 1937, when Johnson Line was not affiliated in any way with the Conference), both lines were in the Conference. Since the War, Grace Line has not been in the Conference although Johnson Line has been.

5. Waivers of section 804 of the Act have been given from time to time by the U. S. Maritime Commission and by the Maritime Administration to permit Grace Line's affiliates to act as agents for Johnson Line's vessels.

6. On August 21, 1953, the Maritime Administrator continued section 804 waivers previously granted to permit the agency relationships to continue subject to the following:

> * * * *provided* that such services shall not include solicitation of cargo or passengers for said Johnson Line vessels, with the understanding, however, that Grace Line Inc. may request a public hearing on said matter of solicitation * * *.

The waiver was subject also to a number of other provisos relating to the exact nature of the agency services to be rendered, termination date of the waiver, submission of reports to the Maritime Administrator, right of the Administrator to modify the waivers, and accounting for compensation received by Grace Line or its affiliates for performance of agency services.

7. In deciding to waive section 804 of the Act as to all general agency services (berthing, husbanding, fueling) except solicitation of passengers and cargo, the Maritime Administrator considered that special circumstances and good cause for continuance of the waiver had been shown in that the agency:

(1) protected Grace Line vessels from unlimited foreign-flag competition;

(2) permitted Grace Line, through its affiliates, to exercise a certain amount of control over the cargo moved on the routes and the schedule of ports of call of Johnson Line; and

(3) enabled Grace Line, in any case, to obtain preference for cargo which otherwise might go to foreign-flag vessels.

8. The Administrator, in his action of August 21, 1953, indicated that it was not clear at that time whether other United States-flag operators were aware of Grace Line's affiliates' solicitation for Johnson Line vessels and that it was not evident to what extent Grace Line's affiliates engaged in such solicitation or the effect thereof on Grace Line's subsidized operations.

9. The record indicates that Johnson Line will not continue Grace Line's affiliates as its agents in this hemisphere unless those affiliates can solicit cargo and passengers as well as perform husbanding, berthing, and fueling services. Nor is Johnson Line interested in having different agencies split between North and South America. Johnson Line desires one agency organization in this hemisphere.

10. Moore-McCormack Lines, Inc., and Pacific Argentine Brazil Line, Inc., both United States-flag lines, operate from United States Pacific ports to the Caribbean. States Marine Corporation, another United States-flag line, operates from United States Pacific ports to the United Kingdom and Ireland and from United States Pacific ports to the LeHavre-Hamburg range. All three of these lines have stated that they do not oppose continuance of section 804 waivers to permit Grace Line's affiliates to solicit cargo and passengers for vessels of Johnson Line.

11. Grace Line and Johnson Line have entered into an agreement which provides in part that:

> * * * whenever and wherever our [i. e., Johnson Line] vessels are in a direct competitive position, then our said agents [i. e., Grace Line's affiliates] shall be at liberty to give preference in every respect to Grace vessels.

12. Vessels of Grace Line and Johnson Line are potentially competitive for the following traffic:

(a) Traffic moving northward from the north coast of Colombia (Cartagena) and the Panama Canal Zone to the west coasts of Central and North America, and way traffic;

(b) Traffic moving southward from the west coast of North America to the west coast of Central America, Panama Canal Zone, and the north coast of South America, and way traffic;

(c) Traffic moving southward from the Panama Canal Zone to the west coast of South America, and way traffic;

(d) Traffic moving between North Europe and the west coast of South America; and

(e) Traffic moving between the United States Atlantic and Gulf coasts and the west coast of South America.

13. Passengers carried by Johnson Line are usually travelers with whom Grace Line does business, and they are never carried by Johnson Line unless Grace Line vessels do not have accommodations available. In 1952, the passengers carried by Johnson Line between United States Pacific, Central American, and Canal Zone ports numbered 33, and in the first 9 months of 1953, 19. The corresponding figures for Grace Line were 34 and 39.

As to passenger traffic between the United States Atlantic coast and the west coast of South America, Grace Line endeavors to sell tickets for the through transportation. As a consequence, its vessels usually do not have accommodations available at Cristobal, but at ports on the west coast of South America accommodations become available as passengers are discharged. It was testified by Grace Line's witness that most of the passenger movement between these ports is "commercial traffic"; that passengers are carried by Johnson Line only when Grace Line's vessels have no accommodations available; and that "when we are unable to give space to a client on one of our ships and are able to obtain space on one of the Johnson Line ships, it helps us in our contacts". In 1952, Grace Line carried 51 passengers from Cristobal-Balboa to ports on the west coast of South America, and Johnson Line carried 18; in the first 9 months of 1953, Grace Line carried 35 passengers from Cristobal-Balboa to these ports, and Johnson Line carried 19. In 1952, Grace Line carried 438 passengers from Callao to other ports on the west coast of South America and to Cristobal, and Johnson Line carried 40; in the first 9 months of 1953, Grace Line carried 274 passengers from Callao to such other ports, and Johnson Line carried 19. In 1952, Grace Line carried 529 passengers from Valparaiso to other ports on the west coast of South America and to Cristobal, and Johnson Line carried 32; in the first 9 months of 1953, Grace Line carried 340 passengers from Valparaiso to such other ports, and Johnson Line carried 35.

14. Percentages of sailings and cargo carried northward from the Panama Canal Zone to the west coasts of Central and North America by Grace Line and Johnson Line and their competitors in 1952 and the first 9 months of 1953 are as follows:

TABLE I

Line	Percentage of sailings	Percentage of cargo carried
1952		
Grace	14.4	45.3
Johnson	17.4	3.4
Others [1]	68.2	51.3
1953 (first 9 months)		
Grace	14.6	53.2
Johnson	16.4	6.0
Others [1]	69.0	40.8

[1] "Others" are all foreign-flag carriers except United Fruit Co., which in 1952 carried 46.8 percent of the cargo with 21.2 percent of the sailings and in the first 9 months of 1953 carried 31.5 percent of the cargo with 20.0 percent of the sailings.

Percentages of sailings and coffee [3] carried northward from the north coast of Colombia (Cartagena) to the west coast of North America by Grace Line and Johnson Line and their competitors in 1952 and the first 9 months of 1953 are as follows:

TABLE II

Line	Percentage of sailings	Percentage of coffee carried
1952		
Grace	7.1	------------
Johnson	89.3	73.7
Others [1]	3.6	26.3
1953 (first 9 months)		
Grace	4.3	5.2
Johnson	78.3	29.7
Others [1]	17.4	65.1

[1] "Others" are foreign-flag carriers.

15. Numbers and percentages of sailings and amounts and percentages of cargo carried from the west coast of Central America to the west coast of North America by Grace Line and Johnson Line and

[3] Coffee is the only export cargo moving in any substantial amount out of Cartagena to the west coast of North America.

their competitors in 1952 and the first 9 months of 1953 are as follows:

TABLE III

Line	Number of sailings	Percentage of sailings	Long tons of cargo carried	Percentage of cargo carried
1952				
Grace	31	30.4	41,552	58.8
Johnson	23	22.5	14,580	20.6
Others [1]	48	47.1	14,630	20.6
1953 (first 9 months)				
Grace	23	25.3	29,584	47.5
Johnson	21	23.1	8,116	13.0
Others [1]	47	51.6	24,618	39.5

[1] "Others" are all foreign-flag carriers except for tramps, whose flags are not shown by the record and who carried less than 10 percent of the cargo.

16. Johnson Line does not compete with Grace Line for cargo moving southward from the west coast of North America to the west coast of Central America, Panama Canal Zone, and north coast of South America even though Johnson Line vessels have the capacity and the time to do so and even though they call at ports on the west coast of Central America to load cargo for Europe. In 1952, on leaving the last west coast of North America port, the vessels of Johnson Line's North Pacific service had unused space averaging per vessel 2,100 tons cubic and 1,950 tons deadweight. In the first 9 months of 1953, they had unused space averaging 3,300 tons cubic and 1,250 deadweight per vessel.

17. Revenue tons of cargo transshipped at Cristobal, Canal Zone, to ports on the west coast of South America by Grace Line and Johnson Line and their competitors in 1952 and the first 8 months of 1953 are as follows:

TABLE IV

Line	Revenue tons carried
1952	
Johnson (service from Europe)	5,415
Others (service from Europe) [1]	18,395
Grace (service from U. S. Atlantic)	3,834
Gulf and South American (service from U. S. Gulf)	439
Others (service from U. S. Atlantic and Gulf) [1]	16,618
1953 (first 8 months)	
Johnson (service from Europe)	7,504
Others (service from Europe) [1]	7,457
Grace (service from U. S. Atlantic)	1,046
Others (service from U. S. Atlantic and Gulf) [1]	7,867

[1] "Others" are all foreign-flag carriers.

It is estimated that 15 to 20 percent of the cargo that moved from Cristobal to the west coast of South America during 1952 and the

first 8 months of 1953 originated at U. S. Atlantic and Gulf ports. Such cargo is not solicited for a specific on-carrier. The record does not show the extent to which Grace Line or Johnson Line participates in carrying such cargo. Grace Line is not interested in carrying transshipment cargo from Cristobal, preferring to carry through-haul cargo from the United States to South America.

18. Percentages of sailings and cargo carried by Grace Line and Johnson Line and their competitors from named ports on the west coast of South America to Europe either direct (D) or by transshipment (T) at New York in 1950, 1952, and the first 9 months of 1953 are as follows:

TABLE V.—*Guayaquil (general cargo)*

Line	Percentage of sailings	Percentage of cargo carried
1950		
Johnson (D)	5.5	1.9
Others (D) [1]	38.3	80.5
Grace (T)	35.9	17.3
Others (T) [1]	20.3	3
1952		
Johnson (D)	9.0	6.0
Others (D) [1]	32.3	68.2
Grace (T)	25.9	25.8
Others (T) [1]	32.8	
1953 (first 9 months)		
Johnson (D)	7.8	13.7
Others (D) [1]	39.1	78.0
Grace (T)	26.3	8.3
Others (T) [1]	26.8	

[1] "Others" are all foreign-flag carriers.

TABLE VI.—*Buenaventura (coffee)* [1]

Line	Percentage of sailings	Percentage of cargo carried
1950		
Johnson (D)	2.2	10.9
Others (D) [2]	22.8	81.9
Grace (T)	38.6	6.5
Others (T) [2]	36.4	.7
1952		
Johnson (D)	7.2	18.2
Others (D) [2]	14.5	39.3
Grace (T)	27.5	42.5
Others (T) [2]	50.8	
1953 (first 9 months)		
Johnson (D)	6.4	24.5
Others (D) [2]	14.8	44.0
Grace (T)	20.9	31.5
Others (T) [2]	57.9	

[1] Coffee constitutes approximately 97 percent of all cargoes exported from Buenaventura to all destinations.
[2] "Others" are all foreign-flag carriers.

In 1953, Colombia, Finland, and Sweden concluded reciprocal trade agreements, one of the terms of which provided that coffee moving from Colombia to Sweden should move by direct carrier. The greater portion of cargo moving from Colombia to Europe goes to Sweden.

TABLE VII.—*Callao (general cargo)*

Line	Percentage of sailings	Percentage of cargo carried
1950		
Johnson (D)	6.2	3.8
Others (D) [1]	50.0	95.8
Grace (T)	35.6	.4
Others (T) [1]	8.2	
1952		
Johnson (D)	7.8	4.3
Others (D) [1]	52.6	94.9
Grace (T)	29.6	.8
Others (T) [1]	10.0	
1953 (first 9 months)		
Johnson (D)	7.9	2.4
Others (D) [1]	48.3	94.4
Grace (T)	32.6	3.0
Others (T) [1]	11.2	.2

[1] "Others" are all foreign-flag carriers.

Most of the cargo moving from Callao to Europe is bulk ores and metals which are rated so low it is not usually possible to transship them profitably.

TABLE VIII.—*Valparaiso (general cargo)*

Line	Percentage of sailings	Percentage of cargo carried
1950		
Johnson (D)	7.1	5.3
Others (D)[1]	51.0	74.2
Grace (T)	31.4	19.4
Others (T)[1]	10.5	1.1
1952		
Johnson (D)	6.9	21.5
Others (D)[1]	51.4	78.5
Grace (T)	27.3	
Others (T)[1]	14.4	
First 9 months of 1953		
Johnson (D)	10.0	[2] 20.3
Others (D)[1]	52.9	[2] 78.2
Grace (T)	29.3	[2] .3
Others (T)[1]	7.8	

[1] "Others" are all foreign-flag carriers.
[2] These figures account for only 98.8 percent of the cargo. The record contains no explanation for the missing 1.2 percent.

Nearly all of the Valparaiso cargo handled by Grace in 1950 consisted of onions for London and Liverpool. Because of excessive rot, carriage of this cargo by transshipment was abandoned after 1950.

19. Grace Line's European transshipment business reflected in tables V through VIII was developed by Grace Line commencing in the early 1930's. It has now reached the point where the traffic both ways (westbound traffic is not reflected in the tables above) accounts for something over $1,000,000 revenue per year. The record shows that in the development and maintenance of this business Johnson Line has been of assistance from time to time by way of supplying Grace Line with information on rates and conditions of the European-South Pacific Magellan Conference.

20. Johnson Line pays 40 percent of the expense of pier rent, watchmen, and electricity at Grace Line's San Francisco pier. This arrangement would not be continued if Grace Line's affiliates should lose the agency, and Grace Line's witness testified that it is his opinion Grace Line would not be able to sublet the space to another carrier.

21. Johnson Line is one of the foremost proponents of diesel propulsion and has made extensive experiments with cargo gear. It has been cooperative in turning over information on new developments in these matters to Grace Line.

22. If the waiver should be extended, Grace Line's affiliates would pay over to Grace Line, which consistently has been in a recapture position, their profits from the agency fees and commissions. It is estimated that, if such profits had been added to Grace Line's in 1953, there would have resulted additional earnings for reserve and recapture in the sum of $126,897.

23. C. C. N. I. has instituted a service competitive with Grace Line's on Trade Route No. 25. Grace Line claims that it is fair to assume that if Grace Line's affiliates should lose the Johnson Line agency it would fall into the hands of the C. C. N. I.

24. Whenever a vessel of Johnson Line and one of Grace Line are both in position to use port facilities that are not adequate to serve both vessels, the Grace Line vessel gets to use the facilities first.

DISCUSSION

Section 804 of the Act vests the Maritime Administrator with discretionary authority to waive the prohibition of the section so as to permit a subsidized American operator to act as agent for foreign-flag vessels competitive with an essential American-flag service when special circumstances exist and when good cause has been shown. The fundamental approach of the Administrator to the section 804 waiver problem, as exemplified in *American Export Lines, Inc.—Section 804 Waiver*, 4 M. A. 379, is that subsidized operators in the American merchant marine ought to be encouraged to use every means at their

command, as prudent business men, to increase carryings, increase efficiency, or reduce overhead or other costs whenever they can do so without incurring obligations that are unduly disadvantageous. The means of accomplishing these objects or any of them may well include acting as agent for foreign-flag vessels. However, any such arrangement must necessarily result in greater benefit than detriment to the American subsidized operator.

In *American Export*, *supra*, the Administrator pointed out that the American operator and the foreign operator were principal competitors in substantially parallel services; that alleged passenger preference and alleged competitive effectiveness claimed as benefits by the American operator did not appear to flow from the agency for which waiver was sought but from other facts and circumstances; and that with respect to reciprocal traffic promotion obligations of the two lines, the American line appeared at a marked disadvantage.

In this case, on the other hand, the principal services of Grace Line and Johnson Line are not competitive; it appears that Grace Line, with respect to the traffic in which it is mainly interested, has obtained from Johnson Line the right to prefer itself with no countervailing disadvantages comparable to the foreign line's control of westbound traffic mentioned in the *American Export* case; and that, if Grace Line's affiliates are not permitted to solicit for Johnson Line, Grace Line will lose the benefits already recognized in the Maritime Administrator's action of August 21, 1953, waiving section 804 to permit Grace Line's affiliates to act as agents for Johnson Line vessels in all respects except solicitation.

In his action of August 21, 1953, the Administrator recognized that a nonsoliciting agency protects Grace Line from unlimited foreign-flag competition, permits Grace Line to exercise some control over cargo and Johnson Line vessel schedules, and enables Grace Line to obtain preferences as to cargo that might otherwise move on foreign carriers. The record shows that Johnson Line is not interested in a split agency in this hemisphere and that, if Grace Line is not permitted to solicit for Johnson Line vessels, the agency will be transferred to another organization with consequent loss to Grace Line of the special, recognized benefits flowing from the general aspects of the agency.

Moreover, one of the purposes of the instant hearing, on the solicitation aspects of the agency, is to clarify the extent of solicitation and to give other American-flag operators opportunity to make representations in accordance with their own interests. No American-flag operator has objected to Grace Line's affiliates soliciting for vessels of Johnson Line.

Grace Line has urged affirmatively that the agency enables it to obtain preference as to passengers and cargo that would otherwise move in foreign vessels. By the terms of the agency preference agreement referred to in finding 11 above, Grace Line's affiliates are enabled to prefer Grace Line vessels over the vessels of their Johnson Line principal. In my judgment, this in itself is a special circumstance of substantial weight, abrogating as it does the normal agent's obligation to promote the interests of his principal. And the record shows that with respect to cargoes in which Grace Line is interested, vessels of Grace Line have secured, in general, disproportionately larger loadings than their sailings might ordinarily entitle them to.

Public Counsel argues, on this point, that there is no evidence to show how much of the cargo that Grace Line vessels now carry would move on foreign-flag ships if the agency did not exist. Public Counsel also points out that Grace Line is already obliged, under its subsidy contract, to prefer its own vessels over foreign ships. He suggests therefore that the preference agreement is not a special circumstance. The mere fact that there is not of record an exact measure of the extent to which Grace Line obtains preference over Johnson Line does not mean that Grace Line is not in fact securing such preference. In my opinion, indications are that Grace Line does secure some preference in passengers and cargo that would otherwise move over the Johnson Line, and this preference is a proximate result of the fact that the agency agreement is qualified by the preference agreement. Nor does the preference agreement lose its special character merely because it is consistent with Grace Line's obligations under the subsidy contract.

Grace Line further claims that because its affiliates offer a more rounded service, i. e., a service including Johnson Line sailings as well as sailings of Grace Line, Grace Line is able to compete more effectively with foreign-flag lines operating from ports on the west coast of Central America and Mexico to U. S. Pacific ports, without detriment to any U. S.-flag service. The record shows that Grace Line vessels do carry a larger share of this cargo than might normally be justified by their sailings, while other carriers (including Johnson Line) carry a lesser share than their sailings would indicate. In this connection, the record shows that Grace Line's affiliates do not offer Johnson Line space unless no Grace Line space is available, and it is my judgment that shippers tend to patronize the agent who can offer them a wider range of sailing dates. This aspect of the agency thus appears to benefit Grace Line without in any way imposing a disadvantage upon Grace Line or upon the American merchant marine.

688-650 O - 63 - 34

Public Counsel, however, contends that it is anomalous for an American operator to say he is using foreign tonnage to compete more effectively with foreign tonnage. Public Counsel suggests that Grace Line might charter additional tonnage to take care of the cargo it shunts to Johnson Line vessels, or that Grace Line might invite some other American-flag operator into the trade. But the record shows that in the first 9 months of 1953, for example, the traffic shunted to Johnson Line amounted to only 8,116 long tons which, distributed among the 21 sailings that Johnson Line made, would amount to an average of less than 400 long tons per sailing. To suggest either that Grace Line charter additional vessels or that another American operator institute a new service to carry such minor traffic would, in my judgment, be an improper governmental invasion of private managerial discretion.

Grace Line also asserts that special circumstances and good cause speak for continuance of the section 804 waiver in that the agency agreement and the friendly relationship with Johnson Line it has engendered enable Grace Line to compete more effectively for transshipment business to and from the west coast of South America and Europe via the port of New York. This is ascribed to the fact that Johnson Line acted as a "friend in court" at meetings of the European-South Pacific Magellan Conference which controls the trade, to prevent institution of the deferred rebate by that conference and to keep Grace Line informed of conference rates and conditions.

It appears from the record that the heaviest movement of cargo from the west coast of South America to Europe is by direct carriers, of which Johnson Line is one, but that Grace Line, offering only a transshipment service via New York, has been able to carry substantial amounts of European cargo. During all years of record in this proceeding, from all west coast of South America ports served by Grace Line, Grace Line has carried more Europe-bound cargo than all other transshipment carriers together.[4]

Public Counsel contends, however, that this transshipment business was developed by Grace Line during a period when Grace Line's affiliates did not represent Johnson Line's South Pacific service. Despite the fact that Grace Line's affiliates were not representing Johnson Line during part of the time the European transshipment business was developing, Johnson Line probably was some help to Grace Line in the latter's competition with the conference, and in my opinion Grace Line is now and probably will in the future benefit from

[4] An exception was 1950, when neither Grace Line nor any other transshipment carrier lifted any European cargo from Valparaiso.

Johnson Line's affiliation in the conference by way of keeping informed of conference rates and conditions.

Grace Line urges as another special circumstance that Johnson Line vessels forego carriage of cargoes from U. S. Pacific ports to the west coasts of Mexico and Central America, the Canal Zone, and the north coasts of Columbia and Venezuela. The examiner found, and Public Counsel supports the finding, that this forebearance by Johnson Line cannot be said—on the basis of the record—to depend upon the arrangement with Grace Line in the sense that Johnson Line would inaugurate such a service should the agency arrangement come to an end. I have not accorded any weight to this contention of Grace Line.

Grace Line also asserts as special circumstances and good cause the following: (a) That Grace Line vessels receive priority over Johnson Line vessels in use of limited port facilities, thereby avoiding delays and overtime; (b) that Grace Line receives financial benefits from the agency and that such benefits are subject to recapture; (c) that Grace Line has received information on new developments in diesel propulsion and cargo gear from Johnson Line; (d) that if Grace Line should lose the agency it would fall into the hands of C. C. N. I., Grace Line's Chilean competitor on Trade Route No. 25; and (e) that an agency relationship between the two lines has existed for many years without complaint from any source.

Public Counsel argues (a) that avoidance of port delay cannot help justify a section 804 waiver because there is no evidence that delays have ever been avoided in consequence of the agreement; (b) that financial benefits resulting from the agency are normal rather than special circumstances of the agency agreement; (c) that no information on diesel equipment or cargo gear has been used by Grace Line; (d) that even if C. C. N. I. should obtain the Johnson Line agency, Johnson Line vessels would no more compete with Grace Line than they do now; and (e) that the Administrator should not be affected in his decision by the long-time existence of the agency but rather should decide this case on the basis of the facts as they are now.

Even though I have based my decision herein solely upon the facts as they are now, and even though my decision does not turn on the point, I am impressed to some extent with the fact that Grace Line has developed its business over many years to the point where it is carrying apparently more than its share of the traffic in its principal trades while during this period its affiliates in the Americas have represented the vessels of Johnson Line. The relationship has not appeared to hamper Grace Line's development in the past. During the years of record in this proceeding, I am convinced that the rela-

tionship has benefited Grace Line and, in my judgment, the facts indicate that it will continue to do so in the future.

So far as avoidance of port delay is concerned, while I do not give the point much weight, I do find in the record some evidence that there may be benefits to Grace Line from time to time resulting from the priority to which it is entitled in the use of limited port facilities.

The remaining points put forward by Grace Line appear, on the basis of the record before me, to be either of minor weight as special circumstances or so speculative that I cannot in any event accord weight to them as good cause within the meaning of the proviso clause of section 804.

CONCLUSION

The Maritime Administrator has already determined that special circumstances and good cause have been shown to justify waiver of the provisions of section 804, Merchant Marine Act, 1936, to permit affiliates of Grace Line to serve as agents for vessels of Johnson Line in certain respects, not including solicitation. The record herein, in the judgment of the Administrator, shows that special circumstances and good cause also exist which make waiver of section 804 to permit Grace Line's affiliates to book solicited cargo and passengers on Johnson Line vessels beneficial, on balance, to Grace Line and to the American merchant marine.

The waiver sought by Grace Line will therefore be extended for a period of two years from the date hereof, to expire at the close of business on August 12, 1956. The section 804 waivers granted by Administrator's action of August 21, 1953, are also extended to August 12, 1956, so that all the waivers will expire simultaneously.

By the Maritime Administrator.

(Sgd.) A. J. WILLIAMS,
Secretary.

FEDERAL MARITIME BOARD

No. M-61

ANNUAL REVIEW OF BAREBOAT CHARTERS OF GOVERNMENT-OWNED, WAR-BUILT, DRY-CARGO VESSELS, 1954, UNDER PUBLIC LAW 591, EIGHTY-FIRST CONGRESS

REPORT OF THE BOARD

In accordance with section 5 (e) (1) of the Merchant Ship Sales Act of 1946, as amended, an annual review has been made of the bareboat charters of Government-owned, war-built, dry-cargo vessels recommended for use by United States-flag operators during the period from June 30, 1953, to June 30, 1954, inclusive.

On the basis of the foregoing review, the Board tentatively has found that conditions exist justifying the continuance of each of the following charters under the conditions previously certified by the Board:

Charterer	Vessel	Original docket No.	Date vessel delivered
Alaska Steamship Company	Coastal Monarch	M-11	Aug. 9, 1948
	Coastal Rambler	M-11	Aug. 18, 1948
	Lucidor	M-11	Dec. 16, 1948
	Palisana	M-11	Dec. 16, 1948
	Square Knot	M-11	July 6, 1948
	Square Sinnet	M-11	Aug. 1, 1948
American President Lines, Ltd	Lightning	M-27	Apr. 16, 1951
	Shooting Star	M-32	May 23, 1951
Pacific Far East Line, Inc	Contest	M-10	Apr. 27, 1947
	Flying Dragon	M-10	May 8, 1947
	Surprise	M-10	Dec. 20, 1948
	Trade Wind	M-10	Jan. 20, 1949
	Fleetwood	M-10	Dec. 27, 1948
	Flying Scud	M-10	Dec. 10, 1948
	Sea Serpent	M-27	Mar. 28, 1951

Notice of the foregoing tentative findings was served on all interested parties and was published in the Federal Register on July 17, 1954, and interested parties were granted fifteen (15) days from the date of such publication to request a hearing concerning such tentative findings made with respect to any of the above charters by filing written objections thereto, or for other good cause shown. No objections or requests for hearing were filed.

The nine ships chartered to American President Lines, Ltd., and Pacific Far East Line, Inc., are fully refrigerated. They are operated, on a 10-day sailing frequency, in transpacific service primarily to furnish perishable supplies to the military. The Commander, Military Sea Transportation Service, Department of the Navy, has advised that the shipper agencies of the Department of Defense are going to review their requirements beyond October 1954 and that adjustments in the service will be made if the average monthly requirements of the military are so reduced as to make maintenance of the present 10-day schedule uneconomical.

FINDINGS, CERTIFICATION, AND RECOMMENDATION

On the basis of evidence considered by the Board, it is hereby certified to the Secretary of Commerce that, subject to further review at a later date of the charters with American President Lines, Ltd., and Pacific Far East Line, Inc., conditions exist justifying the continuance of the charters listed above, upon the conditions originally certified by the Board.

By the Board.

(Sgd.) A. J. WILLIAMS,
Secretary.

AUGUST 12, 1954.

FEDERAL MARITIME BOARD

No. 741

Misclassification of Tissue Paper as Newsprint Paper

Submitted August 11, 1954. Decided September 16, 1954

Respondent R. Stone & Co., Inc., a shipper, found to have falsely classified knowingly and willfully, a shipment of paper to obtain transportation by water therefor at less than the rate or charge which would otherwise be applicable, in violation of section 16 of the Shipping Act, 1916, as amended.

Respondent Tidewater Forwarding Company, Inc., a forwarder, found not to have falsely classified, knowingly and willfully, a shipment of paper to obtain transportation by water therefor at less than the rate or charge which would otherwise be applicable.

Abraham Grenthal for R. Stone & Co., Inc., respondent.

Milton E. Polakoff for Tidewater Forwarding Company, Inc., respondent.

Allen C. Dawson as Public Counsel.

Report of the Board

By the Board:

This proceeding was instituted by order of the Board dated September 3, 1953, and is a proceeding of investigation into and concerning alleged violations of the Shipping Act, 1916, as amended (hereinafter called "the Act"). As recited in the Board's order, it appeared that R. Stone & Co., Inc. (hereinafter called "Stone"), a shipper, and Tidewater Forwarding Company, Inc. (hereinafter called "Tidewater"), a forwarder, had violated section 16 of the Act. That section provides in part as follows:

That it shall be unlawful for any shipper consignor, consignee, forwarder, broker, or other person, or any officer, agent, or employee thereof, knowingly and willfully, directly or indirectly, by means of false billing, false classification, false weighing, false report of weight, or by any other unjust or unfair device or means to obtain or attempt to obtain transportation by water for property at less than the rates or charges which would otherwise be applicable.

The examiner has inquired into the facts and has issued a decision recommending that we find Stone in violation of the Act and Tidewater not in violation of the Act. The case has been submitted, without oral argument, on exception to the recommended decision and reply to the exception. We agree in principle with the result recommended by the examiner.

Although a hearing was convened by the examiner no witnesses appeared before him. No counsel appeared before the examiner except Public Counsel. The case was presented to the examiner on two stipulations, both signed by attorneys for Stone and Tidewater and by Public Counsel.

The facts of record in this proceeding are as follows:

1. Stone is a New York corporation engaged in the business of importing and exporting general merchandise to and from the United States.

2. Tidewater is a New York corporation, with its principal place of business in New York City, and is a freight forwarder registered as No. 455 with the Board in accordance with its General Order No. 72.

3. In May 1953, Stone, as shipper, caused certain paper to be prepared for export to the Philippine Islands and engaged Tidewater as its freight forwarder. Tidewater has acted as freight forwarder for Stone on numerous occasions for shipments of various types of merchandise.

4. Tidewater was advised of the Stone paper shipment by means of a telephone call to one of the officers of Tidewater from a clerk in the office of Arthur Doniger Paper Co., Inc. (the record does not show anything more about Arthur Doniger Paper Co., Inc., than that one of the company's clerks called Tidewater to advise that the Stone paper shipment was ready to be sent to the Philippines).

5. In his conversation with the Doniger clerk Tidewater's officer understood the paper being shipped was brown kraft wrapping paper.

6. Tidewater next prepared all the preliminary documents, referring to the paper in question as brown kraft wrapping paper, and delivered the documents to the New York office of Barber Steamship Lines, Inc., for shipment to the Philippines.

7. The day after the documents were delivered to the Barber office, Tidewater received written shipping instructions from Stone in which the paper was described as newsprint. On the same day Tidewater received a telephone call from the Barber office to the effect that the cartons in which the paper was being shipped were marked "bleached semicrepe napkin tissue 24×36—14". At the same time, because of expiration of Stone's letter of credit from its Philippine consignee, the shipment was ordered to be held up.

8. Subsequent to receiving the advice from Barber that the cartons were marked napkin tissue, Tidewater called Stone and advised of the information received. An officer of Stone stated to Tidewater that "it was impossible, because of the size of the sheets, to use the merchandise for any other purpose than for printing. He also said that this was a newspaper residue and therefore should be shipped as news print."

9. Later, after Stone had obtained an extension of its letter of credit, Stone directed Tidewater to proceed to ship the paper and, by written instruction, to ship it as newsprint.

10. On the basis of the foregoing, Tidewater arranged to have the paper shipped as newsprint via a ship of American President Lines, Ltd.

We take official notice of the fact that during the time here involved Far East Conference Freight Tariff No. 20, on file with us, the tariff under which Stone proposed to ship the paper, contained the following rates on paper and paper articles:

Item 1518	Napkins, Paper Napkins Stock, and Paper Diapers.	Contract	$34.75 W/M
		Noncontract	38.75 W/M
Item 1520	Newsprint	Contract	$22.75 Ton
		Noncontract	26.75 Ton
Item 1550	Tissue and Crepe, including Wrapping Tissue.	Contract	$34.75 W/M
		Noncontract	38.75 W/M
Item 1580	Wrapping, Kraft	Contract	$30.25 Ton
		Noncontract	34.25 Ton
Item 1585	Paper, N. O. S.	Contract	$61.00 W/M
		Noncontract	65.00 W/M

POSITIONS OF THE PARTIES

Stone "concedes that it knowingly and willfully misclassified the paper" with respect to which this proceeding was instituted.

Public Counsel urges that we find Tidewater in violation of the Act, saying that the facts do not reveal that Tidewater, in the situation before us, has measured up to the standards imposed on forwarders by section 16 of the Act. Quoting from *United States* v. *Illinois Central Railroad*, 303 U. S. 239 (1938), Public Counsel asserts that "willfully" means "purposely or obstinately and is designed to describe the attitude of a carrier, who, having a free will or choice, either intentionally disregards the statute or is plainly indifferent to its requirements." Public Counsel also urges upon us certain language from the decision of the United States Maritime Commission in *Rates from Japan to United States*, 2 U. S. M. C. 426 (1940), where, on page 434, referring to the carrier respondents, the Commission said:

> Their persistent failure to inform or even attempt to inform themselves through the media of * * * means which normal business resources and acumen should dictate, is proof that they *knowingly and willfully* keep themselves in ignorance of the false billings concerned. [Emphasis added.]

Tidewater points out that when it was informed that the markings on the cartons were not consistent with the description of merchandise which Stone had given Tidewater, Tidewater made inquiry of Stone and was reassured twice, once orally and once in writing, that regardless of the markings of the cartons, the paper inside the cartons was not napkin tissue but was newsprint. Tidewater further states that even if it had opened the cartons and examined the paper inside them, it would not have been able to decide whether the paper was newsprint or napkin tissue. Tidewater therefore claims that it did all it was required by the Act to do.

DISCUSSION

In view of Stone's concession that it knowingly and willfully misclassified the paper, and in view of the fact that the paper was classified as newsprint—the lowest rate for paper of the rates available to Stone—we conclude that Stone has violated section 16 of the Act.

The disposition of the case as to Tidewater turns upon the construction to be placed on section 16 of the Act and especially upon the meaning of the phrase "knowingly and willfully".

We believe, following the authority cited by Public Counsel, that the phrase "knowingly and willfully" means purposely or obstinately, or is designed to describe a carrier who intentionally disregards the statute or is plainly indifferent to its requirements. We agree that a persistent failure to inform or even to attempt to inform himself by means of normal business resources might mean that a shipper or forwarder was acting knowingly and willfully in violation of the Act. Diligent inquiry must be exercised by shippers and by forwarders in order to measure up to the standards set by the Act. Indifference on the part of such persons is tantamount to outright and active violation.

We are unable to find in this case, however, that Tidewater's action was purposeful, obstinate, indifferent, or lacking in diligence. A freight forwarder, in our judgment, is not required to be an expert on the uses to which the cargo he is handling may be put. Tidewater appears, on the basis of the record in this case, to have used reasonable means in the exercise of ordinary diligence to determine the proper classification for the paper involved in this case. Tidewater asked Stone about the classification of the paper upon learning that there

Their persistent failure to inform or even attempt to inform themselves through the media of * * * means which normal business resources and acumen should dictate, is proof that they *knowingly and willfully* keep themselves in ignorance of the false billings concerned. [Emphasis added.]

Tidewater points out that when it was informed that the markings on the cartons were not consistent with the description of merchandise which Stone had given Tidewater, Tidewater made inquiry of Stone and was reassured twice, once orally and once in writing, that regardless of the markings of the cartons, the paper inside the cartons was not napkin tissue but was newsprint. Tidewater further states that even if it had opened the cartons and examined the paper inside them, it would not have been able to decide whether the paper was newsprint or napkin tissue. Tidewater therefore claims that it did all it was required by the Act to do.

DISCUSSION

In view of Stone's concession that it knowingly and willfully misclassified the paper, and in view of the fact that the paper was classified as newsprint—the lowest rate for paper of the rates available to Stone—we conclude that Stone has violated section 16 of the Act.

The disposition of the case as to Tidewater turns upon the construction to be placed on section 16 of the Act and especially upon the meaning of the phrase "knowingly and willfully".

We believe, following the authority cited by Public Counsel, that the phrase "knowingly and willfully" means purposely or obstinately, or is designed to describe a carrier who intentionally disregards the statute or is plainly indifferent to its requirements. We agree that a persistent failure to inform or even to attempt to inform himself by means of normal business resources might mean that a shipper or forwarder was acting knowingly and willfully in violation of the Act. Diligent inquiry must be exercised by shippers and by forwarders in order to measure up to the standards set by the Act. Indifference on the part of such persons is tantamount to outright and active violation.

We are unable to find in this case, however, that Tidewater's action was purposeful, obstinate, indifferent, or lacking in diligence. A freight forwarder, in our judgment, is not required to be an expert on the uses to which the cargo he is handling may be put. Tidewater appears, on the basis of the record in this case, to have used reasonable means in the exercise of ordinary diligence to determine the proper classification for the paper involved in this case. Tidewater asked Stone about the classification of the paper upon learning that there

might be some question about it and was reassured at that time that although the paper was marked tissue, it was, nevertheless, newsprint. The explanation made by Stone at that time for the apparent inconsistency is not an unreasonable explanation, and, in our judgment, might well be considered sufficient to lay at rest the concerns of a freight forwarder. And subsequent to receipt of this oral advice, Tidewater was further advised in writing by Stone that the merchandise should be shipped as newsprint.

CONCLUSION

We therefore conclude that Stone has violated section 16 of the Act; as to Tidewater, we conclude that the record does not show that it has violated section 16 of the Act. The proceeding as to Tidewater will be discontinued.

The entire record of this proceeding will be forwarded to the Department of Justice for appropriate action.

By the Board.

(Sgd.) A. J. WILLIAMS,
Secretary.

FEDERAL MARITIME BOARD

MARITIME ADMINISTRATION

No. S–33

American President Lines, Ltd.—Application for Operating-Differential Subsidy, Trade Route No. 17, Service C–2

No. S–17 (Sub. 1)

American President Lines, Ltd.—Application for Extension of Existing Authority to Operate without Subsidy on Trade Route No. 17, Service C–2

Submitted July 7, 1954. Decided September 16, 1954 *

Vessels to be operated on Trade Route No. 17 in Freight Service "C–2", proposed by American President Lines, Ltd., would not, with certain modifications, be in addition to the existing service, or services.

The effect of a subsidy contract between the United States and American President Lines, Ltd., with respect to vessels to be operated on Trade Route No. 17 in Freight Service "C–2", as proposed by American President Lines, Ltd., would not, with certain modifications, be to give undue advantage or be unduly prejudicial as between citizens of the United States in the operation of vessels in competitive services, routes, or lines.

Section 605 (c) of the Merchant Marine Act, 1936, as amended, does not interpose a bar to an award of subsidy to American President Lines, Ltd., with respect to vessels to be operated on Trade Route No. 17 in Freight Service "C–2".

American President Lines, Ltd., or a predecessor in interest, was not in bona fide operation as a common carrier by water in the domestic, intercoastal, or coastwise trade in 1935 over the route or routes or in the trade or trades for which American President Lines, Ltd., has applied for permission to operate in the westbound intercoastal leg of its Trade Route No. 17, Freight Service "C–2".

The operation by American President Lines, Ltd., of its Freight Service "C–2" vessels in the westbound intercoastal service would, except for carriage of reefer cargoes, result in unfair competition to persons, firms, or corporations operating exclusively in the coastwise or intercoastal service.

---

*As modified by order dated October 28, 1954.

The operation by American President Lines, Ltd., of its Freight Service "C-2" vessels in the eastbound intercoastal service would result in unfair competition to persons, firms, or corporations operating exclusively in the coastwise or intercoastal service except to the extent that such vessels may carry cargoes eastbound from Los Angeles.

Vessels operated by American President Lines, Ltd., in Freight Service "C-2", Trade Route No. 17, permitted to call at Guam westbound.

The Freight Service "C-2" vessels of American President Lines, Ltd., permitted to serve Manila and two Philippine outports eastbound.

The Fright Service "C-2" vessels of American President Lines, Ltd., permitted to call eastbound at San Francisco Bay ports, but not to lift eastbound intercoastal cargo at such ports.

The Freight Service "C-2" vessels of American President Lines, Ltd., authorized to continue to perform eastbound intercoastal service from the port of Los Angeles only.

Warner W. Gardner, *Reginald S. Laughlin*, *Willis R. Deming*, *David H. Batchelder*, *William G. Symmers*, and *John I. Heise, Jr.*, for applicant.

Odell Kominers for Pacific Far East Line, Inc., and Luckenbach Steamship Co., Inc., *James L. Adams* and *Tom Killefer* for Pacific Transport Lines, Inc., *Wm. I. Denning* for States Steamship Company and Pacific-Atlantic Steamship Co., and *Sterling F. Stoudenmire, Jr.*, for Waterman Steamship Corporation, interveners.[1]

Allen C. Dawson and *William D. Mitchell* as Public Counsel.

Report of the Board and Maritime Administrator

By the Board and Maritime Administrator:

These proceedings were instituted by order of the Board and Administrator dated April 3, 1952, and order of the Board dated June 2, 1952, setting for prehearing conference certain issues raised by applications of American President Lines, Ltd. (hereinafter called "APL"). All the issues in both proceedings relate to a common carrier freight service operated by APL between U. S. Atlantic ports on the one hand and ports in southeast Asia on the other hand, via the Panama Canal, in both directions. This service conforms to Freight Service "C-2" of Trade Route No. 17,[2] recommended as an essential foreign trade route of the American merchant marine by the United States Maritime Commission (hereinafter "Maritime Commission")

[1] American-Hawaiian Steamship Company, appearing by Odell Kominers, and Department of the Interior, appearing by Irwin W. Silverman and A. M. Edwards, both intervened but withdrew before the proceedings were completed. The New England Traffic League, appearing by Harold D. Arnold, also intervened but did not participate actively in the proceedings.

[2] APL's service will in this report be called the C-2 service, and vessels operating thereon will be called the C-2 vessels, it being understood that "C-2" in this report refers to the service and not to type of vessels.

recommendation of May 20, 1946, as amended by Maritime Commission Report of May 1, 1949.[3]

APL, a subsidized operator in three services,[4] has been operating its C–2 service since mid-1948, without subsidy, under approvals given by the Maritime Commission and the Board/Administrator.[5] In January 1952, in accordance with the provisions of title VI of the Merchant Marine Act, 1936, as amended (hereinafter called the "Act"), APL applied for subsidy on its C–2 service, and further applied for (1) authority to continue to perform eastbound intercoastal service in connection with the C–2 service; (2) modification of the C–2 service itinerary to authorize calls at Guam on outbound voyages; (3) the privilege of serving one additional Philippine port (to make a total of two Philippine outports plus Manila); and (4) the privilege of calling eastbound at San Francisco Bay ports and/or Los Angeles, California.

By its order of June 2, 1952, above, the Board set for hearing all the issues raised by both of APL's applications. Issues designated to be heard under Docket No. S–33 embrace all those issues which by sections 605 (c) and 805 (a) of the Act are required to be heard publicly. Issues arising out of the four requests in the paragraph next above were set for hearing under Docket No. S–17 (Sub. 1).

Hearings have been held, the examiner has issued a recommended decision, exceptions have been filed, and we have heard oral argument thereon. The examiner recommended finding in effect that section 605 (c) of the Act does not interpose a bar to an award of subsidy to APL for operation of its C–2 service; that APL should not be permitted to transport any except refrigerated cargo on the westbound intercoastal leg of its C–2 service; that APL should be permitted to continue to transport general cargo eastbound on vessels operated in its C–2 service, subject to revocation of such permission for cause shown; that vessels operated by APL in its C–2 service should be permitted to call at two Philippine outports in addition to Manila homebound, but not at two California ports homebound except upon

[3] The Maritime Commission's 1949 Report describes the service as follows:

Itinerary: New York (other Atlantic ports as traffic offers) via Panama Canal; Los Angeles, San Francisco to Manila, Hong Kong, Singapore, Belawan, Batavia (now called Djakarta), Soerabaja, Hong Kong and Philippine Islands (as traffic offers) to San Francisco, Los Angeles and via Panama Canal to New York; privilege of calling at French Indo China and Siam (now called Thailand) as traffic offers.

[4] Trans-Pacific Passenger-Freight Service (Trade Route No. 29, Passenger-Freight Service 1, from California ports to named ports in Japan, China, and the Philippines and return); Trans-Pacific Freight Service (Trade Route No. 29, Freight Service 2 (modified), from California ports to ports in China, Japan, the Philippines and surrounding area and return); and Round-the-World Service (from New York westbound through the Panama Canal to California, thence to the Far East and India, through the Suez Canal, through the Mediterranean and return to New York).

[5] Approval is required by Article II–16 of APL's operating-differential subsidy agreement.

prior approval; and that vessels operated by APL in the C–2 service should be permitted to transport cargo from Atlantic and California ports to Guam.

In general we agree with the conclusions recommended by the examiner. Exceptions and recommended findings not discussed in this report nor reflected in our findings or conclusions have been given consideration and found not related to material issues or not supported by evidence.

We will direct ourselves first to the issues in Docket No. S–33.

Section 605 (c)

EXISTING SERVICE

The first issue raised by section 605 (c) of the Act is whether APL has been furnishing an existing service on Service "C–2". The section provides in part as follows:

> (*c*) No contract shall be made under this title with respect to a vessel to be operated on a service, route, or line served by citizens of the United States which would be in addition to the existing service, or services, unless * * *.

We find that:

1. The C–2 service provides ocean transportation primarily between the United States Atlantic coast and the area in Southeast Asia known, before World War II, as the Netherlands East Indies-Straits Settlements area.[6] The service also serves areas along the way. A principal way area is the Philippine Islands. Other way areas are Hong Kong, Indo China, and Thailand.

2. Trade Route No. 17 was characterized "essential" by the Maritime Commission largely because of the strategic and economic importance to the United States of the natural resources—tin, rubber, oils, fibers, etc.—in which the Indonesia-Malaya area is so rich. Freight Service "C–2" on Trade Route No. 17 was established by the Maritime Commission to provide an alternative to the Atlantic/Indonesia-Malaya Suez route, which is the traditional route traveled by steamship lines plying the trade.

3. The route between the United States Atlantic coast and the Indonesia-Malaya area via Suez is not only the traditional route; it is shorter by 2,400 to 3,100 miles than the Panama route. The principal steamship lines that use the Suez route, flying the British and Netherlands flags, are well established with merchants in the Indonesia-

[6] The archipelago that used to be called Netherlands East Indies is now largely included in the Republic of Indonesia. The ports of Soerabaja, Djakarta, and Belawan are all in Indonesia, as the area will be referred to in this report.

The ports of Penang and Port Swettenham lie along the southwest coast of the Malay peninsula on the Strait of Malacca. The term "Straits Settlements" no longer has political significance and Singapore is a British Crown Colony. These three ports will therefore be referred to collectively in this report as "Malaya."

Malaya area both by long years of close commercial relationships and by nationalistic ties.

4. Since May 1941 APL has filed four applications for subsidy for a C–2 service. Two filed during World War II were not acted upon, and the third, filed in July 1946, was denied because the Maritime Commission determined under section 605 (c) of the Act that existing United States-flag services substantially paralleling Services C–1, C–2, and C–4 of Trade Route No. 17 were not shown to be inadequate.[7] The fourth application for subsidy is the one now before us.

5. In June 1947 APL applied for permission to operate a C–2 service without subsidy. In May 1948 the Maritime Commission granted such permission, to be effective until June 30, 1949. In May 1949 the Maritime Commission ordered a hearing on the question whether permission to operate the service ought to be extended.

In January 1951 the Board and Administrator issued a report granting permission to APL to continue to operate the C–2 service without subsidy, subject to the following conditions:[8]

(*a*) The permission was subject to review not later than April 30, 1952;

(*b*) APL was to call on each voyage at no fewer than six ports (including Singapore) in the Indonesia-Malaya area;

(*c*) Elapsed time homeward of each voyage from Singapore to New York was not to exceed 38 days, not more than one Philippine port and one California port to be called;

(*d*) The C–2 vessels were permitted to carry eastbound intercoastal cargo but none other than refrigerated cargo westbound;

(*e*) APL was to schedule its C–2 sailings so as to avoid blanketing the sailings of its own subsidized vessels and the sailings of its United States-competitors;

(*f*) APL was not to refuse inbound cargo from Indonesia-Malaya to United States Atlantic ports in the interest of reserving space for inbound cargo to the Atlantic from intermediate ports;

(*g*) APL was not to operate owned freighters in its C–2 service while chartered freighters were employed in its subsidized services;

(*h*) APL was to receive advance approval of the Maritime Administrator for each schedule of a C–2 service sailing; and

(*i*) APL could at any time (upon good cause shown) apply for permission to depart from any of the foregoing conditions.

---

[7] *U. S. Lines Co.—Subsidy, Route 12, etc.,* 3 U. S. M. C. 325, 334 (1947).

[8] *Am. Pres. Lines, Ltd.—Unsubsidized Operation, Route 17,* 3 F. M. B.-M. A. 457 (1951).

6. APL has obtained some modification of the conditions set forth above. At present, elapsed homeward time of each voyage from Singapore to New York may not exceed 42–45 days, depending on the type of vessel (instead of 38 days as specified in 1952); C–2 vessels are permitted to call outbound at Guam; C–2 vessels may call homebound at one Philippine outport plus Manila (instead of Manila only as in 1952).

7. An overall limitation on operation of the C–2 service has been that no more than thirteen voyages per annum could be made. Since June 9, 1948, the C–2 service has provided sailings as follows:

TABLE I

Year	Number of sailings
1948 (after June 9)	3 (2 partial).
1949	14 (4 partial).
1950	13.
1951	11 (1 partial).
1952	10 (1 partial).
1953 (first 3 months)	3.
Yearly average, 1949–53	12.

As of December 31, 1952, more than 725,000 tons of cargo had been carried by C–2 vessels since June 1948 to produce over $26,000,000 in revenue.

APL now operates three owned AP3's in the service, plus one or two chartered vessels. APL proposes to operate five owned C3's or other suitable types if the service is subsidized. APL has provided regular service to Guam commencing with the sailing from New York of the *SS President Tyler* on September 17, 1951.

8. No other United States-flag operator serves all the areas touched by APL's C–2 service. Those lines that serve parts of the route also serve other areas off the route. Interveners States Steamship Company (hereinafter "States") and Pacific Transport Lines, Inc. (hereinafter "PTL"), operate between California and principally Japan and the Philippines on Trade Route No. 29.[9] Intervener Pacific Far East Line, Inc. (hereinafter "PFEL"), also operates on Trade Route No. 29 and serves Guam from California. Intervener Waterman Steamship Corporation (hereinafter "Waterman") serves the Far East from United States ports and also operates intercoastal services.[10] Interveners Luckenbach Steamship Company, Inc. (hereinafter "Luckenbach"), and Pacific-Atlantic Steamship Co. (hereinafter

[9] Trade Route No. 29 includes mainly services between Los Angeles-San Francisco and ports in Japan, North China, Hong Kong, the Philippines, and Indo China-Thailand.

[10] Waterman has intervened only to the extent of its interest in the intercoastal aspects of the case.

688-650 O - 63 - 35

called "Quaker", after the trade name of its intercoastal line) operate intercoastal services.

9. In addition to the interveners, a number of other United States-flag services are competitive in some degree with portions of APL's C-2 service. Isthmian Steamship Co. (hereinafter "Isthmian") serves all the area served by the C-2 service except Guam, operating via Panama and Suez. Isbrandtsen Co., Inc. (hereinafter "Isbrandtsen"), operates a service between the Indonesia-Malaya area and both the west and east coasts of the United States via Suez outbound and via Panama inbound. Between United States Atlantic ports and the Philippines, United States Lines Company (hereinafter called "American Pioneer", after the trade name of its transpacific line) and Waterman provide service in both directions. Isthmian provides service Atlantic/Philippines largely outbound and Isbrandtsen largely inbound.

10. American Pioneer is the only United States-flag line other than APL providing service between the United States Atlantic and Hong Kong. Isthmian and APL are the sole United States-flag operators serving Indo China or Thailand from the United States Atlantic. Service between the west coast of the United States and the Indonesia-Malaya area is provided outbound by Isthmian and APL and inbound by APL, American Mail Line, Ltd. (hereinafter "AML"), and Isbrandtsen. Seven United States-flag lines aside from APL serve the trade between the United States west coast and the Philippines: Isthmian (outbound only), PFEL, PTL, States, Waterman (outbound only), AML (outbound only), and Isbrandtsen (inbound only). Of these operators, only PTL and States intervened to oppose APL's operation on the California/Philippines segment of the route. Isthmian, States, American-Hawaiian Steamship Company (hereinafter "American-Hawaiian"), and APL operate between California and Indo China-Thailand.

Our inquiry is whether the C-2 service proposed by APL would be in addition to the C-2 service presently operated by APL. The examiner found that, for the purposes of section 605 (c), the proposed service would not be in addition to the existing service. APL states in its application for subsidy that "Applicant does not at this time propose to establish any new service, route, or line."

APL's proposed service would in fact differ from the existing service in respect of vessel type, number of Philippine and California ports called, the extent of intercoastal service permitted, and the maximum number of sailings permitted per annum. On the other hand, the proposed change of vessel type (from AP3's to C3's) is not so substan-

tial as to cause us under section 605 (c) to discount the present service as not "existing"; only one additional Philippine and one additional California port are sought to be served; the extent of intercoastal service to be permitted APL's C-2 service is the same as that now provided (see discussion of this subject, *infra*); and the maximum-minimum limits on number of sailings are so close to the actual average performed over the past six years that we do not regard the proposed service in that respect as one "in addition to the existing service."

It is our judgment in this case that APL's proposed service does not, as modified by our actions herein, differ so greatly from the existing service as to make it a service "which", in the words of the Act, "would be in addition to the existing service, or services * * *",[11] and we so conclude.

Undue Advantage or Prejudice

The second issue raised by section 605 (c) of the Act can now be disposed of. Section 605 (c) provides, in its second portion, as follows:

> * * * and no contract shall be made with respect to a vessel operated or to be operated in a service, route, or line served by two or more citizens of the United States with vessels of United States registry, if the Commission shall determine the effect of such a contract would be to give undue advantage or be unduly prejudicial, as between citizens of the United States, in the operation of vessels in competitive services, routes, or lines * * *.

We find that:

11. The four services of APL (Trans-Pacific Passenger-Freight, Trans-Pacific Freight, Round-the-World, and Atlantic-Straits) provide coordinated, integrated services across the Pacific.

12. Between California and the Philippines, carryings of liner commercial cargo have been as follows:

TABLE II

Year	Outbound				Inbound			
	Total tons	Percent via United States flag	Percent APL C-2 to total	Percent APL C-2 to United States	Total tons	Percent via United States flag	Percent APL C-2 to total	Percent APL C-2 to United States
1948	328, 208	77	2	2	336, 421	45	1	2
1949	351, 118	75	3	4	392, 680	53	5	9
1950	215, 568	65	4	6	409, 591	43	2	4
1951	270, 037	68	1	2	370, 811	53	1	2
1952	182, 618	56	2	4	357, 392	44	....	1

[11] PFEL claims that calls at Guam would be in addition to the existing service. Because of the special problems relating to the proposed Guam call, Guam will be separately discussed later.

13. Carryings of liner commercial cargoes between California and Hong Kong have been as follows:

TABLE III

Year	Outbound				Inbound			
	Total tons	Percent via United States flag	Percent APL C-2 to total	Percent APL C-2 to United States	Total tons	Percent via United States flag	Percent APL C-2 to total	Percent APL C-2 to United States
1948	78, 430	84	3	3	19, 756	81	4	5
1949	113, 038	83	5	6	26, 712	68	4	6
1950	121, 545	71	6	9	33, 171	80	9	11
1951	64, 834	69	1	1	16, 678	77	6	8
1952	47, 399	45	2	4	11, 128	74		

14. Tons of liner commercial cargo carried and sailings made by APL's C-2 service and PTL in 1951 and 1952 between California and the Philippines-Hong Kong area were as follows:

TABLE IV

Year	APL C-2				PTL			
	Cargo carried		Sailings		Cargo carried		Sailings	
	Out	In	Out	In	Out	In	Out	In
1951	3, 742	3, 924	9	10	30, 328	58, 938	25	25
1952	4, 774	1, 664	10	10	[12] 16, 596	[12] 51, 786	19	22

15. Percentages of total liner cargoes moving between California and the Philippines-Hong Kong area represented by the PTL carryings set forth in table IV were as follows:

TABLE V

Year	Total tons		PTL tons		Percent, PTL to total	
	Out	In	Out	In	Out	In
1951	334, 871	387, 489	30, 328	58, 938	9. 06	15. 21
1952	230, 017	368, 520	[12] 16, 596	[12] 51, 786	7. 22	14. 05

Of the interveners, States produced no witnesses and offered no evidence. The Board has stated before that any evidence on whether an award of subsidy would create undue advantage or be unduly prejudicial as between citizens of the United States should come from parties claiming undue prejudice under section 605 (c).[13] Therefore,

[12] Estimated, based on first 6 months' carryings.

[13] *Grace Line Inc.—Subsidy, Route 4*, 3 F. M. B. 731 (1952). To substantially the same effect is *Port of New York Authority* v. *Ab Svenska et al.*, 4 F. M. B. 202 (1953), interpreting section 16 First of the Shipping Act, 1916, as amended. That section makes unlawful, inter alia, the giving of undue advantage or the imposition of undue prejudice.

as to nonintervening competitors of APL and as to States, we find that undue advantage or prejudice would not flow from award of a contract.

