# FEDERAL MARITIME BOARD

No. M–69 (Sub. No. 1)

PACIFIC FAR EAST LINE, INC.—APPLICATION TO BAREBOAT CHARTER TWO GOVERNMENT-OWNED VICTORY-TYPE VESSELS

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"), to bareboat charter two Government-owned Victory-type vessels for one voyage each to carry wheat from the Pacific Northwest to Pakistan, beginning in July 1956. The vessels sought, SS *Swarthmore Victory* and SS *Arcadia Victory*, are now under bareboat charter to PFEL pursuant to the Board's findings in Docket No. M–64 and Docket No. M–64 (Sub. No. 1), and the charters will terminate at the end of July.

In Docket No. M–69, 5 F. M. B. 112, involving applications for the bareboat charter of 30 vessels for the carriage of International Cooperation Administration ("ICA") and other Government-sponsored cargoes, as well as such other cargoes as may be approved by the Maritime Administration, the Board held that on the evidence of record an affirmative finding that privately owned American-flag vessels are not available could not be made, but stated that it would reopen the proceeding if a Government agency, having cargo to move, after giving sufficient advance notice to the ship operators, advises the Board that privately owned American-flag vessels at reasonable rates and on reasonable conditions are not available.

Notice of this hearing was published in the Federal Register of July 19, 1956. Since it originally heard Docket No. M–69, the Board in this case heard the evidence and oral argument in lieu of briefs on July 19. Exceptions will not be filed to this dicision.

American Tramp Shipowners Association, Inc. (ATSA), appeared in opposition to the application. Polarus Steamship Co., Inc.

("Polarus"), also appeared in opposition to the application and by telegram dated July 19, 1956, requested that in the event the Board found no privately owned American-flag vessels available, the Board consider Polarus an applicant to charter the two vessels here sought for this trade. This telegram further set forth that Polarus had advised the Pakistan Embassy, through their brokers, that subject to allocation, Polarus would use the subject vessels upon a finding of nonavailability of privately owned tonnage, and would carry the cargo at $27 per ton.

States Steamship Company, Pacific Transport Lines, Inc., and Shepard Steamship Company intervened as their interests might appear. Public Counsel urged recommendation of the application.

Because of the short notice of the hearing, at the conclusion of oral argument the Board ruled it would defer its decision until 5 p. m. on July 20 in order to allow the owners of any privately owned American-flag vessels to offer them for this trade.

Evidence of record indicates that the Government of Pakistan has two full cargoes of wheat, financed by ICA, to be moved from the Pacific Northwest to Karachi, Pakistan, on or before August 3, that PFEL made some canvass on the Pacific coast as to the availability of vessels, without success, that the Chief, Office of Ship Operations, Maritime Administration, checked on vessels in the Pacific Northwest without finding any available to lift this cargo, that the Pakistan Government canvassed the market also without success, and that PFEL plans to carry the wheat at the N. S. A. rate of $27.99 per ton.[1] The record is clear in establishing the fact that ATSA was aware, on June 15, that bids on this cargo were to be opened on June 18, covering June and July ships. The witness for ICA, under cross-examination by counsel for ATSA, testified in Docket No. M-69:

> However, there are bids to be opened on the 18th * * * 110,000 tons of grain for Pakistan * * *. And these people can offer their vessels in to the Pakistan Embassy on Monday [June 18] morning or to the grain houses for fixtures. *That's in existence today.* (Record, p. 241.) (Italics added.)

In this proceeding, ATSA offered no vessels whatever.

In view of the foregoing, we feel that Polarus and members of ATSA had knowledge of this cargo and had ample time, if they had no vessel available, to canvass the market in an effort to determine whether or not privately owned American-flag vessels were available at reasonable conditions and rates, and if not, then to initiate a request for the charter of Government-owned vessels to lift the cargo.

[1] Subsequent to the hearing in the case, PFEL advised the Board that the company had offered and the Pakistan Government had accepted a rate of $27 a ton subject to the Board's approval of the use of the vessels in question.

This was not done by Polarus or member companies of ATSA until the date of the hearing on the PFEL application. The Board sees no reason why Polarus should be given precedence over PFEL. The argument that the cargo in question is tramp type and should be limited to tramp operators is without merit.

*Public interest.* It has been held in *Grace Line Inc.—Charter of War-Built Vessels*, 3 F. M. B. 703 (1951), that a service in which one commodity is carried from one port to another for but a single shipper, unless exceptional circumstances are shown, is not in the public interest. We think, however, that the mandates of Congress, as in this instance executed by ICA, in financing aid cargoes to nations such as Pakistan, clearly establish exceptional circumstances, and we find that the movement of Government-financed wheat in vessels chartered from the Government in circumstances where privately owned tonnage is not available, is in the public interest.

*Adequacy of service.* The charter market has been, and remains, tight. Although the evidence is adequate that no space for these cargoes existed on liners out of the Northwest, and that no tramp vessels could be found that would engage in the trade at the time required, we feel that applicant, with more specificity, should have established the extent to which the market for privately owned American-flag vessels was canvassed—when, by whom, and in what manner. We feel that applicant should have produced a witness who could testify directly on this matter. However, the record is clear in establishing the fact that at the time of the hearing privately owned American-flag service was not adequate to accommodate the cargoes in question.

*Reasonable conditions and rates.* The fact that the record discloses that no privately owned American-flag vessels were available for this trade at any rates makes unnecessary a determination as to the reasonableness of conditions and rates of available privately owned American-flag vessels.

## Findings, Certification, and Recommendations

On the basis of the facts adduced at the hearing, 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 American-flag vessels are not available for charter from private operators on reasonable conditions and at reasonable rates for use in such service.

Any charter which may be granted herein should be for one voyage for each of the two vessels, basic charter hire should be at a rate not less than 15 percent of the unadjusted statutory sales price of the vessels chartered or the floor price, whichever is the higher, readying and lay-up costs should be for account of applicant, and the operation of the vessels chartered should be limited to the outbound carriage of wheat from the Pacific Northwest to Pakistan, and the vessels be required to return to a West coast United States port, to be named by the Maritime Administrator, and there redelivered in accordance with instructions from the Maritime Administrator.

JULY 23, 1956.

# FEDERAL MARITIME BOARD

No. S-60

ISBRANDTSEN COMPANY, INC.—APPLICATION FOR OPERATING-DIFFERENTIAL SUBSIDY AGREEMENT — EASTBOUND ROUND-THE-WORLD SERVICE

No. S-60 (Sub. No. 1)

ISBRANDTSEN COMPANY, INC.—APPLICATION FOR WRITTEN PERMISSION—SECTION 805 (a)

*Submitted June 20, 1956. Decided August 31, 1956*

REPORT OF THE BOARD ON APPEALS FROM RULINGS OF EXAMINER

CLARENCE G. MORSE, *Chairman*, BEN H. GUILL, *Vice Chairman*, THOS. E. STAKEM, JR., *Member*

BY THE BOARD:

Pursuant to Rule 10 (m) of our Rules of Practice and Procedure, Isbrandtsen Company, Inc. ("Isbrandtsen"), has appealed from certain rulings of the examiner directing applicant and Public Counsel to furnish information, and Bull-Insular Line, Inc., A. H. Bull Steamship Co., Luckenbach Steamship Company, Inc., Marine Transport Lines, Inc., and Weyerhaeuser Steamship Company ("domestic operators"), interveners, have "cross-appealed" from certain rulings of the examiner which denied their requests for data from applicant.[1]

Isbrandtsen appealed from rulings (1) that Public Counsel supply statistics showing the number of sailings and the amount of cargo from and to each port on the proposed eastbound round-the-world service; (2) that applicant furnish data pertaining to all of its foreign-flag affiliations, whether or not related to the route proposed to be served; and (3) that applicant produce detailed data as to way cargo carried on its round-the-world vessels and details as to any

[1] Our decision of June 8, 1956, disposed of that portion of the appeal dealing with the determinations of the Administrator of essentiality of trade routes under section 211 of the Merchant Marine Act, 1936, as amended ("the Act").

agreements between applicant and any shipper for present or future cargo movements in any domestic or foreign operation.

Cross-appellants appealed from the rulings which denied their requests that applicant furnish (1) details of its merchant activities; (2) the entire subsidy application, including "confidential" portions; (3) details of its vessel replacement program; and (4) all data from the year 1950 rather than the year 1951.

Oral argument was heard on the issues on June 20, 1956. Public Counsel appeared in support of the examiner's ruling on the issue of production of statistical data by Public Counsel and in support of the appeal otherwise. Isbrandtsen appeared in support of the appeal, and the domestic operators appeared in opposition to the appeal and in support of their own "cross-appeal." American Export Lines, Inc., appeared in opposition to the appeal.

## Discussion

With reference to the production of statistics by Public Counsel showing the number of sailings and the amount of cargo from and to the ports involved on the proposed service, we are in complete agreement with the examiner. It is to be noted that ports and areas in Isbrandtsen's proposed service vary materially from the ports and areas covered by the services and trade routes which the proposed service overlap. It is obvious, then, that the statistical data for the ports and areas proposed to be served are relevant and material to issues of existing service, adequacy of service, and undue advantage and undue prejudice raised in a section 605 (c) proceeding.

Turning now to the data pertaining to Isbrandtsen's foreign-flag affiliations on routes and services other than those of applicant's eastbound round-the-world service, we fail to see their relevancy to the issues raised in either a 605 (c) or an 805 (a) proceeding. These are matters to be determined under section 804 of the Merchant Marine Act, 1936, as amended. The Board will see that this section of the law is fully satisfied before any final determinations are made on the subsidy application. *States Marine Corp.—Subsidy, Tri-Continent Service*, 5 F. M. B. 60.

Applicant's foreign-flag affiliations on routes not here under consideration can have no bearing on the issues of existing U. S.-flag service, adequacy of service, or undue advantage and undue prejudice in a section-605 (c) proceeding, or the issues of unfair competition or the objects and policy of the Act in a section-805 (a) hearing.

As to the rulings concerning the production of data relating to way cargo carried on its round-the-world vessels, we believe such data are

not germane to issues raised in a section-805 (a) proceeding, and therefore Isbrandtsen should not be compelled to furnish such data. Way cargoes carried on the foreign legs of the proposed service cannot adversely affect carriers engaged solely in the domestic commerce of the United States. Similarly, the Board believes that agreements between shippers and applicant covering present and future cargo movements in the foreign commerce of the United States cannot unduly prejudice the United States coastwise and intercoastal operators, and Isbrandtsen need not furnish such information.

With regard to agreements between Isbrandtsen and any shipper covering present or future cargo movements in the domestic trade, we feel that section 805 (a) of the Act deals with any and every domestic intercoastal or coastwise trade in which an applicant for subsidy is engaged, and is not merely confined to a situation where the domestic service is a part of the route for which subsidy is sought. Findings by the Board that permission to engage in the domestic coastwise or intercoastal trade may or may not result in "unfair competition" or may or may not be "prejudicial to the objects and policy" of the Act must be predicated on relevant facts, among which is the amount of cargo available for carriage in the domestic trade. We are of the opinion that agreements or understandings between Isbrandtsen and any shipper covering present or future movements of cargo in the domestic trade is relevant and material to the issues raised in this proceeding and therefore must be furnished by Isbrandtsen.

The examiner properly refused the request of domestic interveners that Isbrandtsen disclose its so-called "merchant" activities.

With reference to that portion of the "cross-appeal" requesting that the entire subsidy application, including "confidential" information be furnished, we point out that the application was submitted to the Board pursuant to section 601 of the Act for the exclusive use of the Board in carrying out its functions under that section. Such confidential information is not subject to scrutinization in either a 605 (c) or an 805 (a) proceeding since it is not material to the issues under those sections.

Isbrandtsen's vessel replacement program, although a matter in which the Board is interested, has no relationship to the issues raised here. Compiling traffic data from 1950 to date would entail far more work and expense than from 1951 to date, and, since we believe the value of such additional data in this proceeding is disproportionate to such work and expense, we feel that the examiner acted properly within his discretion in setting the period from 1951 to date.

An appropriate order will be entered in accordance with the foregoing.

ORDER

At a Session of the FEDERAL MARITIME BOARD, held at its office in Washington, D. C., on the 5th day of September A. D. 1956

No. S–60

ISBRANDTSEN COMPANY, INC.—APPLICATION FOR OPERATING-DIFFERENTIAL SUBSIDY AGREEMENT—EASTBOUND ROUND-THE-WORLD SERVICE

No. S–60 (Sub. No. 1)

ISBRANDTSEN COMPANY, INC.—APPLICATION FOR WRITTEN PERMISSION—SECTION 805 (a)

Interlocutory appeals having been made to the Board in these proceedings, and the Board having served its reports therein on June 12, 1956, and September 4, 1956, which reports are hereby referred to and made parts hereof;

*It is ordered*, That neither the Maritime Administrator's determinations of essential trade routes made pursuant to section 211 of the Merchant Marine Act, 1936, as amended, nor the data upon which such determinations were based, are to be received in evidence in these proceedings;

*It is further ordered*, That Public Counsel produce statistics showing the number of sailings and the amount of cargo from and to the ports involved on the proposed service of applicant;

*It is further ordered*, That neither data pertaining to applicant's foreign-flag affiliations on routes and services other than applicant's eastbound round-the-world service, data pertaining to way cargo carried by applicant, agreements between applicant and shippers covering present and/or future cargo movements in the foreign commerce of the United States, data pertaining to applicant's so-called "merchant" activities, the "confidential" index to applicant's subsidy application, nor applicant's vessel replacement program be produced by applicant;

*It is further ordered*, That applicant furnish details of agreements between any shippers and applicant covering present and/or future movements of cargo in the domestic intercoastal or coastwise commerce of the United States; and

*It is further ordered*, That all traffic data required shall be from the year 1951.

By the Board.

(SEAL)

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

# FEDERAL MARITIME BOARD

No. M-71

GRACE LINE INC.—APPLICATION TO BAREFOOT CHARTER TWO VICTORY-TYPE VESSELS FOR OPERATION ON TRADE ROUTE NO. 25, SERVICE B

REPORT OF THE BOARD

CLARENCE G. MORSE, *Chairman*, BEN H. GUILL, *Vice Chairman*, THOS. E. STAKEM, JR., *Member*

BY THE BOARD:

This proceeding was instituted pursuant to Public Law 591, 81st Congress, upon the application of Grace Line Inc. for the bareboat charter of two Government-owned, Victory-type, dry-cargo vessels for operation for one year on Trade Route No. 25, Service B.

Hearing was held before an examiner on July 25, 1956, pursuant to notice in the Federal Register of July 18, 1956. Oral argument was had before the examiner in lieu of briefs. The examiner's initial decision was served on July 30, 1956, in which he recommended that the Board should make the necessary statutory findings, and should recommend, *inter alia*, that applicant bear all break-out, readying, and lay-up costs incurred on the two chartered vessels. Exceptions to the initial decision were filed by opposing intervener American Tramp Shipowners Association, Inc. ("ATSA"), and by applicant.

We are in substantial agreement with the conclusions of the examiner.

The record indicates (1) the two vessels sought to be chartered are to be used on Trade Route No. 25, applicant's Line "B" service between United States Pacific coast ports and the west coast ports of Mexico, Central, and South America, on which service applicant, as the only United States-flag berth service, operates six vessels with fortnightly sailings; (2) none of applicant's owned tonnage is under charter to any other operator; (3) the vessels sought are desired for delivery at a United States Pacific coast port; and (4) applicant desires the charter because of increasing commercial and Government-sponsored "aid" cargoes on Trade Route No. 2, requiring transfer of the *Santa*

*Elisa* from operation on Trade Route No. 25 to Trade Route No. 2 in August 1956, an increase in commercial and Government-sponsored "aid" cargoes southbound on Trade Route No. 25 within the next 8 to 12 months, and an increase in ore and nitrate tonnage northbound on Trade Route No. 25 through February 1957. The record further establishes that after applicant attempted to secure privately owned United States-flag vessels for charter, the only firm offers were for two Liberty-type vessels at $75,000 per month and one C–1 type vessel in excess of $70,000 per month.

Of the two vessels sought, one would replace the *Santa Elisa*, which would be transferred to operation on Trade Route No. 2, and operating-differential subsidy aid is requested for this vessel. The second vessel, with which the applicant intends to carry "aid" and other bulk cargoes southbound and bulk commodities northbound, is sought without subsidy. Applicant plans to integrate one vessel on its sequence voyage and turnaround schedule, while the second vessel, although operated on this trade route, will not serve a full range of United States Pacific coast ports.

In connection with the request for subsidy on one of these vessels, we note that applicant filed an application for operating-differential subsidy on June 25, 1956, but that application will not be considered here.

*Public interest.* Trade Route Nos. 2 and 25 have been determined to be essential foreign trades routes. Predicated upon these findings, the *Santa Elisa*, when transferred from operation on Trade Route No. 25 to operation on Trade Route No. 2, will be used in a service which is in the public interest. We also find that the vessel sought to be chartered to replace the *Santa Elisa* on Trade Route No. 25 is to be used in a service which is in the public interest. Although the second vessel sought to be chartered will not be integrated in applicant's voyage sequence and turnaround schedule on Trade Route No. 25, it will operate on this route without serving the full range of United States Pacific coast ports and will carry Public Law 480, 83d Congress, cargoes. It is our opinion that the vessel is to be used in a service which is in the public interest.