The only valid claim of undue advantage and prejudice under section 605 (c) of the Act in this case comes from PTL and relates to service between California and the Philippines-Hong Kong area. PTL's main objection to operation of APL's C–2 service is that the service adds to APL's other three transpacific services to provide a superior competitive, coordinated, integrated complex of services with the following results asserted by PTL to constitute undue advantage and prejudice:

(1) The C–2 service permits APL to offer greater frequency of sailings among Trade Route No. 29 ports;

(2) The C–2 service permits APL to operate a southern as well as a northern route in its freight service on Trade Route No. 29;

(3) By offering direct sailings from Malaya to California, APL obtains cargo not only on its C–2 vessels but also on its other transpacific vessels at the expense of PTL;

(4) With its greater frequency of sailings, APL loses fewer bookings because of letter of credit expirations;

(5) By being allowed to carry Trade Route No. 29 cargo on C–2 vessels, APL obtains an advantage over PTL with respect to overland pool-car shipments and stockpiled petroleum products; and

(6) APL obtains certain advantages over PTL by utilizing a combined sales force for all its four services.

All these advantages stem from the fact that APL operates four coordinated, integrated services across the Pacific and accrue whether or not the C–2 service is subsidized. The burden of the PTL argument is that a subsidy to APL will enable that company to increase the effect of the advantages or prejudices on PTL's operations and that this will provide APL with an undue advantage and will unduly prejudice PTL.[14]

It appears that the C–2 service has carried very little liner commercial cargo between California and the Philippines-Hong Kong area. In 1951, the service carried altogether, both directions, slightly over two percent of such traffic, and in 1952, slightly over one percent. If PTL had carried in 1951 its share of C–2 liner commercial cargo between California and the Philippines-Hong Kong area, it would have amounted to approximately 14 additional tons on each outbound sailing and 24 tons on each inbound sailing. The additional cargoes

[14] PTL takes the position that continuance of the C–2 service unsubsidized will also result in undue advantage and prejudice as between APL and PTL. This issue is not related to Docket No. S–33, which is concerned exclusively with sections 605 (c) and 805 (a) of the Act.

in 1952 would have been 18 tons on each outbound sailing and 11 tons on each inbound sailing.[15]

Although, as argued by PTL, it may be that the mere existence of APL's C–2 service operates to help APL draw cargo away from PTL to APL's other transpacific services, there are no data in the record to measure the extent to which this may occur. In view of this lack of any measurable showing of advantage or prejudice, and in view of the small carryings of C–2 vessels in the trade, we must conclude that any advantage to APL or prejudice to PTL flowing from an award of subsidy to APL would not be undue.

Aside from PFEL's claim with respect to calls at Guam, discussed later, no other intervener has raised any claim of undue advantage or prejudice under section 605 (c) with respect to any part or the whole of the service.

We therefore conclude that the effect of making a subsidy contract with APL, to the extent that contract would deal with the foreign areas served by the C–2 service, would not be to give undue advantage or be unduly prejudicial, as between citizens of the United States, in the operation of vessels in competitive services, routes, or lines. We add, without implying criticism of APL's past operations, that APL must schedule its C–2 sailings so as to avoid blanketing the sailings of its other services and the sailings of its United States-flag competitors.

ADEQUACY OF SERVICE

In view of our conclusions on the initial issues of section 605 (c), viz., (1) that the service proposed by APL would not be in addition to the existing service, or services, and (2) that award of a subsidy contract would not have the effect of giving undue advantage or of being unduly prejudicial as between citizens of the United States, we need not inquire into whether there is, without APL's C–2 service, adequate service by vessels of United States registry in Freight Service "C–2" of Trade Route No. 17, or whether, in accomplishment of the purposes and policy of the Act, additional vessels ought to be operated therein. *American President Lines* v. *Federal Maritime Board*, 112 F. Supp. 346 (1953), appeal dismissed December 8, 1953.

Our conclusions on the issues raised by section 605 (c) of the Act are not tantamount to a finding that APL is entitled to a subsidy for the whole or any part of its C–2 service, for such a conclusion can be reached only after the necessary administrative study and action under section 601 and other provisions of the Act. In any action taken, we

[15] These figures are arrived at by multiplying the number of tons of liner commercial cargo carried by C–2 vessels by the figures representing the percentages of all liner commercial cargoes carried by PTL and dividing the results by the number of sailings made by PTL.

will take steps to insure that APL does not refuse inbound cargo from Indonesia-Malaya to United States Atlantic ports in the interest of reserving space for inbound cargo to the Atlantic from intermediate ports.

GUAM

The question of service from the continental United States to Guam presents special problems in our administration of the provisions of the Act. Guam is not served by any foreign-flag ocean carriers and is in that respect similar to our domestic intercoastal and coastwise trades. Operators in such trades are protected from subsidized competition by section 805 (a) of the Act, but no such protection is available to operators serving Guam.[16] Intervener PFEL, the only ocean carrier, aside from APL, serving Guam from the continental United States, claims the protection of section 605 (c) of the Act.

We cannot, in a technical sense, apply section 605 (c) to the Guam leg of APL's proposed C-2 service because that section as a whole relates to proposed subsidized services in their entirety and not to individual legs of proposed services.[17] As far as the Guam leg of the proposed C-2 service is concerned, we cannot say that section 605 (c) would apply under any circumstances, in view of the fact that the section by its terms relates to a "contract * * * made under this title." Such contracts can be made applicable only to vessels "which," in the words of section 601, "are to be used in an essential service in the *foreign* commerce of the United States" (emphasis added). Commerce between the continental United States and Guam is not foreign commerce of the United States.[18] It is our judgment, however, that operators trading to Guam are entitled to some protection. Accordingly, our present inquiry extends to whether the effect of the contract sought by APL would be to give undue advantage or be unduly prejudicial as between APL and PFEL.

The record shows that the volume of commercial cargo handled by APL's C-2 service vessels from California to Guam has been small, amounting in 1953 to around 9 percent of PFEL's total, or less than 200 tons per sailing since September 1951. PFEL and APL provide the only commercial ocean carrier services between Guam and the

[16] *American President Lines, Ltd.—Application, etc.*, 3 M. A. 450 (1950).

[17] See *Lykes Bros. S. S. Co. Inc.—Increased Sailings, Route 22*, 4 F. M. B. 455, 464, where we said, on the "adequacy" issue of section 605 (c)

Much less are we willing to say that 50 percent participation is the standard of adequacy for United States—flag vessel participation in cargo moving over a particular part of an essential foreign trade route.

[18] We do not mean to suggest that a subsidized service may not include a call at Guam. Section 605 (a) of the Act authorizes such a call and provides for pro rata abatement of subsidy on account of domestic cargo, mail, or passengers to Guam.

United States. During the years of record, PFEL has increased its sailings. We are therefore unable to find that the effect of awarding a subsidy contract to APL for its C-2 service would be to give undue advantage or be unduly prejudicial as between APL and PFEL.

SECTION 805 (a)

The remaining issues in Docket No. S-33 arise out of the intercoastal operations proposed by APL as part of its C-2 service, and the effect on such operations of section 805 (a) of the Act.[19] Section 805 (a) provides in part as follows:

> It shall be unlawful to award or pay any subsidy to any contractor under authority of title VI of this Act * * * if said contractor * * * shall own, operate, or charter any vessel or vessels engaged in the domestic intercoastal or coastwise service * * * without the written permission of the Commission. Every person, firm, or corporation having any interest in such application shall be permitted to intervene and the Commission shall give a hearing to the applicant and the interveners. The Commission shall not grant any such application if the Commission finds it will result in unfair competition to any person, firm, or corporation operating exclusively in the coastwise or intercoastal service or that it would be prejudicial to the objects and policy of this Act * * *.

APL proposes to institute full westbound intercoastal service (instead of reefer service only as now limited), and to continue carrying eastbound intercoastal cargoes out of Los Angeles and, in addition, to lift some eastbound cargo out of San Francisco.

STANDING OF INTERVENERS

APL at the outset urges upon us that neither Luckenbach nor Waterman has standing, as an exclusively intercoastal or coastwise operator, to object under section 805 (a) of the Act to APL's C-2 intercoastal operation. We find:

16. Luckenbach charters out to offshore operators, for use in the offshore trades, vessels which it owns but for which there is no demand in the domestic trades. Waterman, in addition to its domestic operations, operates vessels for its own account in the offshore trades. Both Luckenbach and Waterman operate a domestic intercoastal service that does not include foreign ports.

Luckenbach's standing is destroyed by its offshore charters and Waterman's by its own offshore operations, according to APL. APL's argument as to Luckenbach was rejected by the Board in its consideration of *American President Lines, Ltd.—Sec. 805 (a) Ap-*

[19] Section 805 (a) is applicable to the intercoastal aspects of the C-2 service whether subsidized or not. Therefore, while our discussion of section 805 (a) issues has been placed under the Docket No. S-33 heading, it should be clearly understood that our determinations are equally applicable to the Docket No. S-17 (Sub. 1) requests of APL.

plication, 4 F. M. B. 436 (1954).[20] In any event, Luckenbach, Waterman, and APL were parties to *Am. Pres. Lines, Ltd.—Unsubsidised Operation, Route 17, supra*, where the Board and Maritime Administrator said, at page 470, that operators engaged "exclusively" in the intercoastal trade are:

operators furnishing an intercoastal service that does not include foreign ports.

Since both Luckenbach and Waterman do furnish such services, they have standing to intervene under section 805 (a) against APL's proposed intercoastal operations.

GRANDFATHER RIGHTS

As to carriage of intercoastal cargoes westbound, APL claims grandfather rights under the proviso clause of section 805 (a), which, following the portion of the section set forth above, provides in part as follows:

Provided, That if such contractor * * * or a predecessor in interest was in bona-fide operation as a common carrier by water in the domestic, intercoastal, or coastwise trade in 1935 over the route or routes or in the trade or trades for which application is made and has so operated since that time * * * except * * * as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall grant such permission without requiring further proof that public interest and convenience will be served by such operation, and without further proceedings as to the competition in such route or trade.

APL does not claim grandfather rights for its proposed eastbound intercoastal operation; only westbound.

We find that:

17. APL's round-the-world service has, except during World War II, been operated either by APL or by its predecessor in interest,[21] since 1924.

18. The first leg of the round-the-world service has been a westbound intercoastal run.

19. APL operates two combination and seven freight vessels on a fortnightly sailing frequency in its round-the-world service; before World War II, it had operated only combinations.

APL's claim of grandfather rights is based mainly upon the westbound intercoastal leg of its round-the-world service No interested party in this case disagrees with the proposition that in order to claim

[20] Neither the argument nor rejection of it by the Board is mentioned in the written report, because not determinative of the case (the result was favorable to APL). But the record in that case shows the argument was made, and in the report Luckenbach was given full standing as an exclusively intercoastal operator.

[21] The Robert Dollar Company instituted a round-the-world service in 1924. The service was continued under the Dollar name until, in August 1938, the Dollar Steamship Line, Inc., Ltd., changed its name to American President Lines, Ltd.

grandfather rights under section 805 (a), the service for which such rights are claimed (C–2) must be in substantial parity with the service said to have been operated in 1935 (round-the-world).

Intervener Luckenbach takes the position that the westbound intercoastal segment of APL's proposed C–2 service would not be in substantial parity with the 1935 intercoastal segment of the round-the-world service because (1) a greater number of ships is proposed now than were operating then, (2) sailing frequency would be increased by 50 percent, and (3) the different character of the offshore trades involved would result in different cargoes being carried and would involve different amounts of space.

APL urges that it is irrelevant whether cargo or passenger vessels are involved; the combination vessels carry cargo, and it is cargo that the interveners are interested in. APL also points to *APL—Round-the-World Subsidy, Intercoastal Operations*, 3 F. M. B. 553 (1951), where the Board held that APL had westbound intercoastal grandfather rights for its round-the-world freight vessels as well as combination vessels, even though pre-war there had been no freight vessels in the service.

Section 805 (a) was inserted in the Act "to protect those companies already interested in the coastwise or intercoastal service." [22] In disposing of the question of section 805 (a) grandfather rights, we are guided by two considerations: (1) substantial parity must exist as between proposed and past operations, for the protection of domestic operators already interested in the trade, and (2) the grandfather clause cannot be so strictly read as to permit absolutely no flexibility in equipment. Accordingly, we note (1) that the round-the-world service has been permitted equipment flexibility (*APL—Round-the-World Subsidy, Intercoastal Operations*, *supra*), and (2) that the proposed C–2 service is, after all, a different one from round-the-world: it was not in operation in 1935 as an Atlantic to Indonesia-Malaya service (having been inaugurated in 1948); it would increase APL's westbound intercoastal sailings by 50 percent; and it would add five C3's or similar types to the westbound intercoastal service over and above the round-the-world service. In short, APL proposes to institute a new and different service, and we do not believe Congress intended that services operated prior to 1935 should provide a basis for claim of grandfather rights for a new and different service.

We therefore conclude that APL or a predecessor in interest was not, as to its C–2 service, in bona fide operation as a common carrier by water in the domestic, intercoastal, or coastwise trade in 1935.

[22] S. Rept. No. 1721, 74th Cong., 2d Sess.

OTHER SECTION 805 (a) QUESTIONS

The remaining questions under section 805 (a) of the Act are: Whether operation of the intercoastal legs of APL's C–2 service will result in unfair competition to exclusively intercoastal operators or whether such operation would be prejudicial to the objects and policy of the Act. The facts that bear on these questions are as follows:

20. C–2 vessels departing the Atlantic coast westbound usually have had available between 80,000 and 100,000 cubic feet of space for foreign-area cargoes to be lifted off the California coast. This space would be sufficient, over a year, to carry about 16,000 tons of cargo or approximately four percent of the cargoes moving in the westbound intercoastal trade. Carriage of that amount of cargo by C–2 vessels (which cargo can be lifted by APL on an added cost basis since the ships make the ports involved anyway) would bring in net revenues that would help bring the over-all C–2 service operation to about a break-even point, financially. APL would not solicit more westbound intercoastal cargo than enough to fill the free space for California offshore cargoes.

21. Westbound, Luckenbach provides weekly sailings, APL's round-the-world vessels provide fortnightly sailings, and Isthmian provides fortnightly sailings.

22. Between August 1952 and March 1953, Luckenbach canceled eleven scheduled westbound intercoastal sailings because of lack of cargo. Luckenbach has more than enough vessels to schedule weekly sailings and, when conditions warrant, does schedule sailings more frequently than weekly.

23. Of the interveners, only Waterman and Luckenbach operate in the eastbound intercoastal trade. Waterman has commenced such operations recently (August 1953) under a temporary certificate from the Interstate Commerce Commission. Luckenbach has been operating on a substantial and successful scale in the eastbound intercoastal trade from California. Luckenbach has regularly scheduled bi-weekly sailings but found it possible in 1951 and 1952 to approximately double that regular schedule with "extra" sailings. In 1951 and the first half of 1952, even with the extra sailings put into the trade, Luckenbach vessels averaged less than four percent free space.

24. In addition to Waterman's recent temporary (ICC) certification, Isbrandtsen has been authorized to provide a limited eastbound intercoastal service from ports in northern California.

25. Los Angeles ordinarily accounts for less than 20 percent of eastbound intercoastal cargoes. APL's C–2 vessels, operating from Los Angeles, carried an average of 450 revenue tons of eastbound inter-

coastal cargo on each sailing in 1952. This amounted to less than one percent of Luckenbach's eastbound carryings during the year.

26. Two of APL's C-2 vessels called eastbound at San Francisco in 1951, averaging 5,400 tons of intercoastal cargo each out of that port.

27. None of the intercoastal interveners has been able to secure enough intercoastal cargo to operate profitably in the intercoastal trade with the ships intended for such trade.

COMPETITIVE EFFECT

In *Am. Pres. Lines, Ltd.—Unsubsidized Operation, Route 17, supra*, it was established that the Board and Maritime Administrator, in order to carry out the intent of Congress as expressed in section 805 (a), must be alert to protect coastwise and intercoastal operators against competition from subsidized offshore operators for cargoes which the intercoastal carriers need, have the capacity to carry, and to which they are entitled.

The record shows that the intercoastal interveners herein need all the available intercoastal cargo. We also note that they have the capacity to carry more intercoastal cargo than they are now lifting. APL makes much of the fact that Luckenbach is "over-vesseled," and that "extra" Luckenbach ships, i. e., ships that are in excess of the ships required to provide weekly sailings, should not enter into our evaluation of the capacity of the intercoastal operators. We are aware of the fact that a good many operators today are "over-vesseled" because of lack of cargoes, not only in our own intercoastal trades but also in other trades throughout the world. But in the face of Congress' special concern for exclusively intercoastal operators, and in the face of the importance to the national security and to our domestic commerce of a healthy and vigorous intercoastal water transportation system, we cannot penalize the intercoastal operators by limiting our evaluation of intercoastal capacity solely to those ships which are presently being used on regular schedules.

Taking into account the apparent potential capacity of the intercoastal operators, we conclude that these operators presently have the capacity to carry the cargoes available in the intercoastal trades. And in our judgment those operators who provide exclusively intercoastal services are entitled, as against primarily offshore operators such as APL, to whatever intercoastal cargoes they can carry. For APL to carry westbound intercoastal cargoes on an unrestricted basis would result in unfair competition to persons, firms, or corporations operating exclusively in the coastwise or intercoastal service, and further, for APL to carry such cargoes would be prejudicial to the objects and policy of the Act. It has not been shown, however, that for APL to

carry westbound intercoastal refrigerated cargoes would, under presently existing circumstances, result in unfair competition or would be prejudicial to the objects and policy of the Act, and permission will be given for C–2 vessels to carry such cargoes.

APL's request to serve San Francisco to carry eastbound intercoastal cargo apparently does not amount to a request for permission to serve that port regularly. APL claims that the only time its C–2 vessels would call at San Francisco to pick up eastbound intercoastal cargo would be on occasional voyages when Indonesia-Malaya cargoes are scarce and when Philippine cargoes are not available so that on the order of approximately 50 percent free space is available on a vessel arriving eastbound at California. APL does not anticipate that San Francisco calls in the future would be any more frequent or regular than in the past, which is to say one or two calls per year.

It is difficult to determine what would be the competitive impact of permitting C–2 vessels to call at San Francisco because no one, not even APL, is able to predict how much eastbound intercoastal space would be made available. APL claims that the regular intercoastal operators do not have the capacity to carry the available cargo out of San Francisco during the peak canned goods season, which is the only period when APL would be likely to call. Luckenbach claims that it is able to provide capacity to carry all available eastbound intercoastal cargo even during the canned goods season. Admittedly part of this capacity estimate is based upon the availability to Luckenbach of "extra" ships. Three California shippers testified on the necessity for eastbound intercoastal service from San Francisco Bay and, while none suggested there was an over-supply of such service, neither does the record support a finding that without calls by C–2 vessels the Bay is not adequately served.

As stated above, in our estimate of intercoastal capacity we include Luckenbach's "extra" capacity. With this estimate, it is our judgment that eastbound intercoastal operators would have the capacity to carry all the available cargo. Therefore, on the basis of the present record, we conclude that to permit APL to call at San Francisco for eastbound intercoastal cargo would result in unfair competition to exclusively intercoastal operators and would be prejudicial to the objects and policy of the Act. We will leave it open, however, for APL, in individual cases, to apply to the Maritime Administrator for permission to call at San Francisco for eastbound intercoastal cargo, and he will decide at such times, subject to the hearing requirements of section 805 (a) of the Act, whether or not such permission should be granted.

The position of interested interveners if the C–2 service is limited to Los Angeles as a source of eastbound intercoastal cargo is not clear. Luckenbach states that its principal objection to a call by C–2 vessels

at a second California port is "that it will permit APL * * * to raid eastbound canned goods traffic originating in the San Francisco Bay area * * *. Luckenbach also makes more general arguments apparently directed against *any* eastbound intercoastal service by C–2 vessels, and so does Waterman. But we have not been presented with any substantial evidence that interveners claim should lead us to conclude that permission for APL to lift eastbound intercoastal cargo at Los Angeles would result in unfair competition to them or would be prejudicial to the objects and policy of the Act. Liftings of such cargo have been small, amounting on the average to less than 500 tons per sailing. We will grant permission to APL to continue lifting eastbound intercoastal cargo out of Los Angeles with its C–2 vessels.

We turn now to the issues in Docket No. S–17 (Sub. 1).

APL has been operating its C–2 service since June 1948 without subsidy under permissions granted by the Maritime Commission and the Board/Administrator. Such permissions have been granted for limited periods of time, subject to termination, modification, or extension. On March 7 and 11, 1952, the Board and Administrator approved "in principle" continued operation of the C–2 service. On the same dates they approved "in principle" the recommendation of their General Counsel that permission to continue the service be in the nature of a temporary extension pending the conclusion of the hearing on APL's subsidy application.

By notice dated April 3, 1952, the Board and Administrator advised that—

> The Maritime Administrator and Federal Maritime Board have authorized the continuation of existing operation by American President Lines, Ltd., in the Atlantic-Straits Freight Service C–2, Trade Route 17, subject to conditions imposed * * * and the right being reserved to the Administrator and Federal Maritime Board to review and thereafter to terminate or extend the entire operation at any time.

and that a hearing might be held on the following three requests of APL:

(1) for modification of the C–2 service itinerary to authorize calls at Guam on outbound voyages;

(2) for the privilege of serving one additional Philippine port; and

(3) for the privilege of calling eastbound at San Francisco Bay ports and/or Los Angeles, California.

By notice dated June 2, 1952, the Board and Administrator advised that the hearing would embrace the three issues above set forth, plus

(4) A request for authority to continue to perform eastbound intercoastal service in connection with Service C–2, Trade Route No. 17.

GUAM CALLS

So far as request number (1) is directed toward modification of the itinerary of an unsubsidized service, the following facts appear of record:

1. APL's C–2 vessels began calling outbound at Guam in late 1951 pursuant to authority granted on September 5, 1951. That authorization was based largely on requests by shippers for more Guam service. Since September 1951, carryings of C–2 vessels to Guam have increased, but such carryings have never reached very substantial proportions. The last two C–2 vessels sailing in 1952 and the first three in 1953 averaged slightly over 1,500 tons each.

2. Fifteen shippers have testified they desire to have APL serve Guam from the Atlantic coast, and sixteen said they desired APL's service from California. The economy of Guam is gradually improving, and the demand for goods and supplies of all kinds from the mainland is increasing. It appears that the island itself is unable to feed, clothe, or shelter the population.

3. No ocean service other than APL's C–2 service serves Guam from the Atlantic. Only APL and PFEL serve the island from California. PFEL operates to Guam under a series of Maritime Administration authorizations, subject to withdrawal if circumstances change to make such authorizations unjustified. PFEL's sailings to Guam have been increasing, from 19 in 1950 to an estimated 44 in 1953 (based on first six months sailings in 1953). Cargo carryings of PFEL, California to Guam, have also been increasing; commercial cargoes lifted in 1951 amounted to 37,633 tons while first half of 1953 carryings of such cargoes were 20,607 tons—an annual rate for 1953 of 41,214 tons. APL's carryings of commercial cargoes, California to Guam, mounted in the first quarter of 1953 to 910 tons—an annual rate of 3,640 tons. This was about 9 percent of the commercial cargoes carried to Guam by PFEL.

4. The Guam call adds three or four days to the voyage time of a C–2 vessel. In 1952 APL's C–2 vessels averaged 41 days from New York to Manila. No operator was faster. Only American Pioneer, De La Rama Lines, and Ellerman & Bucknall were as fast. From California to Manila, APL's C–2 vessels provided the second fastest service in 1952, averaging 20 days. Isthmian was faster with 18 days; Ellerman & Bucknall and Klaveness equalled APL's time.

It appears that there is a real need for ocean carrier service from the United States mainland to Guam; that APL's C-2 vessels help meet that need; that the C-2 vessels have provided substantial and increasing service to Guam; that without the service of APL's C-2 vessels, Guam would be without service from the United States Atlantic coast; that even with the extra time involved in making the call at Guam, APL's C-2 vessels have been and will be able to maintain a New York to Manila schedule that is competitive with the fastest schedules offered by any competitor, and that C-2 carryings to Guam are minor when compared with the carryings of PFEL, and have not constituted an unduly prejudicial burden on PFEL.

We therefore conclude that authority should be granted to APL to call outbound with its unsubsidized C-2 vessels at Guam, subject to the condition that cargoes destined to foreign areas served by the C-2 service may not be sacrificed for cargoes destined to Guam.

ADDITIONAL PHILIPPINE PORT

5. At the present time APL's C-2 vessels' eastbound Philippine calls are limited to Manila, plus no more than one Philippine outport.

6. On voyages commenced after January 1951, through the voyage terminated March 23, 1953, C-2 vessels made ten homeward voyages which included calls at no Philippine outports; two voyages which included calls at one outport; five voyages which included calls at two outports; and one voyage which called at three outports. Bugo was the most frequently called outport; the next most frequently called was Naratívas (Bangnara). While APL has not limited itself to a request for calls at specific outports, it has mentioned Bugo as a likely first call, the second outport (which might be Subic Bay, Singora, or Iloilo) depending on cargo available.

7. From 1948 through 1952, the C-2 service has carried an increasing share of the inbound cargo from Malaya to the Atlantic (1948, 1 percent of total liner commercial cargo; 1952, 5 percent). The C-2 service has similarly increased its participation in cargo moving from Indonesia to the Atlantic (1948, 1 percent; 1952, 4 percent).

8. APL asserts that it needs authority to call on occasion at more than one outport in order to fill excessive free space sometimes left by a dearth of Indonesia-Malaya cargo. Rubber is the principal Indonesia-Malaya cargo but is characterized as "chancy". There are nearly 200 ships a year on berth in Singapore, for example, competing for cargoes. Rubber, which is brought into Belawan and Singapore by small coasting feeder services, is distributed among conference vessels so as to give all conference vessels, over a period of time, approximately equal opportunities to carry it. APL says that there

have been a few C–2 vessels—say two or three each year—that because of a dearth of available cargoes, had to leave the Indonesia-Malaya area with free space of about 50 percent. In order to keep such voyages from being financially disastrous, APL desires to call at more than one Philippine outport to pick up sugar or other cargoes.

9. Philippine outport cargoes have been overwhelmingly for the Atlantic and not California. In 1950, of 33,720 tons of Philippine outport cargo, only 2,042 tons were for California. In 1951, total outport cargo was 7,680 tons, of which 798 tons were for California. In the first half of 1952, APL's C–2 vessels carried 1,975 tons of Philippine outport cargo, all of which was for the Atlantic.

10. In 1952, homeward transit time for C–2 vessels averaged 42 days from Singapore to New York, which is the number of days now allowed. This compares with 41 days for Barber-Fern-Ville Line, a foreign-flag operator using the Suez route, and with transit times of from 45 to 57 days by seven other foreign-flag lines and two United States-flag lines, all using the Suez route. A total of five extra days would be involved in calling at two Philippine outports, which, added to the C–2 schedule of 38 days from Singapore to New York, makes 43, only one more than now allowed and actually averaged in 1952.

PTL and States object to C–2 vessels serving California from the Philippines whether or not the service is subsidized, on the two general grounds that (1) such service is inconsistent with the purposes and policy of the Act, because it permits APL to sacrifice Indonesia-Malaya area cargoes for Philippine cargoes and generally derogates from the effectiveness of the C–2 service as an Indonesia-Malaya/Atlantic service; and (2) because APL's C–2 service, so far as the Philippines homeward leg is concerned, creates undue prejudice to the interveners and undue advantages for APL.

On most voyages APL does not call at any Philippine outport, and the calls that have been made have not appeared to lessen either APL's participation in cargo moving Indonesia-Malaya to the Atlantic, or to have increased the homeward transit time of C–2 vessels beyond a length that is competitive with the best transit times of other operators. Nor do the minor carryings from Philippine outports to California constitute, in our judgment, undue prejudice and advantage as between APL on the one hand and PTL and States on the other.

We therefore conclude that APL's C–2 vessels may call homebound at two Philippine outports in addition to Manila, subject to the *caveat* that Indonesia-Malaya cargoes may not under any circumstances be sacrificed for Philippine cargoes. The Administrator will review the results of this operation after one year, and, if circumstances warrant, a further report will be made to the Board.

688-650 O - 63 - 36

SAN FRANCISCO BAY PORTS

Our determination hereinabove as to C-2 vessels lifting eastbound intercoastal cargo out of San Francisco renders moot to some extent this issue in Docket No. S-17 (Sub. 1). If APL wishes to call at San Francisco for any good reason other than to lift eastbound intercoastal cargo, we can see no objection thereto. APL says that no San Francisco call will be made on any voyage that has served Philippine outports and that San Francisco calls will not increase the transit time from Singapore to New York by any more than four or five days. As pointed out before, the extra four or five days over the 38-day schedule amounts to 42 or 43 days, and APL is now allowed and actually averaged 42 days in 1952. An occasional San Francisco call, when no call has been made at any Philippine outport, will not have the effect of cutting down on APL's participation in Indonesia-Malaya cargoes and will not have the effect of increasing the transit time beyond that which is competitive with the best transit times of other carriers.

EASTBOUND INTERCOASTAL SERVICE

The question of APL's legal right to continue its eastbound intercoastal service has been discussed in Docket No. S-33, so far as service from Los Angeles is concerned. No considerations have been presented to us which, apart from the legal considerations already discussed in connection with section 805 (a) of the Act, would justify our forbidding APL from lifting eastbound intercoastal cargo at Los Angeles. We therefore conclude that APL's C-2 service should be permitted to continue to perform eastbound intercoastal service from Los Angeles.

By the Board and Maritime Administrator.

(Sgd.) A. J. WILLIAMS,
Secretary.

FEDERAL MARITIME BOARD

No. 726

Isbrandtsen Co., Inc.

v.

States Marine Corporation of Delaware et al.

Submitted October 16, 1954. Decided October 28, 1954

Report of the Board on Motion for Relief in the Nature of Summary Judgment

This matter is presented on a motion of complainant Isbrandtsen Co., Inc. (hereinafter called "Isbrandtsen"), in the nature of a motion for summary judgment, to terminate the proceeding under Rule 5 (o) of the Board's Rules of Practice and Procedure and for relief as prayed for in its complaint. That complaint, filed November 5, 1953, alleges for a first cause of complaint that respondent States Marine Corporation of Delaware (hereinafter called "States Marine"), as a member line of respondent Far East Conference (hereinafter called "the Conference"), employs the exclusive-patronage dual rate, contract/non-contract system; that States Marine refused to allow Isbrandtsen to enter into an exclusive-patronage contract; and that States Marine, in violation of the Shipping Act, 1916 (hereinafter called "the Act"), transported cotton from ports in Texas to ports in Japan at a discriminatory freight rate of $2.20 per 100 lbs., rather than at the exclusive-patronage contract rate of $2.00 per 100 lbs. For a second cause of complaint, Isbrandtsen alleges that Waterman Steamship Corporation (hereinafter called "Waterman"), as a member line of the Conference, employs the exclusive-patronage, dual rate, contract/non-contract system; that Isbrandtsen applied to Waterman and was denied an exclusive-patronage contract; and that Isbrandtsen paid freight for the shipment of cotton from Texas to Japan at a rate of $2.20 per 100 lbs., rather than at the $2.00 exclusive-patronage contract rate for the service. For a third cause of complaint, Isbrandtsen alleges that the Conference's exclusive-patronage, dual rate, contract/non-contract system violates sections 14, 15, 16, and 17 of the Act, and has never been approved by this Board.

Isbrandtsen seeks in relief (1) reparation in the amount of $5,455.00

the sum by which freight paid States Marine exceeded the exclusive-patronage contract tariff rate for cotton, (2) reparation in the amount of $1,232.28, the sum by which freight paid Waterman exceeded the exclusive-patronage contract rate for cotton, and (3) an order directing the Conference and its members to cease and desist from using the exclusive-patronage, dual rate, contract/non-contract system.

The answer filed on February 16, 1953, for States Marine, Waterman, and for all members of the Conference with the exception of respondent Isthmian Steamship Company (hereinafter called "Isthmian"), admits the use of the exclusive-patronage, dual rate, contract/non-contract system, that the sums alleged represent the difference between the contract/non-contract rates on the shipments complained of, and that States Marine and Waterman collected freight on the shipments complained of at the non-contract tariff rate. The answer denies that Isbrandtsen was the shipper of the cotton involved and denies that Isbrandtsen was refused the right to enter into an exclusive-patronage contract.

Isthmian filed a separate answer to the complaint but has not filed a reply to complainant's motion.

Following the complaint and answers thereto, hearings in this matter in conjunction with Docket Nos. 732, 733, 734, and 735 were held in Houston, Texas, between May 25 and June 4, 1954. The hearings were not completed and were adjourned to October 19, 1954.

On July 16, 1954, Isbrandtsen filed the motion now before us. Replies thereto were timely filed by Public Counsel and by counsel for respondents other than Isthmian. The motion was set for oral argument on October 6, 1954, and heard on that date. Argument in support of the motion was made by counsel for Isbrandtsen, and in opposition to the motion by counsel for the Conference, counsel for respondents other than Isthmian, and by Public Counsel. All parties were given an opportunity to file and did file briefs subsequent to argument.

We consider that the motion of Isbrandtsen raises issues as to whether:

(a) this Board has power, express or inherent, to issue the summary award requested; and

(b) assuming such power, whether summary procedures are applicable to the matter presently before us.

We conclude that no summary power of disposition has been expressly delegated to this Board by the Congress or is inherent in the Board's functions. Our power to award reparation and to order the discontinuance of unlawful practices in freight rate matters is derived from and defined by the Act. The manner in which that power is to

be exercised is set forth in section 23 of the Act, which provides in part as follows:

Orders of the board relating to any violation of this Act shall be made only after full hearing, and upon a sworn complaint or in proceedings instituted of its own motion.

The plain and inescapable effect of the quoted language is to require us to give full opportunity to all parties to present evidence in questions of statutory violation, as well as to preclude us from making any adjudications prior to completion of that presentation. Since Isbrandtsen's complaint alleges violations of the Act, the provisions of section 23 thereof preclude us from granting the relief requested.

Counsel for Isbrandtsen argues that the power of summary proceeding is inherent in Rule 5 (o) of the Rules of Practice and Procedure, and quotes in part therefrom as follows:

* * * motions to dismiss or otherwise terminate the proceeding * * * shall be addressed to the Board.

Counsel implicity contends that the phrase "otherwise terminate the proceeding" contemplates summary proceedings, in the absence of some other provisions in the rules for termination; put otherwise, that given the power to terminate a proceeding in a manner other than by dismissal of a complaint, all methods of terminating proceedings employed by judicial bodies necessarily flow from that power.

We point out that, in full context, Rule 5 (o), from which the phrase relied on by counsel for Isbrandtsen was extracted, does not create a type or types of relief but describes the procedural requirements to which motions must conform. We further point out that methods of terminating proceedings other than by motion to dismiss have been provided by Rules 6 (a) and 6 (c) of the Board's Rules of Practice and Procedure. Both methods require consent of the parties and obviously do not contemplate summary proceedings.

Assuming, however, express or implied power in this Board to grant the relief now requested, we are not persuaded that a summary order should issue in the present circumstances. The object of the motion for summary judgment is to separate what is formal or pretended in denial or averment from what is genuine and substantial, so that only the latter may subject a suit to the burden of a trial. *Richard* v. *Credit Suisse*, 242 N. Y. 346, 152 N. E. 110 (1926).

The moving party has the burden of showing the absence of any genuine issue as to all the material facts. *Walling* v. *Fairmont Creamery Co.*, 139 F. 2d 318 (CCA 8th 1943). Isbandtsen has not met that burden here since the record reveals substantial issues of fact among which are the following:

(a) The parties dispute whether Isbrandtsen was denied an

exclusive-patronage contract by respondents States Marine and Waterman, as well as other facts necessary to establishing prejudice, disadvantage, and discrimination as alleged in the complaint.

(b) Although the parties are in agreement as to the fact of the cotton shipments, the freight rates under which cotton was shipped and the sums by which freight paid to respondents States Marine and Waterman exceeded the exclusive-patronage contract tariff rates for that commodity, it is nevertheless incumbent on Isbrandtsen to show injury prior to an award of reparation under section 22 of the Act. Even if discrimination and unjust preference were undisputed, the question of injury remains. In this regard, our predecessors in *Port of Phila. Ocean Traffic Bureau* v. *Export S. S. Corp.*, 1 U. S. S. B. B. 538 (1936), at page 541, have clearly stated the following:

> It is well settled that the existence of unjust discrimination and undue prejudice and preference is a question of fact which must be clearly demonstrated by substantial proof. As a general rule there must be a definite showing that the difference in rates complained of is undue and unjust in that it actually operates to the real disadvantage of the complainant. In order to do this it is essential to reveal the specific effect of the rates on the flow of the traffic concerned and on the marketing of the commodities involved, and to disclose an existing and effective competitive relation between the prejudiced and preferred shipper, localities, or commodities. Furthermore, a pertinent inquiry is whether the alleged prejudice is the proximate cause * * *

See also *H. Kramer & Co.* v. *Inland Waterways Corp. et al.*, 1 U. S. M. C. 630 (1937), and *Eden Mining Co.* v. *Bluefields Fruit & S. S. Co.*, 1 U. S. S. B. 41 (1922).

Viewing specifically the incompleted hearings and difficult legal question presented, we do not feel that the facts and circumstances surrounding this motion properly lend themselves to determination by summary proceedings. We consider the facts and legal issues sufficiently complex and of sufficient far-reaching import as to fall within that category of controversy described by the Supreme Court in *Kennedy et al.* v. *Silas Mason Co.*, 334 U. S. 249 at pages 256 and 257, as not proper for the exercise of summary procedures:

> We do not hold that in the form the controversy took in the District Court that tribunal lacked power or justification for applying the summary judgment procedure. But summary procedures * * * present a treacherous record for deciding issues of far-flung import, on which this Court should draw inferences with caution from complicated courses of legislation, contracting and practice.

The motion is denied.

By order of the Board.

(Sgd.) A. J. WILLIAMS,
Secretary.

FEDERAL MARITIME BOARD

No. S-27 (Sub. 2)

INVESTIGATION OF AGREEMENT NO. 7616 (LYKES-HARRISON POOLING AGREEMENT)

Submitted October 29, 1954. Decided November 17, 1954

Pooling Agreement No. 7616 between Lykes Bros. Steamship Co., Inc., and Thos. and Jas. Harrison, Ltd., found to create relationships which slightly diminish but which do not eliminate competition between its signatories.

The Board is required as a matter of law to consider, under sections 603 (b) and 606 of the Merchant Marine Act, 1936, diminution of competition in computing the amount of operating-differential subsidy to be granted to American-flag operators signatory to pooling agreements.

Odell Kominers for Lykes Bros. Steamship Co., Inc.

John Mason and *Allen C. Dawson* as Public Counsel.

REPORT OF THE BOARD

BY THE BOARD:

This proceeding arises out of our order of investigation and hearing dated August 8, 1951, recast April 7, 1952, in which we proposed to determine the effect of pooling and/or sailing agreements Nos. 7549, 7616, 7792, and 7796 [1] on foreign-flag competition as a factor in determining the operating-differential subsidies payable under title VI, Merchant Marine Act, 1936, as amended, 46 U. S. C. 1171 et seq. (hereinafter called "the Act"), to the subsidized operators which are parties thereto. The purpose of the investigation, as recast, was to develop and receive evidence with respect to the following issues:

1. Whether these agreements by (a) pooling or apportioning earnings, losses or traffic; (b) allotting or distributing sailings, traffic or areas; (c) restricting the volume, scope, frequency or coverage of services; or (d) any other means, create relationships such as eliminate or tend to eliminate or diminish the extent of competition among their signatories.

---

[1] The pooling and/or sailing agreements are:

Pooling Agreement No. 7796 between Grace Line Inc. and Chilean Line (C. S. A. V.); Sailing Agreement No. 7549 between Moore-McCormack Lines, Inc., and Swedish Lines; Agreement No. 7792 (supporting Agreement No. 7795), referred to as the Colombian Coffee Pooling Agreement, an eight-party agreement; and Pooling Agreement No. 7616 between Lykes Bros. Steamship Co., Inc., and Thos. and Jas. Harrison, Ltd.

2. If so, whether the Board is required, as a matter of law, to consider under sections 603 (b) and 606 of the Merchant Marine Act, 1936, as amended, such elimination or diminution of competition in computing the amount of operating-differential subsidy to be granted to American-flag operators, signatory to such agreements.

3. Whether, if the Board is required, as a matter of law, to consider such elimination or diminution of competition, if any, in such computation, it is precluded from so doing in the case of any approved agreement which was in effect at the time the operating-differential subsidy contract was first awarded.

4. Whether, if the Board is not required as a matter of law, to consider such elimination or diminution of competition, if any, in such computation under sections 603 (b) and 606 of the Act, it should nevertheless so consider the same in the exercise of sound administrative discretion.

The issues, as recast, narrowed the scope of investigation and hearing to the confined issues presented under sections 603 (b) and 606 of the Act, which provide as follows:

SEC. 603. * * * (b) Such contract shall provide that the amount of the operating-differential subsidy shall not exceed the excess of the fair and reasonable cost of insurance, maintenance, repairs not compensated by insurance, wages and subsistence of officers and crews, and any other items of expense in which the Commission shall find and determine that the applicant is at a substantial disadvantage in competition with vessels of the foreign country hereinafter referred to, in the operation under United States registry of the vessel or vessels covered by the contract, over the estimated fair and reasonable cost of the same items of expense (after deducting therefrom any estimated increase in such items necessitated by features incorporated pursuant to the provisions of section 501 (b)) if such vessel or vessels were operated under the registry of a foreign country whose vessels are substantial competitors of the vessel or vessels covered by the contract.

SEC. 606. Every contract for an operating differential subsidy under this title shall provide (1) that the amount of the future payments to the contractor shall be subject to review and readjustment from time to time, but not more frequently than once a year, at the instance of the Commission or of the contractor. If any such readjustment cannot be reached by mutual agreement, the Commission, on its own motion or on the application of the contractor, shall, after a proper hearing, determine the facts and make such readjustment in the amount of such future payments as it may determine to be fair and reasonable and in the public interest. The testimony in every such proceeding shall be reduced to writing and filed in the office of the Commission. Its decision shall be based upon and governed by the changes which may have occurred since the date of the said contract, with respect to the items theretofore considered and on which such contract was based, and other conditions affecting shipping, and shall be promulgated in a formal order, which shall be accompanied by a report in writing in which the Commission shall state its findings of fact; * * *.

At a prehearing conference on January 18, 1954, a motion to sever and to proceed separately with hearings on Agreements Nos. 7549, 7616, 7792, and 7796 was granted by the presiding examiner.

Separate hearings on Pooling Agreement No. 7616 were conducted from March 2, 1954, through March 4, 1954. Although the exam-

iner's recommended decision, served on August 6, 1954, deals with all of the matters in which hearings was held, this present report is directed only to the specific recommended decision of the examiner in the matter of the pooling agreement between Lykes Bros. Steamship Co., Inc. (hereinafter called "Lykes") and Thos. and Jas. Harrison, Ltd. (hereinafter called "Harrison").

The examiner recommended that the Board find, under issue No. 1, that (a) the subject agreement creates relationships which do not eliminate competition between its signatories, but (b) which do tend to diminish such competition, that (c) notwithstanding, the competition met by Lykes remains substantial. The decision recommended as to issue No. 2 that the Board is required, as a matter of law, to consider under sections 603 (b) and 606 of the Act, diminution of competition in computing the amount of operating-differential subsidy. It was further recommended that no determination be made under issue No. 3, since the Lykes/Harrison agreement was not in effect when Lykes' subsidy contract was first awarded. Likewise no determination was recommended under issue No. 4 in view of the recommended findings in issue No. 2.

Exceptions to the recommended decision hereinabove described were filed by Public Counsel and by counsel for Lykes. Oral argument on the exceptions was heard by the Board on October 13, 1954. Thereafter the matter was remanded to the examiner for clarification of his finding of diminution of compensation between the pool members. By supplemental recommended decision served on October 29, 1954, the examiner found the degree of diminution to be slight.

No exceptions to the supplemental recommended decision have been filed by the parties.

On November 5, 1954, the parties were notified of our intention of taking official notice, under Rule 13 (g) of the Rules of Practice and Procedure, of reports dated October 22, 1954, and November 1, 1954, from Director, Office of National Shipping Authority and Government Aid, to the Secretary, Federal Maritime Board, relating to competitive conditions in the trade here under consideration during the first nine months of 1954. The parties have not advised us of any intentions of disputing the facts shown in these reports.

We agree generally with the examiner's recommended decision and specifically find the following:

1. Lykes holds operating-differential subsidy agreement contract No. MCc-62431 with the Board. That agreement, executed in 1937 and inoperative during World War II, was resumed on December 29, 1949, effective as of January 1, 1947, and includes Lykes' service Line B-1 (Trade Route No. 21), described in the contract as follows:

Between a United States Gulf port or ports (west of but not including Gulfport, Mississippi) and a port or ports on the West Coast of the United Kingdom, with the privilege of calling at Irish ports and with the further privilege of calling at Tampa, Port Tampa, Boca Grande, and at ports in the West Indies and Mexico.

2. Lykes, along with Harrison, a British shipping company, is party to a pooling agreement providing for equal participation in revenue and traffic from designated United States Gulf ports to Mersey ports in the United Kingdom.[2] The other pool member, Harrison, has served the trade from the Gulf to Mersey ports since shortly after the United States Civil War and owns 41 vessels which are comparable to those of Lykes.

3. The other lines in the trade besides Lykes and Harrison are Brocklebank (Cunard) Line (hereinafter called "Brocklebank"), Ropner Line (hereinafter called "Ropner"), both British, and States Marine Corporation of Delaware (hereinafter called "States Marine"), an American line operating foreign-flag vessels in this trade. Prior to 1954, the combined annual sailings of these lines did not exceed 16 as compared with the pool sailings ranging from 39 to 59 per year. Two United States-owned lines, Waterman Steamship Corporation (hereinafter called "Waterman") and States Marine, have tried unsuccessfully to penetrate the trade, although neither line has applied for admission to the pool. During the first nine months of 1954, carryings of non-pool, foreign-flag vessels have substantially increased. Reports from the Director, Office of National Shipping Authority and Government Aid, of which we may take official notice, reveal, inter alia, the following increase in sailings as compared with preceding years:

[000 omitted]

Year	Lykes Harrison Pool						Foreign Flag Competing Lines[3]	
	Total		Lykes		Harrison			
	Sailings	Tons	Sailings	Tons	Sailings	Tons	Sailings	Tons
1950	46	268.9	23	128.7	23	140.2	9	12.7
1951	59	363.7	31	192.5	28	171.2	4	11.2
1952	46	299.0	22	138.3	24	160.7	11	11.9
1953	39	205.1	19	110.7	20	94.4	16	45.0
1954 (9 mo.)	41	(4)	21	(4)	20	(4)	23	114.5

[2] The agreement provides for cooperation in the transatlantic trade to the United Kingdom ports of Liverpool, Garston, Birkenhead, Manchester and Runcorn from the U. S. A. Gulf ports of Tampa, Port Tampa, Boca Grande, Florida, New Orleans, Louisiana, Lake Charles, Louisiana, Orange, Texas, Beaumont, Texas, Port Arthur, Texas, Port Neches, Texas, Houston, Texas, Galveston, Texas, Texas City, Texas, Freeport, Texas, Corpus Christi, Texas, and Brownsville, Texas. It will be noted that ports embraced in the pooling agreement are not identical with the ports described in Lykes' Line B-1 (Trade Route No. 21).

[3] Ropner in all years 1950–54; Cunard Brocklebank since November 1953; Gulf Shipping Lines and U. S.-Europe Merchant Line in 1951 only.

[4] Not yet available.

4. The trade encompassed by the pooling agreement is governed by the Gulf/United Kingdom Conference Agreement No. 161, of which Lykes, Harrison, States Marine, Ropner, and Brocklebank are members.[5]

5. The present pooling agreement was preceded by similar agreements. After World War I, the predominant lines in the Gulf/Mersey trade were Harrison and Leyland, largely through the nationalistic tendency of British consignees to instruct routing on British vessels. The United States Shipping Board line was unable to attract more than 25 to 30 percent of the total traffic. The keen competition led to blanketing of sailings, uneconomical calls at numerous ports, and overtonnaging of the berth. In 1932, agreement was reached between the Shipping Board and the British lines to alternate monthly sailings at Sabine River ports to prevent wasteful competition. In the meantime, Lykes, as agent for the Shipping Board, attempted but failed to reach an agreement with European lines serving the Gulf because the latter offered a percentage participation to the United States flag line substantially below 50 percent. Finally, in 1933, Lykes, as agent, was able to obtain a pooling agreement with Harrison and Leyland whereby Lykes would receive 50 percent of the traffic and revenue and the two British lines the remainder. The result was that Lykes obtained a greater share of the traffic, and all three lines achieved greater operating economies. The latter agreement (No. 2218) was approved by the Shipping Board under section 15 of the Shipping Act, 1916, on February 8, 1933. A subsequent and similar agreement (No. 2401), approved on July 18, 1933, continued in force without change (except for the purchase by Lykes of the service run by the United States Shipping Board line and the purchase of Leyland by Harrison) until terminated in 1939 after the outbreak of World War II.

6. The pooling agreement here under consideration (No. 7616) was executed on June 24, 1947, filed with the Maritime Commission on July 28, 1947, and approved under section 15 of the Shipping Act, 1916, on July 1, 1948. Agreement No. 7616 differs from the prior agreement (2401) primarily in its provisions covering carriage of parcel lots of bulk cargo. It is self-renewing from year to year, subject to cancellation on six months notice, and covers the eastbound traffic of Lykes and Harrison, with enumerated exceptions, from

[5] Complete membership of Conference Agreement No. 161 is as follows: The Cunard Steam-Ship Company Limited; Thos. & Jas. Harrison Limited (Harrison Line); Larrinaga Steamship Co., Ltd. (Larrinaga Line); Lykes Bros. Steamship Co., Inc. (Dixie-U. K. Line); (Ropner Line)—Joint Service of Sir R. Ropner & Co. (Management) Ltd.; The Pool Shipping Company Limited; The Ropner Shipping Company Limited (States Marine Lines)—Joint Service of States Marine Corporation, States Marine Corporation of Delaware. Waterman is not presently a member.

designated United States Gulf ports to United Kingdom Mersey ports.

7. Under the pooling agreement freight revenues less carrying charges are to be placed in a money pool and are to be distributed 50 percent to Lykes and 50 percent to Harrison.[6] Although there is a provision for quarterly distribution of the money pool, no money actually changes hands. Joint allocation is made each month by a Pool Committee composed of representatives of the carriers to the end that the carryings and revenue of each will be approximately on the agreed fifty-fifty basis. The parties, in addition, exchange information as to expected traffic movements and schedule sailings in order to avoid conflict and duplication of loading and discharge ports, and cargo manifests of each line are submitted to an independent agency for purposes of recording and computing the carryings of each line. When one member has carried a greater proportion of cargo than another, the pool gives a larger vessel allocation to the undercarrying member.

8. The lines solicit for this trade as independently and as intensely as for trades outside of the pool. The solicitation staff of Lykes outnumbers Harrison's in the United States by five to one. Harrison's staff in England, however, outnumbers Lykes by about twenty to one. Although cargo is not booked by either party for the other, in the event that one party has booked cargo for which a ship cannot be provided, that party will suggest to the shipper that its cargo be carried on a vessel of the other. Cargo-booking contracts of either line apply on ships of the other.

9. The pool results in increased frequency of service at principal ports, adequate coverage at lesser ports, greater share for Lykes of the available traffic, including high-rated cargo, and increased earnings by the carriers from maximum utilization of vessel space, better balanced cargoes, elimination of wasteful calls at smaller ports, and reduced voyage turnaround. Additionally, the pool has tended to break down the traditional preference of British shippers for British-flag lines. Lykes, under the pooling agreement, has carried 50 percent of cotton moving from the Gulf to the United Kingdom under the control of British Government procurement agencies, whereas in the absence of the pool, Lykes would probably have been excluded from participation in such shipments. Although control over these shipments has recently been released by the British Government to private British purchasers, Lykes continues to participate in the trade to an extent not possible without the pooling agreement.

[6] Carryings and revenue derived from non-pool ports are not subject to the agreement.

10. Since the freight rates in the Mersey trade are comparable to the rates in Lykes' service B-2 from the Gulf to London and continental ports,[7] in which there is no pool, it is clear that the pooling agreement has neither an adverse nor a beneficial effect on rates. All members of the Gulf/United Kingdom Conference who qualify as cotton carriers may vote on freight rates.

11. The pooling agreement, in the following manner, has the effect of diminishing foreign-flag competition within the meaning of section 603 (b) of the Act:

(a) Operational economies resulting from the pooling agreement present formidable competition for non-member carriers;

(b) During the life of the present agreement, Harrison cannot receive more than 50 percent of the revenue derived from the combined carryings of both lines;

(c) Lykes and Harrison, during periods in which no other line or an insufficient number of other lines qualify as cotton carriers,[8] have the *power*, in the Gulf/United Kingdom Conference, to control tariff rates on cotton, the most important commodity in the trade;

(d) In the absence of a pooling agreement, the participation of Lykes in movements in the trade would be substantially reduced. We find that Harrison has refrained, because of the pooling agreement, from obtaining the amount of cargo which it could otherwise have obtained. In the past this restraint has been manifested by Harrison's cooperation in refraining from taking steps to preclude Lykes from obtaining cargo controlled by British procurement agencies.

12. Competition with foreign lines has not been eliminated in the Gulf/Mersey trade by virtue of the agreement for the following reasons:

(a) Either line, if dissatisfied with the other's carryings and efforts to solicit cargo, may free itself of the unsatisfactory member by withdrawal from Agreement No. 7616 on six months' notice;

(b) Each party solicits cargo as vigorously and as independently for this trade as for its other trades;

[7] Line B-2 covers the route between Mobile (other east Gulf ports as traffic offers) to Havre, London, Antwerp, and Rotterdam, returning east Gulf, with privilege of calling at Baltic ports.

[8] Conference Agreement No. 161, clause 4, provides that only those lines providing regular services to the ports of Liverpool and Manchester shall be entitled to vote on freight rates on cotton and cotton linters.

(c) While the pool remains formidable competition to other foreign-flag lines, the recent release of control of cargo movements by British Government procurement agencies to private British buyers created new opportunities for British-flag lines other than Harrison to obtain a larger participation in such movements. While participation of lines by vessels, other than British lines, in movements of British-controlled cargo has been hampered by traditional British nationalism, no such obstacle is presented to British-flag non-pool vessels;

(d) As hereinabove stated, carryings of non-pool, foreign-flag vessels have substantially increased during the first nine months of 1954 to a combined total of 23 sailings as contrasted with the previous annual high of 16 sailings. The data, while incomplete as to tonnage lifted, indicate increased competition in the trade.

13. The existence of the pooling agreement does not affect Lykes' need for cost-parity with foreign-flag competitors. It further appears, from the evidence adduced at the hearing, that Lykes could not long operate in this trade on a long-range basis without subsidy and that the termination of subsidy might well result in cancellation of the pooling agreement. Lykes' president testified that Harrison might well seek to drive Lykes out of the trade if Lykes should be put to the disadvantage of unsubsidized operation. We infer from this testimony that the pool only exists while substantial competition between Lykes and Harrison remains; that the pool serves only to partially restrain, for economic advantage in operation, the continuing, substantial competition between the parties.

14. The Maritime Commission was aware of the pre-war pool (Agreement No. 2401) when, in 1937, it first awarded a subsidy contract to Lykes. The present pooling agreement (No. 7616) was not then in existence. It was in existence, however, when the resumption subsidy contract was executed.

15. When the present pooling agreement was before the Maritime Commission for approval under section 15 of the Shipping Act, 1916, the Commission dealt not only with the questions involved under that section, but also considered the implications and effect, under the Act, of approving a pooling agreement to which a subsidized operator was a party. In fact, the Commission approved the agreement only after it had sought and received advice from its General Counsel that the agreement was not unlawful *per se* under the Act.[9] Actually, the consideration of this agreement led to the formulation and incorpora-

[9] Minutes of United States Maritime Commission, July 1, 1948. One Commissioner dissented on the ground that the agreement was contrary to the purposes and policy of that act.

tion of Article II–18 (c) in all operating-differential subsidy agreements.

16. On at least four occasions, the subject agreement was brought to the attention of congressional committees in the House and Senate concerned with the merchant marine, and no adverse comment was made.

From the foregoing statement of facts we reach the identical conclusions arrived at by the examiner, restated as follows:

Issue No. 1. Relationships have been created which do not eliminate competition between the signatories to Agreement No. 7616, but which do tend slightly to diminish competition between the signatories thereto. Notwithstanding the diminution, the competition met by Lykes remains substantial.

Issue No. 2. The Board is required as a matter of law to consider, under sections 603 (b) and 606 of the Act, diminution of competition in computing the amount of operating-differential subsidy.

In view of our conclusions on issue No. 2, it is unnecessary to consider issue No. 4. Since the agreement was not in effect when Lykes' subsidy was first awarded, it is unnecessary to consider issue No. 3.