*Adequacy of service.* We agree with the examiner in his findings that the service is not adequately served. The record shows that on Trade Route No. 2 applicant's vessels are sailing at capacity southbound and have frequently refused cargoes. Further, on Trade Route No. 2 applicant's vessels are carrying full underdeck cargoes and substantial deckloads southbound, and both commercial and Public Law 480 cargo has had to be turned down on this route, justifying the

transfer of the *Santa Elisa* to this trade route. The record indicates that applicant is not able to accommodate all the cargo offered on Trade Route No. 25 and that its vessels are running at approximately 100 percent full cubic capacity southbound and approximately 90 percent northbound. There is substantial evidence that both commercial and Government-sponsored cargoes will materially increase within the next ten months on Trade Route No. 25. Approximately 310,000 tons of Public Law 480 cargoes are yet to be moved southbound from United States Pacific coast ports. The evidence indicates that northbound traffic over Trade Route No. 25 of ores and concentrates during the next 12 months will be considerably increased over any corresponding period. In regard to the northbound movement, a witness for ATSA testified that a substantial imbalance of northbound over southbound cargo existed in tramp operations on Trade Route No. 25. It is noted from the record that the basis of this testimony was a Census Report No. FT 1000, but it was not introduced into evidence, no exhibit was made from it, and the witness did not know what commodities it covered. The examiner gave no weight to this evidence on the ground that the record as to the figures supporting the witness's statement was neither clear nor complete. We agree with this conclusion.

*Availability of vessels—reasonableness of rates and conditions.* Applicant endeavored without success to secure offers of charter of United States-flag C–2s from several owners of such vessels. Efforts were made through several brokers to charter other United States-flag vessels, but the only offers obtained were firm offers for two Libertys at $75,000 each and one C–1 vessel in excess of $70,000 per month. These offers were rejected by applicant as its projections showed substantial losses at those figures.

In June applicant was again advised by brokers that the time-charter market was $70,000 for C–2s and Victorys and $65,000 for Libertys. Again in July applicant was advised that the time-charter market was $75,000 to $85,000 for C–2s, $75,000 to $78,000 for Victorys, and $66,000 to $68,000 for Libertys. Applicant testified that no firm offer for any of these vessels was made since its calculations showed a charter at that rate would entail too much loss.

ATSA states that two C–2s were fixed on June 25, 1956, for 10 to 12 months at $75,000, and another C–2 for 6 to 8 months, with delivery in August, at $80,000. These vessels, ATSA stated, were available to any reputable charterer. At the time of the hearing ATSA was not aware of any Victorys available for charter, but there were 6 to 8 Libertys available at current rates which it placed at $65,000 a month.

We note that the witness for ATSA did not represent the owner of any vessel who could offer them at the rates stated.

While there is testimony to the effect that some Liberty-type vessels are now available for charter, we note that there was no claim that Victorys or C–2s are now available. Indeed, applicant did not receive any firm offers at any price for Victorys or C–2s, the types which it desires to charter. In June, applicant purchased a C–2-type vessel for operation on Trade Route No. 25 as a replacement for the *Santa Elisa*, but delivery will not be effective until January 1957; because delivery will be at an Atlantic coast port it will not be available for southbound service on Trade Route No. 25 until April 1957. We consider it significant that no firm offers for Victorys or C–2s have been made, and conclude from the record that vessels which are suitable for this service are not available.

## Discussion

Applicant excepts to the recommendation that it bear all break-out, readying, and lay-up costs incurred on the two chartered vessels. ATSA excepted to the findings (1) that the charter would be in the public interest, (2) that the service is not adequately served, and (3) that privately owned American-flag vessels are not available at reasonable rates.

The exceptions filed by ATSA have been fully covered in the preceding discussion.

As noted above, applicant's exception relates only to the recommendation that it bear all break-out, readying, and lay-up costs, and insists that the letter and spirit of Public Law 890, 84th Congress, approved August 1, 1956 (H. J. Res. 613), suggests a change in policy which should be reflected in the Board's recommendation.

Recent recommendations of the Board resulting from Public Law 591 proceedings have included a recommendation that break-out, readying, and lay-up costs be borne by the charterer, although in most instances the applicant has maintained that he will not accept the vessels sought on such a condition. While the Board has recommended that the applicant bear such costs, in some cases the charterers have been able to secure vessels having already been broken out, and the break-out, readying, and lay-up costs have been less than the $150,000 to $200,000 which has been estimated in this proceeding. Additionally, we recognize the fact that break-out, readying, and lay-up costs vary from vessel to vessel, which results in lack of uniformity and therefore makes for inequities among charterers.

Under the provisions of Public Law 890, the Secretary of Commerce is authorized to use the previously created vessel operations revolving fund in connection with charters awarded in activation, repair, and deactivation of vessels. Although the revolving fund may be used, the law does not direct its use, and, on the contrary, the Senate Report (S. Report No. 2627, 84th Cong., 2d sess.) points out that the law's flexibility permits the Secretary of Commerce to drive the hardest bargain possible under conditions existing at the time of charter.

In view of the large cost of break-out, readying, and lay-up, the unusual heavy cargo offerings anticipated here, the Secretary of Commerce may deem that the public interest warrants the cost of break-out, readying, and lay-up be paid from the fund with a recoupment of such costs through charter hire. In our opinion it is essential that charter rates be uniform and consistent with the policies of the Merchant Ship Sales Act of 1946, as amended. It is our view that in fixing charter rates under the Act consideration should be given to the "fair and reasonable" rates determined by N. S. A. We recommend, therefore, that the Secretary of Commerce authorize the payment of break-out, readying, and lay-up expenses from the vessel operations revolving fund, and that in such event he give consideration to the recoupment of such costs through charter hire. In fixing the charter rate consistent with the policies of the Act, and giving consideration to the N. S. A. "fair and reasonable" rate, if such charter rate is not sufficient to recoup such costs within the period of the charter requested by applicant, consideration should be given by the Secretary of Commerce to lengthening the period of the charter.

## Findings, Certification, and Recommendations

On the basis of the facts adduced at the hearing, 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 American-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 charter which may be granted herein should be for the requested period of 12 months, subject to the right of cancellation by the charterer on 15 days' notice, such right at the option of the Administrator to be conditioned upon full payment to the Government of the remainder of one year's charter hire, which will be considered as recoupment of break-out and lay-up costs, and

the right of cancellation by the Government on 15 days' notice; that the basic charter hire rate be directly related to the N. S. A. fair and reasonable rate, but shall in any event be at a rate of not less than 15 percent of the floor price of the vessel.

Action with respect to subsidization for one vessel, which the applicant seeks to charter, shall await further action of the Board. In the event subsidization is allowed, the charter party executed should include provisions to protect the interest of the Government under its operating-differential subsidy agreement with applicant.

With reference to break-out, readying, and lay-up costs, we recommend that the Secretary of Commerce establish uniform rates of charter hire which take into consideration the N. S. A. fair and reasonable rates, and authorize the use of the vessel operations revolving fund for the activation, repair, and deactivation cost provided for in Public Law 890, 84th Congress.

The Board further recommends that except in special circumstances where the urgency of the situation overrides our desire to recoup average activation, repair, and deactivation expenses, as a desired goal, charters should be for a period which will enable the Administration to recoup substantially all such expenses. Where the charter is earlier terminated at charterer's option, then at the option of the Administrator a consideration for such early termination should be charged against charterer in an amount which, when added to charter hire already paid, will aggregate one year's charter hire.

Inasmuch as the Government will have recouped substantially all of the average activation, repair, and deactivation expenses during the first year of operation, in charters which are made for a period extending beyond one year, consideration should be given to reducing the rate of charter hire in the second and subsequent years, always consistent, however, with the policies of the Merchant Ship Sales Act of 1946, as amended.

SEPTEMBER 6, 1956.