LYKES' EXCEPTIONS

On September 13, 1954, Lykes filed a memorandum primarily supporting, but partially excepting to the recommended decision. Lykes excepted to the conclusion of the examiner on issue No. 2 on the grounds that:

(1) The examiner's recommendation that consideration must be given to diminution of competition in computing the subsidy rate penalizes Lykes for following a policy previously laid down by the Shipping Board;

(2) Recomputation of subsidy rates must be based on cost-parity alone;

(3) The recalculation proposed is unauthorized by the act;

(4) The Government is precluded under section 606 from recomputing the subsidy under the circumstances, since the pooling agreement was in effect when the subsidy contract was awarded;

(5) The examiner's recommended decision runs contrary to the policy of encouraging subsidized operators to increase efficiency and improve service.

Lykes excepts to the conclusion on issue No. 1 on the ground that the examiner erroneously found diminution of competition.

Lykes also excepted generally to the examiner's recommended findings insofar as those findings differed from Lykes' proposed findings, and additionally that having approved of the pooling agreement, the Government should be estopped from now "questioning its own actions."

We reject with little discussion Lykes' first and fourth bases for exception to the examiner's conclusions on the second issue. First, actions and policies of the Shipping Board prior to passage of the Act do not enter into consideration of matters arising under that statute. Considering the fourth basis for exception, we think that the examiner correctly found the 1937 subsidy contract and the resumption agreement executed in 1949 to be one agreement. The intent of the parties in this respect is abundantly evident from an examination of the instrument executed in 1949, which provides, in pertinent part, as follows:

> NOW, THEREFORE, in consideration of the premises, the parties hereto agree that effective January 1, 1947 * * * the Subsidy Agreement, as amended, is hereby *amended* as follows: * * *. (Emphasis added.)

Contrariwise, the pooling agreements are distinct and separate documents, in spite of their similar content. The pre-war agreement, No. 2401, was *terminated* by the parties and *cancelled* by the Maritime Commission on October 17, 1939, at their request. The present agreement, No. 7616, does not refer to earlier agreements or purport to be other than an independent and original agreement between the parties.

The second and third bases for exception to the conclusions in the second issue are in substance the same; that is, that section 606 of the Act does not contemplate or authorize a recalculation of operating-differential subsidy rates where foreign-flag competition is diminished below the level upon which the subsidy contract was based.

We agree with the examiner that diminution in competition must be considered in computing the amount of subsidy to be granted. Section 606 of the Act provides for periodic review of future payments under the contract and readjustment thereof, where required, in the event of changes "with respect to the items theretofore considered and *on which such contract was based* (as described in section 603 (b)) *and other conditions affecting shipping* * * *." (Emphasis supplied.) The purpose of providing cost-parity is to enable the United States flag lines to meet foreign competition, and the existence and degree of such competition are considerations basic to the subsidy contract. Certainly where foreign-flag competition is eliminated, the basis for the award disappears. So, too, where competition has diminished from the level existing upon computation of the award, the basis for the award may be affected to the extent of the

change in competition. The factors set out in section 603 (b) which affect and measure the subsidy award are not confined to necessary visible differences in operational cost between the United States-flag operator and those of a foreign competitor but are broader and more flexible in conformity with the purposes and policies of the Act. Efficiency in vessel utilization, foreign governmental aid, cargo preferences, and other factors which depend in varying degree on the kind and/or amount of foreign-flag competition are considered prior to grant of the award; changes in these factors, as a result of diminished competition, may alter the basis for the award and must, under section 606, be considered in review. Additionally, section 606, by requiring review of future payments in respect to "* * * other conditions affecting shipping * * *," implicitly contemplates consideration of conditions not existing at the time of execution of the subsidy contract or necessarily basic to the contract, at the time of execution. Whether the diminution of competition here must be reflected in the amount of subsidy award payable, we do not here determine, nor would such a determination be possible from the record before us.

We now come to Lykes' fifth basis for exception to the conclusions of the examiner on the second issue. Lykes there argues that recalculation of subsidy awards on the basis of diminished competition violates the policy of encouraging increased efficiency in subsidized operations. The Act itself furnishes a complete answer to that contention. Section 606 *requires* operational efficiency in order to minimize the public expenditure necessary to enable a United States-flag line to compete with foreign lines. Increased efficiency is encouraged, as a matter of policy, for the same reasons. Further, we interpret sections 606 and 603 (b) as *requiring* us to consider diminution of competition and the effects thereof in review of subsidy payments, for the same public considerations, among others. Accordingly, we find no inconsistency between our policy and the examiner's recommended decision.

Finally, Lykes argues that the express Maritime Commission approval of Agreement No. 7616 under section 15 of the Shipping Act, 1916, precludes us from now finding a diminution of competition resulting from that agreement.

Lykes further contends that the approval of Pooling Agreement No. 7616 by the Maritime Commission in 1948 under section 15 of the Shipping Act, 1916, and an implicit approval of the agreement under the subsidy provisions now estop the Government from reviewing the amount of subsidy payments. We consider as a complete answer to Lykes' contentions the facts that (a) the Maritime Commission's *ex-*

688-650 O - 63 - 37

press order of approval was issued only under section 15 of the Shipping Act, 1916, and (b) the Commission's implicit approval of the pooling agreement, if any, was limited to the lawfulness *per se* of the agreement and did not extend to the practices thereunder.

EXCEPTIONS OF PUBLIC COUNSEL

Public Counsel filed exceptions to the examiner's recommended decision on the ground that:

(1) The examiner erred in finding that the pooling agreement did not eliminate competition between its signatories; and

(2) The examiner erred in holding that the question of whether or not the subject agreements comport generally with the purposes and policy of the Act, is foreclosed in the investigation.

Public Counsel's first exception reaches the fundamental issue in this proceeding, the question of the effect of the pooling agreement on competition between Lykes and Harrison. Public Counsel contends that the agreement between the parties is a substitute for competition, necessarily destroys or diminishes competition below a substantial level, and does not meet the standards for competition prescribed in *Review of Grace Line Subsidy, Route 2*, 4 F. M. B. 40 (1952).

Public Counsel does not contend that shipping pools, in essence, are unlawful under the Act or that any such pool necessarily eliminates competition between its signatories and in the trade concerned, nor do we take his assertion that "pooling agreements are bald efforts to substitute monopoly for competition" to be so intended; in oral argument counsel has stated his belief that there are carrier pools which do not reduce or eliminate competition. He confines his objections, rather, to the effect of this particular agreement on competition between its member carriers.

We agree with Public Counsel that pooling agreements are not unlawful *per se* under the Act or under the Shipping Act, 1916, although pooling agreements necessarily tend to reduce "competition" as ordinarily defined. We do not agree that Agreement No. 7616 diminishes competition between the parties below a substantial level. Competition, in the usual sense, has three elements: price, quality, and service.[10] Competition in this sense has been defined as: "The effort of two or more parties, acting independently, to secure the custom of

[10] *Mississippi Valley Hardwood Co. et al.* v. *McClanahan, Dist. Atty., et al.*, 8 F. Supp. 388 (W. D. Tenn., 1934).

a third party *by the offer of the most favorable terms* * * *."[11] (Emphasis supplied.)

It is apparent that the concept of competition as applied in decisions dealing with antitrust law violations and unfair trade practices cannot be made applicable to shipping practices under the Act, which contemplates the continued existence of price regulation by steamship conferences as well as other practices which, absent enabling legislation, would violate Federal antitrust laws. "Competition" under the Act necessarily contemplates a less than full, free, and unrestrained struggle for custom, since price regulation, the antithesis of "competition" as usually defined, is present. We are of the opinion that the word "competition", as applied in the Act, must be given a broader meaning within the structure of the Act and consistent with its purposes. Competition in this sense is an elastic term not readily categorized or restricted in application. As we stated in *Review of Grace Line Subsidy, Route 2, supra*, pages 44–45:

> Congress has not provided a definition of the term "substantial competition" as it applies to foreign-flag operators. * * * The term "foreign-flag competition" has similarly not been given a restricted or definite meaning, nor did Congress direct that the administrators of the Act should crystallize its meaning in the manner in which they were directed to do with respect to the words "net earnings" and "capital necessarily employed," in section 607 (d) of the Act. * * * For those words, like the words, "interstate commerce" and "navigable waters," used in the Constitution of the United States, should retain that degree of flexibility that will permit the administrators of the Act to carry out the general policies of Congress with consideration for the exigencies of the day.

Accordingly, we believe that the finding of substantial competition, as above discussed, in the Gulf/Mersey trade is fully justified from the facts outlined in paragraph 12, *supra.*

The examiner did not err in holding that the question of whether or not the subject agreements comport generally with the purposes and policy of the Act is foreclosed in this investigation. The scope of inquiry was outlined in the notice of investigation given on August 8, 1951. Further broadening of the issues would do unwarranted violence to the notice requirements of the Administrative Procedure Act.

Contentions of the parties or requested findings not dealt with in this report have been given consideration and found not related to material issues or not supported by the evidence.

Investigation is discontinued.

By order of the Board.

(Sgd.) A. J. WILLIAMS, *Secretary.*

---

[11] *Lipson* v. *Socony Vacuum Corporation*, 87 F. (2d) 265 (CCA 1st, 1937).

FEDERAL MARITIME BOARD

No. S–27 (Sub. 4)

INVESTIGATION OF AGREEMENT NO. 7796 (GRACE-C. S. A. V. POOLING AGREEMENT)

Submitted August 31, 1954. Decided December 15, 1954

Pooling Agreement No. 7796 between Grace Line Inc. and Chilean Line (C. S. A. V.) found not to create relationships such as eliminate or diminish competition between its signatories.

W. F. Cogswell and *E. Russell Lutz* for Grace Line Inc.
John Mason and *Edward Aptaker* as Public Counsel.

REPORT OF THE BOARD

By the Board:

This proceeding arises out of our order of investigation and hearing dated August 8, 1951, recast April 7, 1952, in which we proposed to determine the effect of pooling and/or sailing agreements Nos. 7549, 7616, 7792, and 7796 [1] on foreign-flag competition as a factor in determining the operating-differential subsidies payable under title VI, Merchant Marine Act, 1936, as amended, 46 U. S. C. 1171 et seq. (hereinafter called "the Act"), to the subsidized operators which are parties thereto. The purpose of the investigation, as recast, was to develop and receive evidence with respect to the following issues:

1. Whether these agreements by (a) pooling or apportioning earnings, losses or traffic; (b) allotting or distributing sailings, traffic or areas; (c) restricting the volume, scope, frequency or coverage of services; or (d) any other means, create relationships such as eliminate or tend to eliminate or diminish the extent of competition among their signatories.

2. If so, whether the Board is required, as a matter of law, to consider under sections 603 (b) and 606 of the Merchant Marine Act, 1936, as

[1] The pooling and/or sailing agreements are:

Pooling Agreement No. 7796 between Grace Line Inc. and Chilean Line (C. S. A. V.); Sailing Agreement No. 7549 between Moore-McCormack Lines, Inc., and Swedish lines; Agreement No. 7792 (supporting Agreement No. 7795), referred to as the Colombian Coffee Pooling Agreement, an eight-party agreement; and Pooling Agreement No. 7616 between Lykes Bros. Steamship Co., Inc., and Thos. and Jas. Harrison, Ltd.

amended, such elimination or diminution of competition in computing the amount of operating-differential subsidy to be granted to American-flag operators, signatory to such agreements.

3. Whether, if the Board is required, as a matter of law, to consider such elimination or diminution of competition, if any, in such computation, it is precluded from so doing in the case of any approved agreement which was in effect at the time the operating-differential subsidy contract was first awarded.

4. Whether, if the Board is not required as a matter of law, to consider such elimination or diminution of competition, if any, in such computation under sections 603 (b) and 606 of the Act, it should nevertheless so consider the same in the exercise of sound administrative discretion.

The issues, as recast, narrowed the scope of investigation and hearing to the confined issues presented under sections 603 (b) and 606 of the Act, which provide as follows:

Sec. 603. * * * (b) Such contract shall provide that the amount of the operating-differential subsidy shall not exceed the excess of the fair and reasonable cost of insurance, maintenance, repairs not compensated by insurance, wages and subsistence of officers and crews, and any other items of expense in which the Commission shall find and determine that the applicant is at a substantial disadvantage in competition with vessels of the foreign country hereinafter referred to, in the operation under United States registry of the vessel or vessels covered by the contract, over the estimated fair and reasonable cost of the same items of expense (after deducting therefrom any estimated increase in such items necessitated by features incorporated pursuant to the provisions of section 501 (b)) if such vessel or vessels were operated under the registry of a foreign country whose vessels are substantial competitors of the vessel or vessels covered by the contract.

Sec. 606. Every contract for an operating differential subsidy under this title shall provide (1) that the amount of the future payments to the contractor shall be subject to review and readjustment from time to time, but not more frequently than once a year, at the instance of the Commission or of the contractor. If any such readjustment cannot be reached by mutual agreement, the Commission, on its own motion or on the application of the contractor, shall, after a proper hearing, determine the facts and make such readjustment in the amount of such future payments as it may determine to be fair and reasonable and in the public interest. The testimony in every such proceeding shall be reduced to writing and filed in the office of the Commission. Its decision shall be based upon and governed by the changes which may have occurred since the date of the said contract, with respect to the items theretofore considered and on which such contract was based, and other conditions affecting shipping, and shall be promulgated in a formal order, which shall be accompanied by a report in writing in which the Commission shall state its findings of fact; * * *.

At a prehearing conference on January 18, 1954, a motion to sever and to proceed separately with hearings on Agreements Nos. 7549, 7616, 7792, and 7796 was granted by the presiding examiner.

Separate hearing on Pooling Agreement No. 7796 was held on March 31, 1954. Although the examiner's recommended decision, served on August 6, 1954, deals with all of the pooling/sailing agreements on which hearing was held, this present report is directed only to the specific recommended decision of the examiner in the matter of Pooling Agreement No. 7796.

The examiner recommended that we find, under issue No. 1, that relationships have been created which do not eliminate or diminish competition between the signatories to Agreement No. 7796 and that the Board specifically find the following, in addition to the ultimate fact:

1. *The parties to the pool* are Grace Line Inc. (hereinafter "Grace") and Compania Sud Americana de Vapores (hereinafter "Chilean Line"). Grace operates a subsidized service on Line A, Trade Route 2 (U. S. Atlantic ports/west coast of South America). Its operating-differential subsidy contract was awarded in 1937; operations were suspended during World War II, and were resumed on January 1, 1947. Its contract provides for 50–52 sailings with combination passenger and freight vessels, and 13–26 sailings with cargo vessels.

2. Its combination service is weekly between New York and Arica, Antofagasta, Charnal, Valparaiso, and San Antonio, Chile, and at several ports in the Canal Zone, Colombia, Ecuador, and Peru, with occasional calls at other ports. Its freighters make two sailings per month between Boston, New York, Baltimore, and Norfolk, and Tocopilla, Antofagasta, Coquimbo, and Valparaiso, Chile, and several ports in the Canal Zone, Colombia, and Peru, with occasional calls at other ports.

3. Chilean Line has operated in the trade since before 1920. It averages two sailings per month between New York, Philadelphia, and Baltimore, and Arica, Tocopilla, Antofagasta, Coquimbo, Valparaiso, San Antonio, Talcahuano, San Vincente, and Iquique, Chile, and several ports in Colombia, Ecuador, and Peru, with occasional calls at other ports. Four of its C–2 ships also serve European ports regularly. It has ample capacity to carry more than 50 percent of the total kilo tonnage from United States Atlantic ports to Chile and still have sufficient space for its European carryings.

4. *The other lines in the trade*, providing berth services, operate foreign flag vessels—the Coldemar Line, Grancolombiana, West Coast Line, and Isbrandtsen Company, Inc. (foreign-flag time charters). Of these, only the West Coast Line provides berth service to Chilean ports, with a sailing every two weeks covering the same general area as Grace and Chilean Line. Northbound from Chile, an industrial

carrier and Isbrandtsen, occasionally, carry full cargoes of ore in foreign-flag vessels.

5. *Participation of lines in the trade.* The pool covers the trade between United States North Atlantic ports and Chile. During the period 1948–1953, the percentage of southbound liner cargo moving to Chile ranged from 28 to 48 percent of the total southbound movement on Trade Route No. 2. Northbound from Chile, the percentages ranged from 47 to 55. During the same period the relative participation of berth services in cargo to and from Chile was as follows:

TABLE I

	Sailings (1948–1953)	*Percent of Cargo carried*
Grace		
Southbound	64–70	45–56
Northbound	65–72	53–78
Chilean Line		
Southbound	24–28	30–43
Northbound	24–27	10–19
West Coast Line*		
Southbound	25–30	12–22
Northbound	24–26	10–23

*Since the inception of the pool, West Coast Line has improved its service somewhat, and has increased its over-all participation in the trade.

Grace's carryings of copper northbound during the same period were between 75 and 83 percent of the total, compared with 13 to 22 percent carried by Chilean Line.

6. *Prior pooling agreements* were formerly had by Grace with West Coast Line (1937) and Chilean Line (1941), apportioning revenue on southbound cargo. They were terminated due to World War II. Grace listed the former pool in its application for an operating-differential subsidy filed in 1937. Grace's share in the pool with Chilean Line was 75 percent.

7. *The reason Grace entered the present pool* was to mitigate the effect of controls over import cargo established by the Chilean Government beginning in 1949. These controls were designed to promote the growth of Chilean shipping lines and to alleviate the dollar shortage in Chile by encouraging the use of Chilean-flag carriers rather than United States-flag lines. Control was exercised by: (a) governmental scrutiny of import licenses, in which importers were required to identify the carrier which they intended to patronize and to specify whether payment was to be made in Chilean or foreign currency; and (b) the requirement by the principal Chilean bank, which is controlled by the Government, that letters of credit covering imports contain the condition that the cargo involved must be transported on Chilean Line

vessels. These practices made it possible for the Government effectively to direct cargoes to Chilean Line. Whereas in 1950 a substantial number of commodities were on the "free list", i. e., free from control, now all commercial imports are subject to licensing. The same is true as to exports of copper. Negotiations between representatives of the Governments of the United States and of Chile failed to bring about a change in the above-mentioned policies and practices, whereupon Grace concluded it was to its best interests to enter into the pooling agreement.

8. *The present pooling agreement* (No. 7796) was entered into in October 1950, and on July 6, 1951, was approved by the Board under section 15 of the Shipping Act, 1916, and by the Maritime Administrator under Article II–18 (c) of Grace's subsidy agreement. It provides for a pooling of revenues (less handling charges) derived from cargo carried between North Atlantic ports and Chilean ports. It requires maintenance of at least 25 southbound sailings per annum, spaced not more than 25 days apart; and at least 15 northbound sailings, spaced not more than 30 days apart. No cooperative scheduling of sailings is required.

9. The southbound cargo subject to the pool includes all cargo, with certain exceptions,[2] shipped under local bills of lading from Atlantic ports to Chile (not including cargo destined to Bolivia), whether handled direct or for transshipment. Northbound, the pool covers copper only.

10. Southbound pool revenues are to be divided equally; northbound, to be divided generally in the same proportion as actual copper carryings by the lines. If either party fails to provide the agreed minimum service, its share of the pool shall be reduced by stipulated amounts.

11. The agreement is to continue in force until 1960 and thereafter from year to year, cancelable on 3-months' notice. Cancellation is also provided for upon failure to maintain service and so forth.

12. *Operation of the pool.* The agreement has resulted in the payment of moneys by Grace to Chilean Line in every quarterly period since it was executed in 1950. To the end of 1953, the payment has averaged approximately 14 percent of Grace's gross revenues from southbound cargo subject to the pool, and about seven percent on the northbound pool. For the entire period of the pool, the payments with respect to both southbound and northbound operations under the pool have amounted to 11 percent of Grace's gross revenue.[3]

---

[2] Excluded are explosives; specie, gold and silver bullion or coins, bulk oil, mail, and passengers' baggage and automobiles.

[3] In 1953 the total payments by Grace amounted to $423,791.

13. There is no provision in the agreement which interferes with Grace's operations based on its free business judgment as a private steamship operator under the United States flag. There have never been any consultations, arrangements, or understandings regarding spacing or scheduling of sailings, either northbound or southbound, between Grace and Chilean Line. There is no joint solicitation or advertising or any joint agency arrangement.

14. *Effect of the pool on solicitation.* Grace actively solicits and seeks all types of cargo in the trade. The establishment of the pool has not resulted in a lessening of its solicitation activity. It does not solicit cargo for the Chilean Line, nor has it ever diverted shut-out cargo to that line. Chilean Line has a large staff in Chile, and their representatives are in active touch with the trade there as well as in New York. The management is in constant touch on a personal basis with Chilean Government authorities.

15. *Benefits of the pool.* The agreement has resulted in the ability of Chilean importers to obtain import licenses designating Grace as the carrier as freely as those designating Chilean Line. Immediately prior to the pool, the import control authority in Chile selectively processed import licenses so as to secure for Chilean Line a greater proportion of higher-rated cargoes. Under the pooling agreement Grace has succeeded in recouping more of this traffic. Free selection of carriers is permitted to large private firms with a general import license, and to certain large governmental enterprises in Chile which are substantial importers. It is Grace's judgment that in the absence of the pooling agreement, this freedom of choice would be withdrawn and the patronage of these importers would go to Chilean Line exclusively.

16. *The effect of the pool on Grace's subsidy.* Counsel for Grace state that without subsidy Grace would not be able to operate at all. Comparison of annual costs of operating C–2 freighters under United States and Chilean flags for the year 1951 indicates an excess in United States costs over Chilean in the amount of $187,583. Grace estimates that its subsidy would have been greater, at least through 1951 (the last year on which rates have been agreed to) had the Chilean Line been eliminated as a competitor. The pooling agreement imposes no requirement of service upon Grace which is inconsistent with its obligation under its operating-differential subsidy contract. The minimum requirements set up by the agreement do not affect the frequency or volume of Grace's service as specified in its subsidy contract.

17. *The basic facts* derived from the foregoing findings 1 to 16, inclusive, under issue 1, are: (a) The concessions made to Chilean

Line in the subject agreement were due to restrictions imposed by the Chilean Government; (b) Grace had no alternative means, other than by this agreement, of preserving its position in the trade; (c) the agreement has not caused any relaxation in Grace's solicitation, Chilean Line has not relaxed its competition vis-a-vis Grace, and competition by Chilean Line continues to be substantial; (d) the agreement has had no effect with respect to the operational aspects of Grace's service, and therefore has not affected the volume or frequency of service as specified in its subsidy contract; (e) the agreement affects only the earnings of Grace; and (f) the agreement has resulted in no diminution of competition.

No exceptions have been filed to the recommended decision.

On consideration of all of the facts and circumstances of record, the Board adopts as its own the examiner's findings and conclusions of fact as to issue No. 1. While we consider that the concept of competition inherent in decisions dealing with antitrust law violations and unfair trade practices is violated by the terms of Pooling Agreement No. 7796 and the practices thereunder, we do not consider that the agreement or its effects in any way creates relationships tending to diminish competition as necessarily defined under the Act. As we stated in *Lykes-Harrison Pooling Agreement*, 4 F. M. B. 515, 527:

> It is apparent that the concept of competition as applied in decisions dealing with antitrust law violations and unfair trade practices cannot be made applicable to shipping practices under the Act, which contemplates the continued existence of price regulation by steamship conferences as well as other practices which, absent enabling legislation, would violate Federal antitrust laws. "Competition" under the Act necessarily contemplates a less than full, free, and unrestrained struggle for custom, since price regulation, the antithesis of "competition" as usually defined, is present. We are of the opinion that the word "competition", as applied in the Act, must be given a broader meaning within the structure of the Act and consistent with its purposes. Competition in this sense is an elastic term not readily categorized or restricted in application.

See also *Review of Grace Line Subsidy, Route 2*, 4 F. M. B. 40 (1952).

In view of our finding and conclusion as to issue No. 1, it is unnecessary for us to consider issues Nos. 2, 3, and 4 outlined in our order of investigation and hearing, as recast.

The investigation is discontinued.

By order of the Board.

(Sgd.) A. J. WILLIAMS,
Secretary.

FEDERAL MARITIME BOARD

No. 759

ANGLO CANADIAN SHIPPING CO., LTD., ET AL.

v.

MITSUI STEAMSHIP COMPANY, LTD.

Submitted December 13, 1954. Decided December 15, 1954
Issued January 27, 1955

Motion to dismiss complaint of Anglo Canadian Shipping Co., Ltd., et al., members of Pacific Coast European Conference, under sections 16 and 17 of the Shipping Act, 1916, as amended, granted. The making and quoting, by a carrier, of rates lower by fixed differential than the rates of competing carriers is not a violation *per se* of section 16 or section 17 of the Shipping Act, 1916, as amended, nor is the payment of "excessive" fees to freight forwarders, without more, a violation of those sections.

Motion to dismiss petition of Anglo Canadian Shipping Co., Ltd., et al., members of Pacific Coast European Conference, under section 19 of the Merchant Marine Act, 1920, for investigation of alleged differentially lower rate making by Mitsui Steamship Company, Ltd., and for the issuance of section-19 rules, if warranted, denied.

Jerome A. Strauss and *Alan F. Wohlstetter* for Mitsui Steamship Company, Ltd.

Leonard G. James for Anglo Canadian Shipping Co., Ltd., et al.

John Mason as Public Counsel.

REPORT OF THE BOARD ON MOTION TO DISMISS COMPLAINT AND TO DISMISS PETITION FOR RULES

Complainants-petitioners, members of Pacific Coast European Conference and parties to Agreement FMB No. 5200 (hereinafter "the Conference"), by combined complaint and petition filed on July 12,

1954, allege violation of sections 16 and 17[1] of the Shipping Act, 1916, as amended (hereinafter "the 1916 act"), on the part of respondent Mitsui Steamship Company, Ltd. (hereinafter "Mitsui"), a Japanese-flag line, in quoting rates differentially lower than published conference rates and in paying excessive fees to freight forwarders.

The Conference seeks an order requiring Mitsui to desist from said violations and to pay the Conference reparation for damages caused thereby. The Conference further petitions the Board to investigate the practices of Mitsui and to issue, pursuant to section 19 of the Merchant Marine Act, 1920[2] (hereinafter "the 1920 Act"), such rules and regulations as may be necessary in the premises.

[1] SEC. 16. That it shall be unlawful for any shipper consignor, consignee, forwarder, broker, or other person, or any officer, agent, or employee thereof, knowingly and willfully, directly or indirectly, by means of false billing, false classification, false weighing, false report of weight, or by any other unjust or unfair device or means to obtain or attempt to obtain transportation by water for property at less than the rates or charges which would otherwise be applicable.

That it shall be unlawful for any common carrier by water, or other person subject to this Act, either alone or in conjunction with any other person, directly or indirectly—

First. To make or give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever, or to subject any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

Second. To allow any person to obtain transportation for property at less than the regular rates or charges then established and enforced on the line of such carrier by means of false billing, false classification, false weighing, false report of weight, or by any other unjust or unfair device or means.

Third. To induce, persuade, or otherwise influence any marine insurance company or underwriter, or agent thereof, not to give a competing carrier by water as favorable a rate of insurance on vessel or cargo, having due regard to the class of vessel or cargo, as is granted to such carrier or other person subject to this Act.

Whoever violates any provision of this section shall be guilty of a misdemeanor punishable by a fine of not more than $5,000 for each offense.

SEC. 17. That no common carrier by water in foreign commence shall demand, charge, or collect any rate, fare, or charge which is unjustly discriminatory between shippers or ports, or unjustly prejudicial to exporters of the United States as compared with their foreign competitors. Whenever the board finds that any such rate, fare, or charge is demanded, charged, or collected it may alter the same to the extent necessary to correct such unjust discrimination or prejudice and make an order that the carrier shall discontinue demanding, charging, or collecting any such unjustly discriminatory or prejudicial rate, fare, or charge.

Every such carrier and every other person subject to this act shall establish, observe, and enforce just and reasonable regulations and practices relating to or connected with the receiving, handling, storing, or delivering of property. Whenever the board finds that any such regulation or practice is unjust or unreasonable it may determine, prescribe, and order enforced a just and reasonable regulation or practice.

[2] Insofar as is pertinent to this motion, section 19 of the 1920 Act provides:

(1) The board is authorized and directed in aid of the accomplishment of the purposes of this Act:

(a) To make all necessary rules and regulations to carry out the provisions of this Act;

(b) To make rules and regulations affecting shipping in the foreign trade not in conflict with law in order to adjust or meet general or special conditions unfavorable to shipping in the foreign trade, whether in any particular trade or upon any particular route or in commerce generally and which arise out of or result from foreign laws, rules, or regulations or from competitive methods or practices employed by owners, operators, agents, or masters of vessels of a foreign country; * * *

On September 14, 1954, Mitsui moved to dismiss the complaint and petition on the grounds that (1) as a matter of law the facts alleged are not sufficient to constitute a cause of action under section 16 or section 17 of the 1916 Act; (2) as a matter of law the facts alleged in the petition are not sufficient to justify an investigation into the alleged practices of Mitsui and the initiation of a rule-making proceeding; (3) the Board has no authority to prohibit the alleged practices of Mitsui by the issuance of rules under section 19 of the 1920 Act; and (4) should the Board find that it does have such power, it should decline, as a matter of discretion, to exercise that power.

Reply to the motion to dismiss the complaint and the petition was filed by the Conference on October 18, 1954, and reply to the motion to dismiss the petition was filed by Public Counsel on September 24, 1954. In oral argument on December 3, 1954, Public Counsel addressed his arguments to the complaint as well as to the petition. Both Mitsui and the Conference were allowed time to rebut the arguments of Public Counsel and were granted an additional 10 days within which to file memoranda in reply thereto.

THE COMPLAINT

Mitsui argues that the facts alleged in the complaint do not establish preference or prejudice within the meaning of section 16, or prejudice or discrimination within the meaning of section 17, of the 1916 Act. It contends that for a carrier to be guilty of preference or prejudice under section 16 it must accord different treatment to two different individuals, other than the carrier, who are in substantially the same circumstances and conditions and to whom the carrier owes the duties of a common carrier. Since a common-carrier relationship vis-a-vis the Conference does not exist, and since a triangular relationship between a carrier and two individuals other than the carrier is not alleged, Mitsui implicitly argues that the Conference has no standing to complain under section 16.

Mitsui distinguishes an early decision of our predecessors in *Intercoastal Investigation, 1935*, 1 U. S. S. B. B. 400 (1935), in which, under similar circumstances, a violation of section 16 of the 1916 act was found. Mitsui argues that the finding in that case was based on the power, conferred on the Secretary of Commerce under section 18 of the 1916 act, over rates in the domestic trade whereas in the instant case the rates involved are those in foreign commerce.

Mitsui further argues that the facts alleged do not establish a violation of section 17 of the 1916 act since (1) the first paragraph of the section extends protection to shippers, ports, and exporters of the

United States and not to carriers, and (2) the authority conferred on the Board by the second paragraph of the section, to establish "just and reasonable regulations and practices relating to or connected with the receiving, handling, storing, or delivering of property," excludes control over the payment of brokerage and the level of rates established by an individual water carrier.

The Conference submits that there is ample precedent for the Board to entertain the complaint, and relies upon the decisions of our predecessors in *Intercoastal Rates of Nelson S. S. Co.*, 1 U. S. S. B. B. 326 (1934); *Intercoastal Investigation, 1935, supra; Section 19 Investigation, 1935*, 1 U. S. S. B. B. 470 (1935); *Rates, Charges, and Practices of Yamashita and O. S. K.*, 2 U. S. M. C. 14 (1939); *Cargo to Adriatic, Black Sea, and Levant Ports*, 2 U. S. M. C. 342 (1940).

The Conference further argues that the Board's predecessors have condemned the payment of excessive brokerage in *Section 19 Investigation, 1935, supra*, and *Rates, Charges, and Practices of L. & A. Garcia and Co.*, 2 U. S. M. C. 615 (1941).

Public Counsel, in oral argument, contends that a complaint under sections 16 and 17 of the 1916 Act does not depend, for sufficiency, on the relationship of the complainant to the respondent; that a "person" filing a complaint setting forth a violation of that act need not be one directly affected by the alleged violation since the remedy does not necessarily include reparation, citing *Isthmian S. S. Co.* v. *United States*, 53 F. (2d) 251 (S. D. N. Y. 1931). Public Counsel further argues, however, that the weight of the decisions of our predecessors is against the contention of and the cases relied upon (*supra*) by the Conference; that the triangular relationship described by Mitsui is necessary to establish violations of sections 16 and 17 of the 1916 Act, and that, since no such relationship has been alleged, the complaint is insufficient.

While it is true that in previous decisions, as cited by the Conference, our predecessors have considered practices similar to those alleged in the complaint before us, we are not persuaded that they support the present complaint.

In *Intercoastal Rates of Nelson S. S. Co., supra*, which was a proceeding to determine, among other questions, the feasibility of approving proposed reductions in rates by certain carriers in the intercoastal trade, the Secretary of Commerce disapproved a carrier's proposed tariff differentially lower than the tariffs of its competitors and condemned the practice *without* finding violation of the 1916 Act. The report specifically reserved for later determination in a then pending investigation the question of whether the practice of differential rate cutting was violative of the 1916 Act. In the referenced

investigation, reported as *Intercoastal Investigation, 1935, supra*, the Secretary of Commerce adopted as his own the findings of the hearing examiner, including the finding, at page 462:

* * * That the practice of Shepard to name tariff rates and charges lower by fixed percentages than those of its competitors (naming competing carriers) results in undue and unreasonable advantage to it and in undue and unreasonable prejudice and disadvantage to the carriers named, and is unjust and unreasonable, in violation of sections 16 and 18 of the Shipping Act, 1916.

It is this decision and this language on which the Conference primarily relies in support of its complaint. In *Section 19 Investigation, 1935, supra*, no violation of section 16 or of section 17 of the 1916 Act was found, although the practice of openly or secretly quoting rates by differentially lower amount or percentage was condemned as unfair. Neither *Rates, Charges, and Practices of Yamashita and O. S. K., supra*, or *Cargo to Adriatic, Black Sea, and Levant Ports, supra*, held the practice of rate making by an amount or percentage differentially lower than the rates of competitors to be in violation of section 16 or of section 17 of the 1916 Act, although the practice was considered in both cases to be harmful and contrary to the purposes of that act.

We must consider, then, only the report in *Intercoastal Investigation, 1935, supra.* While we are reluctant critically to examine this report of our predecessors, the later decisions involving substantially similar practices cast doubt upon the applicability of sections 16 and 17 here, since no violations of the 1916 Act were found in those cases.

At the outset, the fact that the intercoastal investigation in 1935 was directed solely at practices existing in interstate as distinguished from foreign commerce is not significant. The Secretary of Commerce, having full power under section 18 of the 1916 Act over rates in interstate commerce, nevertheless found a violation of section 16. Section 16 applies equally to the domestic and foreign trades. It imposes prohibitions, standards, and sanctions which are not dependent, for force and effect, on the provisions of section 18. Further, apart from the intercoastal classification of the carriers involved in that investigation, we are unable to distinguish the facts there considered from the allegation in the matter before us that Mitsui has violated and continues to violate section 16 by quoting and granting rates which are differentially lower than those of the Conference.

Nor do we consider that a person filing a complaint under section 16 must be a person injured by the practice or practices alleged therein. As stated by Public Counsel, *Isthmian S. S. Co.* v. *United States, supra*, as well as section 22 of the 1916 Act, competely settles this point.

Although the interests of sound statutory interpretation dictate

that we follow in similar circumstances the principles enunciated by our predecessors, we must differ with the report in *Intercoastal Investigation, 1935, supra.* Insofar as that report interprets rate cutting by fixed and lower differential to be a violation *per se* of section 16, it is in conflict with other well-established principles of this Board and its predecessors.

In *Huber Mfg. Co.* v. *N. V. Stoomvaart Maatschappij "Nederland"*, 4 F. M. B. 343 (1953), we stated at page 347:

> It will be seen that the language of section 16, First, makes it a violation to give any undue preference *to any particular person* or to subject *any particular person* to any undue or unreasonable prejudice. The undue preference and the undue prejudice mentioned in this section is always a relative matter, that is, the preferring of one person to another or the deferring of one person to another. To constitute a violation of this section there must always be two persons given unequal treatment by the carrier or other person subject to the Act * * *.

To the same effect see *Eden Mining Co.* v. *Bluefields Fruit & S. S. Co.*, 1 U. S. S. B. 41 (1922); *H. Kramer & Co.* v. *Inland Waterways Corp. et al.*, 1 U. S. M. C. 630 (1937); *United Nations et al.* v. *Hellenic Lines Limited et al.*, 3 F. M. B. 781 (1952). Although these decisions relate primarily to a preference or an advantage given to persons other than carriers, it is unquestionably true that all persons under section 16 must be treated alike. Therefore, if the section applies to a preference given by a carrier in favor of itself as against a competitor, then the section must also apply to relationships between a carrier and one shipper. This possibility, however, is expressly excluded by the cited decisions. We see no indication that the Secretary of Commerce in *Intercoastal Investigation, 1935, supra*, found the carrier in that case to have accorded different treatment to two persons other than itself, or that the Secretary considered a triangular relationship necessary to establish a violation of section 16. On the contrary, it appears that the Secretary considered quotation of rates by fixed and lower differential or percentage to be a violation *per se* of section 16, and self-preference to constitute a violation of sections 16 and 18. We must, therefore, in the light of the *Huber* and *Eden Mining Co.* cases, *supra*, disagree with the interpretation of section 16 implicitly expressed in *Intercoastal Investigation, 1935, supra.*

It is unlawful under section 16 "to make or give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever, or to subject an particular person, locality, or description of traffic to any undue unreasonable prejudice or disadvantage in any respect whatsoever. We do not consider the language to include the concept of self-preference unless the words "to make or give" can be so construed.

The meaning of the word "give" is clear and militates against the concept of self-preference. The word "make," on the other hand, as employed in the phrase "make or give," is ambiguous. Whether "make" and "give," as used in the phrase, are synonymous and the word "or" is explanatory rather than disjunctive, or whether "make" connotes "create" or "cause generally," without reference to "any particular person, locality, or description of traffic," is not clear from the context. If the word "make" can be given the latter meaning, it includes the concept of self-preference. That the word "or" used in the phrase is explanatory rather than disjunctive, is indicated from Report No. 689 of the Senate Committee on Commerce, 64th Congress, 1st Session, where, in reporting on section 16, the Committee considered the words employed in the phrase "make or give" to be synonymous.

The words under consideration were derived from section 3 of the Interstate Commerce Act, which was modeled on the second section of the (English) Railway and Canal Traffic Act of 1854.[3] The English act provided in pertinent part as follows:

> No such company shall *make or give* any undue or unreasonable preference or advantage *to or in favour of* any particular person or company, or any particular description of traffic, in any respect whatsover, nor shall any such company subject any particular person or company or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever. [Emphasis supplied.]

In incorporating substantially the language of the Railway and Canal Traffic Act of 1854 in section 3 of the Interstate Commerce Act, Congress eliminated the words "or in favour of" appearing after the word "to." That no substantial change was intended, however, is apparent from the construction given section 3 of the Interstate Commerce Act in *Texas & Pac. Railway* v. *Interstate Com. Com.*, 162 U. S. 197 (1896), at page 219, where it was stated:

> The third section forbids any undue or unreasonable preference *in favor of* any person, company, firm, corporation or locality * * * [Emphasis supplied.]

Decisions under both the second section of Railway and Canal Traffic Act of 1854 and section 3 of the Interstate Commerce Act are persuasive and pertinent to this inquiry. Where the language of English statutes has been adopted in our legislation, the known and settled construction of the English statutes has been recognized as silently incorporated in our acts. *McDonald* v. *Hovey*, 110 U. S. 619 (1884). In the absence of something peculiar in the question under consideration or dissimilarity in the terms of the act relating thereto, the 1916 Act and the Interstate Commerce Act were intended to have

[3] 17 & 18 Vict., c. 31; 10 July 1854.

like interpretation, application, and effect each in its own field. *U. S. Nav. Co.* v. *Cunard S. S. Co.*, 284 U. S. 474 (1932).

English courts have considered complaints, under the Railway and Canal Traffic Act, involving self-preference by carriers.[4] It is noted, however, that those complaints concerned preference of a carrier for itself in a capacity other than as the carrier granting the preference. This is not the self-preference in the matter before us. The preference of a carrier for itself in other capacities involves preferring, preferred, and deferred parties.

Similarly, decisions under the Interstate Commerce Act excludes self-preference as a practice regulated under section 3 of that Act. As stated in *Ilwaco Ry. & Nav. Co.* v. *Oregon Short Line & U. N. Ry.*, 57 Fed. 673 (CCA 9th, 1893), at page 676:

> The act contemplates, we think, independent carriers, capable of mutual relations and capable of being objects of favor or prejudice. There must be at least two other carriers besides the offending one. For a carrier to prefer itself in its own proper business is not the discrimination which is condemned.

See also *Little Rock & M. R. Co.* v. *East Tennessee, V. & G. R. Co.*, 47 Fed. 771 (W. D. Tenn., 1891).

The remaining language of section 16, First, of the 1916 Act describes those persons, localities, or descriptions of traffic who shall not be unduly preferred or deferred. Section 16, Second and Third, we find inapplicable to the facts alleged in the present complaint.

Our reasoning applies with equal force to the allegation that payment of brokerage fees higher than those paid by competitors is a violation *per se* of section 16. We conclude therefore that the complaint does not state a cause of action either as to rate making or as to payment of brokerage fees. We look with disfavor on the practice of quoting rates by differentially lower amount or percentage than the rates of competitors but find it, without more, not within the scope of section 16. We also look with disfavor on the payment of brokerage fees or payment for any other services which are not fairly related as to amount to the services performed. Experience has shown that the practices complained of, differentially undercutting rates and the payment of excessive fees for services, lead to disastrous rate wars, the siphoning off of freight earnings, and ultimately monopolization by a few big lines to the detriment of the commerce of the United States.

The Conference has not stated a cause of action under section 17 of the 1916 Act. Although, as previously discussed herein, a complaint need not be filed by an injured party, it must allege facts amounting

[4] *In re Baxendale and Great Western Rly. Co.*, [1858] 5 CB 336; *Phipps* v. *London and North Western Ry. Co.*, [1892] 2 QB 229.

to discrimination against or prejudice to a person whom the statute, in terms, purports to protect. We have no such allegation before us.

THE PETITION

The protection of the American merchant marine as well as American shippers and receivers from conditions unfavorable to shipping arising out of unfair foreign competitive practices is clearly within the stated purposes of section 19 of the 1920 Act.

Consistent with the purposes of the 1920 Act our predecessors have construed section 19 thereof as authorizing (1) investigations to determine whether conditions unfavorable to shipping exist and (2) the issuance of rules directed against such conditions, if found. *Section 19 Investigation, 1935, supra; Rates, Charges, and Practices of Yamashita and O. S. K., supra.* With that view we agree. If warranted by investigation, appropriate rules for the protection of American *interests* will issue whether or not incidental benefit may be derived therefrom by foreign-flag carriers and allied interests.

The issuance of rules depends on the results of investigations undertaken and not on the form or substance of a petition. For this reason, a motion to dismiss a petition for rules cannot lie as a matter of right. The petition serves the purpose of informing us of the possible existence of practices and conditions described in section 19, and may be granted or denied in our discretion if such be consistent with the purposes and policies of the 1916 Act and the 1920 Act.

The motion to dismiss the complaint is granted.

The motion to dismiss the petition is denied.

By order of the Board.

(Sgd.) A. J. WILLIAMS,
Secretary.

MARITIME ADMINISTRATION

No. S-54

Pacific Transport Lines, Inc.—Application For Written Permission Under Section 805 (a), Merchant Marine Act, 1936

Submitted December 30, 1954. Decided December 30, 1954

William I. Denning and *Alan F. Wohlstetter* for applicant.
Odell Kominers and *J. Alton Boyer* for Coastwise Line.
Leroy F. Fuller as Public Counsel.

Report of the Acting Maritime Administrator

This proceeding arises out of an application filed on December 23, 1954, by Pacific Transport Lines, Inc. (hereinafter "PTL"), for written permission under section 805 (a) of the Merchant Marine Act, 1936 (hereinafter "the Act"),[1] to permit its parent company, States Steamship Company (hereinafter "States"), or its affiliate, Pacific-Atlantic Steamship Co. (hereinafter "Pacific-Atlantic"), to

[1] Section 805 (a):

It shall be unlawful to award or pay any subsidy to any contractor under authority of title VI of this Act, or to charter any vessel to any person under title VII of this Act, if said contractor or charterer, or any holding company, subsidiary, affiliate, or associate of such contractor or charterer, or any officer, director, agent, or executive thereof, directly or indirectly, shall own, operate, or charter any vessel or vessels engaged in the domestic intercoastal or coastwise service, or own any pecuniary interest, directly or indirectly, in any person or concern that owns, charters, or operates any vessel or vessels in the domestic intercoastal or coastwise service, without the written permission of the Commission. Every person, firm, or corporation having any interest in such application shall be permitted to intervene and the Commission shall give a hearing to the applicant and the intervenors. The Commission shall not grant any such application if the Commission finds it will result in unfair competition to any person, firm, or corporation operating exclusively in the coastwise or intercoastal service or that it would be prejudicial to the objects and policy of this Act: *Provided,* That if such contractor or other person above-described or a predecessor in interest was in bona-fide operation as a common carrier by water in the domestic, intercoastal, or coastwise trade in 1935 over the route or routes or in the trade or trades for which application is made and has so operated since that time or if engaged in furnishing seasonal service only, was in bona-fide operation in 1935 during the season ordinarily covered by its operation, except in either event, as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall grant such permission without requiring further

load approximately 1,500 tons of newsprint at Port Angeles, Washington, on or about December 28, 1954, for discharge at Long Beach, California.

Coastwise Line (hereinafter "Coastwise") and Olympic-Griffiths Lines, Inc. (hereinafter "OGL"), intervened in opposition to the application. OGL withdrew its opposition, however, because of its inability to appear on the date set for hearing.

After hearing testimony on December 30, 1954, from PTL and Coastwise, as well as oral argument, I granted written section 805 (a) permission to PTL, allowing States or Pacific-Atlantic to load the newsprint in question, having found that the permission granted would not result in unfair competition to any person operating exclusively in the coastwise or intercoastal trade, and would not be prejudicial to the objects and policy of the Act.

That decision was based on the following facts, determinations, and considerations: PTL, a California corporation, holds an operating-differential subsidy agreement (FMB–21) with the Federal Maritime Board for operation in the transpacific trade. It is wholly owned by States, an unsubsidized line, which likewise operates in the transpacific trade from United States Pacific coast ports. Its affiliate, Pacific-Atlantic, operates in the intercoastal trade. Coastwise, an Oregon corporation, is a common carrier operating in the Alaska/British Columbia/United States Pacific coastwise trade. It provides regular services from Ocean Falls, British Columbia, and Port Angeles, Washington, for the carriage of newsprint, which constitutes an important part of its traffic.

OGL is an exclusively domestic operator, operating between Puget Sound and Los Angeles Harbor via Portland and San Francisco. OGL and Coastwise currently are the only Pacific coast water carriers serving the mills of Crown Zellerbach Corporation (hereinafter "the shipper"). That corporation, a paper manufacturer operating Pacific coast mills located at Ocean Falls, B. C., Port Angeles, Washington, and Portland, Oregon, owned the 1,500 tons of newsprint here under consideration.

During the month of December 1954 the shipper's transportation requirements were unusually heavy. For the preceding year, Coastwise vessels, which at capacity carry approximately 5,300 tons of

proof that public interest and convenience will be served by such operation, and without further proceedings as to the competition in such route or trade.

If such application be allowed, it shall be unlawful for any of the persons mentioned in this section to divert, directly or indirectly, any moneys, property, or other thing of value, used in foreign-trade operations, for which a subsidy is paid by the United States, into any such coastwise or intercoastal operations; and whosoever shall violate this provision shall be guilty of a misdemeanor.

paper, averaged 1,624 tons of paper out of Ocean Falls and 2,906 tons out of Port Angeles, or approximately 800 tons short of capacity. During the month of December, however, Coastwise vessels were booked to capacity. Further, two of Coastwise's five vessels were inoperative during this period, the SS *North Beacon* due to breakdown and the SS *Pacificus* because of a labor dispute.

The first Coastwise vessel booked full in the month of December was the SS *Seafare*, which arrived at Ocean Falls on December 21. The succeeding Coastwise vessel was the SS *Joel Chandler Harris*, scheduled to arrive at Ocean Falls on January 1 and at Port Angeles on January 5. The original full booking for the *Joel Chandler Harris* was revised several days prior to the hearing by the elimination of some 800 tons of newsprint from Ocean Falls, subject to further revision upward or downward, prior to sailing.

The traffic manager for the shipper, appearing in support of the application, testified that he had been ordered by the shipper's sales department to move 1,500 tons of newsprint from the Port Angeles mill on bill of lading dated prior to the year end. Shipment of this cargo on or after January 1, 1955, it was testified, would not satisfy the shipper's desire to swell its total sales for 1954 or the consignee's need for paper. The witness repeatedly stated that the shipment would move by rail at an added cost to the shipper of $4 per ton in the event that no water carrier could lift the cargo prior to the year end. Although the shipment was offered to both Coastwise and OGL, neither was able to handle the cargo prior to January 1955. A Coastwise witness stated that, because of the free space for 800 tons of newsprint then available on the *Joel Chandler Harris*, that vessel could handle the entire lift if the shipper would permit deck stowage of a portion of the cargo. The *Joel Chandler Harris*, however, was not scheduled to depart from Port Angeles until January 7, 1955, and, accordingly, would not have met the shipper's requirements even assuming that on-deck carriage would have been permitted by the shipper.

After offering the 1,500 tons of newsprint to Coastwise and OGL the shipper offered it to States. Immediately thereafter, on December 17th, States applied to the Interstate Commerce Commission (hereinafter "ICC") for temporary authority to operate as a common carrier in the domestic trade in the transortation of one shipment of not more than 1,500 tons from Port Angeles, Washington, to Long Beach, California. The authorization was granted by ICC order dated December 27, 1954.

After the filing of States' ICC application, Coastwise offered to satisfy the shipper's entire requirements at Port Angeles provided that

it could be relieved of the obligation to call at Ocean Falls. Under those conditions Coastwise would have had no objection to the carriage of the Ocean Falls cargo by any other carrier, including States. States, however, was unable to accommodate the amount of cargo available at Ocean Falls, approximately 3,000 tons, and was unwilling in any event, presumably for insurance reasons, to deviate its vessel from Puget Sound to British Columbia.

States proposed to carry the 1,500 tons of newsprint from Port Angeles to Long Beach on the SS *Sea Comet*, a vessel returning from the Far East to Puget Sound. Although the vessel was originally scheduled to proceed southward via Portland and San Francisco, a later schedule revision eliminated San Francisco as a southbound port of call and added that port as an outbound call. There is no indication that the schedule revision was made to accommodate the shipper or to expedite the discharge of the newsprint concerned in this application.

Since the cargo was destined for Long Beach there was no possibility of shutting out off-shore cargoes at Los Angeles and San Francisco in favor of the domestic cargo. Only at Puget Sound and Portland did this possibility arise, and in those areas States continued actively to solicit transpacific cargoes for the *Sea Comet* in spite of the proposal to lift the 1,500 tons of newsprint at Port Angeles. In this regard, a States employee testified that the amount of the shipper's cargo which could be carried would necessarily be reduced by the amount of additional transpacific cargo which might be obtained at Puget Sound or Portland.

In opposition to the application, Coastwise argued that grant of permission for States to lift the 1,500 tons of newsprint would result in unfair competition to Coastwise since, were it not for this cargo, the *Joel Chandler Harris* would sail full. The evidence adduced, however, did not support this position. The shipper testified that the 1,500 tons would move by rail if water transportation were not available prior to January 1, 1955. In no event would the cargo have moved on the *Joel Chandler Harris* or other Coastwise vessel, since the shipper's desires and the consignee's need for paper precluded shipment at the time when those vessels could have been made available. Furthermore, no assurance was given that the *Joel Chandler Harris* would have had space available for any portion of the cargo. Although that vessel's booking out of Ocean Falls had been revised downward just prior to the hearing, there remained every possibility that a later revision might restore the original booking.

Further, Coastwise's offer to lift the entire 1,500-ton shipment on the *Joel Chandler Harris* would have involved carriage of 700 tons

on deck, contrary to the custom in the trade to stow newsprint under deck. In view of that custom, the on-deck stowage capacity could not be considered as space available for this newsprint, even assuming that the schedule of the *Joel Chandler Harris* would have fit the shipper's desires and needs.

Coastwise also argued that grant of permission for a States vessel to lift the shipper's newsprint would be prejudicial to the objects and policy of the Act. States, it was argued, reserved 1,500 tons of space for this domestic lift and failed to continue to solicit transpacific cargo.

There can be no doubt that shutting out or refusing to solicit offshore cargo by States in order to carry a domestic cargo might require denial of PTL's application. The testimony on this point, however, did not indicate such to be the case. Although, as argued by Coastwise, States informed the shipper as early as December 18 that the *Sea Comet* would have space available for 1,500 tons of newsprint, that information was not tantamount to a refusal to solicit transpacific cargo in preference to domestic cargoes. On the contrary, a States employee testified that there was no slackening of solicitation of transpacific cargo and that, in order to avoid offering tonnage for coastwise service that could be used for transpacific service, States offered space for only 1,500 tons although more space may have been available. It was partly for this reason that the *Sea Comet* did not lift the 3,000 tons of newsprint available at Ocean Falls, although Coastwise would have had no objection to that lift.

The permission granted was limited to the single voyage and to the amount of cargo specified in the application.

By the Acting Maritime Administrator.

[SEAL] (Sgd.) A. J. WILLIAMS,
Secretary.

FEDERAL MARITIME BOARD

No. S–46

GRACE LINE INC.—APPLICATION FOR EXTENSION OF SERVICE AND INCREASED SAILINGS ON TRADE ROUTE NO. 25 (U. S. PACIFIC PORTS—WEST COASTS OF MEXICO, CENTRAL AMERICA, AND SOUTH AMERICA)

*Submitted November 2, 1954. Decided December 30, 1954**

Grace Line Inc. found to be operating an existing service between the Pacific coast of the United States and the west coasts of Mexico and Central Americe, Balboa, Cristobal, the North coast of Colombia, and the Gulf of Venezuela and Lake Maracaibo.

The service proposed to be operated by Grace Line Inc. on the foregoing itinerary found not to be in addition to its existing service.

Section 605 (c) of the Merchant Marine Act, 1936, as amended, found not to interpose a bar to the granting to Grace Line Inc. of an operating-differential subsidy for the foregoing service.

George F. Galland, *W. F. Cogswell*, and *E. Russell Lutz* for Grace Line Inc.

Ira L. Ewers and *A. F. Chrystal* for Moore-McCormack Lines, Inc., and *Odell Kominers* for Pacific Argentine Brazil Line, Inc., interveners.

Edward Aptaker and *Richard J. Gage* as Public Counsel.

INITIAL DECISION OF C. W. ROBINSON, EXAMINER

By letters of June 12, 1950, and February 5, 1952, as amended by letter of April 6, 1953, Grace Line Inc. ("Grace") petitioned to have its operating-differential subsidy contract extended insofar as it relates to its Line B service (Trade Route No. 25—U. S. Pacific/west coasts of Mexico, Central America, and South America). The matter was set for hearing under section 605 (c) of the Merchant Marine

*In the absence of exceptions thereto by the parties and notice by the Board that it would review the examiner's initial decision, the decision became the decision of the Board on the date shown (section 8 (a) of the Administrative Procedure Act and Rules 13 (d) and 13 (h) of the Board's Rules of Practice and Procedure).

Act, 1936 ("the Act"), as amended. Moore-McCormack Lines, Inc ("Mormac"), and Pacific Argentine Brazil Line, Inc. ("PAB") intervened in opposition to the extension.

Article I-2 (a) (2) of the subsidy agreement covering Grace's Line B service provides as follows:

> Not fewer than 18 and not more than 26 sailings with cargo vessels on the service designated Line B (Trade Route No. 25) and described as follows:
>
> > Between United States Pacific Coast ports and a port or ports on the West Coast Mexico, ports on the West Coast of Central America, and ports on the West Coast of South America, with the privilege of calling at British Columbia, Canada, and Balboa, Canal Zone.

The amendment sought to the foregoing description reads as follows:

> Not fewer than 30 and not more than 36 sailings with cargo vessels on the service designated Line B (Trade Route 25, with Caribbean extension on Trade Route 23), described as follows:
>
> > Between U. S. Pacific ports, and port or ports on the West Coast of Mexico ports on the West Coast of Central America; ports on the West Coast of South America; ports on the North Coast of Colombia; port or ports on the Gulf of Venezuela and Lake Maracaibo in Venezuela; with the privilege of calling at other ports in Venezuela and Netherlands West Indies ports to handle way cargo, and with the privilege of calling at ports in Panama ports in the Panama Canal Zone and ports in British Columbia.
>
> Of the sailings herein provided for in Line B service, not fewer than 18 shall be made to the West Coast of South America.

At the end of the presentation of Grace's case Public Counsel informed the examiner that he had been authorized to read into the record the terms of an agreement reached by Grace, Mormac, and PAB, as follows:

> Grace Line, Inc., Pacific Argentine Brazil Line, Inc., and Moore-McCormack Line, Inc., having studied the exhibits and testimony in this proceeding, stipulate and agree as follows:
>
> 1. That the application herein be and the same hereby is amended so that the requested service description as amended will read as follows:
>
> > Not fewer than 30 and not more than 36 sailings with cargo vessels on the service designated Line B (Trade Route 25, with Caribbean extension on Trade Route 23), described as follows:
> >
> > > Between U. S. Pacific ports, and port or ports on the West Coast of Mexico, ports on the West Coast of Central America; ports on the West Coast of South America; ports on the North Coast of Colombia port or ports on the Gulf of Venezuela and Lake Maracaibo in Venezuela with the privilege of calling at other ports in Venezuela and at Netherlands West Indies ports to handle way cargo but not cargo to or from the Pacific Coast of the United States or Canada, and with the privilege of calling at ports in Panama, ports in the Panama Canal Zone and ports in British Columbia.