# FEDERAL MARITIME BOARD

No. S–57

STATES MARINE CORPORATION AND STATES MARINE CORPORATION OF DELAWARE—APPLICATION FOR OPERATING-DIFFERENTIAL SUBSIDY ON THEIR TRI-CONTINENT, PACIFIC COAST/FAR EAST, AND GULF/MEDITERRANEAN SERVICES

REPORT OF THE BOARD ON APPEALS FROM RULINGS OF THE EXAMINER

CLARENCE G. MORSE, *Chairman*, BEN H. GUILL, *Vice Chairman*, THOS. E. STAKEM, JR., *Member*

BY THE BOARD:

This matter has been presented on interlocutory appeal, under Rule 10 (m) of our Rules of Practice and Procedure, from rulings on November 30, 1955, of the examiner in this proceeding, and the Statement of Grounds for rulings dated January 12, 1956. The Board previously disposed of one of the appeals on June 8, 1956, and the remaining rulings appealed from by applicant, and a subsequent "cross-appeal" filed by certain of the interveners, will be disposed of now. The examiner ruled, *inter alia*, (1) that applicant supply voyage-by-voyage detail of cargo liftings for affiliated interests, including date of lifting, port of loading and of discharge, commodity, and long tons carried; (2) that applicant supply information as to its foreign connections, such as its related foreign corporations, the foreign-flag vessels in which it or its affiliates have an interest, for which it serves as agent, or which it charters; and (3) that applicant disclose the grounds upon which it proposes to retain any interest as to which divestiture is not proposed. From these rulings applicant takes this appeal.

The subject matter of the "cross-appeals," filed by interveners Lykes Bros. Steamship Co., Inc., Pacific Far East Line, Inc., and Weyerhaeuser Steamship Company, relates chiefly to the denial by the examiner of rulings ordering the production, by applicant, of the following: (1) a complete copy of the application and all exhibits and amendments; (2) a list of common stockholders in States Marine

and Anderson, Clayton & Co., and holdings of each; (3) with respect to F. M. B. Agreements Nos. 8001 and 8002 between States Marine and Bloomfield Steamship Co. and its stockholders, the record of performance thereunder, i. e., cargo for which States Marine is responsible versus total cargo carried by Bloomfield (segregating bulk, cotton, other general), and fees received; (4) a list of all persons owning, directly or indirectly, more than two percent of the stock of States Marine or of Anderson, Clayton; (5) a statement of foreign business activities of each stockholder owning, directly or indirectly, more than two percent of the stock of States Marine or of Anderson, Clayton, with particular reference to shipping, merchandising, stevedoring, and terminal operations.

Oral argument on the issues was heard on June 20, 1956. Public Counsel and States Marine appeared in support of the appeal from the rulings; American President Lines, Ltd., appeared in opposition to the appeal; and Lykes, PFEL, and Weyerhaeuser appeared in opposition to the appeal and in support of their own "cross-appeal."

## Discussion

This proceeding is one held pursuant to the provisions of section 605 (c) of the Merchant Marine Act, 1936 ("the Act"), and all the demands for information which are the subject matter of this appeal and "cross-appeal" must be viewed in the light of materiality and relevance to issues within the purview of that section, which reads:

> 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 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.

With reference to applicant's appeal, the issues to be determined are: (1) whether data pertaining to applicant's voyage-by-voyage cargo liftings for affiliated interests are material and relevant to applicant's existing service and the adequacy of existing United States-flag service, and (2) whether applicant's pecuniary interest in foreign corporations, maritime and/or nonmaritime, is material and relevant to the question of whether an award of subsidy would tend to create undue advantage to applicant or undue prejudice to interveners.

As to the voyage-by-voyage cargo lifted for affiliated interests, applicant contends that it is willing to supply such information on an annual or semiannual basis, but that the voyage-by-voyage requirement is both too burdensome and may result in a detriment to the shipper. It is the belief of the Board that statistics compiled on a semiannual basis identifying all of the cargo carried for affiliated interests is sufficient for the purposes of this 605 (c) hearing. In connection with the carriage of cargo for affiliated interests by applicant, interveners have requested details of all of the affiliated interests' shipments on all vessels regardless of flag. It is the belief of the Board that such statistics are not required for purposes of these proceedings.

Data pertaining to applicant's foreign-flag interests are matters for determination pursuant to section 804. Unless they are clearly shown to be relevant to issues raised under section 605 (c) as well, they have no place in this proceeding. The question presented, therefore, is: are applicant's foreign-flag operations and affiliations relevant to the issues of (1) existing service or (2) undue advantage and undue prejudice?

Since applicant has agreed to furnish data pertaining to the foreign-flag sailings on the routes and services involved, we are not here confronted with any question concerning such data.

Under section 605 (c), foreign-flag operations have no place in the determination of whether or not applicant has an existing United States-flag service on the route or routes on which subsidy is sought.

There remains the question of relevancy of data concerning applicant's foreign-flag relationships and operations on routes and services other than those involved in these proceedings to the issue of existing United States-flag service and to the issue of undue advantage or prejudice.

In determining whether the effect of a subsidy award would result in undue advantage or will be unduly prejudicial, the prime responsibility is one of providing adequate service by vessels of United States registry in the "competitive services, routes, or lines." Foreign-flag relationships and operations which pertain to routes and services other than those involved in these proceedings or represent nonmaritime

foreign activities are not relevant or material to the resolution of the issue of "undue advantage" and "unduly prejudicial."

Such foreign-flag operations as may be conducted by applicant are subject to a thorough scrutiny by the Board as one of its responsibilities antecedent to the award of subsidy and the making of the contract, but such determination is not made pursuant to section 605 (c) but rather to section 804 of the Act. Under section 804, foreign operations and affiliations are unlawful unless the Administrator, under special circumstances and for good cause shown, waives the provisions of that section. The Board in its consideration of the application will determine the effect of an applicant's foreign-flag operations and affiliations upon all essential American-flag services.

The Board rules, therefore, that applicant should not be compelled in this proceeding to furnish data relating to its foreign-flag relationships other than the data which it has agreed to furnish. All foreign-flag investments, relationships, and operations will be scrutinized properly by the Board when reviewing the application in light of section 804.

Approval under section 605 (c) alone is not tantamount to the award of a subsidy, nor is such action an indication that the award of a subsidy contract necessarily follows.

The Board's determination under the Act and its disposition of pending problems are made in an orderly fashion although not necessarily in sectional sequence. It would serve no useful purpose to conglomerate into one proceeding all the several matters which require serious consideration by the Board antecedent to the contract award. As a matter of fact, to the extent there remains to be made any determination, all prior actions are subject to or dependent thereon before finality has been achieved.

Although interveners have raised questions regarding the citizenship of applicant in light of foreign-flag relationships that are known to exist, the Board nevertheless rules that these citizenship questions will be given thorough examination when the application is considered pursuant to the provisions of section 601, and such questions need not be the subject of inquiry under the present 605 (c) proceeding.

With reference to the first item of the "cross-appeal," the application for subsidy aid, including "confidential" financial information, was submitted pursuant to section 601 of the Act for the exclusive use of the Board in carrying out its functions under that section. Such confidential information is not subject to scrutinization in a 605 (c) proceeding since it is not material to the issues under that section.

Certain of the interveners in their "cross-appeal" objected to a ruling by the examiner denying a request for a list of the common stockholders of States Marine and of Anderson, Clayton, and details as to the holdings of each such stockholder. The Board fails to see the relevancy of this material in the present 605 (c) hearing and therefore sustains the examiner's ruling. The names of all persons owning stock in States Marine have been submitted to the Board pursuant to section 601 (b).

Interveners' request for a record of performance between States Marine and Bloomfield Steamship Company and its stockholders is based on an alleged possible violation of sections of the Act which have no bearing on this proceeding and should not be considered.

Reference to the further request of the interveners for a statement of all foreign business activities of each stockholder of the applicant and of Anderson, Clayton is unnecessary in view of our determination that applicant's foreign-flag interests are immaterial and irrevelant here. These matters are properly for consideration under section 804 rather than in the present proceedings.

An appropriate order will be entered in accordance with the foregoing.

ORDER

At a Session of the FEDERAL MARITIME BOARD, held at its office in Washington, D. C., on the 5th day of September A. D. 1956

No. S–57

STATES MARINE CORPORATION AND STATES MARINE CORPORATION OF DELAWARE—APPLICATION FOR OPERATING-DIFFERENTIAL SUBSIDY ON THEIR TRI-CONTINENT, PACIFIC COAST/FAR EAST, AND GULF/MEDITERRANEAN SERVICES

Interlocutory appeals having been made to the Board in this proceeding, and the Board's reports thereon of June 8, 1956, and September 5, 1956, being hereby referred to and made parts hereof;

*It is ordered*, That Public Counsel need not produce the Maritime Administrator's determinations of essential trade routes made pursuant to section 211 of the Merchant Marine Act, 1936, as amended, or the data upon which such determinations were based;

*It is further ordered*, That applicant furnish cargo liftings for affiliated interests on a semi-annual basis;

*It is further ordered*, That applicant need not produce data pertaining to its foreign-flag relationships on routes and services other than those involved in this proceeding, or data pertaining to its nonmaritime foreign activities;

*It is further ordered*, That applicant need not produce the "confidential" portion of its subsidy application, a list of its common stockholders and of its affiliate Anderson, Clayton & Co., data pertaining to the record of performance between applicant and Bloomfield Steamship Co., a list of persons owning, directly or indirectly, more than two percent of applicant's stock or that of Anderson, Clayton & Co., or any statement of the foreign business activities of each stockholder of applicant or of Anderson, Clayton & Co.

By the Board.

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

# FEDERAL MARITIME BOARD

No. M–70

AMERICAN COAL SHIPPING, INC.—APPLICATION TO CHARTER THIRTY LIBERTY-TYPE, WAR-BUILT DRY-CARGO VESSELS

*Submitted August 9, 1956. Decided October 3, 1956*

The transportation of American coal in foreign commerce on American-flag vessels operated by American Coal Shipping, Inc., found to be a service which is required in the public interest and is not adequately served, and for which 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.

*John C. Gall* and *Jerome Powell* for applicant.

*Welly K. Hopkins* for United Mine Workers of America.

*Richard W. Kurrus* for American Tramp Shipowners Association, Inc., *Mark P. Schlefer* for A. H. Bull Steamship Company, Inc., Luckenbach Steamship Company, Inc., Marine Transport Lines, Inc., and Marine Navigation Company, Inc., *Frank B. Stone* for American Export Lines, Inc., *Ronald A. Capone* for United States Lines Company, *Walter E. Maloney* for American Merchant Marine Institute, Inc., and *Robert H. Duff* for Moore-McCormick Lines, Inc., interveners.

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

CLARENCE G. MORSE, *Chairman*, BEN H. GUILL, *Vice Chairman*, THOS. E. STAKEM, JR., *Member*

REPORT OF THE BOARD

BY THE BOARD:

This is a proceeding under section 5 of the Merchant Ship Sales Act of 1946, as amended by Public Law 591, 81st Congress ("the Act"), American Coal Shipping, Inc. ("ACS"), filed an application to bareboat charter 30 Liberty ships from the national defense reserve fleet

for use "in world-wide trade principally to carry American produced coals to foreign ports and to carry other suitable bulk cargoes, including manganese, bauxite, and iron ores", for an indefinite period. The Martime Administrator referred the application to the Board for a hearing, as required by section 5 (e) of the Act. After due notice published in the Federal Register, hearings were held and oral argument was had before an examiner.

The application was opposed by United States Lines Company, American Export Lines, Inc., Moore-McCormack Lines, Inc., A. H. Bull Steamship Company, Inc., Luckenbach Steamship Company, Inc., Marine Transport Lines, Inc., Marine Navigation Company, Inc., American Merchant Marine Institute, Inc., and American Tramp Shipowners Association, Inc. United Mine Workers of America appeared in support of the application.

The examiner recommended that the Board make the findings required by section 5 (e) of the Act and so certify to the Secretary of Commerce, subject to certain restrictions and conditions. Exceptions were filed to the examiner's initial decision by applicant and by United States Lines, American Export, A. H. Bull, Luckenbach, Marine Transport, Marine Navigation, American Merchant Marine Institute, and American Tramp Shipowners Association. Replies to the exceptions were filed by applicant and by A. H. Bull, Luckenbach, Marine Transport, Marine Navigation, American Tramp Shipowners Association, and Public Counsel. The matter was argued orally before the Board.

Telegrams were received by the Board, before and after the record was closed, from persons claiming to have an interest in the outcome of the proceeding, urging the Board to deny the application. This is inappropriate and contrary to the Administrative Procedure Act, and such messages will be disregarded.

We agree generally with the conclusions reached by the examiner on the three statutory issues, but we are not in accord with some of the restrictions and conditions recommended by him.

ACS is a newly formed company, incorporated in June of this year. Its stockholders, all of whom are said to be American citizens, consist of three groups, each of which owns one-third of the issued stock and is represented on the board of directors. The three groups are: (1) United Mine Workers of America, the labor union that represents substantially all of the bituminous coal miners; (2) the three railroads that carry coal to Hampton Roads, namely, the Chesapeake & Ohio, Norfolk & Western, and Virginian, which handle more than 85 percent of the coal exported by sea; and (3) seven coal mine operators and producers, including some of the largest

producers and exporters, who, in 1955, mined approximately 25 percent of the bituminous coal exported from the United States and controlled possibly 40 to 50 percent of such exports.

The authorized capital stock of the company is $50 million, of which $5 million has been paid in so far. Its officers testified that there will be no public offering of stock, but that the balance of the $50 million will be made available when needed. The certificate of incorporation precludes intercoastal and coastwise operation.[1]

ACS has a skeleton staff at present, but two of its stockholders, C. H. Sprague and Pocahontas Fuel, own and operate American-flag vessels in the coastwise coal trade, and stand ready and willing to furnish the necessary experienced operating personnel as soon as they are needed.

The company owns no vessels but it has just contracted to purchase one Liberty ship at a cost of $775,000. The 30 reserve fleet Liberties are sought as a "stopgap" until the company can build or convert vessels. Applicant has employed a naval architect to prepare plans and has preliminary sketches for a new 20,500 ton collier. The company contemplates acquiring and converting a T–2 tanker to a collier, but it has no figures on the amount it would invest in new construction or reconversion. Further than that, applicant has not revealed plans for acquiring its own fleet, except to state that any construction or conversion would be in United States yards.

According to the chairman of its board of directors, the purpose for which applicant was formed was to enlarge the facilities for exporting coal on American-flag vessels. He testified that the company would serve all shippers "without discrimination" and that it was not formed to transport the coal of its stockholders alone. One of the directors said that applicant's "broader objective is to provide a stabilizing force on ocean shipping rates." But its president testified that it was not intended to depress rates. Witnesses also testified in effect that applicant was formed to assure an adequate supply of American-flag vessels at reasonable rates to transport some of the increase in coal exports anticipated over the coming years. The opponents of the application attributed other motives to the incorporators, which will be considered later.

Witnesses testified that coal exports, in particular those to western Europe, are expected to increase very substantially over the coming years; that exports would increase at the rate of 10 percent each year for an indefinite period in the future; that coal exports during

[1] The Interstate Commerce Act prohibits a railroad from owning or having any interest in a common carrier by water if the railroad might compete for traffic with the water carrier. 49 U. S. C. 5, Paragraphs (14), (15), and (16).

the first six months of 1956 increased 17 percent over 1955; that between 30 and 40 million tons of coal were exported in 1955 and 22½ million tons were exported during the first 6 months of 1956; that exports in 1956 will be over 40 million tons, possibly 44 million tons, or 10 percent over 1955; and that based on the record dumpings at Hampton Roads this July, more than 50 million tons may be exported in 1956. Estimates of future exports went as high as 100 million tons by 1960. These figures, it was said, do not include exports of coal by rail to Canada, which average from 17 to 22 million tons a year.

ACS has had long and short term offers from importers in Europe to charter its vessels and has received requests to quote rates for contracts from Belgian and German brokers for several hundred thousand tons a year. An officer of a large coal producer said that his company has a contract to export one million tons a year for three years, mostly to Germany, and that, in all, the company would export three million tons to Germany, Holland, France, England, South America, Japan, and Belgium in 1956. He said his company also has had substantial inquiries through exporters for prices FOB mines for export over periods of 2 to 5 years.

Witnesses for applicant testified that transportation costs represent from 40 to 60 percent of the cost of coal delivered in Europe; that practically all coal moving from America to overseas ports moves on foreign-flag vessels; that American vessels carried from 4 to 5 percent of the coal exports in 1955 and only 1 percent during the first six months of 1956; that coal exporters are at the mercy of the foreign-flag ship owners; and that the potential foreign market for coal could be jeopardized by insufficient bottoms or excessively high rates.

The responsibility for passing upon charter applications is shared by the Federal Maritime Board and the Maritime Administrator.[2] The Administrator may, "in his discretion", reject or approve the application, but he may not approve it until he has made certain determinations and until the Board has made certain findings and recommendations. The Administrator must determine, among other things, that the applicant is a citizen of the United States, and that, in his opinion, "the chartering of the vessel to the applicant would

[2] Section 5 of the Act as modified by section 204 of Reorganization Plan No. 21 of 1950, 64 Stat. 1273, and Public Law 591, 81st Congress, 64 Stat. 304, divides the responsibility for passing upon charter applications between the Secretary of Commerce and the Federal Maritime Board. The Secretary has delegated his authority in such matters to the Maritime Administration (section 6.01, subsection 2, paragraphs (1) and (2) of Department Order No. 117 (amended), published as section 5 (a) (2) (i) and (ii) in the Federal Register, September 15, 1953, 18 F. R. 5518, 5519).

be consistent with the policies of this Act." The Administrator also passes upon applicant's financial and operating qualifications.