Of the sailings herein provided for in Line B service, not more than 15 annually shall be made beyond Cristobal.

2. Such amendment being effective, PAB and Mormac withdraw their opposition to said application under the provisions of Section 605 (c) of the Merchant Marine Act, 1936.

3. Nothing contained in the amendment applied for in these proceedings shall in any way limit the right of PAB or Mormac to operate as required or permitted by their respective operating differential subsidy agreements.

DISCUSSION

Section 605 (c) of the Act provides in part as follows:

> (a) No contract shall be made under this title with respect to a vessel to be operated on a service, route, or line, or line served by citizens of the United States which would be in addition to the existing service, or services, unless the Board shall determine after proper hearing of all parties that the service already provided by vessels of United States registry in such service, route, or line is inadequate, and that in the accomplishment of the purposes and policy of this Act additional vessels should be operated thereon; (b) and no contract shall be made with respect to a vessel operated or to be operated in a service, route, or line served by two or more citizens of the United States with vessels of United States registry, if the Board shall determine the effect of such a contract would be to give undue advantage or be unduly prejudicial, as between citizens of the United States, in the operation of vessels in competitive services, routes, or lines, unless following public hearing, due notice of which shall be given to each line serving the route, the Board shall find that it is necessary to enter into such contract in order to provide adequate service by vessels of United States registry. (Lettering in parentheses supplied for ease of reference.)

The withdrawal of Mormac and PAB from further participation in the proceeding leaves no articulate opposition to the application by any United States-flag operator. Under the circumstances, the issues of undue advantage and prejudice and adequacy of service, as posed by clause (b) of section 605 (c), cease to be of concern. *Grace Line Inc.—Subsidy, Route 4*, 3 F. M. B. 731, 737; *Lykes Bros. Steamship Co., Inc.—Increased Sailings, Route 22*, 4 F. M. B. 455; *American President Lines, Ltd.—Subsidy, Route 17*, 4 F. M. B.—M. A. 488; *American President Lines v. Federal Maritime Board*, 112 F. Supp. 346. There thus remain for consideration the questions raised by clause (a) of section 605 (c), namely, whether the service here involved is an existing service or a service in addition to an existing service, and if the latter, whether additional vessels should be operated thereon.

In 1946, following the termination of World War II, Grace reestablished its various services, including the unsubsidized service between

the Pacific coast of the Uinted States and the west coasts of Mexico and Central America, Balboa, and Cristobal, with transshipment at Cristobal for Colombia and Venezuela. C1-M-AV1 vessels chartered from the Maritime Commission were used until recently in this service, which has as its chief competitor the foreign-flag Independence Line. In 1947, Independence Line extended its direct service into the Caribbean to serve Colombia and Venezuela. To meet this competition Grace likewise extended its service, the first sailing being from Los Angeles on July 2, 1948. Grace consistently has given preference to its subsidized vessels on Line B when the available cargo is insufficient for the Line B vessels and the unsubsidized vessels. The C1-M-AV1s have been replaced by two owned C-1 vessels and one other vessel.

Table 1 shows the number of calls and the volume of traffic in long tons handled by the unsubsidized vessels from 1948 through March 1954.

TABLE 1

Year	West coasts Mexico-Central America, Balboa		Cristobal		North coast of Colombia		Gulf Venezuela, Lake Maracaibo	
	Calls	Tons	Calls	Tons	Calls	Tons	Calls	Tons
1948: S/B	19	53,888	18	4,001	6	1,849	6	353
N/B	20	35,992	13	509	4	86	4	443
1949: S/B	22	41,486	20	3,779	19	5,603	21	12,358
N/B	21	32,446	15	548	19	1,274	21	237
1950: S/B	20	40,982	18	1,065	18	6,393	18	4,326
N/B	18	33,928	15	512	17	3,705	18	1,720
1951: S/B	22	48,243	21	1,478	17	7,503	17	6,214
N/B	23	42,304	15	457	15	3,400	16	386
1952: S/B	17	38,740	16	2,223	14	5,327	12	6,287
N/B	18	32,895	12	72	12	2,751	12	182
1953: S/B	14	27,054	14	1,115	13	5,813	13	5,394
N/B	15	28,025	10	317	13	2,976	13	881
1954, Jan.-Mar.: S/B	3	5,279	3	252	3	1,150	3	1,508
N/B	3	8,327	3	127	3	616	3	278
Total: S/B	117	255,672	110	13,913	90	33,638	90	36,440
N/B	118	213,917	83	2,542	83	14,808	87	4,127
Yearly average:[1] S/B	18	38,787	17	2,095	14	5,298	14	5,852
N/B	18	34,128	13	417	13	2,379	13	705

[1] Based on four times the 1954 figures.

In addition to the cargo having its origin or destination on the Pacific coast of the United States, a considerable quantity of cargo has been handled by Grace's unsubsidized service to and from the west coasts of Mexico and Central Mexico and transshipped at Cristobal. The volume of this traffic in revenue tons is shown in table 2.

TABLE 2

Year	West coasts of Mexico and Central America					
	U. S. Atlantic-Gulf			Elsewhere		
	To—	From—	Total	To—	From—	Total
1948	8,970	30,587	39,557	5,630	4,005	9,635
1949	14,441	38,720	53,161	5,112	9,550	14,662
1950	16,362	27,068	43,430	6,491	21,197	27,688
1951	22,138	37,317	59,455	7,571	30,816	38,387
1952	15,572	34,284	49,856	5,785	24,208	29,993
1953	4,566	3,451	8,017	5,295	6,099	11,394
Total	82,049	171,427	253,476	35,884	95,875	131,759
Yearly average	13,367	28,571	41,938	5,980	15,979	21,959

Table 3 gives the totals of the through cargo (long tons) and the way cargo (revenue tons) handled by the unsubsidized service.

TABLE 3

Year	From/To U. S. Pacific ports	Way ports	Total
1948	97,041	74,149	171,190
1949	97,731	101,431	199,162
1950	92,631	91,695	184,326
1951	109,985	127,588	237,573
1952	88,477	108,348	196,825
1953	71,575	17,567	89,142
Total	557,440	520,778	1,078,218
Yearly average	82,906	86,796	179,703

Even a cursory study of the foregoing statistics will warrant the conclusion that Grace has been operating a consistent service since 1948 (at least) between the Pacific coast of the United States and the west coasts of Mexico and Central America, Balboa, Cristobal, the north coast of Colombia, and the Gulf of Venezuela and Lake Maracaibo. That the traffic handled at way ports has greatly augmented the other cargo is equally plain, and it is clear that the foreign commerce of the United States has profited by the handling of the way cargo.

Public Counsel contends, however, that the proposed service will be in addition to the existing service in that the vessels to be operated thereon will be larger and faster than those used in the past. He argues that the proposed minimum of 12 sailings with C–1 instead of C1–M–AV1 vessels will permit Grace to furnish a dead-weight capacity of about 103,000 tons and a cubic capacity of about 5,350,000 feet as compared with a total dead-weight capacity of 71,500 tons and 3,080,000 cubic feet provided in 1953. While it is true that Grace presently is using two C–1s and that a third C–1 or a C–2 will be added, as many as six (but usually four) C–1–M–AV1s have been

utilized in the service since 1948. The only proposed change ir itinerary is that Cartagena, Colombia, will be served regularl instead of occasionally.

If the restricted view taken by Public Counsel were accepted ir this case it would put a penalty on the incentive of United States-fla operators to improve their lot in the foreign commerce of the Unite States, and certainly would not be in consonance with the spirit o the Act. As recently as September 16, 1954, in *American Presiden Lines, Ltd.—Subsidy, Route 17*, *supra*, the Board/Administrator said

> APL's proposed service would in fact differ from the existing service in respec of vessel type, number of Philippine and California ports called, the extent o intercoastal service permitted, and the maximum number of sailings permitte per annum. On the other hand, the proposed change of vessel type (from AP3' to C3's) is not so substantial as to cause us under section 605 (c) to discount th present service as not "existing"; only one additional Philippine and one addi tional California port are sought to be served; the extent of intercoastal servic to be permitted APL's C-2 service is the same as that now provided * * *; an the maximum-minimum limits on number of sailings are so close to the actua average performed over the past six years that we do not regard the propose service in that respect as one "in addition to the existing service."
>
> It is our judgment in this case that APL's proposed service does not, as modi fied by our actions herein, differ so greatly from the existing service as to make i a service "which", in the words of the Act, "would be in addition to the existin service, or services * * *", and we so conclude.

The present case is so analogous in its essentials to the case just cite that it must be found that the proposed service by Grace would not b in addition to its existing service.

In view of the finding thus made, it is unnecessary to determin whether "the service already provided by vessels of United State registry in such service, route, or line is inadequate", and whether "i the accomplishment of the purposes and policy of this Act additiona vessels should be operated thereon".

CONCLUSIONS AND FINDINGS

On this record, it is concluded and found:

1. That Grace is operating an existing service between the Pacifi coast of the United States and the west coasts of Mexico and Centra America, Balboa, Cristobal, the north coast of Colombia, and th Gulf of Venezuela and Lake Maracaibo;

2. That the service proposed to be operated by Grace on the fore going itinerary would not be in addition to its existing service; and

3. That section 605 (c) of the Act does not interpose a bar to th granting to Grace of an operating-differential subsidy for suc service.

FEDERAL MARITIME BOARD
MARITIME ADMINISTRATION

No. S-33

AMERICAN PRESIDENT LINES, LTD.—APPLICATION FOR OPERATING-DIFFERENTIAL SUBSIDY, TRADE ROUTE NO. 17, SERVICE C-2

No. S-17 (Sub. 1)

AMERICAN PRESIDENT LINES, LTD.—APPLICATION FOR EXTENSION OF EXISTING AUTHORITY TO OPERATE WITHOUT SUBSIDY ON TRADE ROUTE NO. 17, SERVICE C-2

Submitted January 4, 1955. Issued January 5, 1955

REPORT OF THE BOARD AND MARITIME ADMINISTRATOR ON PETITION TO REOPEN PROCEEDINGS FOR RECONSIDERATION AND REARGUMENT

On December 20, 1954, Luckenbach Steamship Co., Inc. (hereinafter "Luckenbach"), intervener, petitioned to reopen these proceedings for reconsideration of our report of September 16, 1954, amended and clarified by our order of October 28, 1954 (hereinafter "the report"), and for reargument. Luckenbach contends that the report does not afford the full protection required by section 805 (a) of the Merchant Marine Act, 1936, as amended (hereinafter "the Act"), with respect to the permission granted to American President Lines, Ltd. (hereinafter "APL"), for intercoastal service eastbound from Los Angeles and westbound refrigerated service as part of its Trade Route No. 17 C-2 service (Atlantic/Straits service), whether subsidized (Docket No. S-33) or unsubsidized (Docket No. S-17 (Sub. 1)).

Luckenbach argues: (1) that the Board and Administrator failed to issue an order defining the scope of the written permission, if any, granted to APL pursuant to section 805 (a); (2) that the granting of permission to serve Los Angeles is completely inconsistent with the Board's own subsidiary findings of fact; (3) that in any event, there is no warrant whatsoever for the Board's relinquishing control over

APL's service; (4) that there is no evidentiary foundation whatsoever for finding that APL has grandfather rights in its round-the-world service; and (5) that the Board should remand the case to the examiner for evidence as to the meaning of "Orient" in sections 506 and 605 (a) of the Act.

Replies to the petition were filed by APL and by Public Counsel. Both replies support the report, except insofar as Public Counsel argues that an additional finding on public interest and convenience is required under section 805 (a) of the Act.

Referring to Luckenbach's arguments in the order in which they appear, we determine, first, that the Administrative Procedure Act (hereinafter "APA") does not require orders separate and apart from reports or decisions, as apparent from an examination of sections 2 (d) and 8 (a) of the APA. Moreover, the written permission required by section 805 (a) of the Act is clearly set forth in the report.

Second, we reaffirm our conclusion that a grant of permission to APL to serve Los Angeles will not result in unfair competition or be prejudicial to the purposes and policy of the Act. That conclusion is adequately supported by findings 23, 24, and 25 of the report. We have not, as stated by Luckenbach, shifted to the interveners the burden of proving the statutory requirements under section 805 (a). It is sufficiently clear from the language of the report that Luckenbach has failed to meet the burden of rebutting the *prima facie* proof required by section 805 (a).

Luckenbach further argues that if a finding on public interest and convenience is required under the Act, no such finding is here justified from the facts of record. We restate the conclusion implicit in the report that section 805 (a) does not require a separate finding on public interest and convenience. We do not consider that the phrases "public interest and convenience" and "competition in such route or trade", appearing in the proviso of section 805 (a), impose any requirement or requirements in addition to those set out in the body of section 805 (a).

Third, we see no legal basis for Luckenbach's contention that we were not warranted in relinquishing control over APL's service, since the permission granted is clearly within the scope of our authority and the absence of a condition in the order granting permission to APL pursuant to section 805 (a) does not preclude a later review, if changing circumstances warrant. We hereby explicitly state that the permission granted by the September 16, 1954, report is subject to review by the Board or Administrator in appropriate cases and at approprite times and, in any case, is subject to re-examination upon

the expiration of the proposed operating-differential subsidy agreement on December 31, 1957.

Fourth, we reject Luckenbach's request for elimination of our finding 17, that APL has grandfather rights in its round-the-world service. We based that finding on our decision in *A. P. L.—Round-the-World Subsidy, Intercoastal Operations*, 3 F. M. B. 553 (1951). Our finding was adequately supported by the decision and need not be reargued here.

Fifth, we do not agree with Luckenbach that the Board and Administrator erred in failing to remand the recommended decision to the examiner for further testimony on the issue of the meaning of the word "Orient", as used in sections 506 and 605 (a) of the Act. In advance of the hearings herein, on Luckenbach's own motion, we heard argument on the meaning of the word "Orient" and decided that issue,[1] as a matter of law, based on legislative history and other legal sources, largely presented to us in argument on the motion. Assuming, *arguendo*, that the decision was based to any extent on facts officially noticed, Luckenbach's remedy was to petition us at that time for the opportunity, provided by the APA, to show facts to the contrary. Luckenbach failed to do this. Further, that issue was not before the examiner, and he properly excluded evidence thereon.

The petition is denied.

By the Board and Maritime Administrator.

(Sgd.) A. J. WILLIAMS,
Secretary.

[1] *American President Lines, Ltd.—Subsidy, Route 17,* 4 F. M. B. 63 (1952).

FEDERAL MARITIME BOARD

No. S-27 (Sub. 1)

INVESTIGATION OF AGREEMENT No. 7549 (MOORE-MCCORMACK-SWEDISH AMERICAN SAILING AGREEMENT)

Submitted September 10, 1954. Decided January 28, 1955

Sailing Agreement No. 7549 between Moore-McCormack Lines, Inc., and Swedish lines found to create relationships which do not eliminate competition but which do tend to diminish competition between its signatories.

Ira L. Ewers and *Albert F. Chrystal* for Moore-McCormack Lines, Inc.

John Mason as Public Counsel.

REPORT OF THE BOARD

BY THE BOARD:

This proceeding arises out of our order of investigation and hearing dated August 8, 1951, recast April 7, 1952, in which we proposed to determine the effect of pooling and/or sailing agreements Nos. 7549, 7616, 7792, and 7796[1] on foreign-flag competition as a factor in determining the operating-differential subsidies payable under title VI, Merchant Marine Act, 1936, as amended, 46 U. S. C. 1171 et seq. (hereinafter "the Act"), to the subsidized operators which are parties thereto. The purpose of the investigation, as recast, was to develop and receive evidence with respect to the following issues:

1. Whether these agreements by (a) pooling or apportioning earnings, losses or traffic; (b) allotting or distributing sailings, traffic or areas; (c) restricting the volume, scope, frequency or coverage of services; or (d) any other means,

[1] The pooling and/or sailing agreements are:

Pooling Agreement No. 7796, between Grace Line Inc. and Chilean Line (C. S. A. V.) (Docket No. S-27, Sub. 4); Sailing Agreement No. 7549, between Moore-McCormack Lines, Inc., and Swedish lines (Docket No. S-27, Sub. 1); Agreement No. 7792 (supporting Agreement No. 7795), referred to as the Colombian Coffee Pooling Agreement, an eight-party agreement (Docket No. S-27, Sub. 3); and Pooling Agreement No. 7616, between Lykes Bros. Steamship Co., Inc., and Thos. and Jas. Harrison, Ltd. (Docket No. S-27, Sub. 2).

create relationships such as eliminate or tend to eliminate or diminish the extent of competition among their signatories.

2. If so, whether the Board is required, as a matter of law, to consider under sections 603 (b) and 606 of the Merchant Marine Act, 1936, as amended, such elimination or diminution of competition in computing the amount of operating-differential subsidy to be granted to American-flag operators, signatory to such agreements.

3. Whether, if the Board is required, as a matter of law, to consider such elimination or diminution of competition, if any, in such computation, it is precluded from so doing in the case of any approved agreement which was in effect at the time the operating-differential subsidy contract was first awarded.

4. Whether, if the Board is not required as a matter of law, to consider such elimination or diminution of competition, if any, in such computation under sections 603 (b) and 606 of the Act, it should nevertheless so consider the same in the exercise of sound administrative discretion.

As recast, the scope of investigation and hearing was narrowed to those issues presented under sections 603 (b) and 606 of the Act, which provide as follows:

Section 603 (b):

Such contract shall provide that the amount of the operating-differential subsidy shall not exceed the excess of the fair and reasonable cost of insurance, maintenance, repairs not compensated by insurance, wages and subsistence of officers and crews, and any other items of expense in which the Commission shall find and determine that the applicant is at a substantial disadvantage in competition with vessels of the foreign country hereinafter referred to, in the operation under United States registry of the vessel or vessels covered by the contract, over the estimated fair and reasonable cost of the same items of expense (after deducting therefrom any estimated increase in such items necessitated by features incorporated pursuant to the provisions of section 501 (b)) if such vessel or vessels were operated under the registry of a foreign country whose vessels are substantial competitiors of the vessel or vessels covered by the contract.

Section 606:

Every contract for an operating differential subsidy under this title shall provide (1) that the amount of the future payments to the contractor shall be subject to review and readjustment from time to time, but not more frequently than once a year, at the instance of the Commission or of the contractor. If any such readjustment cannot be reached by mutual agreement, the Commission, on its own motion or on the application of the contractor, shall, after a proper hearing, determine the facts and make such readjustment in the amount of such future payments as it may determine to be fair and reasonable and in the public interest. The testimony in every such proceeding shall be reduced to writing and filed in the office of the Commission. Its decision shall be based upon and governed by the changes which may have occurred since the date of the said contract, with respect to the items theretofore considered and on which such contract was based, and other conditions affecting shipping, and shall be promulgated in a formal order, which shall be accompanied by a report in writing in which the Commission shall state its findings of fact * * *.

At a prehearing conference on January 18, 1954, a motion to sever and to proceed separately with hearings on each agreement was granted by the presiding examiner.

Hearings on Sailing Agreement No. 7549 were held on January 18 and 19, 1954. The examiner's recommended decision, served on August 6, 1954, embraces all of the pooling and sailing agreements on which hearings were held. This present report is directed only to the specific recommended decision of the examiner in the matter of Sailing Agreement No. 7549 between Moore-McCormack Lines, Inc. (hereinafter "Scantic"), and Swedish American Line and Transatlantic Steamship Co. (hereinafter "Swedish Agreement Lines").

The examiner's ultimate findings were that—under the first issue, relationships have been created which do not eliminate but which tend to diminish competition between the parties signatories to Agreement No. 7549; under the second issue, we are required, as a matter of law, to consider under sections 603 (b) and 606 of the Act, diminution of competition in computing the amount of operating-differential subsidy; no consideration of the third issue is necessary since the agreement was not in effect when the subsidy contract was first awarded; and no consideration of the fourth issue is necessary in view of the recommended finding on the second issue. They were substantially based upon the following findings of fact, which we adopt as our own.

The parties to the agreement. Scantic, the only United States flag line on Trade Route 6, operates a subsidized service thereon between United States North Atlantic ports and Scandinavian and Baltic ports in Sweden, Norway, Denmark, and Finland, with a minimum of 36 and a maximum of 48 sailings per annum. Cargo between such ports is to have preferential treatment, but Scantic has the privilege of calling at other places, including Iceland. Scantic (or its predecessor) has operated in this trade, either on its own behalf or as agent for the United States Government, since prior to World War I, with ocean mail contracts and with operating subsidy first awarded in 1937. Its subsidy contract and its operations thereunder were suspended during World War II. Thereafter, its operations were resumed and again became subject to subsidy contract dated January 1, 1947. This contract was amended on March 8, 1951, to include Article II–18 (c). Swedish Agreement Lines operate a joint service between ports of the United States and Sweden, among other places. Swedish Agreement Lines and Scantic serve Sweden directly.

Other lines in the trade. Sweden is also served directly by one nonagreement Swedish line (Thorden Line), and seven other foreign-flag lines (Finnish, Norwegian, and Danish); and indirectly by six lines (mostly foreign) with fast transshipping service via European ports—

all of which, together with Scantic and Swedish Agreement Lines, are members of the North Atlantic Baltic Freight Conference (F. M. B. Agreement No. 7670—hereinafter called the Baltic Conference or Agreement). There are also 10 nonconference lines (mostly foreign) serving the trade indirectly through transshipment. The Baltic agreement governs the trade from United States North Atlantic ports, either direct or via transshipment, to ports in Sweden and other Baltic and Scandinavian countries, and provides for the establishment and maintenance of agreed rates, including contract rates on certain commodities.

Participation of lines in the trade. The subject agreement covers the trade from New York to Sweden. The following table shows the participation of Scantic and foreign-flag lines in eastbound traffic, both liner and bulk cargo, on Trade Route No. 6 and to Sweden during 1951 and 1952, as well as the participation of the agreement lines in the revenue from cargo to Sweden.

TABLE I

	(1) Participation in total TR/6 cargo eastbound	(2) Participation in cargo to Sweden eastbound	(3) Percent Swedish cargo of total	(4) Participation of *Agreement Lines* in revenue on Swedish cargo
1951	799,930 tons	208,643 tons	26%	
Scantic	44%	23%		42%
All Swedish	23%	69%		58%
Other foreign	33%	8%		
1952	625,174 tons	182,825 tons	29%	
Scantic	23%	*16%		36%
All Swedish	30%	73%		
Swedish agreement		61%		64%
Thorden		12%		
Other foreign	47%	11%		

*Scantic's share of cargo carried by Agreement Lines was 20 percent.

Of the total westbound movement on Trade Route No. 6, Scantic carried 43 percent in 1951 and 44 percent in 1952; foreign lines other than Swedish carried 30 percent in 1951 and 23 percent in 1952. From Sweden, Swedish lines carried 44 percent in 1951 and Scantic carried 50 percent; in 1952, Swedish lines carried 87 percent and Scantic carried only 6 percent, due apparently to its concentration on cargo from Norway. The heaviest general cargo movement is to and from Sweden, and the most important foreign-flag competition on Trade Route No. 6 is Swedish.

Scantic's percentage of revenue on cargo to Sweden has declined steadily from a high of 53 percent in 1949. This is attributed to the fact that the Swedish Agreement Lines carry coal whereas Scantic does not; also, to Scantic's diversion of ships to carry United States

Government defense cargo to Iceland, which is not available to foreign lines.[2]

Prior pooling agreements. Scantic was a member of several pooling agreements prior to World War II. It entered into its first pooling agreement with Swedish lines in 1924, as agent for the United States Shipping Board, with a division of 20 percent of the traffic, later increased to 33⅓ percent. This agreement or its successor was mentioned by Scantic in its first application for operating subsidy filed in December 1936. Apparently, reference is made to Agreement No. 2687 which, however, was canceled on January 8, 1935. No mention is made of such pool in Scantic's application for subsidy dated February 24, 1937, upon which was based the first (temporary) subsidy contract awarded to Scantic, dated June 18, 1937. Neither did a subsequent application, dated October 11, 1937, mention such pool. The record does not indicate there was any similar subsequent agreement until late 1945, when No. 7549 was executed and approved.

The present sailing agreement (No. 7549), dated October 17, 1945, was approved under section 15 of the Shipping Act, 1916, on December 4, 1945. It is styled as temporary pending development of conditions permitting reestablishment of prewar conference arrangements which existed in the trade. It is cancelable on 30 days' notice. The signatories agree to alternate sailings under Swedish and American flag every Friday from New York, ships to sail as scheduled whether loaded or not. Swedish Agreement Lines are permitted to berth more than one ship during Swedish-flag periods when necessary to offset the larger American ships. The stated purpose of the alternating sailings is:

> to maintain a regular service to Sweden with an approximately even division of Swedish and United States freight, East and Westbound, originating from or destined to United States North Atlantic ports, between Swedish and American flag ships, both from a freight revenue point of view and of volume.

Manifests are to be exchanged on each vessel sailing. In practice, the names of shippers and consignees are deleted therefrom. Rates quoted by the signatory lines (eastbound) are to be in accordance with the Baltic Agreement (7670), of which they were members prior to their execution of No. 7549. No provision is made for westbound rates.

Amendment No. I to No. 7549, approved March 5, 1946, recites that trade between the United States and Sweden has so developed that it becomes necessary to increase alternate sailings. Made in con-

[2] Permission of the Maritime Administration is required to carry bulk cargoes. The overcarriage by Swedish Agreement Lines in terms of revenue was $434,753 in 1951, $878,898 in 1952, and $1,233,515 in 1953.

templation of larger postwar trade, it has been inoperative since about 1950.

A proposed Addendum No. II, which would have extended No. 7549 to the Finnish trade and included Finnish lines, was negotiated in March 1946. Tariffs were filed thereunder but it was never completed. The parties to No. 7549 have made a continuing effort to develop it into a full conference agreement including not only Finnish lines but all of the regular Danish and Norwegian lines in the trade. The purpose is to secure rate stability, particularly westbound and especially on woodpulp.

Operation of the agreement. The agreement in No. 7549 on westbound traffic was never effectuated, primarily because of disagreement between Scantic and Swedish shippers on woodpulp rates. This commodity constitutes approximately 90 percent of the westbound movement and is handled on a contract or charter basis. Scantic does not solicit Swedish woodpulp because it does not care to assume the burden of supplying tonnage required by the charters at the rate obtainable.[8] On its small westbound general cargo movement, Scantic generally applies tariff rates published by Swedish America Line, but its competition for such cargo is limited. Its wide diversity of trade prevents it from giving full continuity of service required for westbound general cargo.

Eventually, the plan to alternate sailings every Friday was abandoned and ships were scheduled alternately, as frequently as cargo offered. An attempt was made to have the berth covered at all times.

When the manifests exchanged showed overcarryings by the Swedish Agreement Lines, due frequently to overlap of sailings, *Scantic requested them to close their books after the ship was due to sail; or to reduce their sailings when the berth was overtonnaged; or to prevail upon their shippers to route cargo via Scantic*, *particularly that which is controlled by the Swedish Government. There is no evidence of record that Scantic ever succeeded in these attempts.* In the reverse situation, no similar requests were made upon Scantic. *None of the parties has refused cargo for the purpose of diverting it to the other.*

While no action has been taken to enforce an exact division of traffic, it is testified that adjustments are made at the end of every six months or year, and that it has never happened that any material adjustment has not been made or considered necessary by the principals. No money changes hands. The subject agreement does not

---

[8] Because of the safety factor involved, Scantic does not solicit Swedish ore but carries it occasionally for an important customer.

guarantee or assure either participant a fixed share of either traffic or revenue, but does purport to provide "an approximately even division of Swedish and United States freight, East and Westbound, * * * both from a revenue point of view and of volume." Although, as hereinabove stated, Scantic has not realized a 50 percent or greater participation in revenue on cargo carried to Sweden by agreement lines since 1949, Scantic is satisfied that it gets a reasonably fair share of the type of cargo which it accepts.

Effect of the agreement on solicitation. There is always a highly competitive condition existing between the parties in the traffic departments, especially when there is too much overlap on sailings. Witness Lee stated: "There is always a fight going on between traffic offices . . . What we [member lines] attempted to do as principals . . . was to convince our own traffic departments that we were attempting to run a friendly cooperation . . . attempting to fight a common enemy, which was the outside competition." He testified further that the primary purpose of Scantic is to develop the trade by active solicitation; that the subject agreement had no effect on Scantic's competition because the parties thereto did not control all of the trade; that solicitors for Scantic made from 5 to 68 calls on its patrons making substantial shipments to Sweden in 1953; and that there would not have been more calls if the agreement had not existed.

Effect on competition. Scantic carried 13,949 tons of defense, and 4 tons of commercial, cargo to Iceland in 1952. Ships carrying defense cargo and calling first at Iceland are also offered to Sweden, but the resulting delay puts them at a definite competitive disadvantage as against Swedish ships. Consequently, Scantic is satisfied to permit the Swedish Agreement Lines to carry an increased portion of Swedish cargo as a temporary situation, confident that Scantic can regain its full quota upon cessation of the defense movement to Iceland. Scantic concedes that when its service is inadequate to meet the demands of the Swedish trade, it relies upon the Swedish Agreement Lines to supply such demands.

Justification of the agreement. Were it not for the agreement, *Scantic's portion of the traffic would be around 15–20 percent. This is based upon the fact that Swedish buyers control approximately 90 percent of eastbound cargo, which is the dominant movement in the trade.* Many of them are financially interested in the shipping companies and are naturally inclined to patronize Swedish lines exclusively. Witness Lee testified that the reasons why the Swedish Agreement Lines agreed to an even division of the business were (1) the resulting stability of rates on a compensatory level, (2) an opportunity for the member lines to control cargo as against the trans-

shipping lines, particularly the nonconference lines which offer the most serious competition, and (3) governmental support received by Scantic. He emphasized that while the Baltic Agreement (7670) controls the eastbound rates, that agreement is founded upon the stabilized competition provided by No. 7549 and its predecessors. His prediction was that if No. 7549 were dissolved, cut-throat competition and rate wars would ensue in times of stress.

Relation of the agreement to Scantic's subsidy. If Swedish competition were eliminated from the subsidy calculations, and the only competition used was that of Norwegian and Danish lines, the operating-differential subsidy rate on wages would be substantially increased. The comparative wage costs per month and differential rates for a C-3 vessel operating on Trade Route No. 6 in 1949 is illustrated by the following table:

TABLE II

(Wage-differential rates on C-3 vessel—1949 [1])

Flag	Wages per month	Unweighted differential (percent)	Competition weight factor (percent)	Weighted differential (percent)
United States	$22,285			
Denmark	5,806	73.95	21.7	16.05
Norway	6,619	70.30	26.7	18.77
Sweden	7,650	65.67	51.6	33.89
Composite weighted differential				68.71

[1] The wage differential for 1951 was 73.6 percent.

Witness for Scantic testified that the parity it now enjoys with its competitors in the trade through its subsidy contract makes it possible for Scantic to stay in the trade; that the fact that it may obtain as much as 50 percent of the business by virtue of the subject agreement has no relation to the need for parity; and that if the operating-differential subsidy on wages is discontinued, or substantially reduced, by the elimination of Swedish competition, United States-flag vessels could not continue to be operated in this trade for two reasons, as witness Lee put it: first, "this support that we have from the Government is the primary motive for the Swedes doing business with us; and the second is the financial angle which would of course be utterly impossible for us to meet."

The basic facts derived from the foregoing findings under issue 1 are:

(a) The subject agreement creates a relationship which tends to diminish competition. This is true to the extent the agreement *permits* Scantic to divert its service to Iceland for the carriage of noncompetitive cargo, to thus impair its regular direct service to Sweden, and to

rely upon the Swedish Agreement Lines to fill the void, expecting to resume its position when the defense movement ends.

(b) *Aside from the Iceland diversion*, the agreement is not shown to have had any appreciable effect on competition among its signatories, which appears to be substantial. Scantic actively solicits shipments against the other parties, and vice versa; and against the nonmember lines, including Thorden, which together carried approximately 23 percent of the eastbound traffic to Sweden in 1952. The agreement does not guarantee or assure any participant a fixed or ascertainable share of either traffic or revenue. While it is estimated that Scantic's share of the traffic would be about 15 to 20 percent without the agreement, nevertheless, with the agreement it has obtained only slightly more—23 percent in 1951 and 16 percent in 1952. Indeed, it is difficult to conceive how the agreement could materially affect competition considering the perfunctory manner in which it is carried out. Despite overlapping of sailings, the ship which is due to sail continues to receive cargo, which would seem largely to thwart the purpose of alternating sailings. It is testified that periodical adjustments are made, but the record does not disclose what is adjusted. The ambiguous statement that no material adjustment has been made or "considered necessary" by the principals, fails to shed any light on what kind of adjustments, if any, are made.

Exceptions to the recommended decision were filed by both Scantic and Public Counsel.

Scantic excepts to the examiner's finding of diminution of competition and requests amended findings of fact, including and consistent with an ultimate finding that competition has not been diminished by virtue of the sailing agreement or the practices thereunder. Scantic urges in support of its proposed amended findings that, since the sailing agreement does not specifically permit or otherwise purport to control the diversion of Scantic ships to Iceland, that diversion is unrelated to this investigation, and the examiner's finding of diminution of competition between the signatories to Agreement No. 7549, based entirely on the diversion to Iceland, is therefore erroneous.

On the other hand, Public Counsel excepts to the recommended decision on the grounds, among others, that the examiner erred in concluding that the relationship between Scantic and Swedish Agreement Lines tends to diminish the competition only to the extent that it permits Scantic to divert its service to Iceland for the carriage of non-competitive cargo and in concluding that, aside from the Iceland diversion, the agreement is not shown to have had any appreciable effect on competition.

Viewing the evidence adduced before the examiner, we agree with him; we cannot agree with Scantic's contentions or adopt the amended findings of fact proposed. We find that the diversion bears a direct relationship to the sailing agreement. That relationship is evident from Scantic's reliance on the Swedish Agreement Lines to cover the berth during the periods in which Scantic does not provide a direct service to Sweden, from Scantic's assurance of regaining, presumably through the continuing agreement, its proportionate share of Swedish cargo upon termination of the Icelandic movement, and from the fact that the agreement remained in force during Scantic's participation in that movement in spite of the termination provisions of the agreement.

Although Public Counsel urges that the diminution of competition is not confined to the diversion, we see no other present evidence of diminution. It is true that the terms of the agreement contain a potential for other practices tending to diminish competition and that performance under the agreement has been inconsistent with the relationships ostensibly created. In view of the testimony concerning the present relationship of the parties to the agreement, the purpose thereof, and the level of nonpool competition, we consider the probability of realizing the potential for diminution of competition to be slight. We are concerned therefore with the actual state of competition rather than the potentials inherent in the agreement. Public Counsel further urges that the examiner erred in holding that the question of whether or not the subject agreement comports generally with the purposes and policy of the Act is foreclosed in this investigation. We are of the opinion that consideration of those matters would violate the notice requirements of the Administrative Procedure Act in view of the confines of the order of investigation.

Finally, Scantic excepts to the examiner's conclusions of law in so far as inconsistent with the joint brief of respondents filed March 10, 1952. This general exception fails to provide the particularity with which errors are to be indicated under Rule 13 (h) of the Board's Rules of Practice and Procedure. We consider the reasoning in our opinion in *Lykes-Harrison Pooling Agreement*, 4 F. M. B. 515, to constitute a full answer to Scantic's general exception.

The ultimate findings of the examiner are adopted as our own.

The investigation is discontinued.

By order of the Board.

(Sgd.) A. J. WILLIAMS,
Secretary.

FEDERAL MARITIME BOARD

No. S-44

AMERICAN EXPORT LINES, INC.—APPLICATION FOR INCREASE IN NUMBER OF SUBSIDIZED VOYAGES ON LINES A, B, AND C (TRADE ROUTE NO. 10)

Submitted January 4, 1955. Decided January 31, 1955

Applicant found to be an existing operator on Trade Route No. 10 within the meaning of section 605 (c) of the Merchant Marine Act, 1936.

The Board is unable to find that permitting an increase in the combined number of subsidized sailings on Trade Routes Nos. 10 and 18 would give undue advantage or be unduly prejudicial as between citizens of the United States in the operation of vessels in competitive services, routes, or lines.

Section 605 (c) of the Merchant Marine Act, 1936, does not interpose a bar to granting a prospective increase in the number of applicant's subsidized sailings on Trade Route No. 10.

Gerald B. Brophy, *Carl S. Rowe*, and *Donald L. Deming* for American Export Lines, Inc.

John J. O'Connor for Isbrandtsen Company, Inc.

John Mason and *Edward Aptaker* as Public Counsel.

REPORT OF THE BOARD

This proceeding arises out of the application of American Export Lines, Inc. (hereinafter "Export"), for an increase in the number of its subsidized sailings on Trade Route No. 10 (U. S. North Atlantic/Mediterranean).

Presently, under the terms of operating-differential subsidy contract No. FMB-1 (hereinafter "the contract"), Export is permitted a combined maximum of 104 sailings on Lines A, B, and C (Trade Route No. 10) and Line E (Trade Route No. 18), described in Article I-2 (f) of the contract as follows:

(f) The description of the services, routes and lines and sailings required thereon shall be as follows:

Line A—North African Service (Trade Route 10)

Between United States North Atlantic ports (Maine to and including Hampton Roads, Virginia) and ports in North Africa from Casablanca to the western boundary of Egypt; with the privilege of calling at Gibraltar, ports in Portugal, Spanish Atlantic ports south of Portugal, Spanish Mediterranean ports, Adriatic ports, and Sicily, and with the further privilege, when traffic offers, of calling at any other ports within the limits of Lines B, C, and D, as herein described.

	Minimum	Maximum
Sailings per annum	22	The combined maximum for Line A and Lines B, C, and E, below, is 104.

Line B—West Coast of Italy Service (Trade Route 10)

Between United States North Atlantic ports (Maine to and including Hampton Roads, Virginia) and ports on the West Coast of Italy and in Mediterranean France, and Adriatic ports on and after January 1, 1951; with the privilege of calling at Gibraltar, ports in Portugal, Spanish Atlantic ports south of Portugal, Spanish Mediterranean ports, Adriatic ports, and Sicily, and with the further privilege, when traffic offers, of calling at any other ports within the limits of Lines A, C, and D, as herein described.

	Minimum	Maximum
Sailings per annum	22	The combined maximum for Line B, Line A, above, and Lines C and E, below, is 104.

Line C—Black Sea Service (Trade Route 10)

Between United States North Atlantic ports (Maine to and including Hampton Roads, Virginia), and ports in Turkey and the Black Sea, and in the eastern Mediterranean Sea (from the northern entrance of the Suez Canal to and including Greece); with the privilege of calling at Gibraltar, ports in Portugal, Spanish Atlantic ports south of Portugal, Spanish Mediterranean ports, Adriatic ports, and Sicily, and with the further privilege, when traffic offers, of calling at any other ports within the limits of Lines A, B, and D, as herein described.

	Minimum	Maximum
Sailings per annum	22	The combined maximum for Line C, Lines A and B, above, and Line E, below, is 104.

Line E—India Service (Trade Route 18)

Between United States Atlantic ports and (via the Suez Canal) ports in the Gulf of Suez, Red Sea, Gulf of Aden, Pakistan, India, Ceylon, and Burma; with the privilege of calling at ports in Egypt, Palestine, Israel, Syria, Lebanon, and

North Atlantic Canadian ports (but not for cargo to or from the United States), and with the further privilege, when traffic offers, on and after November 1, 1949, of calling at any other ports within the limits of Lines A, B, C, and D, as herein described.

	Minimum	Maximum
Sailings per annum	20	The combined maximum for Line E and Lines A, B, and C, above, is 104.

In addition, Article I–2 (d) of the contract authorizes Export to operate on Trade Route No. 10, on an unsubsidized basis, four vessels purchased in 1949 from Shepard Steamship Company (hereinafter "the Shepard ships"). The article provides as follows:

* * * Until the United States shall direct otherwise, sailings on Lines A, B, and C, Trade Route 10, and Line E, Trade Route 18, may, for any calendar year after the calendar year 1949, exceed by 26 the combined maximum of 104 sailings per annum set for Lines A, B, C and E by this Article I–2 as a result of sailings on Lines A, B and C by the four vessels *Excellency* (ex *Bunker Hill*), *Exilona* (ex *Minute Man*), *Expeditor* (ex *Paul Revere*) and *Exermont* (ex *Bostonian*), acquired by the operator in 1949, and for the calendar year 1949 may exceed the combined maximum of 104 sailings by 9, in each case without the prior approval of the United States. No sailings by said four vessels shall be taken into account in determining whether the Operator has complied with the minimum and maximum sailing requirements set forth in this Article I–2. No subsidy shall be payable with respect to any sailings by any of said four vessels unless the Board shall first have made all determinations and taken all other action antecedent to such payment. In no event shall any subsidy be payable with respect to sailings on Lines A, B, C, and E in excess of 130 per annum.

In its application Export asks that in addition to the combined maximum of 104 sailings per annum there be designated as subsidized sailings, effective February 1, 1950, a maximum of 26 outward sailings per annum to Israeli ports by the four Shepard ships, with the privilege of calling at other ports on Lines A, B, and C as traffic offers.

In the notice of hearing under section 605(c) [1] of the Merchant Marine Act, 1936 (hereinafter "the Act"), served on September 30, 1953, we stated the issues to be:

(1) Whether the application is one with respect to a vessel or vessels to be operated on a service, route, or line served by citizens of the United States which

[1] Section 605 (c) provides as follows:

No contract shall be made under this title with respect to a vessel to be operated on a service, route, or line served by citizens of the United States which would be in addition to the existing service, or services, unless the Commission shall determine after proper hearing of all parties that the service already provided by vessels of United States registry in such service, route, or line is inadequate, and that in the accomplishment of the purposes and policy of this Act additional vessels should be operated thereon; and no contract shall be made with respect to a vessel operated or

would be in addition to the existing service, or services, and, if so, whether the service already provided by vessels of United States registry in such service, route, or line is inadequate, and in the accomplishment of the purpose and policy of the act additional vessels should be operated thereon;

(2) whether the application is one with respect to a vessel operated or to be operated in a service, route, or line served by two or more citizens of the United States with vessels of United States registry, and, if so, whether the effect of the subsidy contract would be to give undue advantage or be unduly prejudicial, as between citizens of the United States, in the operation of vessels in competitive services, routes, or lines, and

(3) whether it is necessary to enter into such contract in order to provide adequate service by vessels of United States registry.

Hearings were held in Washington, D. C., on September 29 and 30, 1954. On December 8, 1954, the examiner issued a recommended decision in which he found that section 605 (c) of the Act is not a bar to the grant of Export's application. Public Counsel excepted to the recommended decision in so far as the examiner found that "* * * Export has been an existing operator on Lines A, B, and C with respect to the * * * (Shepard ships) since 1949."

Since the Act neither contemplates nor authorizes retroactive payment of operating-differential subsidy, we will consider Export's application only in so far as it seeks a prospective award.

The Shepard ships, modified C–3 type vessels, were introduced into the Mediterranean trade in the latter part of 1949, and serve various ports eastbound and westbound on Lines A, B, and C. Eastbound, the vessels call principally at the Adriatic ports of Trieste and Rijeka, at Iskenderun, Turkey, at Tel Aviv and Haifa, Israel, and at Larnaca, Cyprus. The number of calls and the amount of cargo carried to these ports, as well as the number of outward sailings on Lines A, B, and C, are set forth in the following table:

---

to be operated in a service, route, or line served by two or more citizens of the United States with vessels of United States registry, if the Commission shall determine the effect of such a contract would be to give undue advantage or be unduly prejudicial, as between citizens of the United States, in the operation of vessels in competitive services, routes, or lines, unless following public hearing, due notice of which shall be given to each line serving the route, the Commission shall find that it is necessary to enter into such contract in order to provide adequate service by vessels of United States registry. The Commission, in determining for the purposes of this section whether services are competitive, shall take into consideration the type, size, and speed of the vessels employed, whether passenger or cargo, or combination passenger and cargo, vessels, the ports or ranges between which they run, the character of cargo carried, and such other facts as it may deem proper.

TABLE I

Year	No. of sailings	Calls		Cargo carried (tons of 2,240 pounds)
		Port	No.	
1949 (4 mos.)	9	Trieste	6	10,215
		Rijeka	1	331
		Iskenderun	1	3,122
		Tel Aviv	9	11,292
		Haifa	9	14,374
		Larnaca	0	0
1950	21	Trieste	21	33,440
		Rijeka	7	3,257
		Iskenderun	5	1,933
		Tel Aviv	21	13,984
		Haifa	21	12,764
		Larnaca	1	132
1951	21	Trieste	18	27,332
		Rijeka	16	20,852
		Iskenderun	18	8,404
		Tel Aviv	21	17,675
		Haifa	21	39,899
		Larnaca	0	0
1952	18	Trieste	15	19,138
		Rijeka	14	14,904
		Iskenderun	17	7,634
		Tel Aviv	17	6,956
		Haifa	17	16,481
		Larnaca	8	767
1953	23	Trieste	21	16,596
		Rijeka	21	31,362
		Iskenderun	21	6,051
		Tel Aviv	21	13,372
		Haifa	21	28,028
		Larnaca	12	1,601
1954 (6 mos.)	11	Trieste	9	1,802
		Rijeka	10	18,012
		Iskenderun	11	3,152
		Tel Aviv	11	6,123
		Haifa	11	18,894
		Larnaca	5	376

Considering the first issue outlined in the notice of hearing, it is clear from the foregoing table that the service operated by the Shepard ships on Lines A, B, and C is an existing service, and accordingly not in addition to the existing service.

As to the second issue, there is no evidence before us tending to show that award of subsidy for Export's Shepard-ship service would give undue advantage or be unduly prejudicial as between American-flag carriers in the operation of vessels in competitive services, routes, or lines. Since the burden of proving undue prejudice or advantage under section 605 (c) is on those opposing the award,[2] we cannot, in the absence of proof, find that the grant of the application would give

[2] *Grace Line Inc.—Subsidy, Route 4*, 3 F. M. B. 731 (1952).

undue advantage or be unduly prejudicial as between citizens of the United States.

In view of our determinations on the first and second issues, both the third issue and the exceptions of Public Counsel are rendered moot.

We conclude that section 605 (c) of the Act does not interpose a bar to granting a prospective increase in the number of Export's subsidized sailings on Trade Route No. 10. We do not hereby determine questions other than those arising under section 605 (c) of the act.

By the Board.

(Sgd.) A. J. Williams,
Secretary.

FEDERAL MARITIME BOARD

No. M–62

HAWAIIAN STEAMSHIP COMPANY, LTD.—APPLICATION TO BAREBOAT CHARTER THE SS *La Guardia*

Submitted February 3, 1955. Decided February 25, 1955

Joseph A. Klausner for applicant.

Willis R. Deming for Matson Navigation Company and The Oceanic Steamship Company.

Allen C. Dawson and *L. F. Fuller* as Public Counsel.

REPORT OF THE BOARD

This proceeding was instituted by order of the Board, pursuant to sections 5 (e) and 5 (f) of the Merchant Ship Sales Act of 1946, as amended by Public Law 591, 81st Congress, and Public Law 757, 83d Congress, for the purpose of considering the application of Hawaiian Steamship Company, Ltd. (hereinafter "applicant"), to charter the SS *La Guardia*, a Government-owned P2–S2–R2 vessel.

Applicant, a corporation organized and existing in the Territory of Hawaii, seeks a six-year bareboat charter of the *La Guardia* for the carriage of passengers and cargo between San Francisco, California, and Honolulu, T. H., with the privilege of making occasional calls, for passengers only, at Hawaiian ports other than Honolulu and at United States Pacific coast ports other than San Francisco. Applicant does not now own or operate any vessels.

The application is opposed by Matson Navigation Company (hereinafter "Matson") and The Oceanic Steamship Company (hereinafter "Oceanic"). Interveners agree that the service between the Pacific coast of the United States and Hawaii is in the public interest, that the present passenger service is inadequate, and that no privately owned United States-flag vessels are available for charter by private operators for use in such service. They oppose the application, however, insofar as applicant seeks the right to lift cargo.

Hearings were conducted on December 14, 15, and 16, 1954, and oral argument, in lieu of briefs, was made before the examiner on December 17, 1954. Thereafter, the examiner found and certified to the Secretary of Commerce that the service under consideration is in the public interest; that such service is not adequately served; and that privately owned American-flag vessels are not available for charter by private operators on reasonable conditions and at reasonable rates for use in such service. The examiner recommended that the rate of charter hire for the *La Guardia* be fixed by negotiation with applicant and that the charter contain no provisions restrictive of applicant's right to carry cargo as well as passengers.

Exceptions to the initial decision of the examiner were filed by Matson and Oceanic and by Public Counsel, and replies thereto were filed by Public Counsel and by applicant. Matson and Oceanic submitted but subsequently withdrew a request for oral argument.

Under the application the *La Guardia* would be converted to carry about 600 passengers and would have about 150,000 cubic feet of dry-cargo space and 35,000 cubic feet of refrigerated space. Applicant proposes to bear all expenses of breaking out, converting, and laying up the vessel. The *La Guardia's* present dormitory-type accommodations would be converted to cabins accommodating 2, 3, and 4 persons. At a speed of 19 knots, the vessel would have a transit time of 4½ days between San Francisco and Honolulu and would spend about 32 hours in each port, giving it a voyage turnaround time of about 12 days. Since the prime purpose of the proposed charter is the carriage of passengers, the amount of cargo which the *La Guardia* would carry would be limited by the amount of time available for loading, the number of hatches worked, and applicant's stated intention of employing only one set of cargo gear on double rigged hatches. It is contemplated that cargo, if available, would be worked during 21 of the 32 hours available; no cargo operations are planned during the so-called penalty hours between midnight and 0800 hours, although these hours could be used if desired. Only forward hatches Nos. 1, 2, and 3 would be utilized for dry cargo. Under these conditions, it is expected that the amount of cargo lifted by the *La Guardia* per round voyage would not exceed 693 tons of dry cargo and 315 tons of refrigerated cargo or a total of 1,008 short tons. Cargo working time would be reduced to the extent that heavy weather or other factors increased voyage transit time or would be increased by use of the "penalty" hours, if necessary. Based on a planned 28 voyages per year, applicant anticipates lifting not more than 28,000 to 29,000 tons per year.

Analysis of the existing service in the trade and the public interest therein necessarily requires a consideration of the Hawaiian economy, present and prospective.

The Territory of Hawaii has a population of approximately 500,000. Since 1939, the number of its inhabitants has increased about 20 percent. This increase has been accompanied by a substantial growth in the economic wealth of the islands. The gross product, which in 1939 amounted to $270,000,000, exceeded a billion dollars in 1953. Likewise, the personal income of the population rose from $218,000,000 in 1939 to $889,000,000 in 1953, and the disposable personal income, or total income less taxes, from $211,000,000 to $783,000,000. Per capita, the personal income increased from approximately $525 in 1939 to $1,740 in 1953, and the disposable income from $508 in 1939 to $1,532 in 1953.

The main factors sustaining the economy of the islands are sugar cultivation and processing, pineapple cultivation and canning, the so-called tourist industry, and Federal military expenditures. Authorities on economic prospects in Hawaii believe that the greatest promise of growth and stability in the Hawaiian economy lies in the expansion of the tourist industry. Tourist expenditures in Hawaii mounted from 4.5 million dollars in 1921 to 42.6 million dollars in 1953. The number of visitors from North America who stayed two days or longer in the islands rose from 21,737 in 1939 to 72,152 in 1953. An important part of the Hawaiian tourist trade consists of persons of moderate income.

The growth in water passenger traffic between the continental United States and Hawaii has not kept pace with growth in air traffic over a comparable period. The number of passengers carried by the airlines between the continental United States and Hawaii increased from 28,200 in 1950 to 50,256 in 1953 westbound, and from 35,010 in 1950 to 73,218 in 1953 eastbound. The number of passengers carried by water between the continental United States and Hawaii increased westbound from 21,177 in 1950 to 23,511 in 1953 and eastbound from 17,051 in 1950 to 19,360 in 1953. By way of comparison, it is noted that, while passenger traffic between United States and Europe experienced a similar increase in volume over a comparable period, the percentage of participation by water carriers in the total traffic increase remained roughly constant.

The present water passenger service between the continental United States and Hawaii is provided principally by Matson's *Lurline*, the only passenger vessel exclusively engaged in the California/Hawaii trade. Two vessels of American President Lines, Ltd., the *President Cleveland* and *President Wilson*, offer passenger service between Cal-

ifornia and Hawaii but as a leg of regular sailings to and from the Far East and not as an exclusive service.

The *Lurline's* transit time between California and Honolulu is 4½ days. The vessel sails from the west coast every 12 days, serving San Francisco and Los Angeles alternately. Accommodations, all first class, are rated higher than those proposed for the *La Guardia*, as indicated by the following table:

One-way fares	Lurline		La Guardia	
	No.	Percent	No.	Percent
Less than $150	24	4	72	12
$150 to $199	184	29	260	42
$200 to $299	188	29	242	39
$300 to $399	148	23		7
$400	98	15	0	0

It will be noted that 43 percent of the *Lurline* accommodations are rated at $300 or more for one-way passage as contrasted with 7 percent of the *La Guardia* accommodations priced in that range.

In addition to passenger accommodations, the *Lurline* has dry-cargo space which is used solely for the carriage of a maximum of 25 automobiles and 55,000 cubic feet of refrigerated space, 16,000 cubic feet of which is the maximum used on any sailing. The small amount of cargo lifted by the *Lurline* is due primarily to the limited time available for cargo working.

Cargo service between San Francisco and Los Angeles and Hawaii is provided principally by Matson. Although vessels operated by American President Lines, Ltd., and Pacific Transport Lines, Inc., call at Hawaii on voyages between the continental United States and the Far East, the vessels are devoted principally to the Far East trade and do not, accordingly, offer the frequency and regularity of service available on vessels employed exclusively in the United States/Hawaii trade. Neither American President Lines, Ltd., nor Pacific Transport Lines, Inc., opposes the present application. Additionally, on rare occasions, Oceanic vessels have participated in the California/Hawaii trade. Oceanic operates four C–2's from the Pacific coast to the South Sea islands over Trade Route No. 27 and has present plans for inauguration of a passenger service on the same trade route in 1956, under which space would be available for carriage of passengers and cargo to and from Hawaii.

Matson owns eighteen freighters—fifteen C–3's and three Liberties—all of which are operated between the continental United States and Hawaii. With seven of the C–3's (hereinafter "the California ships") Matson provides weekly services between the San Francisco Bay area

and Hawaii and between Los Angeles and Hawaii. The California ships average approximately 530,000 cubic feet of dry-cargo space and 55,000 cubic feet of refrigerated space per vessel.

The California ships sail from San Francisco to Hawaii, where they discharge San Francisco cargo and load cargo inbound to Los Angeles. They return to Los Angeles via Oakland, California, there load military cargo, proceed to Los Angeles and discharge cargo lifted at Hawaii. The vessels then return to Hawaii, discharge Los Angeles cargo and load cargo for San Francisco. The vessels operate at 16 knots and arrive at Honolulu on the sixth day after departure from California. Since general cargo must be delivered to the pier at San Francisco not later than the Friday night preceding the regular Wednesday sailing, the California ships deliver general cargo to Hawaiian consignees not earlier than the 14th day after delivery dockside.

Inbound voyages of Matson freighters regularly employed in the Hawaii/Pacific Northwest trade are occasionally devoted to carriage of California cargo, particularly during the peak movement of sugar from Hawaii. Further, two other Matson vessels have been, during peak sugar movements, operated in ballast from California to Hawaii for return with full loads of sugar. Although Matson asserts that these vessels sailed light only for lack of cargo, the record indicates that the sailings were unadvertised.

Eliminating from computation the *Lurline* and the freighters not regularly operated from San Francisco to Hawaii, the regular vessels in the trade were employed during the first three quarters of 1954 to 87 percent of drycargo capacity and 82 percent of reefer capacity. Adding a small factor for broken stowage, it is probable that the percentage of dry-cargo space utilization reached 90 percent.

Homebound cargo moves on a weight rather than a measurement basis. From information supplied by a witness for Matson, we find that the percentage of utilization is approximately as high homebound as outbound. No cargo has been declined by Matson, however, although on infrequent occasions reefer cargo offered a particular vessel has been deferred until the succeeding sailing.

Applicant has endeavored without success to locate a suitable privately owned American-flag vessel available for charter to it for use in the service hereinabove discussed.

From the foregoing we find:

1. That the service under consideration is in the public interest;

2. That the present passenger service is inadequate to meet the needs and demands of tourists of moderate income;

3. That the present cargo service is inadequate to meet the need for a faster service, as proposed for the *La Guardia*, represented as being an "express" or "expedited" service which would substantially reduce elapsed time between delivery dockside for shipment and delivery to consignee; and

4. That privately owned American-flag vessels are not available for charter by private operators on reasonable conditions and at reasonable rates for use in such service.

In addition to the statutory findings required in this application we may, in our discretion, recommend to the Secretary of Commerce restrictions on and conditions to the charter which we deem necessary or appropriate to protect the public interest and to protect privately owned vessels against competition from Government-owned vessels. Accordingly, we recommend execution of a demise charter for the *La Guardia* for a period of six years, subject to annual review, at a minimum charter hire rate of 8½ percent of the statutory sales price, plus 50 percent of profits above 10 percent of the capital necessarily employed. We recommend no restrictions in the employment of the vessel other than those created by the application itself.

Many of the exceptions to the examiner's initial decision have been rendered moot by the findings and recommendations herein. There remain for consideration, other than those exceptions unrelated to material issues or unsupported by evidence, only the exceptions of Matson and Oceanic to the examiner's failure to find, in relation to cargo service, that service in the California/Hawaii trade is not adequate and the examiner's failure to recommend that the proposed charter prohibit the carriage of cargo. As we have previously indicated, evidence adduced at the hearing showed a need for a service which would substantially reduce elapsed time between delivery dockside and delivery to the consignee. Since we need not, for the purpose of this application, determine the extent of inadequacy of the existing service, we express our finding solely in terms of the cargo service proposed by applicant. Having so found, we cannot recommend a charter restriction against the carriage of cargo.

By the Board.

(Sgd.) A. J. WILLIAMS,
Secretary.

FEDERAL MARITIME BOARD

MARITIME ADMINISTRATION

No. S–50

Pacific Far East Line, Inc.—Application Under Section 805 (a), Merchant Marine Act, 1936, to Act as General Agent for Coastwise Line

---

Submitted December 3, 1954. Decided February 25, 1955

To permit Pacific Far East Line, Inc., to act as general agent for Coastwise Line, Inc., would be prejudicial to the objects and policy of the Merchant Marine Act, 1936. On the evidence adduced, the Board cannot find that the proposed general agency agreement would not result in unfair competition. To permit Pacific Far East Line, Inc., to charter to Coastwise Line, Inc., its unsubsidized vessels returning in ballast from the Orient would result in unfair competition and would be prejudicial to the objects and policy of the Merchant Marine Act, 1936. Applications for such permission under section 805 (a) of the Merchant Marine Act, 1936, denied.

Odell Kominers and *Robert S. Hope* for Pacific Far East Line, Inc.

John Ambler, *Albert E. Stephan*, and *L. W. Hartman* for American Mail Line, Ltd., *William J. Lippman* for American Tramp Shipowners Association, Inc., *Warner W. Gardner* for American President Lines, Ltd., *James L. Adams* and *Tom Killefer* for Pacific Transport Lines, Inc., *Harry Henke, Jr.*, for Olympic-Griffiths Lines, Inc., *Sterling F. Stoudenmire, Jr.*, for Waterman Steamship Corporation, *William I. Denning* and *Alan F. Wohlstetter* for States Steamship Company, Pacific-Atlantic Steamship Co., and Alaska Freight Lines, Inc., and *Alan B. Aldwell* for Oliver J. Olson & Co., intervenors.

John Mason and *Allen C. Dawson* as Public Counsel.

Report of the Board

These proceedings arise out of applications filed by Pacific Far East Line, Inc. (hereinafter "PFEL"), in which written permission is sought, under section 805 (a) of the Merchant Marine Act, 1936, as

amended (hereinafter "the Act"),[1] (1) to act as general agent for Coastwise Line, Inc. (hereinafter "Coastwise"), in its Pacific coastwise and Alaskan services or for such services operated in combination with Coastwise's service between United States Pacific coast ports and British Columbia, and (2) to charter vessels, owned or chartered by PFEL, to Coastwise for operation by Coastwise from United States Pacific Northwest and/or British Columbia ports to California.

The two applications are not interdependent; while PFEL seeks permission for both proposals, either is desired in the event of denial of the other. The proposed general agency agreement is to replace an existing agency agreement between PFEL and Coastwise, approved by the Administrator tentatively on December 1, 1953, and plenarily on January 19, 1954. PFEL was then informed that, in the absence of changes in the scope or nature of the services to be performed, the existing agreement did not require approval under section 805 (a) of the Act.

Notice of the applications was published in the Federal Register on April 30, 1954. On July 11, 1954, we granted petitions to intervene filed by American Mail Line, Ltd., American President Lines, Ltd. (hereinafter "APL"), Olympic-Griffiths Lines, Inc. (hereinafter "OGL"), Pacific Transport lines, Inc., American Tramp Shipowners Association, Inc., Oliver J. Olson & Co. (hereinafter "Olson"), Water-

---

[1] Section 805 (a):

It shall be unlawful to award or pay any subsidy to any contractor under authority of title VI of this Act, or to charter any vessel to any person under title VII of this Act, if said contractor or charterer, or any holding company, subsidiary, affiliate, or associate of such contractor or charterer, or any officer, director, agent, or executive thereof, directly or indirectly, shall own, operate, or charter any vessel or vessels engaged in the domestic intercoastal or coastwise service, or own any pecuniary interest, directly or indirectly, in any person or concern that owns, charters, or operates any vessel or vessels in the domestic intercoastal or coastwise service, without the written permission of the Commission. Every person, firm, or corporation having any interest in such application shall be permitted to intervene and the Commission shall give a hearing to the applicant and the intervenors. The Commission shall not grant any such application if the Commission finds it will result in unfair competition to any person, firm, or corporation operating exclusively in the coastwise or intercoastal service or that it would be prejudicial to the objects and policy of this Act: *Provided,* That if such contractor or other person above-described or a predecessor in interest was in bona-fide operation as a common carrier by water in the domestic, intercoastal, or coastwise trade in 1935 over the route or routes or in the trade or trades for which application is made and has so operated since that time or if engaged in furnishing seasonal service only, was in bona-fide operation in 1935 during the season ordinarily covered by its operation, except in either event, as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall grant such permission without requiring further proof that public interest and convenience will be served by such operation, and without further proceedings as to the competition in such route or trade.

If such application be allowed, it shall be unlawful for any of the persons mentioned in this section to divert, directly or indirectly, any moneys, property, or other thing of value, used in foreign-trade operations, for which a subsidy is paid by the United States, into any such coastwise or intercoastal operations; and whosoever shall violate this provision shall be guilty of a misdemeanor.

man Steamship Corporation, Alaska Freight Lines, Inc. (hereinafter "AFL"), States Steamship Company (hereinafter "States"), and Pacific-Atlantic Steamship Co. (hereinafter "Pacific-Atlantic").

At a prehearing conference on June 15, 1954, counsel for PFEL stipulated that the applications be deemed amended in the following particulars:

1. Vessels to be chartered by PFEL to Coastwise would exclude those owned by the Government which are or may be under charter to PFEL;

2. PFEL does not seek authority to transport cargo between points in British Columbia and the Pacific Northwest, on the one hand, and ports in the Orient served by Trade Route No. 30, on the other. The granting of the application shall not be construed as permitting PFEL to operate on Trade Route No. 30, and this stipulation shall not be construed as requiring PFEL to cease any transportation in which it has been engaged.

3. If PFEL's application to charter vessels to Coastwise is granted, vessels chartered by PFEL to Coastwise for operation in its service from United States Pacific Northwest and/or British Columbia ports to California will not (a) discharge off-shore cargo in British Columbia or the Pacific Northwest, or (b) be chartered under such terms as to permit the carriage of cargo other than that originating in British Columbia or the Pacific Northwest and ultimately destined to points in the continental United States, other than points in the Pacific Northwest.

4. Any willful breach of the foregoing shall be considered a breach of Article II–15 of PFEL's operating-differential subsidy agreement, unless PFEL has theretofore applied for and received express permission from the Board or Administrator, as the case may be, with respect to the particular cargo in question.

5. PFEL recognizes that no party to this proceeding whose protest is not pressed by reason of the above assurances thereby assents to or concurs in the operation of PFEL's unsubsidized vessels.

Hearings were conducted during the period of June 18 through June 25, 1954, and an initial decision was issued by the examiner on October 11, 1954. The examiner recommended denial of both applications on the grounds that grant of permission to act as general agent for, and to charter vessels to, Coastwise would result in unfair competition, would be prejudicial to the objects and policy of the Act, and would not serve the public interest and convenience. By a remark footnoted to the decision, the examiner expressed the following doubt as to the applicability of section 805 (a):

* * * The examiner is not fully satisfied that section 805 (a) is applicable in the present case. As the parties have proceeded on the assumption of its applicability, however, the examiner simply records his doubt at this point as a matter of record. See pages 3–4 of brief of counsel for PFEL.

Exceptions to the decision were filed by PFEL, Public Counsel, and AFL. Replies to exceptions were filed by PFEL, Public Counsel, APL, States, Pacific-Atlantic, and OGL, and oral argument thereon was held on December 3, 1954. Except as hereinafter particularly stated, we agree with the conclusions of the examiner. Exceptions or recommended findings not discussed in this report nor reflected in our findings or conclusions have been considered and found unrelated to material issues or not supported by the weight of the evidence.

Since the applications are not interdependent, we direct ourselves first to the application to act as general agent for Coastwise. We find that:

1. PFEL holds an operating-differential subsidy agreement (FMB No. 22) with the Board under the terms of which PFEL receives subsidy in the operation of not fewer than 36 nor more than 40 sailings on Trade Route No. 29, Service 2.[2]

2. PFEL further operates, under temporary permission of the Administrator, approximately five unsubsidized voyages per month from the Pacific coast to Guam and the Far East, many of the vessels returning to California in ballast. Vessels employed in its unsubsidized service are three owned AP-3's, two C-3's demise chartered from Luckenbach Steamship Company, Inc., and three C-4's time chartered from Joshua Hendy Corporation.

3. Coastwise is an Oregon corporation, certificated by the Interstate Commerce Commission (hereinafter "ICC") to act as a common carrier between United States Pacific coast ports. It currently operates, and has since September 1953 operated, two services with five Liberty vessels. Four operate on approximately a twelve-day frequency, commencing at Long Beach, California, proceeding northbound to San Francisco, Columbia River, Puget Sound, and Southwest Alaska, and returning southbound via British Columbia to Puget Sound and California. The fifth, the demise chartered *North Beacon*, operates on a fourteen-day frequency between Portland, Oregon, and Long Beach, California. In addition to its common-carrier operations, Coastwise acts as Pacific coast agent for Kawasaki

[2] Described as:

Between the California ports of Los Angeles and San Francisco and Yokohama, Kobe, Osaka, other Japanese ports (as traffic offers), Shanghai, other North China ports and ports in Manchuria and Korea (as traffic offers), Hong Kong, Manila, Philippine Island outports, French Indo-China, and Siam (as traffic offers), with privilege of calls at ports of U. S. S. R. in Asia.

Kisen Kaisha, Ltd. (hereinafter "K Line"), a Japanese-flag operator providing berth services from Japanese ports to Canadian Pacific, United States Pacific, United States Atlantic, and South American ports, and a competitor of PFEL in its subsidized and unsubsidized services. Coastwise also acts as agent for various tramps, United States and foreign, and acts as agent for PFEL in Portland, Oregon.

4. Common carriers in the coastwise trade, other than Coastwise, include OGL, Olson, American-Hawaiian Steamship Company, and Pope & Talbot, Inc. Of these, only OGL's service comes into competition with that of Coastwise.

5. On November 11, 1953, Coastwise decided to approach PFEL to act as its agent in California. Thereafter, on December 1, 1953, the existing agency agreement was executed by the parties. The existing agreement provides substantially as follows:

(a) The agency is limited to California and is for an indefinite period subject to concellation on 90 or 120-day written notice;

(b) PFEL's agency activities are subject to the general supervision and control of Coastwise through the latter's executive office in California, and PFEL is not permitted to formulate over-all operational policies nor to nominate, obtain, or schedule vessels or to take any action concerning Coastwise's activities for other carriers;

(c) PFEL solicits, books, receives, and delivers cargoes, issues bills of lading and all other similar documents, collects and disburses monies, handles claims, mans, equips, supplies, maintains, and repairs, Coastwise vessels, and places insurance thereon; PFEL maintains accounts according to PFEL accounting procedures and makes deposits and withdrawals subject to Coastwise control from bank accounts in the name of "Coastwise Line, Pacific Far East Line, Inc. Agent;"

(d) PFEL is paid 3 percent of the gross revenue derived from Coastwise's common-carrier operations.

6. Although no Coastwise official or employee testified at the hearing, a PFEL witness stated that the existing agency agreement has resulted in substantial overhead savings to Coastwise. The witness testified that, whereas Coastwise's overhead for 1952 and 1953 was $1,248,000 and $1,231,000, respectively, the overhead for 1954 had been reported by Coastwise to PFEL to be $750,000, based on a projection of the experienced overhead of $60,000 per month for the first five months of the year with the addition of a $30,000 safety factor. After deducting the agency fee payable to PFEL, estimated at $255,000, based on a projected estimated gross revenue of $8,500,000, the net savings apparently attributable to the agency agreement are $265,000. Although the witness stated these savings were primarily effected

through reduction in personnel from 153 to 78, there were other factors which may have contributed to the economies. First, the number of United States vessels operated by Coastwise as general agent and as demise charterer was sharply reduced in 1954 over the two preceding years. Although the witness stated that these operations affected general overhead expense, he was unable to isolate from similar general overhead expense that portion of savings achieved by reduction in operation of Government-owned vessels. Second, there may have been, in 1954, as compared with preceding years, a reduction in agency services performed for other lines. No evidence as to the extent of such agency services was offered. However, the witness stated that any reduction in agency expenses would be reflected in general overhead.

7. The added cost of performing the existing agency agreement according to PFEL's financial witness is approximately $75,000, which represents additional salaries, communication costs, and other miscellaneous expenses. This information was given to the witness by the comptroller of PFEL. The witness was not familiar with the components of this added cost, nor was he aware of any accounting studies undertaken to determine the total cost of PFEL of performing the agency services. Although the witness stated that PFEL has largely absorbed the additional work with little increase in personnel, no testimony was offered on the cost to PFEL attributable to the partial direction of the efforts of its employees to Coastwise agency duties, nor was this cost reflected in the added cost figure of $75,000.

8. There is, and has been, a close relationship between PFEL and Coastwise. One of Coastwise's predecessors, Coastwise (Pacific Far East) Line, a partnership formed by W. T. Sexton and K. D. Dawson, organized PFEL and was instrumental in securing vessels for PFEL from War Shipping Administration. Mr. Sexton, later president of Coastwise, was the first president of PFEL, and Mr. Dawson was the first chairman of the Board. The present president of Coastwise, W. J. Bush, holds stock in PFEL and is also president of West Coast Terminals, a stevedoring company, which presently performs services for both Coastwise and PFEL. Mr. B. L. Haviside, vice president of Haviside Co., ship chandlers performing services for PFEL, holds stock in both PFEL and Coastwise. Further interrelation is possible through ownership of Coastwise stock by Emmet and Chandler, insurance agents and brokers, and T. G. Franck, executive vice president of Wilbur Ellis Co., an important export firm, although PFEL witnesses did not know whether either company performs services for PFEL and/or Coastwise.

9. The proposed agreement differs from the existing agreement in two principal respects; first, the services are to be extended to all of Coastwise's common-carrier operations; and second, Coastwise's supervision and control over PFEL's services are to be eliminated. The responsibility and authority reposed in PFEL by the terms of the proposed agreement are restricted only by the agreement's termination provisions.

10. No additional economies are expected to result from operation of the proposed agreement other than those operational economies which might flow from centralization of control. No further personnel reduction or other saving in overhead is contemplated. As hereinbefore stated, PFEL under the proposed agreement would receive an agency fee of $255,000 earned at a stated added cost of $75,000. Since no testimony was offered to establish the total cost to PFEL, the difference, $180,000, does not reflect net profit. Identifiable overhead costs will be charged to Coastwise. All other overhead costs will be absorbed by PFEL. The agency fee, tentatively set at 3 percent of the gross revenues, will be increased if warranted by additional expenses. PFEL witnesses, however, were unable to provide the basis for the fee payable under the existing agreement or the tentative fee under the proposed agreement.

11. Under the proposed agreement, Coastwise will continue to maintain its present offices. Employees in these offices will conduct agency activities under the supervision of Coastwise and perform duties relating to Coastwise common-carrier operations under the supervision of PFEL. Further, in the Portland office, agency services will be performed by Coastwise employees for both PFEL and K Line, one of PFEL's foreign-flag competitors.

Considering the application to charter vessels to Coastwise, we find:

12. As stated, PFEL has approximately five unsubsidized vessels per month returning to California from the Far East. Under the application, all five vessels as well as any other unsubsidized vessels which may be operated by PFEL could be time-chartered to Coastwise for employment in the British Columbia/United States Pacific Northwest/California trade. The plan is to utilize the unsubsidized vessels wherever it is felt that Coastwise has need for a vessel. PFEL does not expect, however, that the service by PFEL vessels would differ substantially from the service now provided by Coastwise.

13. As previously stated herein, Coastwise currently operates two common-carrier services with five Liberty vessels. It is the service presently operated by the *North Beacon* which is primarily affected by the chartering arrangement since the chartered vessels would re-

place the *North Beacon*. Coastwise is not prevented, under the application, however, from employing the *North Beacon* in the Alaska trade. PFEL witness stated that it would be so employed only if business needs require.

14. The *North Beacon*, demise chartered at the rate of $6,000 per month and formerly employed in the Pacific coastwise/Alaska trade, is presently operated on a 14-day frequency from Long Beach to Portland and return. The vessel normally runs northbound in ballast and returns southbound to Long Beach, and occasionally San Francisco, via Portland. The vessel carries about 3,000 tons of paper per voyage from Portland plus an occasional deckload (about 500,000 bd. ft.) of lumber from Rainier. The operation of the *North Beacon* results in a loss varying from $4,400 to $8,000 per voyage, dependent on whether deckloads of lumber are carried.

15. OGL's sole ship, the *Olympic Pioneer*, a time-chartered Liberty, currently operates between Puget Sound and Los Angeles Harbor, via Portland and San Francisco. The vessel carries bulk salt from the San Francisco Bay area to Tacoma and Portland and occasionally automobiles from Richmond, California, to Seattle. Since the degree of profit on the northbound leg is insufficient to sustain both legs of the voyage on an annual basis, OGL solicits, and has obtained since the spring of 1953, paper southbound from Portland. The vessel has averaged 2,300 tons of paper on those voyages on which paper is carried and 1,560 tons of paper on all voyages. Since paper moves as it is produced, OGL's ability to secure such cargo is said to be dependent on spacing the sailing of the *Olympic Pioneer* between sailings of Coastwise vessels. There is evidence, however, that the principal shipper of paper desires at least two carriers in the trade.

16. AFL, an Alaskan corporation, with its principal place of business in Seattle, operates a twice-weekly common-carrier service by means of tug and barge between Seattle and points in Alaska served by Coastwise. About half of Coastwise's Alaskan traffic originates in the Puget Sound area. The movement is predominantly northbound, with little cargo available southbound. Although AFL produced no witnesses, a witness for PFEL stated that there is no present need for additional sailings in the trade.

17. Under the application, PFEL vessels will be time chartered under the New York Produce Exchange form of time charter modified to fit the requirements of the parties, with new charters executed for each voyage. Testimony was offered that vessels under time charter to PFEL will be time chartered to Coastwise at the same rate of hire. Owned and demise-chartered vessels will be chartered at the current

world market rate in the absence of established market rate in the trade. The proposed charter itself merely specifies that the rate of hire is "variable". Charter hire will commence upon arival of the PFEL vessel at or off quarantine station, inbound at the port of loading, whether British Columbia or Puget Sound. After deviation from the Great Circle route PFEL vessels will require approximately 12 hours' operation prior to arrival at the port of loading. The cost of the deviation will be borne by PFEL. The vessel will be redelivered at a California port to be nominated by PFEL.

18. The chartering plan will clearly benefit PFEL and will probably benefit Coastwise. PFEL will save charter hire (on its time-chartered vessels) or operational costs on owned vessels on about 2½ days of the ballast legs from the Far East. Coastwise will benefit to the extent that the total of charter hire and other costs fall short of the cost of operating the *North Beacon* per round voyage. Present operational costs for the *North Beacon* are said to be $25,200, exclusive of cargo costs. Since the amount of southbound cargo is presently limited and since PFEL does not anticipate the generation of new cargo in the trade, the benefit to Coastwise will vary inversely with the number of charters executed per month. In this regard it is noted that PFEL, under the proposed agency agreement, will have the sole right to nominate the vessels to be chartered to Coastwise, will control the number of vessels to be so chartered, and will, in any event, benefit in direct proportion to the number of vessels time chartered per month.

19. Probable per diem costs to Coastwise under time charters of each of the three types of vessels available are set out in the following table, based on information current at the time of hearing:

Per day	AP-3		C-3		C-4	
	In port	At sea	In port	At sea	In port	At sea
Charter hire	$1,850	$1,850	$2,045	$2,045	$2,500	$2,500
Fuel oil	90	------------	170	------------	170	800
Cargo overtime	250	------------	250	------------	250	250
Total	2,190	------------	2,485	------------	2,900	3,550

Assuming a voyage of 6½ to 7½ days under the charter, and assuming the current market rate for C-4's to be the rate of hire actually paid by PFEL to Luckenbach, the cost to Coastwise would be lower in chartering any of the three types of vessels for the southbound leg than for the operation of the *North Beacon* per round voyage. It was not established, however, that Coastwise would show a profit from charter of AP-3's, C-3's, or C-4's.

DISCUSSION

Jurisdiction

Although the examiner expressed doubt as to the applicability of section 805 (a) of the Act to the present applications, his misgivings do not weaken the ultimate confirmation of applicability implicit in his conclusion. We find that the examiner did dispose of the jurisdictional question notwithstanding his doubt. We do not share that doubt nor do we see merit in applicant's arguments that the section is inapplicable. First, the application to become general agent for Coastwise, under which PFEL would have complete control of Coastwise's common-carrier activities, is an application to *operate* vessels engaged in the coastwise trade; second, the application to time charter vessels to Coastwise for employment in the coastwise trade is anticipated in section 805 (a) by any or all of the words "owns, charters, or operates". PFEL *owns* some of the vessels to be so employed, would *operate* all of the vessels under time charter, and would *charter* the vessels to Coastwise. PFEL has argued that Coastwise would not be divested of control of its operations and therefore PFEL would not "operate" vessels in the Coastwise trade. Articles 3 (b) and (f) of the proposed agreement, however, clearly give PFEL ultimate control and responsibility for the operation of Coastwise vessels. Although PFEL stated its intentions of consulting Coastwise, it is not required to do so under the terms of the agreement. This, unquestionably, is operation of vessels within the meaning of the statute.

We likewise reject PFEL's argument that the statute, in prohibiting subsidized operators from chartering vessels in the domestic trade, contemplates *chartering* in the sense of *chartering from* rather than *chartering to* domestic operators. The distinction is unjustified from the language, its history, or the prior interpretations of our predecessors. See *Balto. Mail S. S. Co.—Use of Vessels*, 3 U. S. M. C. 294 (1938). Further, even assuming PFEL's interpretation of the word to be correct, the vessels under time charter to Coastwise would nevertheless be operated by PFEL and some of those vessels are owned by PFEL

PFEL, in exceptions, argues that in two unreported decisions chartering of vessels by a subsidized operator to a domestic operator was considered not within the scope of section 805 (a), citing the chartering of the SS *Robin Mowbray* and the SS *Mormacfir*. The argument is unsound; in neither case did the Board decide that an 805 (a) permission was unnecessary.

Public Counsel similarly argues that the examiner erred in failing to dispose of the jurisdictional question as to the applicability of sec-

688-650 O - 63 - 41

tion 805 (a), and further urges that the examiner erred in failing to find that the administration of section 805 (a) is exclusively a function of the Board. Public Counsel cites an apparent inconsistency in previous decisions of the Board, the Administrator, or of the Board and Administrator jointly.

The problem was recently considered by us on motion to clarify our report in *American President Lines, Ltd.—Subsidy, Route 17*, 4 F. M. B.—M. A. 488 (1954). In that report, although specific permission to serve San Francisco was denied American President Lines, Ltd., we stated:

> * * * We will leave it open, however, for APL, in individual cases, to apply to the Maritime Administrator for permission to call at San Francisco for eastbound coastal cargo, and he will decide at such times whether or not such permission should be granted.

In our order served on December 16, 1954, we implicitly confirmed the Administrator's jurisdiction under the facts there presented to determine 805 (a) matters after compliance with the hearing requirements of that section. We hereby reaffirm the determination therein and state that the Administrator has jurisdiction to hear and determine applications under section 805 (a) where it appears therefrom that the application cannot result in making, amending, or terminating subsidy contracts.

We consider that section 805 (a) issues are pertinent to these applications, as indeed did the examiner, in spite of his expressed doubt. Those issues we state to be whether the proposed agency and chartering arrangements would (1) result in unfair competition to any person, firm, or corporation engaged exclusively in the coastwise service, or (2) be prejudicial to the objects and policy of the Act. We do not agree with the examiner that a third and separate finding on public interest and convenience is required. As we indicated in *American President Lines, Ltd.—Subsidy, Route 17*, 4 F. M. B.—M. A. 555, the phrase "public interest and convenience" appearing in the proviso of section 805 (a) is there employed in substitution of the phrase "not prepudicial to the objects and policy of the act," and imposes no additional requirements. Matters affecting public interest and convenience are necessarily to be considered in the light of the purposes and policy of the Act.

We consider that the Board rather than the Administrator has jurisdiction of both of the present applications since either may result in amending PFEL's subsidy contract.

General Agency Agreement

Interveners argue that the proposed general agency agreement would result in unfair competition in that: (1) Coastwise would have the advantage of the large PFEL solicitation staff; (2) the purchasing power of the PFEL organization would enable PFEL to offer trade reciprocity to prospective shippers; (3) PFEL would be able to offer space on its offshore vessels in return for Coastwise cargo shipments; and (4) performance of the agreement by PFEL on an added cost basis would give Coastwise financial advantage not available to domestic operators and would result in contribution by PFEL to Coastwise's costs, in violation of the second paragraph of section 805 (a).

The evidence adduced at the hearing does not support the arguments relating to trading of coastwise and offshore space and to solicitation and reciprocity advantages. Performance of the proposed general agency by PFEL on an added cost basis, however, would result in an advantage to Coastwise. Whether this advantage amounts to unfair competition, however, cannot be determined from this record. PFEL's general-agency fee, although tentatively set at 3 percent of the gross revenues realized from Coastwise's common-carrier operations, is not specified in the proposed agreement and witnesses for PFEL were unable to provide the basis for the fee or to state whether the fee would be compensatory. While a PFEL witness estimated the net return to PFEL, based on 3 percent of the estimated gross operating revenues, less an anticipated added cost of $75,000, the witness was unfamiliar with the components of the estimated added cost and stated that no study had been made by PFEL of the costs of performing general-agency services. Our inability to determine the effect on competition of the financial aspects of the proposed agreement stems solely from applicant's failure to furnish competent evidence in this regard. We cannot, therefore, make the statutory finding that the proposed agreement will not result in unfair competition.

PFEL, in exceptions, argues that performance of the proposed agreement on an added-cost basis would not violate the second paragraph of section 805 (a) since (1) only overhead costs, for which no subsidy is paid to PFEL, could be diverted to Coastwise, and (2) Coastwise's competitor, OGL, operates on a similar basis. We do not agree with PFEL's construction of section 805 (a). Further, since OGL is not associated with a subsidized operator, its financial structure is not relevant to this inquiry.

PFEL argues that evidence on this and other issues was produced at the hearing to the extent permitted by the examiner; that the examiner first excluded evidence offered by PFEL then drew adverse

inferences to the detriment of PFEL in the absence of such evidence. The record does not support this contention. The examiner held only, and properly, that he would not direct PFEL to furnish information necessary to support its application.

Arguments have been directed by interveners to the conflicts between the proposed agreement and the objects and policy of the Act. In this regard interveners argue that present as well as proposed relationships between PFEL and Coastwise violate or may violate sections 803,[3] 804,[4] and 805 (a) of the Act.

While none of the interveners assert that a violation of section 803 exists, it is nevertheless argued that because of the corporate relationships hereinabove described, Coastwise may be an "associate company" of PFEL. For this reason, it is asserted, performance of services for PFEL by concerns in which present Coastwise stockholders also own interests *may be* in violation of section 803. This present relationship between Coastwise and PFEL would be strengthened, it is said, by the proposed agreement.

We do not find that the evidence adduced at the hearing substantiates a violation of section 803. While we recognize that the matter was incompletely explored, the evidence adduced was not sufficiently indicative of a violation to require rebuttal by PFEL.

It is also alleged, however, that the relationships between Coastwise and PFEL are or may be such as to make PFEL an indirect agent of a foreign-flag competitor, in violation of section 804. The violation, it is argued, would result from the possibility that Coastwise is (1) an "associate" or (2) an "agent" of PFEL and that PFEL has not been granted waivers, under section 804, in either capacity. This relationship we consider to be contrary to the purposes and policy of the Act. Although the proposed agreement specifically excludes PFEL participation in any agency services performed by Coastwise, the absolute separation of Coastwise common-carrier activities from Coastwise agency functions outlined in the proposed agreement cannot practically be achieved under the proposed organization. In Portland, for example, Coastwise employees, who will act under Coastwise supervision for K Line, a foreign-flag competitor of PFEL, will also perform services for PFEL under Coastwise supervision and will act for Coastwise under PFEL control and direction. Similarly, in Seattle, Coastwise employees will act for K Line as well as for Coastwise.

[3] Section 803 makes it unlawful for a subsidized operator, except upon written permission, to obtain services from any company in which the operator has a pecuniary interest.

[4] Section 804 makes it unlawful for a subsidized operator or an associate or agent of the subsidized operator to act as agent for a foreign-flag vessel with which it competes, except by permission under special circumstances and for good cause.

It is also argued by interveners that the proposed agreement would be prejudicial to the objects and policy of the Act in that Coastwise now performs and would, under the agreement, continue to perform agency services for PFEL at Portland although PFEL has not obtained written approval therefor under section 805 (a). No indication was given, however, of the manner in which this relationship would result in unfair competition or in prejudice to the objects and policy of the Act. Although we must require PFEL to seek written approval of that relationship, we see no present indication that approval would not be granted.

It is further argued that performance of the proposed agreement will in some measure divert PFEL officials and employees from full devotion to the off-shore trade, in contravention of the requirements of the PFEL subsidy contract. Since Coastwise agency duties, with certain exceptions, will be absorbed by PFEL's present staff, we must assume that the efforts of the present staff will, to some extent, be divided between off-shore and domestic duties. In the absence of any evidence of the extent of that division, we cannot determine the effect of the proposed agreement on PFEL's operations in foreign trade.

Finally, it is argued that no convincing reason has been advanced for giving control of a domestic operation to a subsidized line. We agree that the sole reasons advanced relate to minor operational and space allocation problems which would readily be resolved by amendment of the existing agency agreement. In the absence of some further indication of the desirability and need for the proposed agreement, the purposes and policy of the Act would not be served by grant of the application.

Application to Charter

Under the application PFEL seeks blanket permission to charter to Coastwise all unsubsidized transpacific vessels which are or may be owned or operated by it, the vessels to be delivered in any of various Pacific Northwest ports. Both parties would probably benefit from such arrangement. PFEL would receive several days' charter hire on otherwise unprofitable ballast legs of transpacific voyages and Coastwise would reduce losses now suffered in operation of the *North Beacon*.

That the application would result in unfair competition is argued by OGL, Public Counsel, States and Pacific-Atlantic, AFL, and APL, either in some or in all of the following respects:

(1) The *North Beacon* is presently being operated as a "fighting ship" with intent to drive OGL's sole vessel, the *Olympic Pioneer*, out

of the coastwise trade. The proposed chartering arrangement constitutes an increased service and poses a greater threat to OGL than the present service provided by the *North Beacon;*

(2) The proposal makes available to Coastwise, at no cost to itself other than charter hire when earned, an unlimited number of vessels for operation in the coastwise trade;

(3) Under the proposed charters, the amount of hire paid by Coastwise may be insufficient to reflect overhead and operational costs to be borne by PFEL. Under these circumstances, Coastwise will be placed in a better position than if it chartered vessels in the open market; and

(4) Under the proposed chartering arrangement, the *North Beacon* could be released by Coastwise for service in the Alaskan trade. Interveners allege that since there is no need for additional sailings in that trade, the proposed chartering arrangement will result in unfair competition to AFL insofar as it will release the *North Beacon* for service in that trade.

We have been presented with no evidence that the *North Beacon* is employed by Coastwise as a fighting ship. Sailings of the *Olympic Pioneer* have not been blanketed, and freight rates have not been reduced.

We agree, however, that unlimited chartering of PFEL's vessels to Coastwise would result in unfair competition. Coastwise would be able, because of the lack of cargo available for the northbound leg of the *North Beacon*, to operate all the vessels required in the Southbound trade without the necessity of finding cargo for the return leg. It may operate as many or as few such vessels as required with no continuing operational, maintenance, or overhead expense attributable to those vessels. No such solution is available to its competitor, which must, because of its ability to procure northbound cargo, continue to operate vessels both northbound and southbound. While it is recognized that, because of intensive rail and trucking competition, cargo offerings both northbound and southbound are limited, we cannot penalize OGL for its ability to obtain northbound cargo and to maintain a whole operation. Permission to charter an unlimited number of PFEL vessels for southbound voyages would impose such a penalty. Further, under this broad application competitors are not informed of the amount of competition which they will be required to meet.

We cannot state with any degree of certainty what, if any, costs, normally borne by Coastwise, would be absorbed by PFEL under the proposed charters. Under the charter form the amount of hire is stated to be "variable". Although witnesses for PFEL have stated that owned and demise-chartered vessels would be chartered at the market rate and that time-chartered vessels would be chartered at the

rate of hire paid by PFEL, these terms are not capable of precise determination. There is no charter market in the coastwise trade for southbound voyages, and the world charter market, if this be an accurate measure of the value of these services, may, at times, become so depressed as to fail to equal or exceed the cost of operation. Further, the rate of hire paid by PFEL on its time-chartered vessels may not represent the world market rate at the time of subcharter to Coastwise. If the world market is greater than the charter rate paid by PFEL the vessels would be made available to Coastwise at rates not available to OGL.

We cannot find that the proposed chartering arrangements would result in unfair competition to AFL. From the evidence before us, the release of the *North Beacon* for possible operation in the Alaskan trade, although hard competition, does not appear to be unfair competition.

It has been submitted that the chartering of PFEL vessels to Coastwise would be prejudicial to the objects and policy of the Act since:

(1) PFEL is seeking blanket approval of employment of its ships as a leg or adjunct of a nonsubsidized operation which in itself requires approval. Approval of these unsubsidized operations have to date been given on a voyage-to-voyage basis; and

(2) There is no need for additional sailings in the coastwise trade; the addition of an unlimited number of PFEL vessels would overtonnage the trade.

These arguments are well taken. As stated, approval of PFEL's unsubsidized transpacific operation has been granted only on a voyage-to-voyage basis. Full approval of PFEL's application to charter its unsubsidized vessels to Coastwise would also be a full approval of a leg of that operation without consideration of the effect on PFEL's competitors or other relevant inquiries.

We also agree that the proposed time charters, unrestricted in scope, would seriously overtonnage the coastwise trade, in which there is presently no need for additional sailings.

Finally, the logical extension of such operation of off-shore vessels in trades now served by exclusively domestic vessels would be the elimination of exclusively domestic operations. This result would clearly contravene the policy of the Act.

PFEL excepts to the examiner's recommendation that the application to charter would be prejudicial to the objects and policy of the Act and would result in unfair competition to exclusively domestic operators, asserting (1) that Coastwise would benefit from the arrangement, (2) that we could grant the application subject to such restrictions as would only permit the chartered vessels to be substituted

for the service now performed by the *North Beacon*, and (3) that we could require administrative approval of each charter and the rate of hire specified therein prior to delivery to Coastwise.

We find no merit to the arguments and suggestions advanced. First, although we have found herein that the arrangements probably would be beneficial to Coastwise, benefit to Coastwise is not the prime issue in this proceeding. Such advantage to Coastwise cannot be determinative of the issues where the application is otherwise prejudicial to the objects and policy of the Act. Second, we cannot approve, as suggested by PFEL, a revised application on which specific section—805 (a) hearings have not been held. To permit PFEL to charter vessels to Coastwise solely in substitution for the present *North Beacon* service would be to grant an application on which the interveners have not been heard. Although it might be argued that the unlimited application includes the request in the limited one, the arguments of interveners have been directed to a particular proposal and did not anticipate a limited application. We cannot assume that interveners would not, if given the opportunity, offer particularized, vigorous, and sound objections to the proposal now presented.

Similarly, we cannot grant the application subject to administrative approval of charter-hire rates prior to execution of each charter. As hereinbefore discussed, the amount of charter hire to be paid under the proposed arrangement is potentially a source of unfair competition. We cannot, then, exclude the amount of charter hire payable from the hearing requirements of section 805 (a).

Conclusions

1. To permit PFEL to act as general agent for Coastwise would be prejudicial to the objects and policy of the Act.

2. On the evidence before us we cannot state that the proposed general agency agreement would not result in unfair competition.

3. To permit PFEL to charter its unsubsidized vessels to Coastwise would result in unfair competition.

4. To permit PFEL to charter its unsubsidized vessels to Coastwise would be prejudicial to the objects and policy of the Act.

The applications are denied.

By the Board.

This report is concurred in and adopted by the Maritime Administrator.

(Sgd.) A. J. Williams,
Secretary.

FEDERAL MARITIME BOARD

No. M-63

COASTWISE LINE—APPLICATION TO BAREBOAT CHARTER A GOVERNMENT-OWNED, WAR-BUILT, DRY-CARGO VESSEL FOR USE IN THE PACIFIC COASTWISE/ALASKA/BRITISH COLUMBIA SERVICE

REPORT OF THE BOARD

This is a proceeding under Public Law 591 of the 81st Congress upon the application of Coastwise Line (Coastwise) for the bareboat charter of a Government-owned, war-built, dry-cargo Liberty-type vessel for use in the Pacific coastwise/Alaska/British Columbia service for a period of some four to six months. A hearing was held on the application and an initial decision was issued by the examiner. Exceptions thereto were filed by Alaska Freight Lines, Inc. ("AFL"), a competitor of Coastwise in the Alaska trade, by American Tramp Shipowners Association, Inc. ("ATSA"), and by Public Counsel.

The examiner found that the services under consideration are in the public interest, that such services are not adequately served, and that privately owned American-flag vessels are not available for charter on reasonable conditions and at reasonable rates for use in such services.

Coastwise is an Oregon corporation, certificated by the Interstate Commerce Commission to act as a common carrier between United States Pacific coast ports. It normally operates two services with five Liberty-type vessels, two owned and three operated under bareboat charter. Normally, four vessels are employed in the service (hereinafter "the Alaska service"), commencing at Long Beach, California, proceeding northbound to San Francisco, Columbia River, Puget Sound, and ports in southwest Alaska, returning by British Columbia ports to Puget Sound and California. The remaining vessel, until recently the bareboat-chartered *North Beacon*, normally operates on a 14-day frequency in a service between Portland, Oregon, and Long Beach, with occasional calls at San Francisco. That service is hereinafter described as "the Columbia River service."

Since late October 1954 Coastwise has not had five vessels employed in the two services. On October 27, 1954, the bareboat-chartered *Pacificus*, then engaged in the Alaska service, became strikebound at Long Beach as a result of a maritime labor jurisdictional dispute, remaining idle until January 28, 1955. In March 1955, when the redelivery of the *North Beacon* necessitated substitution of the *Pacificus* for the *North Beacon* in the Columbia River service, again the *Pacificus* became strikebound, remaining in an idle status during the period March 24, 1955, to April 16, 1955. During the entire period, commencing in October 1954, the Alaska service was served with three vessels, and the Columbia River service, during a great part of this period, was not served by any Coastwise vessel.

Under Public Law 591 we are required, prior to chartering a Government-owned vessel for use by a private operator in competition with privately owned vessels, to find that the service in which that vessel is to be employed is required in the public interest, that the service is not adequately served, and that privately owned American-flag vessels are not available for charter by private operators on reasonable conditions and at reasonable rates for use in such service. We do not consider the first statutory requisite to be here at issue. We agree with the examiner's finding that either or both of the services in which Coastwise is engaged is or are in the public interest, to which finding no intervener has excepted. The issue before us, however, is this: In which of these two services must inadequacy of service be shown?

Although the Government-owned Liberty-type vessel sought to be chartered would, under the application, be used in the Columbia River service, the vessel is desired primarily in order to free for Alaska service the Coastwise-owned or operated vessel now employed in the Columbia River service. This purpose is evident from the application itself, which advises that the specific vessel desired by Coastwise (the *Ira Nelson Morris*) is not fully fitted with special equipment necessary to operate in the Alaska service, while the vessel to be replaced is so equipped.

The application further states that the four-to-six-month charter period desired roughly coincides with the peak traffic movement in the Alaska service. Applicant has argued, however, that although Coastwise's total service, as augmented by the Government-owned vessel, would result in the operation of four rather than three vessels in the Alaska service, the application, nevertheless, ultimately has been made necessary by the loss of the *North Beacon* to Coastwise. Applicant concludes that, from these considerations, the service to be considered

is the Columbia River service, in which the *North Beacon* was engaged, and not the Alaska service.

Interveners AFL and ATSA argue that the Columbia River service is presently adequately served by a Coastwise vessel; that no additional vessel is needed for that service; and that, since a vessel would be released for Alaska service by grant of this application, it is the adequacy of the Alaska service which must be considered in the light of the statutory requirements and not the adequacy of the Columbia River service.

Interveners state that the Board has previously refused to bareboat charter a Government-owned vessel to an operator for use in a particular service in substitution for other vessels operating in that service, citing *Prudential S. S. Corp.—Charter of War-Built Vessels*, 3 F. M. B. 627 (1951).

This application does not involve a substitution of vessels within the meaning of the cited decision. The need for a vessel was created by the sale of the *North Beacon* by her owners and redelivery in March of this year. Although it is true that another Coastwise vessel, the *Pacificus*, has been employed in the Columbia River service since that time, it also is true that the vessel has been taken from its usual service in Alaska as a stopgap measure, with the intention of returning the vessel to its Alaska service. We find, therefore, that this application concerns the Columbia River and not the Alaska service. A substitution of vessels, as contemplated by the *Prudential* case, *supra*, would result, however, if the vessel were desired for the Alaskan service in order to retain the *Pacificus* in coastwise operation.

Having determined that it is only the Columbia River service which would be affected by this application, we must consider whether this service would be adequately served without the addition of a Government-owned vessel.

Applicant originally sought a four-to-six-month charter period at the annual rate of 15 percent of the statutory sales price, or, roughly, $8,000. During the course of the hearing, however, it became apparent that under a four-to-six-month charter, the estimated cost of breakout, repair, and lay-up of the Government-owned vessel might well exceed charter-hire receipts accruing at the standard rate. Coastwise, to meet this objection, amended its application by proposing to assume repair costs in order that the Government would not sustain an out-of-pocket loss as a result of the charter. We understand the amended application to be as follows: Coastwise would assume repair costs, which could be amortized over the period of a charter in an amount equal to charter-hire payments, repair costs to be credited against charter hire. The period of the amortization would be suffi-

ciently long to reduce monthly payments to a rate which Coastwise could afford to pay. That rate, it was alleged, was less than the amount of monthly charter-hire payments at the annual rate of 15 percent of the statutory sales price. From the evidence adduced at the hearing, the probable cost of breakout, lay-up, and repair would range from $40,000 to $110,000, with the highest figure the more probable one. Although Coastwise suggested a period of 12 months, the application was not limited to that period, but, rather, extended to a period within which Coastwise might operate the vessel without loss. Since we would require Coastwise to bear breakout, lay-up, and repair costs in addition to payment of charter hire, we consider that the period for which the vessel is desired, as amended, extends to an 18-month period.

We must consider then whether an inadequacy of the Columbia River service has been shown for such an extended period. Coastwise's only competitor in this service is Olympic-Griffiths Line, Inc. (OGL), not represented in this proceeding. OGL operates a single vessel, the *Olympic Pioneer*, between Puget Sound and Los Angeles Harbor via Portland and San Francisco. The vessel has been sailing full northbound and with some free space southbound. From the evidence adduced, it is clear that the Columbia River service requires regularity of service to coincide with specific needs of shippers of paper and lumber. There is evidence tending to show that OGL could not serve the trade without the aid of another vessel. The principal commodity carried by OGL is salt, handled on its northbound leg. Because of its carriage of salt, OGL is not in position to carry lumber regularly since the lifting of that commodity must be scheduled, on a common-carrier basis, to coincide with the absence of the shipper's proprietary vessel from the loading berth. Similarly, the evidence does not indicate that OGL, in the absence of Coastwise, would be able to serve the paper shippers now served by Coastwise. Since the trade under consideration is not seasonal, and since forecasts for the service indicate increased rather than decreased traffic, we conclude that Coastwise has met its burden of showing that the trade would be inadequately served for an 18-month period without the addition of the Government-owned vessel here sought.

Prior to application for the Government-owned vessel, and upon learning of the imminent sale and redelivery of the *North Beacon*, Coastwise contacted various ship brokers in an effort to replace that vessel, for which Coastwise had paid a $7,400 monthly bareboat rate of hire. A canvass of the market revealed but one offer of a suitable vessel at less than the general time charter market rate of approximately $60,000 per month or the monthly bareboat equivalent of ap-

proximately $15,000. The one suitable vessel offered was available for June–July, Florida delivery, at $8,500 per month, the highest rate which Coastwise was prepared to pay. The cost of positioning the vessel for operation in the Columbia River service, however, would have raised the monthly cost to Coastwise to $11,900.

Although the evidence is inconclusive on Coastwise's alleged inability, because of labor obstacles, to employ a time-chartered vessel in the trade, we consider that question immaterial to the issue here presented, namely, are privately owned vessels available for charter on reasonable conditions and at reasonable rates for use in the service? Reasonableness of rates must be measured in terms of the particular trade in which the vessel is to be employed. *Coastwise Line—Charter of War-Built Vessels*, 4 F. M. B. 211 (1953); *Pacific-Atlantic Steamship Co.—Charter of War-Built Vessels*, 3 F. M. B. 705 (1951). The vessels offered to Coastwise on time charter or bareboat-charter terms have been offered at rates beyond Coastwise's estimated income from operations in the Columbia River service.

Interveners variously estimate that Coastwise will have $16,000 or $16,500 available for charter hire. Those estimates, however, have been reached without regard to overhead allocation in this trade. Although a Coastwise witness testified that as an internal accounting matter all overhead is allocated to the Alaska vessels, overhead, wherever allocated, is nevertheless a genuine factor to be considered in determining funds available for payment of charter hire. We find, then, that the sum available for payment of charter hire will be about $7,000 per month, assuming applicant's optimistic traffic forecasts are justified. The vessel which was available for Florida delivery, then, whether or not still firm, it not now a reasonable rate for this service nor are other privately owned vessels available for charter at reasonable rates for use in this service.

On the basis of the facts adduced, we find and hereby certify to the Secretary of Commerce that:

1. The service considered is in the public interest;
2. Such service is not adequately served; and
3. Privately owned American-flag vessels are not available for charter by private operators on reasonable conditions and at reasonable rates for use in such service.

We recommend denial of Coastwise's application for an option to substitute the chartered vessel in the Alaska service in the event of casualty to one of the Alaska vessels. Whether or not applicant has shown an inadequacy of that service for the four-to-six-month peak movement season, the burden of proving such inadequacy of service for an extended period has not been met.

We recommend that any charter which may be granted be for a period of 18 months, subject to the usual right of cancellation by either party on 15 days' notice, and subject to annual review as provided in Public Law 591. We further recommend that all breakout, lay-up, and repair costs be for the account of the charterer, and that the basic charter hire for the vessel be set at a rate of 15 percent per annum of the statutory sales price, of which 8½ percent is payable unconditionally and the remainder of 6½ percent is payable if earned, on a cumulative basis.

By the Board.

JUNE 14, 1955.

(Sgd.) THOS. E. STAKEM, Jr.,
Acting Secretary.

FEDERAL MARITIME BOARD

No. 766

PONCE CEMENT CORPORATION—INCREASED RATE ON "TRAILER RATE CARGO N. O. S."

No. 769

PONCE CEMENT CORPORATION—RETURNED EMPTY PROPANE GAS TANKS

Submitted April 27, 1955. Decided July 7, 1955

Ponce Cement Corporation found to be a common carrier in its operations between Puerto Rico and Florida.

Publication of indivisible round-trip rates on trailers and propane gas tanks found to contravene section 2 of the Intercoastal Shipping Act, 1933, as amended, and to be an unjust and unreasonable practice under section 4 thereof and under section 18 of the Shipping Act, 1916, as amended.

Respondent's indivisible round-trip rates not found to have resulted in violation of section 14-Fourth or 16-First of the Shipping Act, 1916, as amended.

Respondent's dual common and proprietary carriage on the same voyage is not unlawful per se under sections 14-Fourth or 16-First of the Shipping Act, 1916, as amended.

Tariff trailer measurement requirements found to be unreasonable as arbitrarily selected.

John H. Green for Ponce Cement Corporation.

Mark P. Schlefer for United States Atlantic and Gulf-Puerto Rico Conference and member lines.

John C. Bradley for Trans-Caribbean Motor Transport, Inc.

James L. Pimper, *Edward Aptaker*, and *Leroy F. Fuller* as Public Counsel.

REPORT OF THE BOARD

BY THE BOARD:

Exceptions have been filed to the initial decisions of the examiners in the above-numbered proceedings, and both matters have been argued orally before the Board. We differ to some extent with the examiner's decision in each case. Exceptions taken and recommended findings not discussed in this report nor reflected in our find-

ings have been given consideration and found not related to material issues or not supported by evidence.

The two matters are presented on substantially similar facts. Respondent Ponce Cement Corporation (hereinafter "respondent") is a manufacturer of cement in Ponce, Puerto Rico, and is the owner and operator of a single vessel, the MV *Ponce*. A former lumber carrier now specially fitted for carriage of bulk cement, the vessel is employed primarily in carriage of respondent's own cement northbound from Ponce to Port Everglades, Florida, and, secondarily, in carriage of cargoes owned by other shippers between those ports.

Respondent has on file with the Board general commodity tariff FMB F–No. 2, applicable southbound from Miami and Port Everglades to Ponce. No tariff is on file for northbound service, but the southbound tariff includes in the rates for carriage of cargo in trailers and propane gas in tanks the return of the empty trailers and tanks northbound. Southbound, inasmuch as the residue of the bulk cement is not cleaned out of the holds, the vessel transports loaded trailers and tanks of propane gas stowed on deck, and small quantities of general cargo stowed in the forepeak and, occasionally, in No. 1 hold. Northbound, in addition to proprietary cement, the vessel returns the empty trailers carried full southbound and some general cargo in trailers.[1] Under the proposed indivisible round-trip rate for propane gas tanks, the vessel will return the empty tanks carried full southbound.

Respondent's services for trailers, to date, have been utilized only by Trans-Caribbean Motor Transport, Inc. (T. M. T.), a Florida corporation engaged in transportation as a common carrier by motor vehicle between Florida points and points in Puerto Rico under temporary authority granted by the Interstate Commerce Commission. Similarly, only one shipper has shown any interest in shipping propane gas tanks under the proposed tariff rate.

Docket No. 766

On protest of T. M. T. against a proposed tariff revision [2] increasing rates on cargo loaded in trailers from $1.00 to $1.20 per 100 lbs. and

[1] During the period November 27, 1953, through November 7, 1954, a total of 392,256 pounds of general cargo was carried in the so-called "empty" trailers. This practice was discontinued prior to the hearings herein.

[2] Proposed 5th Revised Page 74, Ponce Cement Corp. Tariff FMB F–No. 2, provides:

"Trailer Rate Cargo N. O. S.

General merchandise exclusive of hazardous or perishable cargo and self-propelled vehicles. Shipped in trailer bodies without wheels measuring 8′ x 8′ x 30′. Not exceeding a total weight of nine net tons of 2,000# to ton. Shipped on deck of vessel at shipper's risk. Rate includes return of empty trailer for discharge at Miami or Port Everglades at vessel's option. Rate based on gross weight of trailer and contents. Per 100 lbs. $1.20."

excluding self-propelled vehicles, the Board, under the authority of section 3 of the Intercoastal Shipping Act, 1933 (hereinafter the "1933 Act"), suspended application of the proposed tariff revision for a period of four months and ordered a hearing on the reasonableness of the rate and its lawfulness under the Shipping Act, 1916 (hereinafter the "1916 Act"). There was a hearing in the matter and U. S. Atlantic and Gulf-Puerto Rico Conference (hereinafter "the Conference") and member carriers[3] intervened in opposition to the suspended item. It was the position of the Conference that (a) an indivisible round-shipment rate is unfair and discriminatory in violation of the 1916 Act; (b) the proposed rate is illegal, since it contemplates employment of a vessel in common and proprietary carriage at the same time; (c) the differential between rates on trailer cargo and break-bulk cargo is unreasonable and unlawful; and (d) the tariff is unreasonable, since it is designed to meet the needs of one shipper.

The Conference did not challenge the level of the rates charged. Public counsel urged that the then current rate, as well as the proposed rate, was unreasonable, in that it provided measurements for trailers arbitrarily arrived at and unlawful in that it assessed handling charges and a charge for use of a place of rest without indicating that the rates are applicable tackle-to-tackle only. Public counsel further urged that the examiner find respondent's duality of operation to be not unlawful *per se*. Protestant T. M. T. withdrew from the proceedings after temporary suspension of respondent's common-carrier service and did not appear at the hearing. Although respondent appeared at the hearing, it neither filed briefs nor excepted to the examiner's initial decision.

The examiner found the suspended schedule unlawful only to the extent that it provides measurements for trailers arbitrarily arrived at and therefore unreasonable. He further stated that the record failed to support a finding of other violations of the 1933 Act or of the 1916 Act, as alleged.

The Conference excepted to the initial decision insofar as it failed to determine that (1) an indivisible round-voyage rate is *per se* illegal under section 2 of the 1933 Act; (2) in any event, discrimination, preference, and unfair competition by reason of such a rate have been shown; and (3) the dual common and proprietary carriage on the in-bound voyage has been shown to be discriminatory, preferential, and illegal. The Conference further urged that we treat the records in both proceedings as one record for the purposes of their disposal.

[3] Member lines are: Alcoa Steamship Company, Inc., Bull-Insular Line, Inc., Lykes Bros. Steamship Co., Inc., Waterman Steamship Corporation.

688-650 O - 63 - 42

Public Counsel excepted to the initial decision on the sole ground that it failed to conclude that the indivisible round-shipment rate contravenes section 2 of the 1933 Act and is an unjust and unreasonable practice under section 4 of the 1933 Act and under section 18 of the 1916 Act.

DOCKET No. 769

Proceedings in this matter commenced on protest of the Conference against the rate on propane tanks set out in proposed 2nd revised page No. 42 of respondent's Tariff FMB F-No. 2, providing as follows:

> Gas, Propane, in Tanks, on Skids, Strapped. Rate includes return of empty tank for discharge at Port Everglades or Miami at Vessel's option. * * * Each $60.00.

By order dated December 10, 1954, the rate applicable from Port Everglades and Miami to Ponce was suspended until April 13, 1955, and hearing was set on the question of whether publication of an indivisible round-trip rate is an unfair and unreasonable tariff regulation or practice within the meaning of section 18 of the 1916 Act or is violative of sections 14-Fourth and 16-First of the 1916 Act and of the 1933 Act. By voluntary action of respondent, approved by the Board, the rate was further suspended until May 18, 1955.

Hearing was held and the examiner found in his initial decision that (1) respondent is operating as a common carrier from Puerto Rico to Florida without having on file with the Board a proper tariff therefor; (2) the publication of the suspended round-trip rate on propane gas tanks contravenes section 2 of the 1933 Act and is an unjust and unreasonable practice under section 4 of the 1933 Act and section 18 of the 1916 Act; and (3) that the suspended rate is in violation of sections 14-Fourth and 16-First of the 1916 Act.

The examiner also found that, while respondent must separately state one-way rates on propane tanks, the publication of two rates on empties, one applicable to empties generally and a lower rate applicable to empties that went out full via respondent's vessel, would not be unlawful.

The examiner further found that Ponce should cancel the suspended rate in the manner provided by Rule 20 (g) of the Board's Tariff Circular No. 3, and that if it should continue to operate as a common carrier from Puerto Rico to Florida it should file with the Board a proper tariff therefor.

Both the Conference and Public Counsel excepted to the initial decision. The Conference excepted on the grounds that (1) the examiner should have found that Ponce may not publish as part of its

tariff a provision which states that cargo would be accepted only to the extent that space is not needed for the cement; (2) the examiner should have found that the joint proprietary and common-carrier movement inbound, while not *per se* illegal, has been shown to be discriminatory, preferential, and unfairly competitive; and (3) the recommended lower return rate on empty propane tanks must be limited to a reasonable differential on return tanks specifically identified as such.

Public Counsel excepted to the examiner's findings that the suspended rate is in violation of sections 14–Fourth and 16–First of the 1916 Act.

Discussion

We find that respondent's northbound carriage of empty trailers, empty propane tanks, and general cargo has been a common-carrier service for which a tariff must be filed with the Board in accordance with section 2 of the 1933 Act. On the facts as presented, we agree with the initial decision of the examiner in Docket No. 769 that publication of an indivisible round-trip rate on propane gas tanks is an unjust and unreasonable practice under section 4 of the 1933 Act and section 18 of the 1916 Act, since the rate limits the carriage of empty tanks to those that have been carried full southbound, and no other shipper of empty tanks could avail himself of this northbound service. We further agree that the quoting of the indivisible round-trip rate on tanks without separately stating the charge for northbound and southbound transportation is here in violation of the terms of section 2 of the 1933 Act.