Section 5 (e) of the Act provides that war-built dry-cargo vessels may be chartered for bareboat use "in any service" which, in the opinion of the Board:

1. "is required in the public interest,"
2. "is not adequately served," and
3. "for which 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."

If the Board makes these findings it is required to so certify to the Secretary of Commerce, and to recommend "such restrictions and conditions" which it determines are "necessary or appropriate to protect the public interest in respect of such charters and to protect privately owned vessels against competition" from the chartered vessels.

*Public interest.* The first question to be determined by the Board is whether the "service" in which the vessels will be operated "is required in the public interest." The application states that the vessels will be used "in world-wide trade principally to carry American produced coals to foreign ports and to carry other suitable bulk cargoes, including manganese, bauxite, and iron ores." The vessels will be operated under the American flag with American crews. We believe that such service is clearly in the public interest. One of the policies of the Act is to promote an American merchant marine sufficient to carry a substantial portion of the waterborne export and import commerce of the United States.

We recently determined in *Isbrandtsen Co., Inc.—Charter of War-Built Vessels*, 5 F. M. B. 95, that the carriage of coal from United States North Atlantic ports to France was in the public interest, and that Government-owned vessels could be bareboat chartered to private operators for use in that service. We found that the transportation of coal to France would assist the economy of that country, which is linked closely to the welfare of the United States, and would benefit the coal and shipping industries of the United States. The record in this case establishes public interest to a greater degree than in the *Isbrandtsen* case. Here, witnesses testified that the need for coal in western Europe is increasing at a rapid rate, and that if the application is granted, coal will be carried on American-flag vessels to all countries of western Europe and possibly to Japan and South America. It will, therefore, help the economy of many friendly countries, and possibly make it unnecessary for them to seek coal from other countries which are potential suppliers of coal.

The proposed service would help the American coal industry to retain its European markets, and it would, therefore, be of benefit to the coal miners, the coal operators, the coal carrying railroads, and indirectly stimulate the general welfare of our economy. Moreover, it would directly result in the employment of 1200 American seamen and the use of American repair yards, which are very tangible elements of public interest.

Applicant's plans to construct or convert vessels in American yards for operation under the American flag with American crews in the coal trade are bold and commendable, but they are entitled to be given little weight in these proceedings until more has been accomplished to carry them out.

Opponents, all of whom are American-flag owners or their representatives, contend that while the transportation of American coal on American vessels to our allies may be in the public interest, such transportation, when performed by a newly formed company, and in particular this applicant, with Government-owned ships in competition with privately owned American-flag vessels, is not in the public interest. They say that it may be in the interest of everyone else but certainly it is not in their interest. In fact, they contend that it is directly contrary to the best interests of the American shipping industry generally, both liners and tramps.

Some of the opponents contend that the objectives of ACS is to benefit the coal industry and not the American privately owned merchant marine; that it will operate at a loss, depress coal rates, indeed "break the market," which will drive the tramp ships out of the coal trade and force them to seek other bulk cargoes such as grain, a higher grade cargo that is carried by American-flag liners as well as American-flag tramps; that the combination of three such powerful elements of the coal industry to "stabilize" ocean freight rates constitutes an illegal combination in restraint of trade in violation of the antitrust laws; that ACS will carry proprietary cargoes; that the solution of the coal transportation problem should be sought under section 211 (h) of the Act; and that ACS is not qualified.

The Board's primary responsibility in considering applications to charter Government-owned vessels is to promote and safeguard the public interest and the American merchant marine. We have therefore considered very carefully the charges of the established American-flag owners that the granting of the application in this case would be injurious to them. We agree with their contention that the "public interest" issue is not satisfied by a showing merely that the promotion of the coal industry and the exportation of coal are in the public interest. The test is whether the proposed "service" is "required in

the public interest." We do not believe, however, that the proposed service would injure the American merchant marine or that the other objections raised by interveners sufficiently outweigh the benefits that would result to the public generally by the operation of the proposed service. Therefore, we must conclude that such service is "required in the public interest."

We do not believe that ACS intends to operate at a loss or to break the market or unduly depress rates. Those charges appear to be based on statements of certain directors of ACS that its objective was "to provide a stabilizing force on ocean shipping rates" and that the rates were "higher than they should be." There is no direct evidence to support such charges. On the contrary, several directors testified that the company intended to operate at a profit and that it did not intend to break or depress rates. Moreover, the railroads who own stock in ACS have called attention to the fact that it would be illegal for them to engage in a loss venture.[3] An experienced charter broker who was familiar with the coal and other bulk cargo trades testified that, in his opinion, ACS with 30 vessels could not "stabilize" or "break the market"; that it might have a temporary depressing effect on the market, but not for long, because 30 ships could carry only 5 percent of the coal exports. He also testified that, in his opinion, 30 ships would be absorbed by the increased demand for coal tonnage and would not divert tonnage from coal to other trades.

We believe that a sufficient showing has been made to justify reasonable persons to conclude that coal exports will be approximately 10 million tons greater in 1956 than in 1955, and that 1957 exports will be approximately 10 percent in excess of 1956. The 30 chartered vessels could carry only 25 percent of the 1956 increase over 1955 exports. No vessels are being built for American-flag operation which could be used to carry any portion of the estimated increase. Even if the increase in exports does not reach one quarter of the estimate, 30 chartered ships would not take away cargoes from American-flag operators. The charters will be subject to review and cancellation by the Maritime Administrator, however, which should provide a safeguard against undue injury to American-flag owners.

Interveners argue that applicant is an illegal combination which will

[3] If ACS operated at a loss the railroads who own stock in it would probably be in violation of sections 2, 3, and 6 of the Interstate Commerce Act, 49 U. S. C. 2, 3 (1), 6 (7), which prohibit rebating, giving undue preference or advantage, and receiving different compensation for the same transportation. *B. & O. R. Co.* v. *U. S.*, 305 U. S. 507, 523–4 (1939); *New Haven R. R.* v. *Interstate Com. Com.*, 200 U. S. 361 (1906), and the Elkins Act, 49 U. S. C. 41 (1), which also makes it illegal for a railroad to give a rebate. *United States* v. *Union Stock Yard*, 226 U. S. 286, 309 (1912); *Kerr* v. *Southwestern Lumber Co. of New Jersey*, 78 F. (2d) 348, 350 (5th Cir. 1935), cert. denied, 296 U. S. 611 (1935); *In Re Wharfage Charges of the Galveston Wharf Co.*, 23 I. C. C. 535 (1912).

operate in restraint of trade in violation of the antitrust laws, and that in deciding whether the application is required in the public interest, the Board has "the duty to give weight to the antitrust policy of the nation * * *," quoting from *Georgia* v. *Pennsylvania R. Co.*, 324 U. S. 439, 456 (1945), which cited *McLean Trucking Co.* v. *U. S.*, 321 U. S. 67 (1944), as authority for that statement. We agree that it would be contrary to the public interest to encourage the formation or operation of an illegal monopoly, and we would not wish to charter Government-owned vessels to a company which we though intended to use them in violation of the antitrust laws. We agree also that in deciding whether the application is required in the public interest we should give weight to the antitrust policy of the nation, but we cannot decide authoritatively such questions as whether the transaction contemplates an illegal price-fixing device, an undue restraint of trade, or an attempt to monopolize, which are forbidden by the antitrust laws. We can only express our opinion on these questions for the purpose of deciding whether the service is "required in the public interest." This principle of administrative law was recognized in the *McLean* case, where the Supreme Court said, with respect to the Interstate Commerce Commission (pp. 79–80):

> Thus, here, the Commission has no power to enforce the Sherman Act as such. It cannot decide definitively whether the transaction contemplated constitutes a restraint of trade or an attempt to monopolize which is forbidden by that Act. The Commission's task is to enforce the Interstate Commerce Act and other legislation which deals specifically with transportation facilities and problems. That legislation constitutes the imediate frame of reference within which the Commission operates; and the policies expressed in it must be the basic determinants of its action.

Within the framework of that concept, we do not believe that the record justifies the claims that applicant is an illegal combination which will operate in restraint of trade in violation of the antitrust laws, any more than it did in *Appalachian Coals, Inc.* v. *U. S.*, 288 U. S. 344 (1933).[4] We do not believe ACS can or will fix prices, which would be illegal under *U. S.* v. *Socony Vacuum Oil Co.*, 310 U. S. 150 (1940).