We see no distinction between the indivisible round-trip rate on propane gas tanks in Docket No. 769 and the indivisible round-trip rate on trailers in Docket No. 766. We therefore disagree with the initial decision in Docket No. 766, and find on the facts presented that the indivisible round-trip rate on trailers is an unjust and unreasonable practice under section 4 of the 1933 Act and section 18 of the 1916 Act, and is in contravention of section 2 of the 1933 Act.

We do not find, however, as did the examiner in Docket No. 769, that the rate on propane gas tanks has resulted in actual violation of sections 14–Fourth and 16–First of the 1916 Act. Although we have applied the standards of those sections in determining the reasonableness of the rates under the 1916 Act and the 1933 Act, no actual violation of those sections has occurred. Under section 14–Fourth the Board's jurisdiction over unfair treatment and unjust discrimination is confined to existing practices and actions. *Carrier-Imposed Time Limits For Freight Adjustments*, 4 F. M. B. 29 (1952). No such

practice or party discriminated against has been shown to exist here. Similarly, only actual unequal treatment of two or more persons, localities, or descriptions of traffic constitutes a violation of section 16-First. Since there is but one shipper of propane tanks, no actual unequal treatment has been shown. *Huber Mfg. Co.* v. *N. V. Stoomvaart Maatschappij "Nederland"*, 4 F. M. B. 343 (1953) ; *Eden Mining Co.* v. *Bluefields Fruit & S. S. Co.*, 1 U. S. S. B. 41 (1922) ; *H. Kramer & Co.* v. *Inland Waterways Corp. et al.*, 1 U. S. M. C. 630 (1937) ; *United Nations et al.* v. *Hellenic Lines Limited et al.*, 3 F. M. B. 781 (1952) ; *Anglo Canadian Ship. Co., Ltd.* v. *Mitsui S. S. Co., Ltd.*, 4 F. M. B. 535.

The examiner's discussion of publication of two return rates was unnecessary to the decision in Docket No. 769 and does not require our consideration.

In exceptions to each decision, the Conference urges that the examiner improperly failed to find that such dual common and proprietary carriage on inbound voyages has been shown to be discriminatory, preferential, and illegal within the meaning of sections 14–Fourth and 16–First of the 1916 Act. The discrimination and preference is alleged to arise out of allotment of space; that is, since cement is a weight rather than a measurement cargo, any common-carriage cargoes carried on deck will displace an equal weight of cement. In this regard, reliance is placed by the Conference on a witness's testimony [4] that northbound common-carrier cargo would be shut out if the vessel should be needed for full cargoes of cement. But this statement does not establish actual violation of sections 14–Fourth and 16–First of the 1916 Act. At the most, it indicates an ability to discriminate or prefer, if necessary, on some future voyage. Whether the discrimination or preference which might occur would be unjust, undue, unreasonable, or unfair would depend on the facts alleged to establish a violation of the 1916 Act at that time. While, as argued, a violation of section 16 of the 1916 Act might arise out of undue preference by a carrier for itself in the capacity of shipper rather than carrier, undue preference must be actual and not potential, as here.

The Conference further urges that the Board cannot approve a tariff which allows a carrier to accept common-carrier cargo only to the extent that space is not needed for proprietary cargo, arguing that carriage of predominantly private cargo on the same voyage on which public cargo is carried is unlawful. In this regard the Conference excepts to the following language of the initial decision:

[4] Green, Tr. p. 48, Docket No. 769.

The tariff also should clearly state that the specific type or types of cargo would be accepted only to the extent that space was not needed for cement.

The argument is not convincing. Combined contract and common carriage was condemned in *Philip R. Consolo* v. *Grace Line Inc.*, 4 F. M. B. 293 (1953), upon a finding of actual discrimination. That decision did not consider the combination of proprietary and common carriage on the same vessel, which is here involved. The fact that private cargo exceeds public cargo in volume, without any showing of discrimination or preference, does not make the combined carriage unlawful *per se*. The motor carrier cases cited [5] in support of the theory that carriage of predominantly proprietary cargo is unlawful stand only as authority for the proposition that such carriage may be considered inconsistent with or repugnant to a motor carrier's certificate of public convenience and necessity and are not controlling or analogous here.

We do not understand the examiner in the foregoing quoted language to have implied that respondent may adjust his carriage of proprietary cement in such a way as to discriminate against or prefer certain shippers, or shut out all common-carrier cargo at his option where a full load of proprietary cement is desirable. Such actions, in addition to possessing potentialities for discrimination and preference, would violate the filing requirements of section 2 of the 1933 Act where done without intention to abandon or discontinue common-carrier service.[6]

The exceptions of Public Counsel have been answered in our discussion of the Conference's exceptions.

CONCLUSIONS

WE CONCLUDE:

1. The publication of an indivisible round-trip rate on propane gas tanks and on trailers contravenes section 2 of the 1933 Act and is an unjust and unreasonable practice under section 4 of the 1933 Act and section 18 of the 1916 Act.

---

[5] *Bartel Common Carrier Application*, 7 M. C. C. 755, 757; *Davidson Extension—Specified Commodities*, 51 M. C. C. 401, 404–5; *Shoemaker Common Carrier Application*, 44 M. C. C. 765, 767; *Eastern Trailer Transport Corp. Common Carrier Application*, Report of the Commission, sheet 5; *Dwyer and Anderson Common Carrier Application*, 11 M. C. C. 749, 751; and other cases.

[6] Although the Board has no authority to prevent discontinuance or abandonment of common-carrier service under the 1933 Act, such a discontinuance is to be distinguished from the duty to furnish reasonable service while engaged in business as a common carrier. See *Gulf-Puerto Rico Rates Via N. Y. & P. R. S. S. Co.*, 2 U. S. M. C. 410 (1940); *Lucking* v. *Detroit Nav. Co.*, 265 U. S. 346 (1924); *McCormick S. S. Co.* v. *United States*, 16 F. Supp. 45 (N. D. Calif. 1936).

2. Respondent's indivisible round-trip rates do not violate sections 14-Fourth or 16-First of the 1916 Act.

3. Respondent's dual common and proprietary carriage on the same voyage is not unlawful *per se*.

We agree generally with the decisions of the examiners in Docket Nos. 766 and 769, not inconsistent herewith. A separate order will be entered dealing with the conclusions herein.

By the Board.

(Sgd.) A. J. WILLIAMS, *Secretary*.

AMENDED ORDER

At a Session of the FEDERAL MARITIME BOARD, held at its office in Washington, D. C., on the 15th day of July A. D. 1955

No. 766

PONCE CEMENT CORPORATION—INCREASED RATE ON "TRAILER RATE CARGO N. O. S."

No. 769

PONCE CEMENT CORPORATION—RETURNED EMPTY PROPANE GAS TANKS

The Board, pursuant to its orders dated October 14, 1954, and December 10, 1954, having entered upon hearings concerning the lawfulness of the tariff schedules set forth in said orders, and the Board having suspended the operation of said tariff schedules and no decision having been issued prior to the expiration of the suspension period provided by law; and

Full investigation of the matters involved having been made and the Board, on July 7, 1955, having made and entered of record a combined report in both proceedings, stating its conclusions and decisions thereon, which report is hereby referred to and made a part hereof; and

The Board having determined, *inter alia*, that respondent Ponce Cement Corporation has engaged in the transportation of property between Florida and Puerto Rico under indivisible round-trip rates in contravention of section 2 of the Intercoastal Shipping Act, 1933; and

The Board having further determined that respondent Ponce Cement Corporation has engaged in the transportation of property from Puerto Rico to Florida without having on file with the Board a schedule of rates and charges therefor, in violation of section 2 of the Intercoastal Shipping Act, 1933; and

The Board having further determined that the trailer measurement requirements set out on fifth revised page No. 74 of Ponce Cement Corporation Tariff F. M. B. No. 2 are unreasonable, under sec-

tion 4 of the Intercoastal Shipping Act, 1933, in that they were arbitrarily arrived at without regard to the lifting or spatial capacity of the vessel, or to the range of measurements of trailers which reasonably could be accepted for shipment;

It is ordered, That respondent Ponce Cement Corporation be, and it is hereby, notified and required to cease and desist on or before August 15, 1955, and thereafter abstain from engaging in the transportation of property between Puerto Rico and Florida without the filing of proper schedules therefor in accordance with section 2 of the Intercoastal Shipping Act, 1933; and

It is further ordered, That these proceedings be, and they are hereby, discontinued.

This order supersedes and cancels the order heretofore served in these proceedings on July 13, 1955.

By the Board.

[SEAL] (Sgd.) A. J. WILLAMS, *Secretary*.

FEDERAL MARITIME BOARD

No. 768

ALLEGED PRACTICES OF COMPAGNIE DE NAVIGATION CYPRIEN FABRE (FABRE LINE) AND OF GULF/MEDITERRANEAN PORTS CONFERENCE

Submitted July 6, 1955. Decided August 18, 1955

Evidence found insufficient to support findings that Fabre Line has violated section 16-Second of the Shipping Act, 1916, in connection with shipments of certain commodities, including cotton, from United States Gulf and South Atlantic ports to Mediterranean ports in Italy and France.

Action of Gulf/Mediterranean Ports Conference in expelling Fabre Line from membership found not to be unfair or otherwise unlawful.

Periodic reports by Fabre Line ordered under the authority of section 21 of the Shipping Act, 1916.

Charges against respondent Lykes Bros. Steamship Co., Inc., and allegations under sections 15, 16-First, and 17 of Shipping Act, 1916, found not sustained.

Walter Carroll, *Wendell W. Lang*, and *Thomas F. Lynch* for Gulf/Mediterranean Ports Conference.

Burton H. White and *Elliot B. Nixon* for Fabre Line.

James L. Pimper, *John Mason*, and *Edward Aptaker* as Public Counsel.

REPORT OF THE BOARD

BY THE BOARD

This is a proceeding undertaken on the Board's own motion for the purpose of determining whether respondent Compagnie de Navigation Cyprien Fabre ("Fabre") or any other respondent [1] has violated sections 15, 16, or 17 of the Shipping Act, 1916 ("1916 Act"), and whether the Gulf/Mediterranean Ports Conference ("the Conference") acted unfairly in expelling Fabre from membership in the Conference. The order of investigation, dated November 4, 1954, also invokes the rule-making provisions of section 19 of the Merchant

---

[1] List of members of the Gulf/Mediterranean Ports Conference is attached as Appendix A.

Marine Act, 1920 ("1920 Act"), and section 204 of the Merchant Marine Act, 1936 ("1936 Act").

The investigation was undertaken upon receipt of information that the Conference had expelled Fabre from its membership, that Italian lines Navigazione Alta Italia (Creole) and Societa Italiani di Armamento (Sidarma) had resigned from the Conference subsequent to Fabre's expulsion, and that the Conference was in imminent danger of disintegration.[2]

Hearings were conducted before the Chief Examiner during the period February 10–25, 1955, and a recommended decision in the matter was served on May 19, 1955.

The examiner found Fabre guilty of granting rebates or rate concessions in violation of section 16-Second of the 1916 Act on cargoes of woodpulp, lubricating oil, carbon black, tinplate, and cotton, and found that the action of the Conference in excluding Fabre from membership was not unfair, unlawful, or unjustified. The examiner further found that Fabre, in violating section 16-Second, was guilty of competitive methods creating conditions unfavorable to shipping in the foreign trade of the type contemplated by section 19 of the 1920 Act, and recommended issuance of rules under that section in order to adjust or meet such conditions.

Countercharges of malpractices by Lykes, raised by Fabre, were found by the examiner to be unjustified.

Exceptions to the recommended decision have been filed by Fabre, replies thereto have been filed by the Conference and by Public Counsel, and oral argument on the issues has been heard. Contentions of the parties or requested findings not discussed in this report nor reflected in our findings have been considered and found not related to material issues or not supported by the evidence.

We adopt the examiner's findings of evidentiary facts, set forth as follows:

The evidentiary facts are as follows:

Parties. 1. All conference members were named respondents, but only the principal lines carrying cotton from United States Gulf ports to Italy are importantly involved. They are Fabre, Lykes Bros. Steamship Co., Inc. (Lykes), Navigazione Alta Italia (Creolè Line), States Marine Lines, Societa Italiani di Armamento (Sidarma Line), Bloomfield Steamship Co. (Bloomfield). Fabre is a French-flag line; Creole and Sidarma, Italian; the others, United States.

[2] At our request, the Conference postponed the effective date of its action in expelling Fabre until completion of the investigation. Similarly, Creole and Sidarma temporarily postponed their resignations from the Conference. Sidarma is no longer a member, although Creole has indicated its intention of remaining permanently in the Conference.

2. Fabre operates from the North Atlantic (since 1880), Great Lakes, and Gulf. It joined the Gulf-Mediterranean Conference in 1950, operated briefly, and resumed service in January 1954, actively since June. It began with one sailing monthly, increasing them approximately to two. The voyages averaged 30 days, the earlier ones 36 days. Sidarma joined the Conference in 1950, resigned in September 1951, and rejoined in December 1953. It has sailings every 5 or 6 weeks, transit time 31–35 days. Transit time of other lines is 14–20 days; sailings per month—Lykes 4, Creole 2 to 3, and States Marine 1 to 2. Creole has been in the Gulf-Italian cotton trade since 1902, Lykes since 1920.

Witnesses. 3. Testifying as Board witnesses: H. A. Carlys, Chairman and Executive Secretary of the Conference; Max J. Wolfson of Genoa, Lykes' Mediterranean manager; Beppe Ansaldo of Genoa, General Manager of Creole; Mario Scerni, Lykes' agent at Genoa; H. W. Roberts, Vice-President of Texas Terminal and Transport Co. and Creole's agent at United States Gulf ports; Alec C. Cocke, Vice-President in charge of traffic, Lykes; G. Parisi of Trieste, freight forwarder with branch offices at Genoa; and Thomas E. Stakem, Assistant Deputy Administrator, Maritime Administration. Stakem went to Italy in December 1954 to investigate charges of rebating, where he interviewed steamship representatives, cotton spinners (receivers), forwarders, and agents of United States cotton exporters. Later, he interviewed Roland Fraissinet, Fabre's president, in France.[3] Carlys also made certain investigations in Italy for the Conference in early October 1954.

Testifying for Fabre: Edward A. McDonnell, Vice-President of James W. Elwell & Co., Inc., Fabre's general agent for North America; Jacques Nahas, Permanent Delegate for Fabre in North and Central America; and Astor W. Norrish, partner in Lertora Bros. & Courtman, who is the agent of Fabre at Genoa, as well as agent of several other lines.

4. A considerable part of the testimony and evidence given by these witnesses consisted of information secured from persons abroad—from letters and documents or from interviews—who were not presented for cross-examination. Such evidence was admitted, over the objection of counsel for Fabre, on various grounds and for various purposes (infra). Most of it was admitted, among other reasons, because, whether true or false, it motivated the Conference in expelling Fabre.

[3] Stakem's interview with Fraissinet and Guido Mosti, a forwarder who patronizes Fabre, was reduced to writing by them and mailed to Stakem at his request. These letters, signed by Fraissinet and Mosti, are of record.

Thus it is relevant and material on the question of the fairness or unfairness of the action of the Conference.

Conference agreement. 5. The agreement (F. M. B. No. 134) governs the trade from United States Gulf and South Atlantic ports to Mediterraneon ports and others. It provides for strict adherence to conference tariffs, prohibits rebates and other concessions, and prohibits brokerage in excess of 1¼ percent of freight earned by initial carrier. It provides that at a meeting especially called for that purpose, after due notice, any party may be eliminated by a majority vote for any violation of the letter or spirit of the agreement proved to the satisfaction of the majority to be sufficient for expulsion, and confers certain duties of investigation on the Executive Secretary in event of a breach of the agreement.[4] This conference has had no case of expulsion since World War II, except Fabre's; and Lykes, the principal complaining line, has never before registered any formal complaint as a result of any loss of traffic due only to what its witness characterized as regular competitive practices.

CHARGES AGAINST FABRE

Woodpulp. 6. Fabre concedes that, contrary to conference tariff rule, it absorbed consignee's discharging costs at Marseilles, France, on the first 2 of 3 shipments of woodpulp, of approximately 500 tons each, which it transported from Fernandina, Fla., in January 1954, on the *C. G. Thulin*, February 1954 on the *Foria*, and June 1954 on the *Bastia.* The rule provides that discharge from the hold to dock at Marseilles is for account of consignee or cargo owner. Fabre's president, Fraissinet, upon learning of Lykes' protest made at a conference meeting in February 1954, wrote his agent Elwell on April 14, 1954, that the absorption (on a "lot" of woodpulp negotiated "under tackle" f. a. s.) was due to an error of the broker who closed the business in Paris, and who did not know that Fernandina was included in the Gulf Conference ports. He gave assurance of no further violations. After Fabre's expulsion in October 1954, Fraissinet advised Elwell, on November 30, 1954, (1) that the first two shipments were obtained for Fabre by Lykes' agent at Marseilles (Michel), (2) that "unless we are mistaken," Lykes' agent told Fabre that Lykes could not handle the shipments, and (3) that Fabre accepted the business on the same conditions that Lykes had allowed, including absorption of discharging costs.[5] Fraissinet stated to Stakem later that Fabre's

[4] The agreement also provides for a $10,000 deposit to insure compliance with conference rules and regulations, for arbitration to determine any assessment against such deposit in event of a breach of the agreement, together with the procedures for such arbitration.

The vote to expel Fabre was 10 to 2 (2 abstaining).

[5] Cocke denied these three assertions.

commercial service had held the opinion that Fernandina was not subject to control of the Gulf Conference.

7. Lykes had booked the first shipment referred to above for the shipper, Rayonier, Inc., New York, N. Y., on November 30, 1953, on the *Helen Lykes.* It was to load on December 20, 1953, and arrive at Marseilles on January 31, 1954, or 21 days ahead of the Fabre vessel *C. G. Thulin.* The Lykes booking was canceled by Rayonier on December 12, 1953, upon instructions from the consignee abroad, who requested January shipment. Lykes offered a vessel for January and Rayonier urged consignee to accept it. Shortly after the cancellation Lykes was requested, but declined, to absorb the cost of discharging at Marseilles.

8. The second shipment was offered to Lykes by Rayonier, but not actually booked. Request was made for absorption. The Fabre vessel *Foria* lifted the shipment on February 7, 1954, and arrived at Marseilles on March 21, 1954, 21 days after arrival of an available Lykes vessel. Lykes urged the Conference, in February 1954 and at subsequent meetings, to eliminate the discharge rule at Marseilles (without success), attributing to the rule loss of woodpulp shipments. As a result, the Conference chairman circularized the rule to member lines on February 19, 1954. The *Thulin* and *Foria* were primarily engaged in the North Atlantic-Mediterranean trade, and were the first Fabre vessels to carry woodpulp out of Fernandina within the Gulf-Mediterranean Conference range.

9. Lykes' Marseilles agent confirmed the third shipment. Lykes was requested to and did name a ship for it in the required position. And Lykes was informed by Rayonier that the cargo would be delivered to the vessel. When this shipment was offered, Lykes was requested not only to absorb discharging costs, but to allow a reduction of $1 under the conference rate. The Fabre vessel *Bastia* lifted this shipment on June 18, 1954, and arrived at Marseilles on July 13, 1954, or 16 days after arrival of an available Lykes ship. Nahas testified that Fabre got no more woodpulp from Fernandina after this shipment.

10. Prior to the third shipment, at a conference meeting on May 6, 1954, Lykes renewed its complaint about losing shipments, whereupon Fabre's Gulf agent offered the "broker's error" explanation of April 14, 1954. The Conference considered this explanation unsatisfactory because it referred only to a "lot" of woodpulp, whereas two shipments had already moved, and the third apparently was being booked for the *Bastia*, then scheduled to sail in late May. Accordingly, the Chairman cabled Fabre on May 6, 1954, for full information

regarding woodpulp bookings, particularly for *Bastia* late May, and reminded Fabre in effect that Fernandina shipments were subject to conference jurisdiction. Fabre replied on May 12 that it was observing conference rules, but that Lykes has been "offering our friend consignee to absorb discharging cost." [6]

11. Lykes renewed its charges at various conference meetings. Fabre did not offer any further explanation. It did not place before the Conference for decision the question as to what should be done about absorptions it had made. Finally Lykes, after notice of intent on October 7, 1954, made formal charges as to woodpulp and other commodities at the conference meeting of October 29, 1954, which culminated in the expulsion of Fabre.

Tinplate. 12. Wolfson (Lykes) produced a letter dated June 5, 1954, concerning a commission on tinplate shipments. He testified he received the letter from B. L. R. Trading Co. of Naples, which sells the product of Inland Steel Co., Chicago, in Italy. The letter (1) asked for "the usual commission paid to anyone who procures cargo", on 900 metric tons which had been carried by Lykes, (2) pointed out that 700 tons were scheduled to move via Lykes' vessels in July, August, and September 1954, with 2,000 tons to follow, but (3) warned that B. L. R. would not ship via Lykes so long as the commission remained unpaid. This correspondence was referred to Cocke (Lykes), who advised Wolfson that Lykes could give no commission, rebate, or concession, which information Wolfson relayed to B. L. R. on July 9, 1954. Thereafter, Lykes received no more shipments from B. L. R. who explained, according to Wolfson, that B. L. R., while they liked the service of Lykes, they had to have a rebate or concession to be competitive with other importers receiving same.

13. Lykes had a written booking, made on November 18, 1954, with Inland Steel's forwarder for 231 short tons of tinplate for loading at New Orleans about December 15, 1954, for shipment to Naples. It was canceled on December 8 and the shipment moved from New Orleans on Fabre's *Marseilles* in early January 1955.[7] The receiver was Ciro Piro, Naples, a customer of B. L. R. This was the first time Fabre had carried tinplate out of the Gulf. Prior to this, Fabre had carried tinplate from Inland Steel's plant at Chicago to Italy in its Lakes service.

14. Lykes was negotiating with Ubbelohde Co., New York, for a second shipment of 120 tons to be shipped from New Orleans Decem-

[6] See "Charges against Lykes" (infra).

[7] Although the booking was canceled on December 8, and presumably rebooked then with Fabre, Fraissinet (Fabre) wrote to Stakem on December 20, 1954, that Fabre had not disembarked any tinplate at Naples coming from the Gulf.

ber 26, 1954, to Bevilacqua and Co., Naples. After reserving space on the *Zoella Lykes*, Ubbelohde transferred the booking to Fabre upon instructions from the receiver. According to Cocke, Ubbelohde strongly urged the receiver to ship via Lykes' vessel, which was in good position, but the latter refused to do so.

15. Ubbelohde promised Lykes a third shipment of 50 tons for loading in February 1955, which Lykes ordered to its wharf. Cocke testified that Ubbelohde received instructions later from Bevilacqua to ship via Fabre. Eventually, the shipment was drayed from Lykes' wharf, and moved via a line other than Fabre.

16. Pursuant to instructions from Lykes, Wolfson made an investigation of the first two cancellations. As to the first shipment, he testified that Piro, the receiver, informed him that he (Piro) paid the conference rate of $17 per ton and that the cancellation was ordered by B. L. R. Wolfson said that Armando Facelli, a partner in B. L. R., told him, on January 14, 1955, in the presence of American Vice-Consul Moran at Naples, that B. L. R. could not do business without a rebate; that Facelli stated a reduction in the rate would be of no help as he needed a private rebate to distribute as a concession on the price of tinplate to customers in order to cope with competitors allegedly doing the same thing; that Facelli offered to prove rebating if Lykes would guarantee to match what B. L. R. was receiving elsewhere, which Lykes refused to do; that Facelli, after consulting some papers, stated that Fabre was offering him a rebate of $2 per ton, and that this offer, according to Facelli, was supported by a paper in his possession signed by Carlo DeLuca, Fabre's agent at Naples, and countersigned by a Fabre official whose signature was illegible.

17. In a letter to DeLuca dated February 17, 1955, Facelli denied having stated that his firm received a rebate from Fabre, and indicated his intention of suing the person making the accusation. And DeLuca, in an affidavit executed before American Vice-Consul Rogers at Naples, on February 17, 1955, denied that any rebates have been paid "to any Naples Importers" for any cargo from Gulf ports transported to Naples on Fabre vessels.[8]

18. As to the second shipment, Wolfson, on January 13, 1954, called on Alisandro of Bevilacqua, who is also a partner in B. L. R. He told Wolfson, according to the latter's testimony, much the same story as did Facelli, intimating that the cancellation was due to the fact that he would be better off financially if the shipment went via Fabre.

19. Cocke testified, as to the third shipment, that Lykes received

[8] Nahas denied Fabre gave a rebate of $2 per ton, and suggested that mention of such figure could have been in reference to a $2 differential in cost of shipping from Chicago via the Gulf and via the Great Lakes.

word from its Genoa agent on January 31, 1955, stating that Bevilacqua says: "Not prepared change without concession."

20. Ansaldo (Creole) instructed his agent at Naples, Gastaldi, to investigate the reason why tinplate shippers in the United States were receiving instructions to ship via another line. As a result of this request for investigation, Ansaldo received a letter dated February 5, 1955, addressed to Gastaldi by Camagna, a tinplate receiver, stating that he had been offered freight rates by other conference members, more advantageous than those indicated by Creole; and that if Creole would meet what had been offered by its colleagues, "by reducing substantially the conference freight rates", Camagna would do his best to favor Creole. The charges as to tinplate were made at the hearing and concerned shipments made after the expulsion of Fabre.

Lubricating Oil. 21. In July 1954, the Spanish Luboil Consorcio, Madrid, which had purchased 1,860 tons of lubricating oil for the Spanish Government, inquired of Lykes' Barcelona representative, O'Neill, about space for August shipment of a portion of such cargo. The oil was to be supplied one-half by Sterns, London, and the other half by Petroleum Specialties Co., New York. It was to move from Gulf to Spanish Mediterranean ports. Cocke testified that Petroleum Specialties considered the Lykes vessels in satisfactory position; that they asked for and were quoted a rate, i. e., the conference rate of $24 per ton; that Consorcio and Petroleum Specialties asked Lykes what "benification" or rebate would be given; and that when Lykes refused same they booked with Fabre about August 9, explaining to Lykes' representatives that Fabre got the business because it granted them a 10 percent rebate. The shipments moved on Fabre's *Marseilles* and *Dufour*, which arrived, or were scheduled to arrive, some days later than available ships of Lykes. The information regarding the alleged rebate was supplied to Cocke upon his instructions to O'Neill to investigate the loss of the bookings. Substantially the same information was given by O'Neill in letters to Stakem dated December 20 and 31, 1954, upon the latter's request for all facts regarding alleged rebating on lubricating oil.

22. Fraissinet admitted in his summary of his interview with Stakem that Fabre allowed its "broker" in Madrid, Maresa, a commission [9] of 10 percent on the oil shipments in question, but stated that Maresa had respected the conference tariff. Nahas testified that Fabre maintains two "agents" in Madrid, Maresa, the "nonofficial agent," and an elderly lady, Josefa di Gibert, the "official agent"; that Maresa does all the work—solicitation—and Gibert does noth-

[9] Stakem testified that Fraissinet said: "if [Maresa] passed [the commission] on he was very foolish, because it was intended merely as a brokerage fee."

ing, except perhaps to make contacts; that he (Nahas) had instructed Maresa to observe conference rates; and that the commission paid to Maresa was not brokerage.[10] The conference rule provides that brokerage shall not be paid abroad, and that it be limited to 1¼ percent.

23. Lykes complained to the Conference regarding the alleged rebates on lubricating oil at a meeting on October 7, 1954. And not having received any explanation from Fabre, it brought formal charges at the meeting on October 29, 1954.

Carbon Black. 24. Carbon black moves from the Gulf, primarily from Houston, to the French Atlantic port of La Pallice via lines of the French-Atlantic Hamburg-Range Freight Conference. Shippers and receivers require and insist upon a direct service. The rate is 35 cents per cubic foot to La Pallice. In August 1954, two parcels of carbon black which had been booked by the French Line and Bloomfield, respectively, for La Pallice were canceled and rebooked with Fabre from the Gulf to Marseilles. This, despite the fact (1) that La Pallice is a regular port of discharge for carbon black, (2) that cargo delivered at Marseilles takes a higher rate (40 cents) and has to bear the additional cost of discharge, and (3) the Fabre vessels scheduled to lift the cargo were indirect sailings to Marseilles. Fabre had asked the Conference, on August 27, 1954, to reduce the 40-cent rate to 35 cents, but it refused to do so.

Nahas testified that in June 1954 he and Fraissinet solicited carbon black from the representative of two French firms in New York, quoting the conference rate of 40 cents, which he said was actually charged on the shipments without rebate or concessions. His recollection was that the booking was made in late June or early July. He erroneously thought that the rate to La Pallice was 40 cents instead of 35 cents.

So far as the record shows, no charges as to carbon black were made against Fabre at the conference meeting on October 29, 1954, when Fabre was expelled. However, Cocke testified that Fabre's agent in the Gulf was fully informed about the matter.

Cotton—Movement of cotton. 25. Cotton is the most important commodity moving in the Gulf-Mediterranean trade. And the movement to Italy is a very substantial part of the cotton exported from the Gulf. Traditionally, it has moved c. i. f., freight prepaid in United States currency, the United States exporter selecting the carrier. Dollar shortages influenced a trend toward f. a. s. purchases of f. o. a. cotton, beginning in 1952, and the Conference allowed Italian lines only to accept shipments freight collect, payable in lire

[10] Nahas did not know if Gibert was paid any fees. When asked whether Maresa solicited for any other lines, he replied: "I don't believe so, no, I am positive of that."

688-650 O - 63 - 43

on f. o. a. cotton. But routings were not usually designated by Italian receivers until Fabre's entry into the trade. The following table summarizes the cotton carryings to Italy of the conference lines during the calendar year 1954, and shows the average carryings per sailing prior to Fabre's entry into the cotton trade, and subsequent thereto:

TABLE I

Line	Sailings (total)	Cotton (bales)	Average bales per sailing		
			1954	Jan.–May (before Fabre entry)	June–Dec. (after Fabre entry)
Lykes	46	90,556	1,970	1,951	1,980
Creole	24	68,815	[1] 2,870	1,208	[1] 3,862
Fabre	11	51,540	4,680	0	[2] 5,154
States Marine	21	49,202	2,343	1,757	2,782
Sidarma	9	18,050	[1] 2,010	420	[1] 2,728
		278,163	Average: Fabre		5,154
			Average: Other lines		2,686

[1] The carryings of Creole and Sidarma were materially increased by Mosti's patronage in June, when Fabre was unable to handle cotton on a collect basis.
[2] Based on 10 sailings during June–December.

Forwarding of cotton. 26. Cotton landed at Genoa is received by a freight forwarder who clears it through customs and arranges for delivery from warehouse at dock to mill at final destination. Accessorial services consist of stevedoring, weighing, sampling, verification of tares, loading to rail or truck, and weighing of truck or rail car. Tariff charges for these services are fixed and regulated by a port authority, the "Consorzio Autonomo," which is a public body. Tariff charges also apply to rail transportation. Truck charges are open to negotiation, but are generally known in the market. On behalf of the consignee, the forwarder pays the above charges, ocean freight, and certain fees, taxes, and custom duties which are also fixed by governmental authority.

Soliciting and forwarding activities of Guido Mosti. 27. The following paragraphs (28, 29, 30, 31, 32, 33, 34) contain a summary of Stakem's testimony regarding his interview with Mosti in Italy on December 14, 1954. It is confirmed in essential respects by Mosti's letter to Stakem of the same date, with supporting documents furnished by Mosti, all of which are of record.

28. Mosti owns or controls two forwarding firms—Spedixioni Cotoni Alta Italia (S. C. A. I.), Milan, and Docks Cotoni, Venice (hereafter collectively called Mosti).[11] He handles approximately 60 percent of cotton shipments to Italy. His policy is to try to get

[11] Norrish (Fabre) testified that a number of cotton spinners have an interest in S. C. A. I.

a discount or rebate from all shipping lines of about $2 per bale.[12] He patronized, and obtained a 10 percent discount from, Sidarma in 1953 before it rejoined the Conference. He had arranged in March 1954 for a reduction of 15 percent with the Flomarcy Line, and thereafter offered "a special rebate of 15 percent" on cotton shipped f. o. b. freight collect, payable in lire. This offer was made to at least two receivers—Cotonificio di Solbiate on April 14, 1954, and Cotonificio Legler on April 20, 1954. The offer to Solbiate was withdrawn on April 29, 1954, because the Flomarcy service failed to materialize. On that date, Mosti requested the Conference to grant a rebate, which was denied on May 10, 1954. In the meantime, in late April or early May 1954, Mosti visited Norrish, Fabre's agent in Genoa, to inquire about Fabre's new service. He did not know of this line until he read its advertisement of the *Bastia* sailing scheduled for late May. Mosti asked whether, and was assured that, Fabre had a regular service and would book cotton collect, payable in lire.

29. Such booking was contrary to the conference rule which required prepayment of freight in United States dollars, except as to Italian-flag lines. Norrish testified he had no knowledge then of this rule (infra). Mosti booked 1,000—2,000 bales with Norrish on a collect basis, on the *Bastia*.[13] Moreover, the bookings were made at the contract rate of $1.45 per cwt. rather than the applicable noncontract rate of $1.75, although none of Mosti's customers had executed conference contracts. Upon protest of the Conference (infra), Fabre canceled this booking about May 13, 1954, and Mosti transferred the cotton to the Italian lines Sidarma and Creole. But after the conference rule was changed on June 14, 1954, to permit collect shipments, Mosti resumed business with Fabre.[14] (See infra.)

30. Mosti stated, and Norrish testified, that no rebate was requested at their meeting.[15] As to rebates, Mosti stated that he "thought that it would be more opportune to direct our request directly to the management of the company in Marseilles." (Fraissinet confirmed that such request was made, but said it was denied, and that Fabre granted no rebates). Also, Mosti denied that he had received any rebates from Fabre.

---

[12] Mosti sought to obtain a rebate or reduction from Creole in 1951 and from Lykes, without success.

[13] According to Ansaldo (Creole), Norrish told him on May 17, 1954, that 6,000 bales were fixed for the *Bastia*.

[14] In July 1954, Mosti had "very considerable" space engaged with Fabre, and in September 1954 he had space engaged with Fabre for 40,000 bales.

[15] When asked if he thought it strange that Mosti had asked rebates of other lines and not Fabre, Norrish testified that when he informed Mosti that Fabre follows the conference rates, presumably Mosti "didn't have the courage to ask me for any rebate."

31. Mosti stated that he has favored Fabre with his business—amounting to 80–90 percent of Fabre's cotton carryings (Norrish)—because of (a) the fight Fabre made in the Conference for the change in the prepaid freight rule, and (b) the fact that Fabre's agent in Genoa extends credit to Mosti on freight monies, which Mosti pays gradually as he receives payment from the cotton receivers. As of December 9, 1954, the credit was approximately 63 million lire, or about $100,000.[16] It is noteworthy that by May 6, 1954, Fabre had booked for Mosti substantial quantities of cotton on its first ship, the *Bastia*, on a freight collect basis, payable in lire, contrary to the conference prepaid freight rule. This was prior to any fight being started for a change. In fact, it was at a time when Fabre did not know of the rule, according to Norrish. Also, it was at a time when the exception to the rule permitted Mosti to ship via Italian lines Creole and Sidarma, freight collect, payable in lire.[17] Note that Mosti discontinued using Sidarma's services, except for the unusual shipment of June 1954 (infra), after that line withdrew its discount in January 1954.

32. Mosti stated that he bills his customers for ocean freight at the conference rate, and that he receives no rebates thereon. Stakem secured from Mosti's customers several invoices showing that the conference rate was billed. These are accompanied by copies of bills of lading issued by Fabre, indicating that Fabre also charged the conference rate. However, Mosti also bills the receiver for accessorial charges and fees on a separate invoice. According to Stakem, and at his request, Mosti consented with some reluctance to furnish copies of these involves on certain designated shipments. But thus far he has failed to do so, even after a second request.

33. Stakem called Mosti's attention to an over-all lump-sum price the latter had quoted to certain receivers in August 1954, including Legler, who had furnished Stakem with a statement of the offer. This was an innovation since lump-sum quotations of forwarders in Italy customarily are confined to charges and services which they directly handle or perform, i. e., from discharge port to mill. The offer included cost of ocean freight, forwarding fee, and accessorial and transportation charges incurred in handling cotton from ship-

---

[16] Fraissinet stated he never authorized extension of credit, and that it was the agent's responsibility. There is no conference rule governing credit. Mosti also pointed out to Stakem that there had been complaints about Lykes' and Creole's handling of cargo.

[17] The fight started on May 12, 1954, when Fabre threatened to resign if the rule were not changed. (See infra.) The change in the rule eliminated an exchange difficulty and made it possible for Italian spinners to buy more cotton.

side to receiver's mill. Mosti's price was 24,300 lire per ton.[18] (See table II, col. (1).) This, less ocean freight at the conference rate of $1.45 per 100 pounds (20,000 lire per ton), leaves 4,300 lire per ton for accessorial charges, inland transportation, forwarding fee, etc. The charges of a competing forwarder, Gandolfo (S. A. C. I. S. A.), who handled Legler's business, computed at a comparable lump sum figure, were 27,389 lire per ton, which amount, less ocean freight, equals 7,389 lire per ton. (See table II, col. (2).) Thus, Mosti's price was 3,089 lire ($5) per ton or approximately 750 lire ($1.20) per bale lower than that of Gandolfo's.

34. Gandolfo is head of the freight forwarders association at Genoa. At Stakem's request, he computed direct accessorial charges from official tariffs of the Consorzio at Genoa, which, including trucking (from Genoa to Bergamo) and insurance but no forwarding fee, amounted to 5,865 lire per ton. (See table II, col. (3).) This amount, which is represented to be the minimum direct, actual cost without forwarding fee, is 1,548 lire higher than Mosti's quotation, which includes his forwarding fee. About the only flexible item in the forwarder's charge is his fee which, according to Parisi, ranges from 700 ($1.10) to 1,700 lire ($2.70) per ton, or about 175 ($.27) to 425 lire ($.68) per bale. This is far less than the 3,089 lire per ton difference between the offer of Mosti and Gandolfo.

TABLE II

Charges per ton-lire	Mosti (1)	Gandolfo (2)	Tariff (3)
Accessorial	X	3,889	3,865
Inland transportation	X	2,000	2,000
Forwarding fee	X	1,500	
Subtotal	4,300	7,389	5,865
Ocean freight ($1.45 cwt.)	20,000	20,000	19,983
Total (lire)	24,300	27,389	25,848

35. As noted, Mosti's offer averages $1.20 per bale lower than Gandolfo's. Both inland transportation costs ($0.80 per bale) and the forwarding fee ($0.27 to $0.68 per bale) add up to barely enough to make up the difference. Thus, assuming that Mosti charges the full ocean freight, he could underquote competing forwarders, to the ex-

[18] This covered "Maritime dues from the loading ports of the Gulf; Disembarking at Genoa or at Venice; loading and delivery to your establishments;" also weighing, sampling, checking tares, "fidejussion" (custom bond), forwarding fee, etc. Mosti told Stakem that sometimes he cuts his price to various spinners, and that it would not necessarily be the same to all spinners.

tent he has done, only if he were able to move the cotton inland substantially free of any cost, and to operate without any fee to cover his overhead and profit.

36. According to Stakem, Gandolfo said he could not meet Mosti's offer to Legler and still charge the full conference rate. When informed of this statement by Stakem, Mosti, according to Stakem, said that his price represented all of the charges plus a fee profitable to him.[19]

The BASTIA *bookings.* 37. As stated, the collect bookings at contract rates were made by Fabre with Mosti on the *Bastia* in late April and early May 1954. On May 5, 1954, Creole and Lykes learned of these bookings, which were allegedly made at a 10 percent reduction of the conference rate. A meeting of the Conference was held on May, 6, resulting in an exchange of cables between the chairman and Fabre. In these the chairman warned Fabre against violation of the rules concerning collect shipments and contract rates, and asked for details of bookings on the *Bastia* and *General Dufour*, and alleged concessions in connection therewith. Fabre cabled its resignation on May 11, 1954; and on May 12 cabled that no bookings would be made on the *Bastia* contrary to rules (for which the Conference expressed its appreciation), and offered to withdraw its resignation if the rule were changed to permit it to accept freight collect in lire. Fabre's position was that otherwise it could not participate in the traffic since United States-flag lines obtained 50 percent of f. o. a. cotton and Italian-flag lines were in a preferential position because they could accept collect freight payable in lire. The non-Italian-flag lines, except Fabre, were reluctant to change the rule because of the lack of convertibiliy of Italian lire into United States dollars.

38. In the meantime, Wolfson (Lykes) and Ansaldo (Creole) remonstrated with Norrish (Fabre) against the collect bookings, at Genoa on or about May 4. Later, at a meeting of the Genoa committee of the Conference, Norrish explained that he did not have a copy of the conference tariff; that until then he had no knowledge of the Conference rule against collect shipments; and that the bookings were based upon his erroneous assumption that the rules of the Conference were the same as those of the Gulf-French Atlantic-Hamburg Range Conference, which did permit such arrangement.[20] Norrish communicated with Fabre at Marseilles for instructions, and was ad-

---

[19] Norrish testified that he was told that Mosti owns some trucks and consequently saves on inland transportation costs.

[20] However, both Nahas and Norrish testified that in January 1954 Nahas told Norrish that Fabre was a member of the Gulf-Mediterranean Conference, and that the rates and rules of that conference had to be observed.

vised not to accept further bookings. Thereupon, the bookings were canceled and Mosti was required to book with Sidarma and Creole, who were permitted to accept collect shipments. Mosti's shipments, on their June sailings, were substantial.

39. The Conference, following further exchanges of cables and meetings both at New Orleans and Genoa, extended permission to Fabre to load 4,500 bales on the *Bastia*, freight collect, which sailed on June 3, 1954, with 2,289 bales. Thereupon, Fabre withdrew its resignation. On June 14, 1954, the Conference amended the rule to permit all members to book shipments freight collect, payable in lire.[21]

Mosti's offer—charges of rebating. 40. As stated, Mosti resumed business with Fabre after the change in the rule, and since then very little Mosti-controlled cotton has been handled by Lykes, Creole, or any line except Fabre. On the other hand, Fabre was markedly successful in securing cotton (see table I), most of which was controlled by Mosti. Mosti actively solicited the cotton industry in Italy, making the offer of substantial savings heretofore mentioned. His offer to Legler of August 1954 (ante) was transmitted by Legler by letter to his forwarder Gandolfo, who relayed the letter to the conference chairman (Carlys) by letter of September 11, 1954. Legler stated in effect that the over-all price (Mosti's) was so greatly below the usual cost, based on Legler's experience, that the difference could not be explained except by concluding that some line "grants rebates in no mean measure and others do not." Legler regretted having signed the cotton contract with the Conference, and both Legler and Gandolfo demanded an explanation from the Conference. This correspondence was circulated to the conference membership.

41. Ansaldo testified that in August 1954, Gandolfo, Parisi, and Cabella, cotton forwarders of Genoa, visited him and reported that a conference line was granting rebates through Mosti.[22] They complained of losing business to Mosti, and demanded some form of relief in meeting his competition. Wolfson testified he received the same information from Gandolfo and Parisi. Carlys testified that

---

[21] Wolfson testified that just prior to the change in the rule the traffic manager of Fabre's Genoa agent called him by phone to borrow a Gulf-Mediterranean tariff. Wolfson asked how the bookings were being made then, and the purported reply was that quotation was made on basis of the North Atlantic Conference tariff "less the usual dollar." (Norrish testified that such statement could not have been made.) Wolfson stated he reported this conversation to his principals by letter of June 19, 1954; also to Ansaldo, chairman of the conference committee at Genoa. The chairman wrote to Fabre's agent about the matter, who replied, according to Wolfson, that they did not know of the existence of a Gulf-Mediterranean tariff until they so heard from Wolfson and Ansaldo.

[22] Norrish states that there is a bitter personal animosity between Gandolfo and Mosti, and that Gandolfo himself has requested a rebate from Fabre. So far as Norrish knows, there is no animosity, other than ordinary competition, between Mosti and Cabella and Parisi.

pursuant to his duties as chairman, he visited Hefti, Managing Director of Legler, at Bergamo, Italy, and Legler's forwarder Gandolfo, in early October 1954, to investigate Legler's complaint about rebating and the cotton contract. Reportedly, Hefti said he was being harmed by the advantages given his competitors; Gandolfo said the only "room" for rebating was in the ocean freight since the other incidental charges are fixed prices; and Hefti showed Carlys Mosti's written (August) offer of 24,300 lire per ton on f. a. s. and f. o. b. transactions. (See table II, col. (1).) Mosti did not name any particular line.[23] Staken testified that he interviewed Hefti and Gandolfo; that Hefti furnished him with a statement of Mosti's offer, and that Gandolfo told him he could not meet Mosti's offer and still charge the full conference rate; but that Gandolfo did make an offer to Legler to cut the differential between his price and Mosti's by 50 percent.

Cancellations of bookings. 42. Coincidentally with the dissemination of Mosti's offer and the charges of rebating, there occurred a series of cancellations of cotton bookings via Creole and Lykes, and rebooking of the cargo with Fabre. They began in late August 1954 and continued through September, October, November, and December 1954 and January 1955. Creole received cancellations of seven written and seven verbal bookings; Lykes received five cancellations of firm bookings. These lines were advised by the exporters in the Gulf that they were obliged to make the cancellations and rebookings upon instructions from the importers abroad.

43. Of these shipments, three had actually been wholly or partly delivered to the Creole dock and had to be physically removed to the Fabre dock. In one instance, the transfer cost was $0.75 to $1 per bale. Neither line had ever before experienced a similar series of cancellations, all in favor of a single competitor.[24] In no case was a cancellation attributed to any defect in the service of Lykes or Creole, or to any particular merit in the service of Fabre. On the other hand, Lykes and Creole are older in the trade and both have a more frequent and regular service than Fabre, particularly Lykes.

44. The cancellations caused delays in shipment as much as 17 days. The record establishes the fact that cotton is a high-value commodity; that shippers usually insist upon fast service in order to secure prompt

[23] Later, Mosti, after learning that his offer had been revealed to Gandolfo and the Conference, advised Legler it could use any line of its choice in connection with the offer, which apparently was not accepted. However, in connection with Mosti's offer to another spinner, Solbiate, he advised the latter on September 17, 1954, that Fabre Line would be used.

[24] McDonnell (Fabre's United States agent) has never experienced such a series of cancellations and would regard as unusual such cancellations if all were in favor of a single competitor.

payment for cotton; that delay increases carrying charges for warehousing, insurance, and interest; that if instructed routing continues, shippers indicate they will have to pass the charges on to receivers; and that instructed routing by the receiver interferes with the warehousing and efficient shipping of cotton because the receiver in Italy cannot keep currently informed of vessel schedules from the Gulf.

45. Roberts testified as to one cancellation of a booking with Creole, that some part of the shipment could not be made ready for the Fabre vessel designated; that the exporter sought permission from the buyer to load on a vessel of another line; and that the buyer replied that he was willing to be assessed carrying charges as much as $1 per bale, but insisted that the cotton move via the Fabre Line.

46. Cocke testified that in the course of his solicitation a complaint was made to him by an exporter that, in a case where contrary to instructed routing via Fabre the exporter had shipped via Lykes because its vessel was in better position, the exporter received a complaint from the Italian buyer that it cost the latter $112.75 more to ship the 100 bales via Lykes. That is, the buyer lost $1.13 per bale on the shipment.

47. Some of the bookings canceled and transferred to Fabre covered cotton to Venice, which is served by Lykes and Creole. Fabre has never called at Venice, a fact known to the receivers abroad. Notwithstanding the fact that discharge costs at Venice run about 1,000 lire ($1.50) per ton lower than at Genoa, Norrish testified that receivers have been content to accept delivery by Fabre at Genoa without any protest, explanation, or request for compensation. He conceded that there was an inconsistency in such practice, was puzzled by it, and has never been able to find an explanation for it.[25]

Fabre's explanation of cancellations and instructed routings. 48. After the cancellations became pronounced the Conference, through its Genoa committee, on October 4, 1954, called on Norrish for an explanation of the volume of instructed f. o. b. routings via Fabre.[26] Norrish's reasons were that (1) Fabre has an internal organization in the United States second to none, and (2) Mosti was grateful to Fabre for causing the Conference to change its rule to permit payment of freight in lire. At the hearing he added, (3) that Fabre had given "good service by keeping ships waiting in New Orleans and in other small ports"; and (4) that his firm extended credit to Mosti, as they "give credit to

---

[25] Norrish testified that recently a receiver requested him to forward a shipment from Genoa to Venice at Fabre's expense, and that such request was still under consideration. He thinks that Lykes and Creole absorb such expense when unable to make delivery at Venice.

[26] This meeting, in Genoa, was attended by Wolfson, Ansaldo, Roberts, and Chairman Carlys, who sent a report of the proceedings, the same day, to the Conference.

any other reliable firm." Norrish testified that neither his firm nor Fabre had ever granted Mosti or spinners any rebates or other concessions. When asked on cross-examination how he knew that Fabre did not pay rebates, he answered that he did not know but he presumed Fabre would inform him about it, in spite of the fact that Fabre would be violating the law and the conference tariff and rules.

49. Additional reasons for Fabre's success were given by Nahas at the hearing and by Fraissinet to Stakem. Nahas mentioned Fabre's willingness to call at secondary ports like Brownsville, Texas, and (5) Fabre's breaking of the alleged monopoly of the business by Lykes and Creole. Fraissinet added that (6) Fabre resumed service "at the psychological moment when certain importers were in litigation with certain companies, members of the Conference," no explanation given; and (7) "personal ties" between the directors of S. C. A. I. (Mosti's firm) and Fabre.

50. As to (1), Fabre's representation in the United States—Mosti's traffic is almost invariably f. o. b. and the routing is instructed by Mosti or his clients in Italy. The bookings are made and the freight monies are collected in Italy.[27] Upon cross-examination, Norrish could say only that the United States organization prevents "monkey business," i. e., attempts by competitors to divert cargo to themselves in spite of routing orders in favor of Fabre.

51. Regarding (2), Nosti's gratitude for Fabre's forcing a change in the conference payment rule—prior to the change, Italian receivers had the services of Creole and Sidarma, offering about three sailings per month, which accepted payment in lire.

52. With respect to (3), Fabre's service at secondary ports—while Fabre made four calls at Brownsville between August and December 1954, Creole made 6, Sidarma 3, States Marine 5, and Lykes 8. As noted, Fabre does not call at Venice. The frequency and regularity of service of Lykes and Creole at New Orleans surpasses, and that of States Marine equals, that of Fabre. Fabre's vessels are slower than those of other conference lines.[28]

53. Respecting (7) "personal ties" between Fabre and Mosti—the first contact Mosti had with Fabre resulted from his reading of a newspaper advertisement of the new service beginning with the proposed May sailing of the *Bastia*. Upon this brief acquaintance, Mosti proposed to give between 5,000 and 7,000 bales to Fabre for the *Bastia*.

---

[27] McDonnell testified that Elwell (Fabre's United States agent) has never booked any cargo for Fabre at other than conference tariff rates.

[28] Norrish testified that a regular service for cotton is more important to spinners than a speedy service. The consensus of other steamship witnesses was that time in transit is a very important factor.

Formal charges against Fabre—investigation of preference for Fabre. 54. Following the October 4 meeting at Genoa, Lykes, feeling that Fabre's explanation was unsatisfactory, gave notice at a meeting of the Conference on October 7, 1954, that at a meeting called for October 11, 1954, it would move to expel Fabre from the Conference on charges of granting rebates or other concessions with respect to cotton and other commodities.[29] As the cancellations continued, Cocke cabled Wolfson to investigate the reasons for the cancellations and for Lykes' failure to obtain cotton bookings. Cocke testified that the invariable reply was that Fabre was granting rebates or other concessions, which testimony was confirmed by Wolfson.

55. In one instance, on October 26, 1954, Wolfson and Morgavi, traffic manager of Creole, visited Cotonificio Vittorio Olcese, a spinning firm which had transferred its business from Lykes and Creole to Fabre.[30] In response to their solicitation for his business, the general manager Pozzi told them, according to the testimony of Wolfson and Ansaldo, that he had been offered a rate concession from a conference line through a forwarder, but did not identify them. Later, in November or December 1954, Creole received a cancellation from a Memphis exporter of a booking of 400 bales of cotton destined to Olcese, which was rebooked via Fabre Line. Olcese had no complaints to make about the service afforded by Creole.

56. On another occasion, on November 10, 1954, Wolfson had his representative in Milan, Cicogna, interview the spinning firm of Cotonificio Bresciano—Ottolini regarding some cotton which had been booked by Lykes for Venice, but then was canceled and rebooked for Venice by Fabre. According to Wolfson's testimony, this firm informed Cicogna that the cancellation was not made by Bresciano—Ottolini but by its forwarder Mosti; that the firm was induced to agree to the cancellation although they knew that Fabre never calls at Venice, upon Mosti's assurance that they would receive a sizeable rebate as compensation for having to truck their cotton from Genoa to destination instead of from Venice.

57. Several agents in Italy who represent United States cotton exporters were interviewed by Carlys, conference chairman, in early October 1954, and by Stakem later. Both testified that these agents stated that their spinner customers told them that their preference for Fabre was based upon a financial advantage on cotton carried by

[29] This meeting was postponed once at Fabre's request, and finally held on October 29 1954, at which Fabre was expelled.

[30] Mosti switched some of Olcese's cotton from the *Bastia* to Creole in June 1954. Ansaldo (Creole) was unable to remember receiving any Mosti-controlled cotton after that, including cotton destined to Olcese.

that line.[31] Stakem was told this amounted to about $1.10 per bale. Stakem also interviewed officials of Olcese, Somaini and Solbiate, spinners who, according to Stakem, advised him they patronized Mosti, and through him Fabre; that they were billed at the conference rate; and that there was a financial advantage in dealing with Mosti which lay in the accessorial charges of Mosti, and according to Solbiate, in lower insurance rates obtainable by Mosti.

Fabre's reaction to charges and expulsion. 58. At the conference meeting of October 29, 1954, Fabre's Gulf agent, Strachan, stated that all cargo handled by him is manifested strictly in accordance with conference rates, rules, and regulations. Thereupon, he read a cable from Fraissinet (Fabre) in which, among other things, he expressed unhappiness over Lykes' alleged domination of the Spanish-Gulf olive trade, and Creole's alleged control over carbon black and timber in the Gulf-Italian trade; accused other conference lines of rebating; denied rebating on the part of Fabre, and in effect invited inspection of Fabre's accounts; threatened legal action if the Conference took any "hasty action" against Fabre "except what we could produce ourselves against most conference members"; and concluded by saying that he (Fraissinet) would be in New Orleans in mid-November for discussion.

59. Norrish testified that at the meeting on October 4, 1954, he informed the Genoa committee that Fraissinet had phoned him that he (Fraissinet) was prepared to go to New York with his general manager, Gauz, and swear that he had not given any rebates on cotton. In reply to Board Chairman Rothschild's invitation to attend the hearing in this proceeding, Fraissinet cabled on January 20, 1955, that he could not attend due to previous commitments, but suggested a meeting in Europe of presidents of companies most interested to solve outstanding problems.

60. On January 19, 1955, Fraissinet sent a letter to Carlys requesting that the expulsion motion be rescinded, and that the Board be requested to discontinue this investigation, stating that Fabre, without admitting any violations, was prepared to participate in any appropriate policing agreement designed to assure strict adherence by all members to conference rules and regulations. Carlys replied that the Board undertook the investigation only after every effort by the Conference to correct the situation had proved unavailing; and that in the absence of specific proposals and undertakings by Fabre which would assure discontinuance of practices complained of, the Con-

---

[31] Carlys reported to the Conference, on October 29, 1954, on his interviews with shipper agents and spinners in Italy. According to him, the former suspected rebating but could offer no proof; and the spinners did not offer any such proof. In fact, Carlys reported that: "I have no proof and it is impossible to prove it."

ference could not in good faith request the Board to discontinue the proceeding.

EFFECT OF RATE INSTABILITY IN GULF-MEDITERRANEAN TRADE

61. Steamship services out of the Gulf are highly competitive with North Atlantic services on commodities originating in the Midwest. This is true particularly as to machinery, agricultural implements, tinplate, and general cargo. Rate adjustments in one trade might require corresponding adjustments in the other trade. A similar situation exists in the competitive relation between Mediterranean and Atlantic ports in Europe. For example, Switzerland and Austria may import and export cargo via either group of ports. The Gulf-Mediterranean Conference has been asked on occasions to adjust its rates to meet rate changes of conferences serving the Antwerp, Rotterdam, Hamburg, range. Ports affected by these changes are Genoa, Trieste, and Venice.

62. Cocke, who is chairman of the Cotton Rate Committee of the Conference, testified it has been the experience of the Committee that rate discrimination and instability have an adverse effect on United States exports of cotton; that present contracts with shippers were negotiated on the basis that shippers required stability of rates and equal treatment for all, with no discrimination as between shippers and receivers; and that such shippers have demanded that this situation be cleared up.

CHARGES AGAINST LYKES

63. Fraissinet informed Stakem on December 20, 1954, that unless the charges against Fabre of rebating were dropped, he intended to use evidence he had of rebating by Lykes. This consisted of two letters which are of record: (1) A letter from Lykes' Marseilles agent, Michel, to Kerr, Lykes' European manager, dated November 3, 1954, stating that Michel had arranged with the stevedore for a special rebate of 5 percent on stevedoring charges for discharging woodpulp at Marseilles; (2) An unsigned, unaddressed letter allegedly written by Scerni, Lykes' agent in Genoa, to an Italian importer, dated September 24, 1954, offering a reduction of 1 percent on freight charges on scrap brass and copper if shipments were routed via Lykes.

64. Lykes denied the charges of rebating on woodpulp and offered evidence to show that its agent Michel did negotiate a 5 percent reduc-

tion in stevedoring, which is for account of the consignee and has no relation to the ocean freight rate. It is explained that this was done in an attempt more nearly to equalize the costs at Merseilles with those at LeHavre, where the steamship lines absorb discharging costs.

65. Scerni testified that he did not write the letter regarding the 1 percent rebate. Norrish, who had sent the letter to Fraissinet, testified it was not from Lykes' agent, but from a forwarding agent who had offered to sell a photostatic copy of the original to Fabre. Thereupon, counsel for Fabre withdrew the assertion that the letter was signed by Lykes' agent.

66. At the hearing Fabre introduced a Lykes' bill of lading dated July 15, 1954, indicating that a rate of $18 per ton, instead of the applicable rate of $36.25 had been charged on a shipment of 294 drums of turpentine substitute from Houston to Venice. Cocke testified this was an error, that it was detected by Lykes' Genoa office on October 1, 1954, that the correct rate was verified with the Conference, that on October 6, 1954, the shipper was billed for the undercharge, that the shipper then negotiated with the Conference for a lower rate which was denied on February 16, 1955, and that Lykes was still pressing for payment of the undercharge.

The examiner recognized that the evidence adduced was, to a large extent, hearsay in nature. He concluded, however, on consideration of direct and hearsay evidence in relation to malpractices, as well as inference of fact drawn against Fabre from the direct evidence, that Fabre had been shown to have violated section 16–Second of the 1916 Act by granting rebates or concession to secure shipments of woodpulp, lubricating oil, carbon black, tinplate, and cotton.

The examiner further found that the record did not support findings of violation, by any respondent, of sections 15, 16–First, or 17 of the 1916 Act, and that the action of the Conference in expelling Fabre from conference membership was not unfair, unlawful, or unjustified.

Fabre excepted both generally and specifically to the recommended decision. In so far as is material to this report, the exceptions relate solely to the examiner's acceptance of hearsay evidence, his use of inferences, and his failure to give credence to testimony favorable to Fabre. Fabre asserts that the evidence relied on to establish violations of the 1916 Act falls short of the standard of "reliable, probative, or substantial" evidence required by section 7 (c) of the Administrative

Procedure Act ("APA") [32] and the standards set forth in our Rules of Practice and Procedure.[33]

Fabre further asserts that the evidence relied on by the Conference in expelling Fabre from conference membership was insufficient to justify that action, the examiner's finding to the contrary notwithstanding.

Public Counsel and the Conference have asserted, and the examiner has found, that section 7 (c) of the APA makes inapplicable to administrative proceedings such as this the strict exclusionary rules of evidence employed in judicial proceedings and permits use of hearsay evidence if corroborated by substantial direct evidence. The examiner rejected Fabre's argument that this is a quasi-criminal proceeding requiring adherence to "rigid rules of evidence", pointing out that the fines authorized in section 16 of the 1916 Act could not be imposed in this hearing.

Character of evidence required in administrative proceedings generally. We concur in the examiner's citation of authorities construing section 7 (c) of the APA specifically and administrative law evidentiary requirements generally. The congressional intent underlying sections 7 (c) and 10 (e) [34] of the APA is clear both from legislative

[32] Section 7 (c):

EVIDENCE.—Except as statutes otherwise provide, the proponent of a rule or order shall have the burden of proof. Any oral or documentary evidence may be received, but every agency shall as a matter of policy provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence and no sanction shall be imposed or rule or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the reliable, probative, and substantial evidence. Every party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses any agency may, where the interest of any party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

[33] Rule 10 (b):

"*Hearings required by statute.* In complaint and answer cases, investigations on the Board's own motion, and in other rulemaking and adjudication proceedings in which a hearing is required by statute, formal hearings shall be conducted pursuant to section 7 of the Administrative Procedure Act. * * *

Rule 10 (q).:

Written evidence. * * *(2) Where a formal hearing is held in a rulemaking proceeding, interested persons will be afforded an opportunity to participate through submission of relevant, material, reliable and probative written evidence properly verified: *Provided,* That such evidence submitted by persons not present at the hearing will not be made a part of the record if objected to by any party on the ground that the person who submits the evidence is not present for cross-examination.

[34] Section 10 (e) Administrative Procedure Act:

SCOPE OF REVIEW.—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall * * * (B) hold unlawful and set aside agency action, findings, and conclusions found to be * * * (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; * * *.

reports and judicial interpretation. In relation to evidentiary requirements, H. R. Report No. 1780 of the 79th Congress, 2d session, states:

> The second and primary sentence of the section is framed on the premise that, as to the admissibility of evidence, an administrative hearing is to be compared with an equity proceeding in the courts. Thus, the mere admission of evidence is not to be taken as prejudicial error (there being no lay jury to be protected from improper influence) although irrelevant, immaterial, and unduly repetitious evidence is useless and is to be excluded as a matter of efficiency and good practice; and no finding or conclusion may be entered except upon consideration by the agency of the whole record or so much thereof as a party may cite and as supported by and in accordance with evidence which is plainly of the requisite relevance and materiality—that is "reliable, probative, and substantial evidence." Thus while the exclusionary "rules of evidence" do not apply except as the agency may as a matter of sound practice simplify the hearing and record by excluding improper or unnecessary matter, the accepted standards and principles of probity, reliability, and substantiality of evidence must be applied. These are standards or principles usually applied tacitly and resting mainly upon common sense which people engaged in the conduct of responsible affairs instinctively understand. But they exist and must be rationally applied. They are to govern in administrative proceedings. These requirements do not preclude the admission of or reliance upon technical reports, surveys, analyses, and summaries where appropriate to the subject matter.
>
> * * * * * * *
>
> * * * The right of cross-examination extends, in a proper case, to written evidence submitted pursuant to the last sentence of the section as well as to cases in which oral or documentary evidence is received in open hearing. * * * To the extent that cross-examination is necessary to bring out the truth, the party must have it.

On May 24, 1946, Representative Walter, on the floor of the House of Representatives, described the evidentiary requirements of section 7 (c) of the APA in the following manner:

> The requirement that agencies may act only upon relevant, probative, and substantial evidence means that the accepted standards of proof, as distinguished from the mere admissibility of evidence, are to govern in administrative proceedings as they do in courts of law and equity. The same provision contains two other limitations—first, that the agency must examine and consider the whole of the evidence relevant to any issue and, secondly, that it must decide in accordance with the evidence. Under these provisions the function of an administrative agency is clearly not to decide arbitrarily or to act contrary to the evidence or upon surmise or suspicion or untenable inference. Mere uncorroborated hearsay or rumor does not constitute substantial evidence—see *Edison Co.* v. *Labor Board* (305 U. S. 197, 230). Under this provision agencies are not authorized to decide in accordance with preconceived ideas or merely to sustain or vindicate prior administrative action, but they must enter upon a bona fide consideration of the record with a view to reaching a just decision upon the whole of it.

While the APA permits the introduction of hearsay evidence and relaxes the strict evidentiary rules obtaining in courts of law,[35] it is designed to eliminate wholesale use of hearsay evidence, the drawing of expert inferences not based upon evidence, and the consideration of only one part or one side of a case.[36] This limitation on the use of hearsay evidence results from the requirement [37] that rules or orders be "supported by * * * reliable, probative, and substantial evidence," from the power in reviewing courts to set aside actions unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 of the APA, and from the right of parties to administrative proceedings "to conduct such cross-examination as may be required for a full and true disclosure of the facts." [38] Thus, while all but "irrelevant, immaterial or unduly repetitious evidence" [39] may be admitted, agency determinations must be based on substantial evidence. The more liberal the practice in admitting testimony, the more imperative the obligation to preserve the essential rules of evidence by which rights are asserted or defended.[40]

The "substantial evidence" requirement has been frequently discussed by the courts both before and after the passage of the APA. It has been said that "the rule of substantial evidence is one of fundamental importance and is the dividing line between law and arbitrary power." [41] In *Edison Co.* v. *Labor Board* (1938), 305 U. S. 197, 229, 230, the Supreme Court stated:

> Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.
>
> * * * * * * *
>
> Mere uncorroborated hearsay or rumor does not constitute substantial evidence.

To the same effect see *Labor Board* v. *Columbian Co.* (1939), 306 U. S. 292; *National Labor Relations Bd.* v. *Union Pacific Stages* (C. A. 9th Cir., 1938), 99 F. 2d 153.

Fabre states that the examiner erred in overruling objections to the introduction of hearsay evidence, arguing that the decision in *Edison Co.* v. *Labor Board*, *supra*, on which the examiner relied, was

---

[35] *Willapoint Oysters* v. *Ewing*, 174 F. 2d 676; *Interstate Commerce Commission* v. *Baird* (1904), 194 U. S. 25.

[36] *Pittsburgh S. S. Co.* v. *National Labor Relations Bd.* (C. A. 6th Cir., 1950), 180 F. 2d 731.

[37] Section 7 (c) APA, *supra*.

[38] Section 7 (c) APA, *supra*.

[39] Section 7 (c) APA, *supra*.

[40] *United States* v. *Watkins* (S. D. N. Y. 1947), 73 F. Supp. 216.

[41] *National Labor Relations Board* v. *Thompson Products* (C. A. 6th, 1938), 97 F. 2d 13, 15.

688-650 O - 63 - 44

based on a statute which specifically relaxed the rules of evidence, which has since been amended, and which does not represent the law applicable to proceedings before this agency. These contentions are unsound; hearsay evidence is clearly *admissible* under the terms of the APA and under our rules which, as hereinbefore stated, follow the APA. Further, the cited decision was relied on in drafting section 10 (e) of the APA. See Appendix to Attorney General's Statement Regarding Revised Committee Print of October 5, 1945, contained in Senate Document 248 of the 79th Cong., 2d session, at page 414, where it was stated:

> Section 10 (e) : This declares the existing law concerning the scope of judicial review. * * * Clause (5) is intended to embody the law as declared, for example, in *Consolidated Edison Co.* v. *National Labor Relations Board* (305 U. S. 197).

The subsequent amendment to the National Labor Relations Act does not alter the reliance placed by Congress in enacting the APA on the principles enumerated in the *Edison* case.

Nor do we consider, as argued by Fabre, that the nature of this proceeding requires application of evidentiary standards proper in criminal or "quasi-criminal" proceedings. Although section 16–Second of the 1916 Act provides criminal penalties, those penalties may only be imposed in a proceeding commenced by the Department of Justice[42] in a court of competent criminal jurisdiction. No penalties may be imposed in this proceeding nor may the record here be used as the basis for collection of fines.[43]

Interpretation of Section 16–Second.—Since both Fabre and Lykes have defended against charges of section 16–Second violations on the ground that reductions in transportation charges were unintentional, it is necessary to examine section 16–Second prior to evaluation of the evidence advanced in support of such charges.

In so far as is here pertinent, section 16–Second provides:

> That it shall be unlawful for any common carrier by water, or other person subject to this Act, either alone or in conjunction with any other person, directly or indirectly—
>
> * * * * * * *
>
> Second. To allow any person to obtain transportation for property at less than the regular rates or charges then established and enforced on the line of such carrier by means of false billing, false classification, false weighing, false report of weight, or by any other unjust or unfair device or means.

Although, unlike the first paragraph of section 16, the quoted language does not contain the words "knowingly and willfully" or simi-

[42] 28 U. S. C. A. 507.

[43] See Davis, Administrative Law, 1951, at pp. 305, 306, on the constitutional requirement for trial by jury in criminal matters.

lar words, intent is, nevertheless, an element essential to establishment of violation of section 16–Second, which makes unlawful allowing, *by unjust or unfair device or means*, any person to obtain transportation at less than the regularly established and enforced rates or charges. No resort to lexicography is necessary to determine that a "device" must be a willful, knowing scheme or means to an end.

It is apparent, then, that a carrier does not violate section 16–Second by inadvertence unless the evidence reveals such a wanton disregard of the duty to exercise reasonable diligence to collect applicable rates and charges for transportation as to amount to an intent to collect less than the applicable rates and charges.[44]

In accordance with our view of the evidentiary standards applicable to this proceeding and our construction of section 16–Second of the 1916 Act, we make the following determinations in respect to the ultimate facts found, inferences drawn, and conclusions reached by the examiner.

Woodpulp. Fabre contends that, of three shipments of woodpulp from Fernandina to Marseilles, discharging costs were inadvertently absorbed on two shipments through a broker's error, contrary to conference regulations; that Fabre had not previously carried woodpulp between these ports and was not aware of the conference rule *re* discharging costs. In spite of the fact that these shipments were booked with or offered to Lykes prior to booking with Fabre, and the report that Lykes was requested to allow a reduction of $1 under the conference rates on these shipments, we cannot conclude that Fabre has knowingly granted rebates or concessions to secure any or all of the aforementioned shipments of woodpulp. Neither an intent to grant a lower rate nor a deliberate failure on the part of Fabre to keep itself informed has been shown. Although the evidence does not justify a finding of violation of section 16–Second, there is no doubt that Fabre violated the conference agreement in absorbing discharging costs on two of the three shipments of woodpulp[45] and in failing properly to respond to the conference's request for information concerning such shipments.

Tinplate. Direct testimony, of significance, in relation to charges against Fabre of rebating on tinplate shipments is confined to the following:

---

[44] See *Rates from Japan to United States,* 2 U. S. M. C. 426 (1940), where the Maritime Commission held that carriers purposely keeping themselves in ignorance of false billing by shippers, in order to deny actual knowledge, were estopped to deny that which could be learned by the exercise of reasonable diligence.

[45] Agreement No. 134 does not make intent an element necessary to a violation of conference rules or regulations.

(a) In June 1954 Lykes was requested to grant a commission on tinplate shipments.

(b) Lykes refused to grant the requested commission.

(c) Lykes received no further tinplate shipments after its refusal to rebate. A Lykes booking made in November 1954 was cancelled on December 8, 1954. The shipment moved in January 1955 via Fabre.

(d) Prior to January 1955 Fabre had not carried tinplate in this trade.

(e) A second shipment of tinplate actively solicited by Lykes moved via Fabre.

(f) A third shipment of tinplate promised to Lykes moved via a conference line other than Fabre or Lykes.

Eliminating hearsay evidence, which tends to show rebating by Fabre, the evidence merely shows one cancellation and two unsuccessful solicitation efforts on three shipments of tinplate, of which two moved via Fabre and a third moved via another conference line, apparently Levant. From the cancellation of the booking with Lykes and subsequent shipments via conference carriers other than Lykes, any of the following inferences reasonably may be drawn: Fabre and/or Levant may have granted rebates to obtain the shipments; the shipper may have been motivated by dislike for Lykes' personnel, a dissatisfaction with Lykes' service, or a desire to retaliate against Lykes for refusal to grant a rebate.

Supplementing this scanty direct evidence with hearsay evidence, a conclusion may be reached from witness Wolfson's testimony of conversations with B. L. R. principal Facelli that Fabre has granted unlawful concessions to B. L. R. On the other hand, Facelli vigorously denied having told Wolfson of a letter from Fabre's Naples agent, DeLuca, which would prove that Fabre had granted rebates on tinplate to B. L. R. Further, DeLuca, in a sworn affidavit, denied having granted rebates "to any Naples importers." Looking at all of the hearsay evidence on this point, it is apparent that Wolfson's testimony of conversation with Facelli is fatally deficient for lack of opportunity for cross-examination, that hearsay evidence adduced by Fabre in the form of denials by Facelli and DeLuca is entitled to as much weight as and neutralizes Wolfson's testimony in this regard.

We conclude that the evidence adduced fails to establish violation of section 16–Second by Fabre or other line on shipments of tinplate. Since this matter was not before the Conference when it voted to expel Fabre, we needn't consider whether the shipments violated conference regulations.

Lubricating Oil. The only direct evidence of significance in relation to the shipment of lube oil is the admission by Fabre that a commission or brokerage fee of 10 percent was paid to the Madrid agent or broker for procurement of the shipment. This admission, however, falls far short of prima facie evidence of violation of section 16–Second of the 1916 Act, although we find, as did the examiner, that payment of 10 percent brokerage fee is in violation of article 5 of Agreement No. 134.

Far from furnishing support to or corroboration of substantial evidence regularly adduced, the hearsay evidence adduced itself constitutes the entire proof of rebating here. Although it reasonably might be inferred from the evidence that Fabre's agent was guilty of rebating to the consignee and that Fabre knew, or should have known, of such rebating, the evidence is not logically compelling to the exclusion of other conclusions inconsistent therewith.

Carbon Black. The Conference, in brief, states: "*While there is no specific proof* that a rate concession was allowed by Fabre, the circumstances attending this incident eliminate all other possible explanations of how Fabre could have taken over the cargo already booked by other lines." (Emphasis supplied.) We find that there is no logically probative evidence, direct or hearsay, tending to show (a) an intent, constructive or actual, to allow the shippers of carbon black to obtain transportation at less than the regular enforced rates, (b) that lower rates were charged and collected, or (c) that lower rates were granted as a result of an unjust or unfair device or means, assuming that less than the regular enforced rates were charged. No element of a violation of section 16–Second has been shown. While it might be inferred from the face of cancellations of shipments booked for other vessels and the fact of subsequent shipment via Fabre at a higher rate, that rebates had been granted, other inferences are equally reasonable. Although the testimony of the Fabre witness Nahas was far from satisfactory as an explanation of the reasons for the shipment moving via Fabre, Fabre cannot be subjected to a legal disability for failure to rebut less than a prima facie case.

We conclude that shipments of carbon black hereinabove discussed have not been in violation of section 16–Second of the 1916 Act or in breach of conference rules or regulations.

Cotton. The uncontroverted direct evidence bearing on the charges against Fabre of unlawful rebating on cotton shipments consists of the following:

1. Nineteen bookings for cotton shipments with Lykes or Creole were canceled reportedly at the request of consignees of receivers; the shipments later moved via Fabre.

   (a) In three instances all or part of the cotton had been delivered to Creole's installation for shipment.

   (b) In one of the aforementioned three instances the movement of cargo from Creole's wharf to Fabre's wharf cost the consignee between $0.75 and $1 per bale.

   (c) The conference rate on cotton is $1.45 per 100 pounds.[46]

2. Despite the facts that Fabre was new to the trade and that Lykes and Creole were long-established cotton carriers, Fabre's average carryings in 1954 far exceeded those of Lykes and Creole.

3. Fabre books cotton for Venice although its vessels discharge the cargo at Genoa and do not call at Venice.

   (a) Discharging costs at Genoa exceed discharging costs at Venice.

4. Lertora Bros. & Courtman, Fabre's Genoa agents, extend substantial credit to Mosti on cotton shipments.

   (a) Fabre does not agree to indemnify its agents against losses sustained by its agents as a result of extension of credit to forwarders and receivers.

While a practice of rebating may reasonably be inferred from the foregoing facts, we cannot say that other inferences, urged by Fabre, are unreasonable. We must, therefore, examine the hearsay evidence of record[47] for probative value, freedom from controversy, and reliability in relation to the APA's provisions for cross-examination as required for a full and true disclosure of the facts.

As more fully indicated in our basic evidentiary findings, there is a great volume of hearsay evidence in the matter of Fabre cotton shipments, much of which is relevant and logically probative of the issues on which offered. Briefly summarized, testimony was introduced to the effect that financial advantages accrued to Italian spinners and receivers out of shipping via Fabre vessels. While none of the evidence indicated direct rebates by Fabre, (a) cotton spinners have indicated an advantage of about $1.10 per bale in dealing with Fabre through Mosti; (b) a buyer has stated that it cost $1.13 more per bale to ship via Lykes than via Fabre; (c) routing of cotton shipments customarily left, prior to early 1954, to United States exporters, became thereafter dominantly controlled by Italian receivers;

[46] Cotton measures roughly four bales to the ton.

[47] Admitted for the purpose of showing the fairness or unfairness of the conference action in expelling Fabre.

(d) as hereinabove indicated, if Mosti's lump-sum offer to two spinners includes ocean freight at conference contract rates, the sum at the worst represents, after deduction of fixed accessorial charges, less than cost to Mosti and, at best, yields Mosti little or no forwarding fee.

On the other hand, (a) charges of rebating by Fabre on cotton have met with consistent denials by Fraissinet, Norrish, and Mosti; (b) spinners reported to have spoken of financial advantage in dealing with Fabre through Mosti are likewise reported to have been billed for ocean freight at the conference rate and to have denied obtaining rebates; (c) the aforementioned spinners failed to specify the manner of obtaining financial advantage; (d) Mosti, the person with most knowledge of his own reasons for dealing with Fabre, is reported to have been influenced by the substantial extension of credit by Fabre's agent; (e) Mosti maintains that he would realize a profit on the aforementioned lump-sum offers, that his prices are not uniform to all spinners, and that he quotes lower rates to new customers in order to obtain new business; (f) there is no evidence tending to show that either of the two Mosti lump-sum offers were ever accepted; (g) and the information relating to fixed accessorial charges originated with Gandolfo, a bitter rival of Mosti; and (h) although the fact that many of the charges are fixed was corroborated, no corroborative testimony, direct or hearsay, was adduced as to the level of the fixed accessorial charges. No explanation was offered by Fabre as to the reasons for booking cargo for Venice, although to all intents that cargo is, in every instance, discharged at Genoa.

From the foregoing, we conclude that although the evidence in relation to charges against Fabre of rebating by unjust or unfair device or means is relevant and logically probative, the evidence does not constitute "substantial evidence" within the meaning of the APA. Further, in view of Fabre's denials and in view of the inferences favorable to Fabre's position, which reasonably may be drawn from hearsay evidence of record, we conclude that the hearsay evidence adduced in support of charges of violation of the 1916 Act is fatally deficient for failure to provide opportunity for cross-examination where used for that purpose.

We find, however, that the shipments of cotton FOB, freight payable in lire, prior to amendment of the conference pre-payment rule, was in violation of conference regulations.

As stated by the examiner, the testimony of Fraissinet, President of Fabre, or other Fabre representative would have gone far toward resolving this matter. Since, however, the law imposed no duty on Fraissinet personally to respond to charges of violation of the 1916

Act or otherwise to appear in this proceeding and, in the face of Fraissinet's communication to Chairman Rothschild stating that prior commitments prevented his attendance, we do not draw adverse inferences from his absence and failure to testify.

Fairness of conference action in expelling Fabre. Article 22 of Agreement No. 134 authorizes elimination, on majority vote, of any member for any violation of the *letter or spirit* of the agreement, proved to the satisfaction of the majority to be sufficient for expulsion. Since, as hereinabove found, Fabre has acted in violation of the letter of the agreement by (1) paying brokerage in an amount greater than 1¼ percent of ocean freight earned,[48] (2) absorbing discharging costs on shipments of woodpulp from Florida to Marseilles,[49] and (3) shipping cotton freight collect in lire,[50] the action of the Conference was clearly within the scope of its approved agreement between carriers and was not in violation of section 15 of the 1916 Act.[51]

Further, as to charges of rebating on various commodities, as hereinabove discussed, on which violations of the 1916 Act have not been sufficiently established, we cannot say that the Conference acted on proof insufficient under the terms of the agreement. The evidence required by the Conference for finding a violation of the agreement [52] need not, under the terms of section 22 thereof, be more than such evidence as will prove the violation to the satisfaction of the majority of the voting members. Our dismissal of the charges of violation of section 16–Second of the 1916 Act here is based, as indicated, on the substantial evidence rule under the APA. No such requirement is imposed on the Conference by law or otherwise. We have been presented with no evidence tending to show that the agreement between conference members to expel Fabre is unjustly discriminatory, unfair as between carriers, operates to the detriment of the commerce of the United States, or is in violation of the 1916 Act.

We agree with the examiner that the record does not support a finding of violation by Fabre of section 16–First or section 17 of the 1916 Act. Many of Fabre's exceptions to the examiner's failure to make specific findings and conclusions have been rendered moot by the foregoing. We cannot find affirmatively, however, as requested by Fabre, that no concessions have been made on cargo booked for

---

[48] Prohibited under revised Article 5 of Agreement No. 134.

[49] Prohibited under Article 4 of Agreement No. 134, as supplemented by tariff regulations.

[50] Prohibited under Article 8 of Agreement No. 134.

[51] Section 15 of the 1916 Act provides standards for Board approval or disapproval of agreements between carriers subject to the Act. It makes unlawful effectuating any such agreement until approved and as long as unapproved by the Board.

[52] Article 2 of Agreement No. 134 forbids payment of rebates of freight or compensation to shippers, receivers, etc.

Venice but discharged at Genoa, that no rebates have been given on cotton shipments to Italy, and that Norrish's lack of knowledge of rebates conclusively disproves the charge of rebating.[53]

Just as the APA forbids, on the evidence of record, finding violations by Fabre of the 1916 Act, so also does it prohibit the affirmative findings requested by Fabre.

Charges against Lykes. Since, as stated, intent is an element of section 16-Second violations, and since, as indicated in findings 63 *et seq.*, the undercharge on a July 1954 shipment of turpentine substitute was clearly inadvertent, the record does not support charges, against Lykes, of violation of the 1916 Act.

The remedy for threatened rate instability. The examiner concluded and found that Fabre, in violating section 16-Second of the 1916 Act, is guilty of competitive methods creating conditions unfavorable to shipping in the foreign trade and recommended issuance of rules under section 19 of the 1920 Act in order to meet such conditions. Those recommendations were as follows:

1. Fabre should be required to file a statement of cargoes carried in each vessel, together with the rates being charged, stating whether prepaid or collect, and the names of the shipper and consignee interested in each shipment.
2. The statement in (1) should include the information as to when and in what amount the ocean freight is paid, and the name of the person or firm paying such ocean freight to the carrier.
3. The statement in (1) and (2) should be certified and submitted under oath accompanied by sworn statements to the effect that no rebates, concessions, or departures from the stated rates have been effected except as expressly set forth.
4. The requirement that rates be filed by Fabre within ten (10) days after clearance from the last port of loading in the United States.

The examiner further recommended that the statement referred to in recommendations 1, 2, 3, and 4 include a statement of all brokerage or commissions paid or payable by Fabre in connection with each shipment, and to whom such payments have been or are to be made.

While the examiner recommended that the rules issue under the authority of section 19 of the 1920 Act, Public Counsel proposed issuance of an order calling for periodic reports under the authority

[53] Proposed findings of fact 9, 15, and 16, respectively.

of section 21 of the 1916 Act,[54] such reports to convey the same information as required by the statement recommended by the examiner.

We consider section 21 machinery more adaptable to the problems of this trade than section 19 of the 1920 Act and authorized, as implicit in our November 4, 1954, order of investigation. We will, therefore, require Fabre to prepare and file with us four quarterly reports setting forth information relative to transactions in the Gulf-Mediterranean trade, as outlined in our attached order, and we will hold this record open for a period of time appropriate for the completion of filing and analysis of such reports.

Although some hearsay evidence adduced by Fabre at the hearing linked other carriers in the trade with malpractices and the current instability, in our judgment these carriers have had insufficient time to defend against such charges brought during the course of the hearing. Further, the extremely limited evidence adduced does not, in our opinion, warrant requiring special reports by those carriers. We reserve the right, however, to require such reports by those carriers in the future, if deemed useful or necessary.

At this time we will limit the filing of periodic section 21 reports to Fabre. The filing does not constitute a penalty against Fabre but is required as a step toward fulfillment of our obligation fully to inform ourselves [55] of conditions in this trade.

---

[54] Section 21 of the 1916 Act:

That the board may require any common carrier by water, or other person subject to this Act, or any officer, receiver, trustee, lessee, agent, or employee thereof, to file with it any periodical or special report, or any account, record, rate, or charge, or any memorandum of any facts and transactions appertaining to the business of such carrier or other person subject to this Act. Such report, account, record, rate, charge, or memorandum shall be under oath whenever the board so requires, and shall be furnished in the form and within the time prescribed by the board. Whoever fails to file any report, account, record, rate, charge, or memorandum as required by this section shall forfeit to the United States the sum of $100 for each day of such default.

Whoever willfully falsifies, destroys, mutilates, or alters any such report, account, record, rate, charge, or memorandum, or willfully files a false report, account, record, rate, charge, or memorandum shall be guilty of a misdemeanor, and subject upon conviction to a fine of not more than $1,000, or imprisonment for not more than one year, or to both such fine and imprisonment.

[55] *Federal Comm'n* v. *Broadcasting Co.* (1940), 309 U. S. 134.

APPENDIX A

MEMBERS OF THE GULF/MEDITERRANEAN PORTS CONFERENCE

Alexandria Navigation Co. S. A. E., Societe Misr de Navigation Maritime S. A. E., Fisser schiffahrt G. m. b. H., Britain S. S. Co., Ltd. (American Mideast Line-Joint Service); Bloomfield Steamship Co.; N. V. Stoomvaart Maatschappij "Nederland", Koninklijke Rotterdamsche Lloyd, N. V., N. V. Nederlandsch-Amerikaansche Stoomvaart-Maatschappij "Holland-Amerika Lijn", The Ocean Steam Ship Co., Ltd., The China Mutual Steam Navigation Co., Ltd., Nederlandsche Stoomvaart Maatschappij "Oceaan" N. V., (Blue Funnel Line-Java New York Line-Joint Service); Compagnie de Navigation Cyprien Fabre (Fabre Line); Compagnie Generale Transatlantique (French Line); Compania Maritima del Nervion; Dampskibsaktieselskabet Alaska, Aktieselskabet Atlas, Dampskibsaktieselskapet Idaho, Skipsaksjeselskapet Hilda Knudsen, Skipsaksjeselskapet Samuel Bakke (Concordia Line-Joint Service); Dampskibsselskabet Torm A/S (Torm Lines); Stockholms Rederiaktiebolag Svea, Rederiaktiebolaget Fredrika, Eckert Steamship Corp. (Eckert Line-Joint Service); Ellerman Lines, Limited, Ellerman & Bucknall Steamship Co., Limited, Hall Line, Limited, The City Line, Limited (Ellerman and Bucknall Associated Lines-Joint Service); Skibsaktieselskapet Varild, Skibsaktieselskapet Marina, Aktieselskabet Glittre, Dampskibsinteressentskabet Garonne, Skibsaktieselskapet Sangstad, Skibsaktieselskapet Solstad, Skibsaktieselskapet Siljestad, Dampskibsaktieselskabet International, Skibsaktieselskapet Goodwill, Skibsaktieselskapet Mandeville (Fern-Ville Mediterranean Lines-Joint Service); Hellenic Lines, Ltd.; Skibsaktieselskapet Arizona, Skibsaktieselskapet Astrea, Skibsaktieselskapet Aruba, Skibsaktieselskapet Noruega, Skibsaktieselskapet Abaco, A/S Atlantica (Høegh Lines-Joint Service); Israel America Line, Ltd.; M. Dizengoff & Co. (Shipping) 1949 Ltd.; Isthmian Steamship Co.; Khedivial Mail Line, S. A. E.; Stockard Steamship Corp., Atlantic Ocean Transport Corp., North American Terminal Corp. (Levant Line-Joint Service); Lykes Bros. Steamship Co.; Inc.; Navigazione Alta Italia-Societa per Azioni (Creole Line); Prudential Steamship Corp.; "Sidarma" Societa Italiana di Armamento (Sidarma Line); States Marine Corp., States Marine Corp. of Delaware (States Marine Lines-Joint Service); Waterman Steamship Corp.

ORDER

At a Session of the FEDERAL MARITIME BOARD held at its office in Washington, D. C., on the 18th day of August A. D. 1955

No. 768

ALLEGED PRACTICES OF COMPAGNIE DE NAVIGATION CYPRIEN FABRE (FABRE LINE) AND OF GULF/MEDITERRANEAN PORTS CONFERENCE

The Board, on the date hereof, having made and entered of record its report in this proceeding, which report is hereby referred to and made a part hereof:

It is ordered, That Compagnie de Navigation Cyprien Fabre (Fabre Line) file in the office of the Secretary, Federal Maritime Board, statements setting forth—

1. Amount and commodity involved in each shipment carried in berth service from Gulf ports to ports in Spain, Mediterranean France, and Italy;
2. The rate charged as to each shipment;
3. The names of shipper and consignee, and "notify party", if any, in connection with each shipment;
4. Method of payment of ocean freight, as between prepaid or collect, in connection with each shipment;
5. The time of payment of ocean freight, and the name of the person or firm paying such freight, in connection with each shipment;
6. The terms governing the extension of credit, where credit is extended in connection with the payment of ocean freight, in connection with each shipment;
7. A certification under oath by a responsible official of Compagnie de Navigation Cyprien Fabre (Fabre Line) that the information submitted in response to items (1) through (6) above is true and correct, and that no rebates, concessions or departures from the stated rates have been or will be effected except as expressly set forth in such statements; and

It is further ordered, That such statements be filed quarterly, the first group to be filed on the first day of October 1955, and covering

all sailings between June 1, 1955, and September 1, 1955, and three more to be filed on January 1, 1956, April 1, 1956, and July 1, 1956, respectively, for the periods September 1, 1955, to December 1, 1955, December 1, 1955, to March 1, 1956, and March 1, 1956, to June 1, 1956, respectively; and

It is further ordered, That within 10 days after clearance from the last port of loading in the United States, Compagnie de Navigation Cyprien Fabre (Fabre Line) file in the office of the Secretary, Federal Maritime Board, a schedule of the rates held out to the public in connection with each sailing; and

It is further ordered, That this record be held open until further order of the Board, pending filing and analysis of the above reports.

BY THE BOARD.

(SEAL) (Sgd.) GEO. A. VIEHMANN,
Assistant Secretary.

FEDERAL MARITIME BOARD

MARITIME ADMINISTRATION

No. S-66

CAPITAL NECESSARILY EMPLOYED—GENERAL ORDER 71

Submitted July 11, 1951. Decided September 17, 1952

Walter E. Maloney for American Merchant Marine Institute; *Carlton C. Lewis, Donald D. Geary*, and *Robert E. Kline, Jr.*, for Farrell Lines, Inc.; *Kenneth Gardner* for American Export Lines, Inc.; *Radner, Zito, Kominers & Fort* for New York and Cuba Mail Steamship Co.

Francis T. Greene, General Counsel, Maritime Administration, and chairman of special staff committee, for the Board and Administrator.

REPORT OF THE BOARD AND MARITIME ADMINISTRATOR

I. INTRODUCTION

BY THE BOARD AND MARITIME ADMINISTRATOR:

This is a report upon the reconsideration of the definition of "Capital Necessarily Employed" as promulgated by the former United States Maritime Commission ("the Commission"), and upon the date when such definition should and legally can become effective with respect to operators holding operating-differential subsidy contracts under the Merchant Marine Act, 1936, as amended ("the Act"). A staff committee submitted its recommendations, as hereinafter set forth, and thereafter oral argument was heard on July 11, 1951. With these recommendations we generally agree.

The essence of the problem is whether, as a matter of law and policy, we should amend the definition of "Capital Necessarily Employed" in General Order 71, and take comparable steps with respect to the "Extended Operating-Differential Subsidy Agreements" heretofore executed and/or amend the effective date thereof so as to make the definition uniformly effective as to all subsidized operators as of their resumption of postwar subsidized operations.

The definition of "Capital Necessarily Employed" embodied in General Order 71, promulgated December 21, 1949, is now applicable from and after "the termination of the recapture period which was current on December 31, 1946." The respective recapture periods terminated for the several operators on various dates between December 31, 1947, and December 31, 1950. The fact that the Commission did not make this definition uniformly applicable to the commencement of postwar subsidized operations on January 1, 1947, was criticized in the Comptroller General's Audit Report for the fiscal years 1948 and 1949 (House Doc. No. 465, 81st Cong., 2d Sess., p. 14) and in the Sixth Intermediate Report of the House Committee on Expenditures in the Executive Departments (H. R. Rep. No. 2104, 81st Cong., 2d Sess., p. 11), on the ground that "* * * the effective date of the revised definition creates inequities and unjustifiably increases the financial burden on the Government." This review has been made pursuant to the House Committee's Recommendation No. 2 to the Commission, at p. 31 of H. R. Rep. No. 2104.

A. *Relevant Statutory Provisions*

Under the recapture provisions of section 606 (5) of the Act, each operating-differential subsidy contract must provide that at the end of any ten-year recapture period the operator shall pay back one-half of the net profits on subsidized vessels in excess of—

10 per centum per annum upon the contractor's capital investment necessarily employed in the operation of the subsidized vessels, services, routes, and lines.

Under section 607 (d)—

The Commission shall adopt and prescribe rules and regulations for the administration of the reserve funds contemplated by this section and shall include therein a definition of the term * * * "capital necessarily employed in the business," as such terms are employed in this section.

In addition to determining the amount of subsidy recapture, "capital necessarily employed" affects the payment of dividends under section 607 (a), mandatory deposits in the Capital Reserve Funds under section 607 (b), as well as mandatory deposits and retentions in the Special Reserve Fund under section 607 (c). The definition of the term therefore controls not only the amount of recapture; it has also a profound effect upon the entire fabric of the financial policies, actions, and condition of the subsidized lines.

B. *Summary of Action Under Section 607 (d) by the Commission*

1. *General Order 31.*—This order, promulgated June 11, 1940, prescribed a definition roughly equivalent to net worth; that is, the excess

of assets over liabilities. It included as capital the balances in the Capital Reserve Fund required by section 607 (b) to finance the purchase of new and replacement vessels, and in the Special Reserve Fund required by section 607 (c) to cover current and future losses and to assure payment of subsidy recapture. This definition was substantially the same as the one contained in the operating-differential subsidy contracts entered into shortly after the Act became effective. When this definition was written into the contracts in 1937 and 1938, the subsidized lines, in general, had no more than capital barely adequate for the needs of their subsidized operations. See Table XVIII–E, S. Rep. No. 2494, 81st Cong., 2d Sess., p. 273; H. R. Rep. No. 2168, 75th Cong., 3d Sess., p. 8.

2. *Proposed Supplement 2 to General Order 31.*—As early as 1941, the situation arising out of the large earnings of the subsidized operators in 1939, 1940, and 1941 led the then Director of Finance to recommend modification in order that the pyramiding of earnings, particularly in the Special Reserve Funds, should not have the effect of nullifying the recapture liability of the operators by the inclusion in "capital necessarily employed" of assets for which there was no foreseeable need. The Commission agreed in principle that General Order 31 should be modified (and so instructed the Division of Finance), but the outbreak of the war and the suspension of subsidized operations led to postponement of working out a solution until after hostilities ceased. From 1946 until November 30, 1948, the staff, after numerous conferences with the industry, developed a revised definition as Proposed Supplement 2 to General Order 31. This proposal was not concurred in by the industry, and, as stated below, was not adopted. Supplement 2 (see Appendix A for comparative analysis of Supplement 2 to General Order 31, General Order 71, and a proposed definition dated January 14, 1949) provided in essence for the inclusion of all balances in the Capital Reserve Fund on account of outstanding mortgage indebtedness on subsidized vessels. Although balances in the Special Reserve Fund were not generally included, Supplement 2 to General Order 31 permitted their inclusion to the extent that they might be transferred to the Capital Reserve Fund for the purpose of paying off mortgages on subsidized vessels or to meet commitments for new vessels. These items were, of course, in addition to undisputed items such as ship equities, reserves for depreciation, the amount of required 25 percent down payments for vessel acquisitions, limited working capital, etc. The Supplement 2 definition was to have become effective as to all operators as soon as they should resume subsidized service.

These provisions for including cash in the Capital Reserve Fund to the extent of ship mortgages and ship commitments constituted at least partial recognition of the abnormal capital asset position of the shipping industry immediately following World War II. The crux of the problem with which we are faced lies in the fact that, as of January 1, 1947, the operators were abnormally "long" of cash (due primarily to 1940–41 earnings, the requisitioning of ships, and the receipt of insurance covering vessels lost during the war). On the other hand, they were abnormally "short" of ships (due to war losses and requisitioning juxtaposed with the postwar increase in shipping requirements). Thus, as of January 1, 1947, the twelve subsidized operators owned a total of only 155 ships, including those in non-subsidized services, and held about $65,000,000 in their Capital Reserve Funds.

During the ensuing three years it appears that these lines acquired approximately 100 ships, the equity of which represented about $100,000,000 of capital translated into physical assets during this period. (See Appendix B.) The operators urge that the balances in their Capital Reserve Funds as of January 1, 1947, or at least the major portion thereof, which were in fact used to increase physical capital assets to be used in subsidized operations as soon as they could be acquired, were, both in fact and law, "necessarily employed in the business" on January 1, 1947, while temporarily awaiting such use.

The most significant aspect of Supplement 2 to General Order 31 is the fact that it would have included cash balances in the Capital Reserve Funds on account of the total mortgage indebtedness of approximately $78,000,000 as of January 1, 1947 (see Appendix B), the proposed effective date of this definition. Similarly, under Supplement 2, increases in ensuing years in mortgage indebtedness for subsidized vessels would also have been included in capital necessarily employed to the extent of deposits in the Capital Reserve Funds.

On November 30, 1948, the Commission, apparently because of the operators' objections to any substantial departure from the old "net worth" definition, disapproved the Supplement 2 definition and directed submittal of a new proposed definition. This new definition was submitted on January 14, 1949. On January 28, 1949, the Commission considered the January 14, 1949, variation of the Supplement 2 definition, took no action on it, and referred the whole problem to one of its members for the purpose of drafting a new definition.

3. *The General Order 71 Definition.*—The proposed definition so developed (the progenitor of General Order 71) was submitted to the industry for comment in the fall of 1949. This definition did not specify an effective date but left a blank space for insertion of the

date. The industry urged, among other things, that the effective date should be fixed at January 1, 1950.

The principal effect of the proposed definition (see Appendix A) was to exclude all assets except ship equities, net working capital equal to voyage expenses, net equity in other physical assets employed on subsidized service, funded depreciation on subsidized vessels, and an amount equal to the 25 percent down payment on new subsidized vessels under executed purchase contracts. The amount in the Special Reserve Fund equal to 5 percent of "capital necessarily employed" (the retention of which is mandatory under section 607 (c)) could also be included. No provision was made for the inclusion of Capital Reserve Funds obligated under ship mortgages or otherwise awaiting expenditure for new or replacement vessels.

Although staff negotiations with the industry had been proceeding on the assumption that any revision of General Order 31 was to be effective as of the postwar resumption of subsidized operations, the industry objected to the staff suggestion that the proposed definition should be made applicable as of the date when subsidized operations were resumed. The operators emphasized that the definition failed to take into account the abnormal situation prevailing at the end of the war when subsidized operations were resumed, in that the operators then held more cash than would normally be required, which, during 1947 and the next year or so, was in fact converted into ships for the subsidized services. The delay in the expenditure of these funds for physical assets did not result wholly from delay by the operators but was due at least in part to the exigencies of the transition to peacetime operations, the burden on the Commission of administering the Ship Sales Act program, and the normal time required to process purchase applications under that Act, including preparation of legal documents and the repair and reconversion of the vessels for delivery prior to operation.

It is quite clear that during the 1949 discussions the operators would have consented to an effective date of January 1, 1947, provided the definition gave credit for the amount of money on hand on that date, which, as soon as reasonably possible, was converted into vessels for operation in the subsidized services. The industry then suggested (October 17, 1949)—

> If it becomes necessary to make the new definition retroactive, then the funds actually used for fleet replacement or acquisition of vessels for operation on subsidized routes between January 1, 1947, and December 31, 1949, should be included as capital necessarily employed from the first of January 1947 onward.

The industry on this point emphasized that inclusion was sought only for funds actually used (not funds that might have been used or

could have been used) in the purchase of physical assets during 1947, 1948, and 1949. On December 21, 1949, the Commission adopted the Commissioner's proposed definition as General Order 71, the effectiveness of which as to each operator was to commence at "the termination of the recapture period which was current on December 31, 1946." This definition has remained in effect to the present time.

The feature of General Order 71 which provided for the postponement of the effective date to the end of each operator's recapture period current in 1946 represented a partial recognition of the "long cash—short ships" problem, for in most cases this permitted the "net worth" definition of General Order 31 to apply during the period of much of the ship acquisitions. Accordingly, in the resumption addenda executed by the Commission with seven lines (herein called contracting lines), there was included Article II–29 to provide for the deferred effective dates of the General Order 71 definition in line with that order, reading as follows:

> (b) "capital necessarily employed in the business" and "capital investment necessarily employed in the operation of the subsidized vessel(s), service(s), route(s), and line(s)" shall, with respect to all annual or other accounting periods which terminated concurrently with or prior to the termination of the recapture period which was current on December 31, 1946, be determined as provided in the applicable rules and regulations as adopted and prescribed by the Commission in its General Order No. 31, as amended, *exclusive, however, of the provisions of* General Order 71; [Italics added].

The material dates affecting these seven contracting lines are as follows:

Operator [1]	Date of resumption	Actual date of execution of addenda	Effective date of G. O. 71
Grace	Jan. 1, 1947	Dec. 29, 1949	Jan. 1, 1948
American Mail	do	Jan. 3, 1950	Jan. 1, 1951
Farrell	do	Jan. 5, 1950	Jan. 1, 1950
Lykes	do	Dec. 29, 1949	Jan. 1, 1948
Seas	do	Jan. 6, 1950	Oct. 15, 1948
Mississippi	do	Apr. 5, 1950	Jan. 1, 1948
U. S. Lines: North Atlantic and American Pioneer Line	Jan. 1, 1948	May 1, 1950	Do.[2]

[1] There are two additional contracts, namely, with United States Lines Co. covering the S. S. *America* and with Pacific Argentine Brazil Line, but these do not present an issue in the present case as they are new contracts made after January 1, 1947. Moore-McCormack also executed a resumption addendum, effective as of January 1, 1947, on March 8, 1951. In accordance with its prior agreement with the Commission, this addendum, as explained below, excludes application of the General Order 71 definition to the earlier recapture period. American Export Lines and New York and Cuba Mail Steamship Co. have executed resumption addenda on June 6 and August 16, 1951, respectively. Oceanic executed resumption addendum on September 28, 1951, and American President Lines on October 5, 1951. However, since these four lines had no prior contract rights to nonapplication of General Order 71, their addenda provide: "* * * the Operator agrees to accept any changes by the United States in the definition of the term 'Capital Necessarily Employed in the Business' as set forth in General Order 71 of the Commission, including without limitation of the foregoing, changes with respect to the effective date of said definition."

[2] United States Lines has two operating subsidy contracts. The 1946 recapture period for the North Atlantic line terminated Dec. 31, 1947, and for the American Pioneer Line Dec. 31, 1949. In addition, a new contract covering the *America*, effective as of August 2, 1948, to which General Order 71 was applicable *ab initio*, was entered into on Jan. 13, 1951.

C. *Criticisms of Commission Action in Deferring Effectiveness of General Order 71 Until Commencement of New Recapture Period*

H. R. Rep. No. 2104, 81st Cong., 2d Sess. (p. 11), dated May 18, 1950, states:

> * * * The new definition was to have been effective after the war. However, it was made effective at the expiration of each operator's 10-year term. This has the effect of giving operators whose 10-year term runs beyond January 1, 1947, the advantage of figuring into their "capital necessarily employed" the special reserve funds enhanced greatly by the profits of the war years. Such an application of the revised definition is more costly to the Government than would have been the case had the revised definition been made applicable as of the date of reinstatement of the operating subsidy program, January 1, 1947. Your subcommittee believes the Commission unnecessarily delayed revising the definition, and further we believe the effective date of the revised definition as determined by the Commission creates inequities and unjustifiably increases the financial burden on the Government.

The General Accounting Office has informally advised the Maritime Administration that—

> We believe the revised definition should be made effective for all operators as of January 1, 1947, as the Commission had originally determined.

It should be noted that no question has been raised as to the *legality* of the Commission's action. The criticism is addressed only to its soundness as a matter of policy. (Hearings on Audit Report Before Subcommittee of the House Committee on Expenditures in the Executive Departments, 81st Cong., 2d Sess., p. 219.)

Solution of the underlying problems under review involved research into basic legal and policy issues as well as into the circumstances surrounding the Commission's action.

II. SUMMARY OF STAFF ACTION AND RECOMMENDATIONS

As a result of the reports of the House Committee and General Accounting Office, *supra*, the matter was referred to the staff committee already mentioned. A series of meetings with industry followed. During the course of these meetings industry repeated its opposition not only to any "roll-back" of General Order 71 but also to the retroactive application of any amended definition, even though the amendment might give effect to ship investments during the postwar period. Thereafter the committee formally suggested to industry an amendment to the definition so as to include in "Capital Necessarily Employed" amounts actually disbursed from the Capital Reserve Fund between January 1, 1947, and December 31, 1949, for the acquisition or improvement of vessels for subsidized operation.

The committee asked whether the operators with executed resumption addenda would "voluntarily agree to the amendment of Article II–29 of their respective resumption addenda * * *" so as to permit the application of such an amendment to the General Order 71 definition. On March 12, 1951, the industry replied that the contracting operators, relying on their legal rights, "have unanimously decided * * * that they will not voluntarily agree to the amendment of their respective resumption addenda" as had been suggested.

On June 1, 1951, the staff committee submitted to us its recommendation as follows:

1. That General Order 71 set forth in Section 291.5 of Part 291—Definition of Capital Necessarily Employed in the Business—Subchapter C—Regulations Affecting Subsidized Vessels and Operators—Chapter II, Title 46 Code of Federal Regulations, be amended as follows:

(a) By striking the period at the end of paragraph (8), "*Certain Deposits in the Captial Reserve Fund*", and adding the following:

"; and Provided further, that, for the period between December 31, 1946, and the termination of the recapture period which was current on December 31, 1946, only, there shall be included in "capital necessarily employed in the business" amounts (excluding mortgage payments) actually disbursed from the Capital Reserve Fund, or from other funds to the extent that the Administrator determines that such disbursements from other funds would have been payable or reimbursable from the Capital Reserve Fund upon proper application, between January 1, 1947, and December 31, 1949, for the purchase or reconstruction (including capitalizable expenditures for reconditioning, betterment, and improvement) of a vessel or vessels required to be operated in the subsidized services, routes, or lines under the provisions of the respective operating-differential subsidy agreements and all addenda thereto, to the extent that such amounts are not otherwise so includable under the provisions of this Order, and Provided further, that in not event shall there be so included any funds, prior to the date of the availability thereof in the Capital Reserve Fund for such use."

(b) By striking paragraph (g) in its entirety and substituting therefor the following:

"(g) *Effective date.*—The effective date of this section 291.5, as amended, shall be as follows:

"(1) The day next following the termination of the recapture period which was current on December 31, 1946, with resepct to an operating-differential subsidy resumption addendum executed prior to May 1, 1951,

"(2) January 1, 1947, with respect to an operating-differential subsidy resumption addendum executed after April 30, 1951, and

"(3) the effective date of the contract, with respect to an operating-differential subsidy contract executed after December 31, 1946."

2 That, as to the four contracting operators which are not in a 100 percent recapture position (American Mail, Farrell, Grace, and U. S. Lines), the Office of Subsidy and Government Aid be directed to negotiate forthwith with each of these companies individually, with a view to obtaining its acceptance to a rollback of General Order 71 as proposed to be amended under 1 (a) above.

3. That the Administrator direct an immediate review of General Order 71 by the staff, with recommendations for any desirable revisions to be submitted within 90 days, such revisions to become effective January 1, 1952.

III. DISCUSSION OF RECOMMENDATIONS

A. *The Contract Rights of Operators Who Had Executed Resumption Addenda or With Whom the Commission Had Made Agreements* [1]

Under the Act, the provisions of an operating-differential subsidy contract are not subject to unilateral modification by either party except as the contract expressly provides for unilateral action by one or the other party with respect to particular matters. The 20-year subsidy contracts authorized by section 603 (a) of the Act are contracts in the ordinary legal sense. The mutual obligations of both the Government and the operators are contained in sections 603 (b), 606, and 607. Section 607 provides remedies for default on, or cancellation of, subsidy contracts by the Government. To use the language of a House Committee report, subsidy contracts are

* * * designed to protect investors in shipping companies against changes in policy by the Government resulting in possible cancellations of the contracts or withdrawals of the subsidies where there has been no default on the part of the contractor. (H. R. Rep. No. 2168, 75th Cong., 3d Sess., p. 23.)

In the light of the language of the sections cited above and the legislative history of the Act, it is clear that subsidy contracts have, and were intended by Congress to have, all the attributes of any commercial contract. See H. R. Rep. No. 1277, 74th Cong., 1st Sess., p. 22. A retroactive application unilaterally by the Board of the General Order 71 definition to the contracting operators in violation of Article II–29 of their resumption addenda would constitute not only a breach of contract by the Government, but also action in violation of the express Congressional intent that holders of operating subsidy contracts should thereby obtain "a fair measure of stability" in the governmental policy as embodied in such contracts. See H. R.

[1] In addition to the seven contracting lines listed at the end of paragraph B–3 above, who had executed with the Commission the resumption addendum, including Article II–29 quoted above, Moore-McCormack Lines, Inc., by letter of February 10, 1950, was advised of the Commission's action with respect to its resumption of subsidized operation. This letter provided for inclusion in the resumption agreement of Article II–29, which excludes application of the General Order 71 definition until the termination of the recapture period which was current on December 31, 1946. Moore-McCormack formally accepted the Commission's offer of February 10 by endorsing its acceptance thereon under date of February 27, 1950.

This written offer and acceptance, in our opinion, constituted an informal but none the less binding contract by the Commission to give, and by Moore-McCormack to accept, among other provisions, Article II–29. Moore-McCormack therefore stood on the same legal footing as the other seven "contracting lines." Accordingly, on the company's insistence and in recognition of this pre-existing contract right, the Board included Article II–29 in the resumption addendum with Moore-McCormack executed on March 8, 1951.

Rep. No. 2168, 75th Cong., 3d Sess., p. 8; S. Rep. 1618, 75th Cong., 3d Sess., p. 3.[2]

Accordingly, we find that we are not free to impose either the original or an amended General Order 71 definition upon the contracting lines prior to the end of their recapture periods which were current on December 31, 1946.

B. *The Situation of the Noncontracting Operators*

As to the four noncontracting operators, we are free to exercise policy judgment untrammeled by contractual commitments. Under the authority conferred by section 607 (d), there is both the power and the duty to amend the definition of "Capital Necessarily Employed" to whatever extent may be necessary to promote the policies and purposes of the Act.

It should be noted that when all the operators resumed subsidized operations in 1947 they did so subject to the Commission's discretion as to the making of the various statutory findings prerequisite to payment of subsidy. There were then no contractual commitments on either side as to the applicability or nonapplicability of any new General Order 71 definition of "Capital Necessarily Employed" in respect of any recapture period.

1. *The present General Order 71 definition.*—The present definition, if retroactively applied to January 1, 1947, would not give proper effect to the then need of the operators for cash with which to finance the replacement and purchase of ships and other capital assets for use in subsidized services. However, prospectively applied, the present definition is not subject to this objection because the operator can secure the inclusion of funds necessary for the purchase and construction of ships either by paying cash for them or, in the case of new construction deemed by the Board to be necessary or desirable for the subsidized service, by making the earmarked deposits for a construction program in accordance with section 291.5 (c) (8) of General Order 71.

2. *A new definition and a recognition of postwar abnormalities.*—A definition of "Capital Necessarily Employed", if it is to be retroactively applied, must take account of the previously existing situation and should include cash needed for planned replacement, modernization, and new vessel acquisitions. Looked at from hindsight, the best standard of need is furnished by what the operators actually did with this cash during the immediately ensuing years. A definition proper for retroactive application should provide that funds in the Capital

[2] The Senate Committee states *"a subsidy contract based on the act is complete in itself and once consummated after negotiation at arm's length should not be amplified by additional strings and conditions not contemplated in the basic subsidy law."* [Italics added.]

Reserve Fund on January 1, 1947, which were actually used between 1947–49 for fleet replacement or acquisition of vessels for operation on subsidized routes should be included as "Capital Necessarily Employed" during the unexpired term of the recapture period current on December 31, 1946. An equitable retroactive application of a definition could have been accomplished in several ways. A principal problem would have been the spread of time allowed for conversion of capital funds to physical assets. The time spread could reasonably have been one, two, or even three years. Where to draw the cutoff line is, of course, a question of administrative judgment. Bearing in mind that the purpose of the 1938 amendment changing the 5-year recapture period to a 10-year period was in order to provide a measure of financial stability over the 10-year average business cycle in the shipping industry (S. Rep. No. 1618, 75th Cong., 3d Sess., p. 14; H. R. Rep. No. 2168, 75th Cong., 3d Sess., p. 22), the inclusion could be extended only until the end of the recapture period current on December 31, 1946. This, however, would have the disadvantage of creating inequalities between operators depending upon the happenstance of when their respective recapture periods terminated. Such inequalities are inherent in the effective date provision of the present General Order 71. A modification of that order permitting the inclusion in "Capital Necessarily Employed" of funds actually used for fleet replacement between January 1, 1947, and December 31, 1949, accords with the period of major ship acquisition. It is also the period which the industry, as stated above, considered fair and representative. The modified order which the committee has recommended, and which we now generally approve, therefore draws the line at December 31, 1949. For the noncontracting operators to which the modified order is applicable, it permits the inclusion in "Capital Necessarily Employed" of amounts actually disbursed from the Capital Reserve Fund or other funds for the purchase or reconstruction (including reconditioning, betterment, and improvement) of subsidized vessels to the extent that the amount of such disbursements are not otherwise included in capital. Of course, no deposit in the Reserve Fund can be included in "Capital Necessarily Employed" by virtue of this amendment, prior to the date that such deposit first became available for such use. Furthermore, as stated above, the amendment by its terms would permit such inclusion only for the remainder of the recapture period which was current at the end of 1946.