We have already considered the charges that applicant plans to depress rates or break the market, and we have concluded that there is

[4] In this case, 137 competing producers of bituminous coal formed a corporation to act as their selling agent, with authority to set the prices. They controlled 73 percent of the coal produced in the Appalachian territory. The Supreme Court dismissed the suit which was brought by the United States to enjoin the company as a combination in restraint of trade and a monopoly in violation of the Sherman Antitrust Act. The Court said (p. 375): "In the instant case there is, as we have seen, no intent or power to fix prices, abundant competitive opportunities will exist in all markets where defendants' coal is sold, and nothing has been shown to warrant the conclusion that defendants' plan will have an injurious effect upon competition in these markets."

insufficient basis to assume that it intends to act improperly or unlawfully. Applicant's operation may have a tendency to "stabilize" rates, but many of its witnesses testified that the company intended to charge reasonable rates and operate at a profit, both of which are worthy objectives. An officer of the company testified that there were no agreements to fix prices or allocate customers or territories to which coal is shipped, and that the company has no intention to break or depress rates. He also testified that before he participated in the organization of ACS he obtained an opinion from his counsel that ACS did not violate the antitrust laws. While that has no weight in determining whether ASC does actually violate the antitrust laws, it shows good faith on the part of one of the organizers, who apparently did not wish to participate in an illegal undertaking.

The chairman of the board of directors testified that ACS will carry coal for all shippers "first come, first serve," without discrimination, and that it was not formed to transport the coal of its stockholders alone. Its President testified that "the policy has been established that these ships are going to be operated as an independent shipping line, offered on the market to any charterer, and not confined to the owners of the company." It was also testified that the mine owners will not give preference to ACS when shipping. The enforcement [5] of the antitrust laws, except where superseded by the Shipping Act, 1916 (which is not here relevant), is primarily the responsibility of the Department of Justice, and we are satisfied that, if the Department deems it necessary it will review the operation of ACS from an antitrust point of view as it does in other cases. The Board has a continuing jurisdiction over all operations under the 1916 Act. *Far East Conf.* v. *United States*, 342 U. S. 570 (1952). Moreover, the charters provide for annual review and termination by the Administrator for any reason upon 15 days' notice, which will amply protect the public interest against the continuance of any improper practices of the charterer should they develop.

Opponents contend that it is not in the public interest to permit Government-owned ships to be chartered for the carriage of proprietary cargoes; that ACS proposes to use the 30 Liberties to carry coal cargoes for its stockholders, whose basic interests are to make money on the sale of the cargo rather than the operation of ships. They say such a practice can lead to demoralizing consequences for established steam-

[5] The penalties for violating the antitrust laws are heavy. The United States, through the Antitrust Division of the Department of Justice, may enjoin the activity (15 U. S. C. 4) or seek criminal penalties (15 U. S. C. 1, 2), or both. It may also sue for damages it sustains as a result of the violation (15 U. S. C. 15a; c. 283, 69 Stat. 282). Private persons aggrieved by antitrust violations may sue for treble damages (15 U. S. C. 1, 15).

ship companies who must make a living from ocean transportation alone. They cite *Ponce Cement Corp.—Charter of War-Built Vessel*, 3 F. M. B. 550, and *Grace Line Inc.—Charter of War-Built Vessels*, 3 F. M. B. 703, and refer to the legislative history of the Merchant Ship Sales Act of 1946. Without deciding whether vessels may be chartered for a solely proprietary purpose, we do not consider the operation in this case as proprietary. None of the coal transported by ACS will be owned by it. Some of it may be coal that was mined by one of its coal producing stockholders, but most of it will not be owned by a stockholder because coal is customarily sold f. o. b. the mine. ACS does not itself operate coal mines and its certificate of incorporation will not permit it to act as a coal dealer or coal broker. We have already referred to testimony of officers of ACS to the effect that it will carry coal for all shippers "first come, first serve," that it will not discriminate in favor of its stockholders, and that it will operate as an independent shipping line and offer its vessels on the market to any charterer and not confine them to the stockholders.

We do not agree with the argument that it would be contrary to the public interest to grant the application because of the provision of section 211 (h) of the Merchant Marine Act, 1936. Under this section the Administrator[6] is authorized to investigate and determine the advisability of enacting legislation authorizing the Board:

* * * in an economic or commercial emergency, to aid the farmers and cotton, coal, lumber, and cement producers in any section of the United States in the transportation and landing of their products in any foreign port * * *.

Before this section could be applied, there would have to be an "economic or commercial emergency", which does not exist in this case. The application is not based on the existence of an emergency such as contemplated by section 211 (h) of the 1936 Act. Applicant admitted that the market for coal in Europe would probably not disappear if the application were denied, and one intervener took exception to the examiner's failure to find that there is no danger of losing the coal export market if the vessels are not chartered to applicant. Moreover, the procedure for chartering vessels under section 5 of the Act is not dependent upon any findings or determinations under section 211 (h) of the 1936 Act.

Finally, on the issue of public interest, we do not agree with the contention that applicant fails to qualify to charter vessels because it

[6] Section 204 of Reorganization Plan No. 21 of 1950, 64 Stat. 1273, transferred to the Secretary of Commerce all functions of the United States Maritime Commission except those otherwise transferred to the Federal Maritime Board, in Part I of the Plan, which did not include functions under section 211 (h) of the Merchant Marine Act, 1936. The Secretary has delegated his authority in such matters to the Maritime Administrator. (See footnote 2.)

has no "practical experience in the operation of vessels" or "any other factors that would be considered by a prudent businessman in entering into a transaction involving a large investment of his capital," as required by section 713 of the 1936 Act, which is made a part of section 5 of the 1946 Act. The responsibility to pass upon applicant's qualifications rests with the Maritime Administrator and not the Board.[7] However, we invite the Administrator's attention to the fact that the record shows that although ACS has never operated a vessel and has only a skeleton staff, its president is a steamship executive of 40 years experience, and two of its stockholders who own and operate American-flag vessels in the coastwise trade have agreed to furnish the necessary experienced operating personnel as soon as they are needed. Moreover, its officers and board of directors are responsible men of wide business experience, who may be relied upon to act as prudent businessmen in managing the affairs of the company.

*Adequacy of service.* The second question for the Board to decide is whether this is a "service" that "is not adequately served" by American-flag vessels. It is well settled that the adequacy of service contemplated by section 5 (e) of the Act is the adequacy of American-flag operations in the service. *Amer. Pres. Lines, Ltd.—Charter of War-Built Vessels*, 3 F. M. B. 646, 648; House Report No. 2353, 81st Cong., 2d sess., page 6.

American-flag vessels carried from 4 to 5 percent of American coal exports in 1955, and only 1 percent of such exports during the first 6 months of 1956, although coal exports increased 17 percent over 1955, according to testimony given by the chairman of the board of ACS. This testimony was unchallenged and must be accepted as establishing conclusively that the export coal service is not adequately served by American-flag vessels. Even the opponents of the application acknowledge that American-flag ships have not traditionally engaged in the coal trade.

Opponents contend that the reason the service is not adequate is because the rates have been too low to support an American-flag operation. The reasons for the inadequacy of the service are not at issue, and we are limited to the question of whether the coal service is adequately served by American-flag vessels. The answer is inescapable. As one witness said, "American-flag vessels have practically abandoned the coal shipping field."

Opponents also say that the need for vessels to carry coal is no greater now than it was when the Board declined to charter vessels for the carriage of Government-sponsored cargoes on July 9, 1956

[7] Section 204 of Reorganization Plan No. 21 of 1950, and Department Order No. 117. See footnote 6.

(*Marine Transport Lines, Inc.—Charter of War-Built Vessels*, 5 F. M. B. 112 (Docket No. M–69)). One intervener suggested that the present case should be consolidated with Docket No. M–69 until a need is shown for more vessels, and that if coal cargoes develop, a formula should be worked out to allocate vessels to existing American-flag owners and operators in proportion to the number of vessels owned by them.

We believe that a greater showing of need for American-flag vessels to transport coal has been made in this case than in Docket No. M–69. There, applications were filed by 14 companies to charter a total of 77 vessels for use in world-wide trading for the carriage of International Cooperation Administration and other Government-sponsored cargoes. While the increasing volume of coal exports to Europe was regarded by ICA as the main factor in bringing about what it considered to be a scarcity of tonnage, the alleged need for ships to carry coal in Docket No. M–69 represented only a small percentage of the total Government cargoes for which vessels were sought. It was estimated that 2.4 million tons of tramp vessels would be needed in 1957 for grain, fertilizer, sugar, lumber, scrap, and coal; whereas, in this case, it has been estimated that coal exports in 1957 will exceed 1956 exports by 10 percent, or from 4½ to 5 million tons.