By avoiding the broad inclusions of the General Order 31 definitions on the one hand, and, on the other, the exclusions of the present General Order 71, which, if retroactively applied, would be drastic to

the opposite extreme, reasonable recognition is given to the postwar shortage of ships for subsidized services and the real need of the operators at that time to hold cash with which to replace lost ships and acquire additional ships for the needs of our foreign commerce.

3. *No legal objection to retroactive feature of proposed amendment to General Order 71.*—Industry objects to the proposed new definition of "Capital Necessarily Employed" as submitted by the committee on the ground that it constitutes "rule making" within the limitation of section 4 (c) of the Administrative Procedure Act, and because of its retroactive feature is prohibited by this section even if its application is limited to the noncontracting operators. In our view, this objection of industry is not supported either by the section of the Administrative Procedure Act relied on or by general law, particularly since the proposed rule will not be applied to operators with definite contract rights. The section of the Administrative Procedure Act relied on in opposition to the proposed rule is by the opening language of section 4 of that act expressly inapplicable—

> to the extent that there is involved * * * any matter relating to * * * grants, benefits, or contracts.

In our opinion, subsidy contracts are clearly within this exception. We believe the exception is intended to cover the Government fully in its proprietary capacity. The Attorney General's Manual on the Administrative Procedure Act expressly states on page 27 that—

> Rule making with respect to *subsidy programs* is exempted from section 4. [Italics added.]

Aside from the Administrative Procedure Act, it is settled that there is no prohibition against the promulgation of retrospective rules provided they are within the promulgating authority of the Federal agency concerned. See *Addison* v. *Holly Hill Co.*, 322 U. S. 607, 620–622. As already stated, section 607 (d) of the Act expressly requires the promulgation of a definition of "Capital Necessarily Employed." The new rule recognizes the contract rights of those eight contacting operators who, prior to May 1, 1951, executed resumption addenda, and is applicable only to those four noncontracting operators whose resumption addenda, dated subsequent to May 1, 1951, expressly gave the Board a free hand in the matter of promulgating a new definition of "Capital Necessarily Employed," including a new effective date.

4. *Policy consideration—uniformity of treatment.*—We are conscious of the desirability of equal treatment of both contracting and noncontracting operators. That we are barred by contractual obligations from applying uniformly a definition which we believe to be

sound does not justify, in our opinion, the granting to the noncontracting operators a definition which we would not have favored were we in the original proceeding. Considerations favoring a sound rule outweigh the considerations of uniformity when uniformity carries with it the extension of a rule which, in our opinion, does not represent a reasonable solution of the problems faced in 1946.

IV. DECISION

After considering all the aspects of this problem and the views of both the staff and the industry, our over-all decision is that the present General Order 71 definition may not be retroactively applied to any of the contracting operators, but that an amended definition should be applied to the noncontracting operators.

While the substance of the present definition may not be unsound for *prospective* application because the temporary abnormal situation of "long cash, short ships," it is this situation which, in our judgment, makes unwise retroactive application. For the reasons already indicated, our general conclusions are summarized as follows:

(a) Article II–29 of the resumption addendum gives valid and binding contract rights to those operators who executed it, or with whom the Commission agreed to execute it (the contracting operators).

(b) As a matter of policy, the General Order 71 definition "as is" should not now be rolled back to January 1, 1947, nor retroactively applied to the noncontracting operators for the remainder of their recapture periods which were current on December 31, 1946.

(c) An amended definition which meets the objections already indicated to retroactive application of the present General Order 71 definition should be applied to the noncontracting operators as of January 1, 1947.

The Maritime Administrator, who, as Chairman of the Board, participates in this report, has this day adopted a new order designated as General Order 71, Amendment 1, to carry out the foregoing decision, which is in the form recommended by the committee, with minor clarifying amendments.

The committee recommendation for further negotiations with the contracting operators with the view of obtaining their acceptance to a rollback of General Order 71 (with proposed amendments) to January 1, 1947, is, in our judgment, inappropriate, and in this detail we disagree with the recommendation. As already pointed out, all the contracting operators have been urged to agree voluntarily to such a rollback and have declined, relying on their contractual rights. We think as to them the issue is closed and should not be reopened.

The staff considers that the present definition can be improved upon in various aspects, and the third recommendation of the committee is that the staff prepare, within 90 days after the date of the report, a proposed revised definition of "Capital Necessarily Employed", such revision to become effective on January 1, 1952. We concur in the substance of this recommendation. The Administrator will issue appropriate instructions as to time limit and effective date.

APPENDIX A

DEPARTMENT OF COMMERCE
MARITIME ADMINISTRATION

Table of comparative analysis of elements in the determination of "capital necessarily employed" under (1) proposed supplement No. 2 to General Order No. 31, (2) proposed definition submitted by a special committee to former Maritime Commission with a memorandum dated Jan. 14, 1949, and (3) General Order No. 71, all subject to qualifying footnotes

[Allowable as Capital Necessarily Employed]

(See notes A to H inclusive, immediately following the table)

			Under proposed supplement No. 2 to G. O. No. 31	Under proposed definition presented Jan. 14, 1949	Under G. O. No. 71
		Allowable (where indicated) to extent balance in capital reserve fund is not allocable for other purposes			
Balance in capital reserve fund	XXX	1.) Accrued reserve for depreciation on subsidized vessels	Yes	No	No.
Add: Accrued requirements for deposit.	XXX	2.) Funded depreciation (including all accrued depreciation whether or not deposited in capital reserve fund) on subsidized vessels, subject to reduction by certain withdrawals.	No	No	Yes.
		3.) Balance on account of principal amount of outstanding mortgage indebtedness on subsidized vessels.	Yes	Yes	No.
		4.) Amount required to make or complete down payment of 25 percent on additional subsidized vessels under executed purchase contracts.	Yes	Yes	Yes.
		5.) Amount transferred to contractual construction fund from capital reserve fund to provide for down payment of 25 percent on additional subsidized vessels under program approved by administration (subject to retroactive adjustment in event program is subsequently canceled).	Yes	Yes	Yes.
Total	XXX				
Special reserve fund	XXX				
Add: Accrued requirements for deposit.	XXX				
	XXX				
Less: Recapture liability	XXX				
Net balance	XXX	Balance in special reserve fund, after deducting recapture liability	No	No	Yes (A).
Floating equipment	XXX	Net equity in subsidized vessels (meaning acquisition cost, less depreciation and outstanding mortgage indebtedness (H)).	Yes	Yes	Yes.

Vessels under construction	XXX	Progress payments on vessels under construction for subsidized services	Yes	Yes	Yes.
Other shipping property and equipment.	XXX	Proportion of net equity of operator in shipping property and equipment determined by Administration to be essential to operation of subsidized services.	Yes	Yes	Yes.
Investments in affiliated companies	XXX	Proportion of net equity of affiliated companies in shipping property and equipment determined by Administration to be essential to subsidized services (not in excess of allocable proportion of investment of operator).	Yes	Yes	Yes.
Inventories (of vessel spares)	XXX	Value of inventories of spares for subsidized vessels	Yes	Yes	Yes (B).
		Working capital "ceiling" applicable if less than total of "other net assets"			
Other net assets	XXX	1.) Amount equivalent to prepaid insurance	Yes (C)	(G)	Yes (E).
		2.) Amount equivalent to overhead and vessel operating expenses such as wages, subsistence, stores, supplies, equipment, fuel, maintenance, and repairs.	Yes (D)	(G)	Yes (F).
		3.) Amount equivalent to voyage expenses such as agency fees and commissions, wharfage, dockage, port expenses, stevedoring and other cargo expenses, brokerage, and canal tolls.	No	(G)	Yes (F).
Total net worth	XXX				

(A) Limited to 5 percent of "capital necessarily employed" as determined under all other provisions of General Order 71.

(B) Under the provisions of General Order 71, the aggregate amount of spare parts and office furniture and fixtures is limited to 2½ percent of the aggregate acquisition cost of the subsidized vessels.

(C) Insurance for 1 year.

(D) Vessel operating expenses for a period of 90 days.

(E) Insurance for a period of 90 days.

(F) Vessel and voyage expenses on the basis of average round voyage in each service.

(G) The proposed definition of Jan. 14, 1949, provided for the inclusion as "capital necessarily employed" of the working assets of the operator, whether in the form of physical assets (other than those separately specified) or in the form of working funds to the extent that the Commission found such assets to be needed for the operation of the subsidized services, in which connection for the purpose of applying the general test of fairness and reasonableness it was suggested that the Commission consider such factors as prepayments of cargo and passenger revenue, the estimated cost of vessel operations or shore operations incident to the subsidized services, requirements for interest payment on mortgage indebtedness, administrative and other necessary overhead expenses.

(H) Under the provisions of General Order No. 71 the contractor's equity in vessel subject to adjustments under section 9 of the 1946 Act is determined on the basis of the original acquisition cost for the period prior to the date of the adjustment agreement; for the period thereafter the contractor's equity in such vessel is determined on the basis of the statutory sales price. This does not conform with the provisions of General Order No. 24, as amended, which provides that the statutory sales price shall be effective Mar. 8, 1946, for the purposes of determining capital necessarily employed in the business. Had Supplement No. 2 to G. O. No. 31 or the proposed definition been adopted the provisions of G. O. No. 24, as amended, would govern in such instances.

APPENDIX B

DEPARTMENT OF COMMERCE—MARITIME ADMINISTRATION

Office of the Comptroller

Obligations for the purchase of vessels and payments from capital reserve funds Jan. 1, 1947, to Dec. 31, 1949

Name of company	Obligations as of Dec. 31, 1946	Capital reserve funds—payments				Obligations as of Dec. 31, 1949
		Calendar year 1947	Calendar year 1948	Calendar year 1949	Total	
American Export Lines, Inc.		$1,100,387.00	$5,428,312.13	$3,496,110.40	$10,024,809.53	$1,732,680.00
American Mail Line Ltd.	$1,537,170.00	2,022,153.00	815,093.81	1,511,738.95	4,348,985.76	5,341,869.00
American President Lines, Ltd.	11,006,075.71	640,939.00	2,491,827.00	7,698,105.81	10,830,871.81	9,486,341.51
Farrell Lines Inc.	7,378,020.00	1,356,237.65	3,328,728.83	3,519,657.90	8,204,624.38	9,236,916.00
Grace Line Inc.	4,765,603.00	569,228.81	325,005.81	944,629.37	1,838,863.99	4,155,560.85
Lykes Bros. Steamship Co., Inc.	10,575,772.10	1,559,951.55	7,782,404.33	2,286,581.07	11,628,936.95	
Mississippi Shipping Co.	7,382,264.00	3,108,379.02	1,087,950.71	2,033,024.00	6,229,353.73	10,622,625.83
Moore-McCormack Lines, Inc.	9,235,871.00	2,371,770.61	11,208,298.06	10,963,095.00	24,543,163.67	
New York & Cuba Mail Steamship Co.	2,329,539.00	355,365.00	545,063.24	539,946.00	1,440,374.24	814,137.34
The Oceanic Steamship Co.		933,812.00	46,460.00	175,810.00	1,156,082.00	2,545,840.00
Seas Shipping Co.	1,507,215.00	4,858,691.57	5,504,758.68	100,753.88	10,464,204.13	3,540,100.00
United States Lines Co.	22,578,751.65	3,526,024.20	4,053,544.35	2,054,269.38	9,633,837.93	29,805,992.42
Total	78,296,281.46	22,402,939.41	42,617,446.95	35,323,721.76	100,344,108.12	77,282,062.95

TITLE 46—SHIPPING

CHAPTER II—FEDERAL MARITIME BOARD
MARITIME ADMINISTRATION
DEPARTMENT OF COMMERCE

SUBCHAPTER C—REGULATIONS AFFECTING SUBSIDIZED VESSELS AND OPERATORS

Part 291—Definition of Capital Necessarily Employed in the Business

[General Order 71, Amendment 1]

General Order 71 (Section 291.5 *Definition of Capital Necessarily Employed in the Business*), published in the Federal Register issue of December 31, 1949 (14 F. R. 7936, 46 C. F. R. 291.5), be and the same hereby is amended as follows:

1. By striking the period at the end of subparagraph (8), *Certain Deposits in the Capital Reserve Fund* of paragraph (c) *Miscellaneous Items* and adding the following:

" ; and provided further, that, for the period between December 31, 1946, and the termination of the recapture period which was current on December 31, 1946, only, there shall be included in 'capital necessarily employed in the business' amounts (excluding mortage payments) actually disbursed from the Capital Reserve Fund, or from other funds to the extent that the Administrator determines that such disbursements from other funds would have been payable or reimbursable from the Capital Reserve Fund upon proper application, between January 1, 1947, and December 31, 1949, for the purchase or reconstruction (including capitalizable expenditures for reconditioning, betterment, and improvement) of a vessel or vessels required to be operated in the subsidized services, routes, or lines under the provisions of the respective operating-differential subsidy agreements and all addenda thereto, to the extent that such amounts are not otherwise so includable under the provisions of this Order and Provided further, that in no event shall there be so included any funds, prior to the date of the availability thereof for such use."

2. By striking paragraph (g) *Effective Date* in its entirety and substituting therefor the following:

"(g) *Effective Date.*—The effective date of this section 291.5, as amended, shall be as follows:

"(1) the day next following the termination of the recapture period which was current on December 31, 1946, with respect to an operating-differential subsidy resumption addendum executed prior to May 1, 1951,

"(2) January 1, 1947, with respect to an operating-differential subsidy resumption addendum executed after April 30, 1951, and

"(3) the effective date of the contract, with respect to an operating-differential subsidy contract executed after December 31, 1946."

Authority: Sec. 607 (d), 49 Stat. 2005, as amended; 46 U. S. C. 1177.

Dated September 17, 1952.

(Sgd.) E. L. COCHRANE,
Maritime Administrator.

FEDERAL MARITIME BOARD

No. 723

CITY OF PORTLAND, OREGON, ACTING THROUGH ITS THE COMMISSION OF PUBLIC DOCKS, AND THE PORT OF SEATTLE

v.

PACIFIC WESTBOUND CONFERENCE, AMERICAN-HAWAIIAN STEAMSHIP COMPANY ET AL.

Submitted June 14, 1955. Decided October 4, 1955

Article 4 of F. M. B. Agreement No. 57, Rule 2 of Pacific Westbound Conference Local Freight Tariff No. 1–V, and specific port equalization practices thereunder found to be unjustly discriminatory and unfair to the ports of Seattle and Portland within the meaning of section 15 of the Shipping Act, 1916, and to be detrimental to the commerce of the United States as contrary to the principles expressed in section 8 of the Merchant Marine Act, 1920.

Article 4 of F. M. B. Agreement No. 57 and Rule 2 of the Pacific Westbound Conference Local Freight Tariff No. 1–V disapproved insofar as they authorize practices found to be unjustly discriminatory between ports, and ordered to be amended.

Thomas J. White and *Edward G. Dobrin* for complainants.

John Hays for respondent Pacific Far East Line, Inc.

Joseph J. Geary, *Allan E. Charles*, and *Tom Killefer* for other respondents.

Frank S. Clay for Portland Freight Traffic Association, *J. D. Paul* for Seattle Traffic Association, and *Ernest Falk* for Northwest Horticultural Council, interveners.

REPORT OF THE BOARD

BY THE BOARD:

This proceeding arises out of the complaint of the City of Portland, Oregon, and the Port of Seattle, filed July 22, 1952, and amendment thereto filed November 30, 1953, wherein complainants allege that respondent Pacific Westbound Conference ("the conference")

and members thereof have violated sections 15, 16, and 17 of the Shipping Act, 1916, as amended ("the Act"), and have violated the principles and policy of section 8 of the Merchant Marine Act of 1920 ("the 1920 Act"), by virtue of the application of Rule 2 of the conference Local Freight Tariff No. 1–V [1] ("Rule 2"). A petition to amend the complaint by an allegation of violation of operating-differential subsidy contracts by respondent conference members American President Lines, Ltd. ("APL"), Pacific Far East Line, Inc. ("PFEL"), and Pacific Transport Lines, Inc. ("PTL"), was denied by the examiner as failing to present a controversy under the Act.

Rule 2, as originally adopted by the conference, allowed an individual conference line to meet the competition of other member lines through equalizing the cost to a shipper of shipping through any Pacific coast port. The difference between the shipper's cost of delivery to ship's tackle at the nearest port and his cost of delivery to ship's tackle at another port, served by the equalizing line, could, under the rule, be absorbed by that line. Rule 2 was amended,[2] effective November 1, 1952, to require equalizing conference lines to submit to the conference for approval all copies of paid inland transportation bills in order to prevent overequalization on any shipment.

Complainants allege that the practices under Rule 2 result in unjust discrimination against complainants, and object to Rule 2 on the grounds that the equalization practice thereunder is unlawful since:

(a) It permits the conference lines to attract traffic to California ports from producing areas not geographically or naturally tributary to these ports;

(b) A large volume of traffic which would logically and normally move through complainants' ports is diverted to California

---

[1] "*Rule No. 2. Direct Loading, Transhipment or Equalization.*—Subject to Rules 3, 4, and 5, rates are based on direct loading at loading ports or docks but the individual Member Line Carrier may meet the competition of other Member Lines loading direct at Terminal Ports or Docks, either by transhipment or by equalization from point of origin.

"Except as may otherwise be agreed, nothing herein shall be construed to mean that a Carrier may meet the competition of other Member Lines by equalizing between Terminal Docks within a Terminal Port.

"Equalization is the absorption by the Carrier of the difference between Shipper's cost of delivery to ship's tackle at Terminal Dock at nearest Conference Terminal Port-and the cost of delivery to ship's tackle at Terminal Dock and Port of equalizing line. Conference Terminal Ports and Docks are those named in Rule No. 3."

[2] Rule 2, as amended by conference action taken in General Meeting 92 (October 14-16, 1952), provides:

"Equalization shall only be applicable on the basis of carload or truckload rates, irrespective of quantity involved.

"Shippers must furnish carriers with copy of paid transportation bill (or certified copy of paid transportation bill) covering movement from point of origin.

"Prior to payment, all equalization bills must be submitted to the conference for approval and for confirmation of applicable interior rates and/or the amount of equalization."

688-650 O - 63 - 46

ports, resulting in the loss to complainants of revenue which should accrue to them;

(c) An equalization of natural disadvantage results through an adjustment of respondents' rates;

(d) By diverting traffic originating in the Pacific Northwest producing areas to the California ports, complainants are deprived of steamship service and frequent sailings by those lines serving complainants;

(e) It permits unfair and unlawful competition among the conference carriers;

(f) It places an undue burden on commodities not subject to equalization, and further results in unnecessary and uneconomic dissipation of carrier revenues;

(g) It results in nullification and disruption of inland rates and ambiguity in the conference tariff; and

(h) It permits shippers to obtain allowances or rebates in excess of actual inland transportation costs.

The conference urged that its equalization practice is not unlawful, defending the practice on the grounds that it—

(a) affects only a small amount of cargo,

(b) is of benefit to carriers in that it attracts traffic which would not otherwise move via that carrier, results in operating economies by eliminating ports of call, and enables them to meet emergencies and operating difficulties, and

(c) is of value to shippers by affording a wider range of loading and discharging, greater refrigerated space, and more frequent sailings, as well as by permitting consolidation of shipments on one vessel and one ocean bill of lading.

Hearings were conducted during the period October 4, 1954, through October 8, 1954, prior to which Portland Freight Traffic Association and Seattle Traffic Association intervened in support of the complaint, and Northwest Horticultural Council intervened in opposition. Thereafter, the examiner issued a recommended decision finding and concluding that the equalization system as a whole does not violate sections 15, 16, and 17 of the Act or the principles and policy of section 8 of the 1920 Act. The finding was made "without prejudice to the correction of specific faults" in relation to specific absorptions considered by the examiner to be excessive or improper.

Exceptions to the recommended decision were filed by the complaining ports and by PFEL, and oral argument on the exceptions has been heard.

The primary evidentiary facts are the following:

1. *The parties.*—Complainants are municipal corporations representing the port interests of Portland, Oregon, and Seattle, Wash., respectively. Both Portland and Seattle have excellent and extensive terminal facilities, including dry and cold storage, with a book value of several million dollars. They are served by various railroads and barge lines and numerous motor truck and ocean steamship lines. In 1953, 431 vessels sailed from Puget Sound to the Orient. The Puget Sound ports are over 1,000 miles closer to the Orient than San Francisco. Ocean rates from all terminal ports are uniform.[3]

The conference, which operates under F. M. B. Agreement No. 57 ("the basic agreement"), originally approved by the Shipping Board under section 15 of the Act, on June 26, 1923,[4] is an association of the individual respondent members engaged in common carrier transportation from United States Pacific coast ports to Japan, Hong Kong, the Phillippine Islands, and other Oriental ports. The conference is divided into Northern and Southern Districts, with offices in Seattle and San Francisco, respectively.

Intervener Northwest Horticultural Council is a trade association representing the principal Oregon and Washington tree-fruit producing industries, including the Hood River and Medford areas in Oregon and the Yakima and Wenatchee valleys in Washington.

2. *Territory tributary to complainants.*—Washington, Oregon, Idaho, and Montana comprise the territory in which the commodities in issue are produced. They are principally dairy products, apples, newsprint, and vegetables. This territory is naturally and geographically tributary to complaining ports because of financial and economic ties, and the fact that inland freight rates from this territory are favorable to such ports. For instance, the truck rate on apples from Wenatchee, Washington, to Seattle, 155 miles, is 35 cents per 100 pounds, whereas to San Francisco, 1001 miles, it is $1.20 per 100 pounds. From Boise, Idaho, to Portland, 492 miles, the truck rate on potatoes was 63 cents per 100 pounds (1952), and to San Francisco, 949 miles, it was 73 cents per 100 pounds.

3. *Apple exports.*—During 1949–53, Oregon and Washington produced almost four times the quantity of apples produced in California, accounting for 90 percent of apple exports to the Orient. Neverthe-

---

[3] Through Seattle there were exported to Asia, Pacific, and Far East destinations, 455,324 tons of cargo in 1952 and only 226,852 tons in 1953; through Portland, 839,838 tons in 1952 and 787,296 tons in 1953.

[4] The agreement, as amended, provides for absorptions of rail or coastal steamer freights or other charges as follows:

"ARTICLE 4. There shall be no payment or refund in respect of freight or compensation received and no absorption at loading or discharging ports of rail or coastal steamer freights or other charges, directly or indirectly, by any of the parties hereto, except as may be agreed to by two-thirds of parties hereto at any regular meeting of the Conference."

less, California ports handled almost four times the number of boxes shipped through Northwest ports (to Hong Kong, Japan, and the Philippines) during that period. Apples were among the 10 leading exports from Seattle during 1950–52, but not in 1953, nor from Portland during 1950–53. During the apple shipping season of 1952–53 and 1953–54 (November through April) there were 69 sailings from Seattle and Portland to destinations served by conference lines by vessels with refrigerated space capable of accommodating 1,720,800 and 1,262,700 boxes of apples, respectively, but only 15,731 boxes were actually loaded on these vessels at Seattle and 48,229 at Portland. The movement of apples through Oregon, Washington, and California ports remained fairly constant and relatively high for the duration of the Government export payment program during the 1949–52 marketing seasons, but fell off precipitously at the end thereof, including the movement through California ports. Other reasons for the decline is the reduced supply of dollars in the Orient for purchases of fruit, the drifting away of Americans from the Far East, and the small crop of apples in the last two seasons.

There has been a substantial movement of apples through Seattle and Portland to the United Kingdom, Europe, and South America. Ships load first at Northwest ports and finish loading citrus fruits at California ports. In those trades, compartments are loaded full with apples and are not opened at subsequent loading ports. In contrast, apples are shipped to Oriental destinations from Northwest ports in less than compartment capacity quantities. On other than direct Pacific Northwest to Oriental and Far East ports voyages, therefore, compartments in which apples have been stowed are subject to reopening at subsequent loading ports.

4. *Operation of the equalization rule.*—Prior to November 1952, when the rule in question was amended to require shippers to furnish carriers with copy of paid freight bill covering movement from point of origin, and to require conference approval of all equalization payments, respondents equalized on a schedule of fixed differentials. These were based upon the differences in the rail rates from interior origins to the ports involved in the equalization. Shipments rarely moved by rail, however, moving largely, as they do now, via cheaper "exempt" trucks (as to agricultural products) with no published or regularly established rate. This practice would inevitably lead to overequalization or the giving of rebates to the shipper. For instance, the actual difference in the truck rates from Hood River, Oreg., to Portland and to San Francisco in March 1952 was 29 cents, but the equalization factor allowed was 34½ cents, resulting in a rebate of 5½ cents.

Since the amendment to the rule, however, the conference members have attempted to equalize on an actual cost basis. The conference receives information from the truck lines as to actual costs of inland transportation, receives from each line, with the exception of PFEL, paid bills supporting equalization payments, and passes on each payment with a view to approval of actual cost. In most cases, this procedure has resulted in equalization on an actual cost basis, although some variation from actual cost may exist.[5]

5. *Examples of absorption and diversion under the rule.*—The percentage of the ocean rate absorbed under equalization was 17 percent on apples from Washington to San Francisco via exempt truck, 47 percent on peas from Idaho via truck, 24.7 percent on explosives from Washington, and 53.3 percent on nitramon from Washington. An extreme example of equalization, by PFEL, was on a shipment of 530 tons of newsprint from Oregon City, Oreg., to San Francisco via truck, where the amount absorbed was 73.6 percent of the ocean rate, or $8,489.25 out of revenue of $10,346.28.[6]

Specific examples of diversion were cited by complainants. In July 1954 a shipment of knocked-down houses weighing 350 tons moved from Pier 30 in Seattle to San Francisco via rail, thence to Korea via PFEL. A witness for Portland also contended that shipments of onions to Manila, from points 30 and 44 miles from Portland, were being diverted to San Francisco, notwithstanding two of the regular lines out of Portland were interested in carrying the cargo. There was testimony, however, to the effect that there were no direct sailings from Portland to the Philippines, that Philippine buyers insists on direct sailings for perishable cargoes such as onions, and that direct sailings were available out of San Francisco.

6. *Amount of cargo equalized and absorptions thereon.*—During the period January 1, 1950, to April 18, 1954, PFEL equalized on 28,619.7 revenue tons originating in Oregon, Washington, Idaho, and Montana and moving via San Francisco, consisting largely of dairy products (13,487 tons), newsprint (6,432.7 tons), apples (4,629.3 tons), and explosives[7] (2,885.6 tons). The absorptions amounted to $309,257

[5] Exhibit 30 shows slight variations of absorptions approved by the conference during 1954 as paid by various conference lines on the same commodity, originating from the same area.

[6] In support of their motion to bring in alleged violations of subsidy contracts, complainants point to the fact that in the year 1952, PFEL absorbed only $18,957 through equalization, but in the year 1953 (after its subsidy contract became effective), it absorbed $176,311 on equalized cargo.

[7] PFEL's witness testified that transportation of explosives (dynamite from Du Pont, Wash., to Manila) is highly specialized since (1) it requires a direct sailing from port of loading to port of discharge; (2) only one conference line (foreign) has a direct sailing from Puget Sound, once a month; and (3) it is loaded at a special anchorage outside of the territorial limits of Seattle, and therefore, that port cannot handle it in any event.

or 23 percent of the ocean revenue on such commodities, or 18.2 percent, excluding newsprint, which PFEL contends was equalized on a temporary and interim movement.[8] During approximately the same periods, except for 5 months in 1952, the other respondents equalized on 18,267 weight tons originating in the Pacific Northwest and moving via California ports, consisting almost wholly of apples and vegetables. Also, in this period, 4,669 weight tons of fruit originating in California, mostly citrus, moved on equalization rates through Pacific Northwest ports. Respondents also equalize between California ports and between Pacific Northwest ports. PFEL asks the Board to take official notice of the fact that all of the traffic reported as moving under equalization from the Northwest through California ports over a period of four years is not more than five shiploads. This takes no account of the 4,669 tons gained by complainants through northbound equalization.

Cargo carried under equalization is a small percentage of the total commercial tonnage carried by respondents. APL equalized on approximately 2 percent of its total cargo carried in this trade during the year ending June 30, 1954, on which the absorptions amounted approximately to 11 percent of the gross revenue from such cargo. PTL's percentage of equalized cargo was about 5 percent of all commercial cargo carried during the last 12 months (on not more than 500 tons from the Northwest), on which the absorption was not more than 1 percent of gross revenue. In 1953 equalized cargo carried by PFEL amounted to approximately 1 percent of the ocean revenue on all cargo, including military cargo. All conference members in the Southern District practice equalization, although the principal practitioners of equalization on cargo originating in the Pacific Northwest are American-flag subsidized operators who serve the San Francisco area and are unable, under the terms of their operating-differential subsidy contracts, to provide general service from Pacific Northwest ports. A witness for the Java Pacific & Hoegh Line expressed the opinion that, in view of the limited extent of the equalization practice, elimination of the practice would not increase sailings out of Northwest ports. The leading cargoes of the Northwest, such as grain and lumber, are not affected by equalization.

7. *Value of equalization practice to carriers.*—All conference members profit from carriage of equalized cargo to the extent that such carriage produces revenue in excess of out-of-pocket costs. Further, credible testimony was offered to the effect that the ability to equalize

[8] PFEL's witness testified that equalization on newsprint is not representative of future handling (which will be cheaper and more efficient) since it is now moving in vans for coastwise transportation directly over the Portland docks.

on a percentage of cargo as small as 2 percent influences the movement of up to an additional 5 to 10 percent due to the desires of California exporters to consolidate on one vessel various cargoes of fruit and produce originating in diverse areas. In the case of conference lines not subject to trading area restrictions,[9] the ability to equalize permits such consolidation without requiring an unprofitable call at another port. In the case of the subsidized American-flag line, equalization permits the line to carry, for consolidation of shipment purposes, cargoes originating in areas which the line is not permitted to serve and prevents loss of the entire shipment to a line able to serve both areas.[10]

Equalization also permits the subsidized lines to lift, in San Francisco, cargoes which originated in the Northwest, even where consolidation of shipments is not involved. Lines privileged to call at both California and Northwest ports are, in addition, enabled, through equalization, to divert cargoes to another port in the event of cargo arrival delays, operating delays, or unanticipated schedule changes.

8. *Attraction of export traffic to San Francisco.*—The business of exporting apples to the Orient was originated and developed, beginning in 1913, by San Francisco brokers and exporters. The Hood River Association, in 1936, attempted to sell direct to Oriental buyers, but without success, because the business was controlled by San Francisco brokers. This association, which represents 75 percent of the growers in Hood River Valley and originates about 50 percent of export shipments to the Orient, sells its apples through a San Francisco broker. San Francisco is the hub of exporting activity on the Pacific coast, due largely to its frequent sailings covering a wide range of discharge ports, and to the practice of the Oriental buyer of opening up a single letter of credit with a San Francisco exporter covering several commodities, including Northwest apples, California fruits, and other foodstuffs, which can be consolidated for shipment on one bill of lading from San Francisco.

9. *Service at San Francisco and at Portland-Seattle.*—There were 73 sailings of refrigerated vessels from the Pacific coast to the Far

[9] Neither APL, PFEL, nor PTL are permitted, under the terms of their respective subsidy contract, to provide service on Trade Route 30 (Washington and Oregon ports to the Far East).

[10] The following colloquy took place, on oral argument before the Board, between Board Member Guill and Mr. Hays, counsel for PFEL:

> Mr. GUILL. Did you make those absorptions before you became subsidized?
>
> Mr. HAYS. I don't believe so, because before we were subsidized, we were calling at Portland and Seattle. That is one thing I was going to say here; that equalization, I do not believe was as prevalent before the subsidized lines were granted their subsidies as it was afterwards."

East between September 17, 1954, and January 15, 1955. Sixty-six were from California ports, 51 of which sailed direct from San Francisco as last port of loading. There were only 25 sailings of refrigerated vessels from Portland and Seattle, 11 of which loaded last at a Northwest port. Fourteen loaded 12 to 17 days later at California ports. Sailings from California ports generally covered a wider range of discharge ports.

Nonrefrigerated service from Northwest ports is more frequent. We take official notice, from the Board's records, of the fact that sailings from the Pacific Northwest follow three general patterns: (1) ships load in the Pacific Northwest, then complete loading at California ports and go direct to the Philippines; (2) ships load at California ports, complete loading at Pacific Northwest ports, and proceed to the Philippines via Japan; and (3) ships load in the Pacific Northwest only and proceed to the Philippines via Japan. In all three cases, the scheduled transit time from Pacific Northwest ports to the Philippines is approximately the same. Outbound sailings calling at Pacific Northwest ports en route to the Philippines average about four per week, and these are divided about equally between United States-flag and foreign-flag ships. Sailing schedules of both foreign- and United States-flag operators show the scheduled time from last Pacific Northwest port to the first Philippine port as ranging from 24–28 days. Exhibits introduced in evidence by the complainants show the total sailings to the Orient from Puget Sound in 1953 number 431, including tramp and military tonnage. Equivalent sailings from the Columbia River equal 335, exclusive of military tonnage.

10. *Circumstances affecting transportation and marketing of apples and other foodstuffs.*—Northwest apple growers meet competition from apples produced in British Columbia, Japan, Korea, and Australia. Competition is more on a quality than a price basis, which requires small shipments properly refrigerated and delivered on a fast schedule. Shipment in large lots would result in excessive spoilage losses, and would glut the market because of inadequate storage and marketing facilities in the Orient. A representative of the Apple Growers Association testified that the need for frequent shipments of apples by association members requires a range of 6 to 10 sailings per week during apple shipping seasons, that the Northwest ports do not provide that frequency of service, and that more than 6 to 8 weekly sailings of vessels with reefer space are available from San Francisco.[11] In many instances the apple buyer designates direct

[11] An exhibit introduced by respondents indicates, however, that commercial sailings of vessels with reefer space from San Francisco average less than five per week.

sailing from San Francisco because he wants his goods delivered on a certain date to meet market conditions, as, for instance, certain Oriental festivals. Similar considerations apply to the exportation of other foodstuffs such as vegetables, which are shipped under ventilation, and dairy products. Canned milk produced in the Northwest is exported through Portland except when the shipments "have" to be sent through San Francisco, as the witness put it. Witnesses stressed the necessity of steady, evenly divided arrivals on many ships to meet the conditions peculiar to the Oriental market.

Exporters expressed objection to loading fruit first at Northwest ports on ships that complete loading at San Francisco, because of the delay incurred and the necessity of reopening the refrigerated compartments. The delay of 12 to 17 days in loading at Northwest ports subjects exporters to the risk of fluctuation in the market. It was further stated that reopening of hatches at San Francisco to load other refrigerated cargo causes fluctuations of hold temperatures and rehandling of the goods, considered to be harmful to apples. Little evidence was offered, however, in explanation of the necessity for rehandling the apples or in explanation of the distinction between rehandling on indirect sailings and the rehandling incidental to prior truck movements on direct sailings from San Francisco. Similarly, no evidence was offered as to the actual or possible variations of temperature in refrigerated compartments which might occur during loading at San Francisco; the effect of the probable temperature variations on apples loaded at a prior port; the distinction between the temperature variations in refrigerated compartments on indirect sailings; and the temperature variations inherent in loading from nonrefrigerated trucks to refrigerated compartments on direct sailings.

11. *Effect of elimination of equalization rule.*—Witnesses for PFEL and the conference were of the opinion that elimination of the equalization rule would result in the reduction of exports of commodities presently equalized, the partial loss to American shippers of foreign markets, a slight increase of service in the Northwest ports, an increase in tramp carryings with corresponding decrease in conference carryings, and some increase in exporting of products, particularly onions and apples, from areas other than the Northwest producing areas. Witnesses for the complaining ports were of the opinion that elimination of the rule would increase service from those ports, with substantial benefit to the economy of the port cities, and would free from jeopardy the heavy investment of the ports in installations and equipment.

DISCUSSION

Basically, the complaint alleges that the conference's equalization practice and Rule 2 are unjustly discriminatory against and prejudicial to the ports of Seattle and Portland, under sections 16 and 17 of the Act, and violate section 15 of the Act. Prejudice to localities, within the meaning of section 16,[12] and discrimination against ports, within the meaning of sections 15 and 17, if existing, result from "* * * the drawing away of traffic inherently and geographically belonging to * * *"[13] the Northwest ports. Whether the drawing away of traffic results in unjust or unfair discrimination or undue or unreasonable preference, however, is a question of fact for determination in each instance. *Beaumont Port Commission* v. *Seatrain Lines, Inc.*, 3 F. M. B. 556 (1951); *City of Mobile* v. *Baltimore Insular Line, Inc.*, 2 U. S. M. C. 474 (1941).

In a further allegation, complainants allege that Rule 2 and the practices thereunder, in addition to being unjustly discriminatory between ports, are detrimental to the commerce of the United States in violation of section 15 of the Act. Complainants further seek an order requiring the conference to amend Rule 2. While it is only the effectuation of unapproved agreements between carriers or other persons subject to the Act which violates section 15 of the Act, and since it has been alleged that Rule 2 represents an unapproved agreement between carriers, we consider this deficiency in the complaint to be insignificant. In view of the request for amendment of Rule 2, we consider the allegation of violation of section 15 of the Act to constitute a request for partial disapproval of the conference agreement and Rule 2 insofar as either authorizes practices which are unjustly discriminatory, unfair, detrimental to the commerce of the United States, or unlawful under the Act.

In support of their allegations of discrimination and preference, the complaining ports have adduced evidence showing or tending to show that (a) competition exists between Pacific Northwest ports and the port of San Francisco for the same commodities; (b) diversions of traffic are effected by conference carriers through absorptions of inland transportation charges on shipments from San Francisco on

[12] Although the U. S. District Court for the Northern District of California indicated in *State of California* v. *United States*, 46 F. Supp. 474 (1942), that the word "localities" appearing in section 16, First, of the Act refers to shippers only, it has been the uniform interpretation of this Board and its predecessors that the word "localities" refers to ports. *Beaumont Port Commission* v. *Seatrain Lines, Inc.*, 2 U. S. M. C. 500 (1941); *City of Mobile* v. *Baltimore Insular Line, Inc.*, 2 U. S. M. C. 474 (1941); *Beaumont Port Commission* v. *Seatrain Lines, Inc.*, 3 F. M. B. 556 (1951); *Port Differential Investigation*, 1 U. S. S. B. 61 (1925); *Everett Ch. of Com. et al.* v. *Luckenbach S. S. Co. et al.*, 1 U. S. S. B. 149 (1929).

[13] *Beaumont Port Commission* v. *Seatrain Lines, Inc.*, 3 F. M. B. 556, 565 (1951).

cargo originating in Northwest producing areas; (c) cargoes on which absorptions of inland freight charges are made originate in areas naturally and geographically tributary to Northwest points because of inland transportation rates favorable to those ports as well as through closer proximity; and (d) the conference equalization rule has proximately caused a substantial loss of cargo to Northwest ports.

The conference and PFEL have shown various circumstances and transportation conditions which, they assert, warrant the establishment and continued existence of rules and practices relative to port equalization. Briefly, the evidence shows or tends to show that the basic reasons for the existence and growth of the practice of port equalization by conference lines are (a) the development of export trade to the Orient by San Francisco exporters and resultant commercial practices, such as consolidation of shipments on one vessel and the establishing by buyers of a single letter of credit; (b) the prohibition against service of Pacific Northwest ports by subsidized lines PFEL, APL, and PTL; and (c) the greater frequency of refrigerated and nonrefrigerated sailings from San Francisco than from Northwest ports.

Equalization on specific commodities

Shippers of apples have urged, and we find, that cancellation of the privilege of equalization on Oregon and Washington apples shipped from San Francisco would result in a substantial reduction in the volume of apples shipped from the Pacific coast to the Orient. While we accord little weight to the testimony that direct sailings are required for shipments of apples, other than to recognize the risk of fluctuation of price on longer voyages, we nevertheless find that insufficient sailings, direct or indirect, are available from the Northwest ports to satisfy the stated requirements of shippers of apples and other deciduous fruits. We conclude, therefore, that the practice of equalizing inland transportation costs on such cargoes is not unjustly discriminatory as between ports, detrimental to the commerce of the United States, or in violation of the Act. We will require, however, that equalization on shipments of apples and other deciduous fruits be subject to continuing review. When reasonably adequate service is provided from the Northwest, the reason for this equalization rule will no longer exist.

The ports have indicated that lines regularly serving Portland are willing and able to accommodate shipments of Oregon-produced onions, irregularly shipped to the Philippines, which have moved under equalization from territory tributary to Portland through San Francisco. Witnesses for the conference have stated, however, that such

cargoes require direct sailings, that no direct sailings to the Philippines are available form Northwest ports, and that direct sailings are available from San Francisco. No credible reason has been offered as to the necessity for direct sailings, as a regular practice, or the necessity for diverting such shipments from Portland on other than an emergency basis. Similarly, no justification has been shown for the diversion of shipments of other types of produce grown in Northwest areas. We conclude, therefore, that absorption of inland transportation costs on shipments of produce from areas geographically tributary to the ports of Seattle and Portland is unjustly discriminatory against, and unfair to, those ports within the meaning of section 15 of the Act.

PFEL, as stated, equalizes to a greater extent than other respondent conference members. In justification for absorption of inland transportation costs on shipments of explosives originating in Du Pont, Wash., PFEL has shown that explosives for the Philippines require direct sailings, that such sailings are available in sufficient frequency from San Francisco, and that there is but one direct conference sailing per month from Northwest ports, although a greater frequency is required to meet shipper needs. PFEL admits, however, that nonconference vessels are able to provide the necessary service from the Northwest. Finally, PFEL has shown that the loading berth at Blake Island, Wash., from which this cargo would have moved if unequalized, is physically located in an adjoining county and beyond the jurisdiction of the city of Seattle. We are unimpressed with this latter argument. The nature of the cargo requires that loading take place in an area sufficiently far from populous areas to remove the danger to the public inherent in such cargo. The fact remains that Blake Island is in the Puget Sound area and is the explosive loading area for vessels calling at Seattle. Further, since it is admitted by PFEL that there is no inadequacy of service to accommodate this cargo but merely an insufficient number of conference sailings, we conclude that the conference has not justified the prima facie discrimination against the Seattle area which is inherent in the practice of equalizing inland transportation costs of moving this cargo to San Francisco. Accordingly, we find that the practice of equalizing inland transportation costs on shipments of explosives, and so much of Article 4 of the basic agreements and Rule 2 which authorize that practice, are unjustly discriminatory and unfair as between ports, within the meaning of section 15 of the Act.

As hereinabove shown, the greatest absorptions, percentagewise, have been made on shipments of newsprint originating in Oregon City and St. Helen's, Oreg., amounting to, in one instance, 73 percent of the ocean freight, or $8,849.25 out of a total revenue of $10,346.28.

PFEL points out, in justification, that such absorptions are not representative of equalization as it was practiced on a single recent shipment and as it will be practiced in the future. Shipments via truck will be eliminated, it was stated, in favor of shipments via van loaded aboard a coastwise steamer, at great reduction in amounts of absorption. An intention to employ more economical methods of equalization in the future, however does not justify equalization in the past or necessarily in the future. The ports here have adequate nonrefrigerated sailings to the Far East and have been deprived of cargo which would normally move through the ports but for the equalization practice. No evidence has been adduced showing or tending to show an inadequacy of service from Portland or Seattle, or other reason for equalization on this commodity. In this regard, we deem it significant that equalization as practiced by other conference carriers does not extend to absorptions of domestic transportation costs on this commodity. We find, therefore, that PFEL's absorption practices *re* newsprint, and so much of Article 4 of the basic agreement and Rule 2 which authorize those practices, are unjustly discriminatory and unfair as between carriers, within the meaning of section 15 of the Act.

The conference has shown that dairy products are shipped frequently in small lots, and that such products normally move through Northwest ports but move through San Francisco under equalization where insufficient service is available from the Northwest. In view of these facts, we find that the practice of equalizing inland transportation costs on shipments of dairy products is not unjustly discriminatory or unfair as between ports, detrimental to the commerce of the United States, or unlawful under the Act. As in the practice of equalizing inland transportation costs on apple shipments, however, we will require a continuing review of absorptions on dairy products until such time as sufficient service is available in the Northwest for all such shipments. Further, we will permit equalization on these dairy products only when service is unavailable in the ports through which such products would normally move but for the conference's equalization practice, and we will require the conference rules to reflect our views in this matter.

Article 4 presently forbids absorptions of rail or steamer freights or other charges except as may be agreed to by two-thirds of the conference members. The provision contains no self-imposed limitations on amounts of absorptions or on the areas in which equalization may be practiced, nor does Rule 2, adopted under the authority of Article 4, contain any such limitations. While we approved a similar provision in *Agreement No. 7790*, 2 U. S. M. C. 775 (1946), as not shown

to be unlawful, discriminatory, or detrimental to the commerce of the United States, our present findings of unjust discrimination in conference equalization practices make mandatory a disapproval of Article 4 of the agreement and Rule 2 insofar as found to authorize such unjustly discriminatory practices. We will require the conference, therefore, to cease and desist from effectuating Article 4 of the basic agreement or Rule 2 by any of the practices which have been condemned herein, and to submit an amended provision for our approval. We will require that amendment to reflect the understanding of the parties and to limit the percentage of absorptions of rail, truck, or coastal steamer freights which will be made and the areas to which the practice may extend. The amendment to Rule 2 or Article 4 should provide that equalization may be practiced out of a port, on cargoes tributary to another port, only where adequate service is unavailable from the latter port. The amendment should further provide for the continued practice of approval, by the conference, of amounts of absorptions.

Nothing in this opinion, however, is intended to preclude a carrier from absorbing the difference between cost of inland transportation to the port through which cargo would normally move and a similar cost to a succeeding or preceding port of call where emergency situations require, provided that the carrier normally calls at both of those ports.

Since no complaint has been made against equalization on cargoes originating in California producing areas and shipped through Northwest ports, we make no finding as to the propriety of such practices. Since the conference serves both areas, however, the amended conference equalization rule must necessarily apply with equal force and with like interpretation to both areas.

The conference and PFEL have argued that elimination or amendment of the equalization rule will result in loss of Oriental markets to exporters for products from Pacific Northwest areas and will not result in additional sailings from Pacific Northwest ports. We recognize this argument only as to those commodities as to which we have herein permitted the practice of equalization to continue. Further, we cannot agree that amendment of the equalization rule will not increase the amount of traffic from the Northwest, in view of PFEL'S estimate that cargo amounting to approximately five shiploads has moved under equalization from the Northwest through California ports over a period of four years, in view of conference testimony that a substantial amount of nonequalized cargo has been influenced by the movement of equalized cargo, and in view of the fact that the

conference itself, serving as it does, both areas, has control of the number of sailings out of Northwest ports.

In view of our findings of unjust discrimination arising out of specific equalization practices, it necessarily follows that those practices are detrimental to the commerce of the United States and violate the principles and policies of section 8 of the 1920 Act.[14] That section requires, all other factors being substantially equal, that a given geographical area and its ports should receive the benefits of or be subject to the burdens naturally incident to its proximity or lack of proximity to another geographical area. To the extent, therefore, that the ports of a given geographical area give or can give adequate transportation services, we look with disfavor on equalization rules or practices which divert traffic away from the natural direction of the flow of traffic.

We see no merit to complainants' argument that the examiner erred in denying their petition for leave to amend the complaint by allegations of violation of operating-differential subsidy contracts by various respondents. As stated by the examiner, an alleged violation of a subsidy contract presents no controversy under the Act, and complainants have no standing to file a formal complaint as to such violation or to demand a public hearing thereon under the Merchant Marine Act, 1936. Irregularities in this regard, if existing, appear here to be matters for consideration and determination by the Maritime Administrator and not by the Board.

It is a strange coincidence that equalization appears to have been practiced almost exclusively by American-flag subsidized operators. The fact is significant that neither nonsubsidized American-flag operators nor foreign-flag operators practice absorption from the Northwest in any substantial amount, and that equalization, as a whole, has increased since the execution of subsidy contracts with lines permitted to serve the San Francisco area but prohibited from serving Northwest ports.

Complainants' argument that the examiner erred in failing to find that the port equalization practice is violative of sections 15, 16, and 17 of the Act, has been rendered moot, in major part, by the result here. The relief afforded complainants as to those practices condemned by us under section 15 of the Act makes unnecessary any determinations as to violations of sections 16 and 17 of the Act, in the absence of a demand for reparation. As to those practices found by us to be justified, as hereinbefore shown, the evidence does not support complainants' contentions.

---

[14] Section 8 charges the Board with the duty to promote and encourage the use by vessels of ports adequate to care for the freight which would naturally pass through such ports.

SUMMARY

In summary, we find the equalization rule and practices of the conference to be unjustly discriminatory and unfair between ports, within the meaning of section 15 of the Act, and detrimental to the commerce of the United States as contrary to the principles of section 8 of the 1920 Act. We disapprove of so much of Article 4 of the basic agreement and Rule 2 which permit the practice herein condemned, and we will require amendment of Article 4 in a manner consistent with this decision.

ORDER

At a Session of the FEDERAL MARITIME BOARD, held at its office in Washington, D. C., on the 4th day of October A. D. 1955

No. 723

CITY OF PORTLAND, OREGON, ACTING THROUGH ITS THE COMMISSION OF PUBLIC DOCKS, AND THE PORT OF SEATTLE

v.

PACIFIC WESTBOUND CONFERENCE, AMERICAN-HAWAIIAN STEAMSHIP COMPANY ET AL.

This case being at issue upon complaint and answer on file, and having been duly heard and submitted by the parties, and full investigation of the matters involved having been had, and the Board, on the date hereof, having made and entered of record a report stating its conclusions and decision thereon, which report is hereby referred to and made a part hereof:

It is ordered, That Article 4 of F. M. B. Agreement No. 57 and Rule 2 of Pacific Westbound Conference Local Freight Tariff No. 1-V be, and they are hereby, disapproved insofar as they authorize practices herein found to be unjustly discriminatory and unfair as between ports; and

It is further ordered, That respondents are required to amend Article 4 and Rule 2 of F. M. B. Agreement No. 57 in a manner consistent herewith.

By the Board.

[SEAL] (Sgd.) A. J. WILLIAMS,
Secretary.

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.

688-650 O - 63 - 48

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.

---

[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,[7] 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

---

[7] *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.

---

[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.

688-650 O - 63 - 49

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:

[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 non-conference 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 noncontract 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,[13] 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

[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.

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 noncontract 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]

---

[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

"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 noncontract 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:

---

[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:

688-650 O - 63 - 50

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 District 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.*

---

[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 overall 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

688-650 O - 63 - 51

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-

688-650 O - 63 - 52

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

---

[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] Doble, 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.

[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.

688-650 O - 63 - 54

FEDERAL MARITIME BOARD

No. M-64

PACIFIC FAR EAST LINE, INC.—APPLICATION TO BAREBOAT CHARTER SEVEN VICTORY VESSELS FOR OPFRATION 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]
>
> * * * * * * *
>
> 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 back 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

[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.

TABLE OF COMMODITIES

Carbon Black. Gulf ports to La Pallice, France. 611.
Cotton. Gulf ports to Mediterranean ports. 611.
Lumber. Eastbound intercoastal. 387.
Oil, lubricating. Gulf ports to Spanish Mediterranean ports. 611.
Paper. False classification. 483.
Propane gas tanks. Puerto Rico and Florida. 603.
Road Rollers. U.S. Atlantic and Gulf ports to Indonesia. 343.
Tinplate. U.S. Gulf and South Atlantic ports to Mediterranean ports. 611.
Trailers. Puerto Rico and Florida. 603.
Wood pulp. Swedish Baltic ports to U.S. North Atlantic ports. 202.
Wood pulp. Fernandina, Fla. to Marseilles, France. 611.

688-650 O - 63 - 56

INDEX DIGEST

[Numbers in parentheses following citations indicate pages on which the particular subjects are considered]

ABSORPTIONS. See also Port Equalization.

Where member of conference absorbed discharging costs on two shipments, contrary to conference regulations, and claimed this was due to a broker's error, evidence that those shipments had previously been booked with another conference member, with a request for a reduction below conference rates, is not sufficient to justify the conclusion that rebates or concessions had been granted knowingly in violation of section 16-Second, where neither intent to grant a lower rate nor a deliberate failure on the part of the carrier to keep itself informed was shown. The evidence, however, was sufficient to support a finding of violation of the conference agreement in absorbing discharging costs and in failing properly to respond to the conference's request for information concerning the shipments in question. Practices of Fabre Line and Gulf/Mediterranean Conference, 611 (637).

A carrier may absorb the difference between cost of inland transportation to the port through which cargo would normally move and a similar cost to a succeeding or preceding port of call where emergency situations require, provided the carrier normally calls at both of those ports. City of Portland *v.* Pacific Westbound Conference, 664 (678).

ADMINISTRATIVE PROCEDURE ACT. See Agreements under Section 15; Capital Necessarily Employed; Intercoastal Operations; Practice and Procedure; Subsidies, Operating-Differential.

ADMISSION TO CONFERENCE. See Agreements under Section 15; Subsidies, Operating-Differential.

AGENTS. See Intercoastal Operations (Sec. 805(a)); Section 804 Waivers.

AGREEMENTS UNDER SECTION 15. See also Absorptions; Brokerage; Contract Rates; Port Equalization; Rebates.

—In General

Although one court has said that the Board has authority to forbid parties from acting under an agreement not approved, the Board will not decide the question where a conference proposes to put into effect a dual-rate system under an approved conference agreement, since section 15 of the Shipping Act gives the Board authority to approve, disapprove, cancel, or modify agreements and 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. Contract Rates—North Atlantic Continental Freight Conference, 98 (104).

Under section 15, the Board has the broadest power to disapprove new or existing agreements. The Board's power to approve, disapprove, cancel, or modify an agreement between carriers is derived from section 15, as amplified

by section 25 providing "that the Board may reverse, suspend, or modify, upon such notice and in such manner as it deems proper, any order made by it." 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.

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

services incident to the handling of truck cargoes on their piers, including an allowance of reasonable free time. Pennsylvania Motor Truck Assn. *v.* Philadelphia Piers, Inc., 192 (196, 197).

A 2-day free time limitation is not unduly prejudicial to truck cargo under section 16 of the Shipping Act of 1916 where, although rail cargo is allowed from 5 to 15 days, there was no showing of existing and effective competitive relation between truck and rail cargo. Id. (197).

Where delays in handling of outbound and inbound cargo beyond a 2-day free time period are occasioned by the physical shortcomings of piers, the resulting congestion, and other conditions such as working hours of checking clerks, such free time period is an unreasonable regulation under section 17 of the Shipping Act of 1916. Id. (197, 198).

Truck operators and associations are proper parties to seek remedial action where they are adversely affected by terminal operators' free time limitation because of wasted time of their trucks and drivers and the resulting increased burden to their operations, even though the truck operators are not themselves liable for demurrage and the charges actually collected from shippers may have been very small. Id. (198).

GENERAL AGENTS. See Intercoastal Operations (Sec. 805(a)); Section 804 Waivers; Subsidies, Operating-Differential.

GENERAL ORDER 71. See Capital Necessarily Employed.

GEOGRAPHICAL ADVANTAGES AND DISADVANTAGES. See Absorptions; Port Equalization.

HEARINGS: See Agreements under Section 15; Charter of War-Built Vessels; Complaints; Evidence; Intercoastal Operations (Sec.. 805(a)); Practice and Procedure; Subsidies, Operating-Differential.

INTERCOASTAL OPERATIONS (Sec. 805(a)).

—Chartering to or from domestic operators

Section 805(a), in prohibiting subsidized operators from chartering vessels in the domestic trade, makes no distinction between chartering from and chartering to domestic operators. Such claimed distinction is unjustified from the language, its history, or prior interpretation of the Board/Administrator's predecessors. Pacific Far East Line, Inc., 580 (589).

—Authority of Administrator/Board

Permission granted under section 805(a), without condition, is within the scope of the Board's and Administrator's authority, and does not preclude later review if changing circumstances warrant. American President Lines, Ltd., 555 (556).

The administration of section 805(a) of the Merchant Marine Act of 1936 is not exclusively a function of the Board but also the Maritime Administrator's. The latter has jurisdiction to determine matters concerning this section after compliance with the hearing requirements and where it appears that the application cannot result in making, amending, or terminating subsidy contracts. Since the present applications may result in amending the subsidy contract, the Board, rather than the Administrator, has jurisdiction. Pacific Far East Line, Inc., 580 (590).

—Competition to domestic operators

Application under section 805(a) to continue present domestic coastwise service between California and Hawaiian ports, in conjunction with service on

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 per-cent 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).

688-650 O - 63 - 59

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.

U.S. GOVERNMENT PRINTING OFFICE: 1963 O—688-650