It is true that no showing has been made in this case that coal shipments have been held up because of a lack of ships. We do not think it is necessary, however, to wait until the pinch has been felt, in view of the strong showing of estimated exports for 1957. Accordingly, we see no need to withhold action in this case or to consolidate it with Docket No. M–69. In view of the number of applicants and ships requested in that case, however, which included some vessels for the carriage of coal, we believe that any applicant in Docket No. M–69 should be afforded the same opportunity to charter vessels for the carriage of coal as the applicant in this case.

*Availability of vessels for charter.* The record in this case establishes that "privately owned American-flag vessels are not available for charter by private operators on reasonable conditions and at reasonable rates."

We agree with interveners that before applying for Government-owned vessels, applicant should have tried to charter privately owned American-flag vessels, which it admittedly made no effort to do. We repeat what we said in *Pacific Far East Line, Inc.—Charter of War-Built Vessels*, 5 F. M. B. 136, 138, which is equally applicable here:

* * * we feel that applicant, with more specificity, should have established the extent to which the market for privately owned American-flag vessels

was canvassed—when, by whom, and in what manner. We feel that applicant should have produced a witness who could testify directly on this matter.

The record shows nevertheless that no American-flag owner has offered a ship to ACS for charter at any rate since notice of this hearing was given on July 20, 1956, although applicant's need for vessels was well known to the industry—so well known, in fact, that witnesses testified that the filing of the application had a depressing effect on the charter market. While we do not condone applicant's failure to try to charter vessels, we believe the American-flag owners who oppose the granting of the application, and who own ships which they say may be forced out of business if the application is granted, should use self-help to the extent of offering their vessels to a prospective charterer. The facts speak for themselves.

American-flag liner operators do not contend that they are interested in carrying coal. American-flag tramp owners do not have sufficient ships to carry any substantial quantity of the anticipated coal exports even if they devote them all to carrying coal, which they will not do, because if the owners made them available for coal they would not be available for grain and other cargoes under the 50–50 law.[8]

A witness for the American-flag tramp shipowners testified that 51 American-flag tramp vessels would become available within nine months. In giving details regarding the availability of these vessels, however, he spoke of only 27 to 30 vessels that possibly would be available between now and the end of the year. Clearly all of these vessels would not be devoted to the coal trade at reasonable rates—NSA rates or lower—because if that were done they would not be available for better-paying grain cargoes under the 50–50 law. If all 27 of these vessels were devoted to the coal trade, however, as well as the 34 others that make up the 51 vessels mentioned as possibly available, they could not begin to carry any substantial portion of the anticipated increase in coal exports.

A witness for an American-flag owner appearing in opposition to the application testified that there was an oversupply of American ships to carry all bulk-type cargoes, but he gave no figures to support that conclusion. He estimated that there were approximately 125 privately owned American-flag Liberty ships, but when asked to estimate how many of these would be available to haul coal by the end of the year and how many were under charter to MSTS, he was unable to do so.

[8] Public Law 664, 83d Congress, approved August 26, 1954, c. 68 Stat. 832.

Although the world fleets are increasing, no dry-cargo vessels are now under construction for American-flag operation. One witness testified that the new construction being built throughout the world would not result in an oversupply of coal-carrying vessels if the estimated coal exports materialize.

*Restrictions and conditions.* The examiner, in his initial decision, recommended that if the charters are granted, they should contain the following restrictions and conditions:

1. That applicant should be required, for a given period, to charge not less than a reasonable minimum rate determined by the Administrator, and that applicant should submit to the Administrator details of its operating costs, with the understanding that the minimum rate might then be changed by the Administrator;

2. That applicant should not be permitted to operate in the coastwise or intercoastal trades;

3. That, in view of the dependence of the berth operators on parcel lots of bulk commodities other than coal, applicant should not be permitted to carry bulk commodities other than coal, either outbound or inbound; provided, however, that the privilege of carrying other cargoes could be accorded by the Administrator upon petition of applicant and after the Administrator was satisfied that the berth operators would not be unduly injured thereby;

4. That any charters which might be granted should be for a period of 12 months, subject to the usual right of cancellation by either party on 15 days' notice;

5. That charter hire should be at a rate not less than 15 percent of the unadjusted statutory sales price or the floor price of the vessels chartered, whichever is higher; and

6. That all break-out, lay-up, and incidental expenses should be borne by the applicant.

Applicant excepted to recommendations 1, 3, 4, and 6.

The examiner's recommendation for a minimum rate was based on his belief that it was possible for applicant with its large resources to charge a rate that would result in substantial loss to applicant and produce chaos among the other operators in the trade. We believe that possibility is so remote as to be almost impossible. We have previously given our reasons for concluding that applicant will not operate at a loss or depress the rates. Although applicant's stockholders represent a large and dominant portion of the coal industry, its position in the overseas transportation of coal is relatively small. The 30 ships operated by applicant would not be able to carry more than approximately 2½ million tons of coal a year in the Hampton

Roads-Antwerp/Rotterdam service, which is only about 5 percent of the estimated coal exports of 45 million tons for 1956 and 50 million tons for 1957. Since foreign-flag vessels carried 95 percent of the coal exports in 1955 and approximately 99 percent of the exports so far this year, they dominate the market and could easily make the minimum rate fixed for ACS their maximum rate and seriously hinder ACS from obtaining cargoes. Moreover, ACS with 30 vessels will be able to carry less than 25 percent of the estimated increase in coal exports over 1955, so that there is little likelihood that it would take cargoes away from American-flag operators. We do not believe, therefore, that it is necessary that a minimum rate be determined by the Martime Administrator to protect the public interest or privately owned vessels from competition.

We agree with the examiner that applicant should be limited to coal cargoes outward, but we do not believe the inward cargoes should be so restricted, because it would have the practical effect of forcing ACS to return light. The principal inward cargoes available to applicant are ores, and we believe ACS should be permitted to carry ore inbound in order to obtain revenues needed for its successful operation in the coal trade.

We believe that the charters should be for an indefinite period. ACS has asked for the vessels as a "stop gap" until it can build or convert vessels. Its construction plans have not been completed, but we believe a year is a reasonable time in which to complete those plans and undertake definite commitments for new ships. We believe also that after the charters have been in effect for a period of six months, the Maritime Administrator should review the progress made by applicant in carrying out its new construction program to determine whether sufficient progress has been made to warrant continuation of the charters, and, lacking reasonable excuse for insufficient progress, should exercise his option to terminate the charters.

The examiner's recommendation that applicant should be required to pay all break-out, lay-up, and incidental expenses conformed with the Board's policy when his initial decision was served. Since that time, however, the Board has recommended to the Secretary of Commerce that, with reference to break-out, readying, and lay-up costs, the Secretary of Commerce should establish uniform rates of charter hire which take into consideration the NSA fair and reasonable rates, and authorize the use of the vessel operations revolving fund for the activation, repair, and deactivation cost provided for in Public Law 890, 84th Congress. *Grace Line Inc.—Charter of War-Built Vessels*, 5 F. M. B. 143. We believe that the same recommendation should be made in this case.

FINDINGS, CERTIFICATION, AND RECOMMENDATIONS

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

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

2. That such service is not adequately served; and

3. 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 Board determines that the following restrictions and conditions are necessary or appropriate to protect the public interest in respect of such charters, and to protect privately owned vessels against competition from the chartered vessels:

1. That any charter which may be granted herein should be for an indefinite period, subject to the right of cancellation by the charterer on 15 days' notice, such right, at the option of the Administrator, to be conditioned upon full payment to the Government of the remainder of one year's charter hire, which will be considered as recoupment of break-out and lay-up costs, and the right of cancellation by the Government on 15 days' notice;

2. That the basic charter-hire rate should be directly related to the NSA fair and reasonable rate, but in no event should it be at a rate less than 15 percent per year of the statutory sales price computed as of the date of charter;

3. That, with reference to break-out, readying, and lay-up costs, the Secretary of Commerce should establish uniform rates of charter hire which take into consideration the NSA fair and reasonable rates, and authorize the use of the vessel operations revolving fund for the activation, repair, and deactivation cost provided for in Public Law 890, 84th Congress;

4. That, when the Government has recouped all of the activation, repair, and deactivation expense, consideration should be given to reducing the rate of charter hire, always consistent however with the policies of the Merchant Ship Sales Act of 1946;

5. That ACS shall at all times be limited to carrying bulk cargoes. In view of the dependence of the berth operators on parcel lots of bulk commodities other than coal, applicant should not be permitted to carry bulk commodities other than coal outbound or ores inbound; provided, however, that the privilege of carrying other bulk cargoes may be accorded by the Maritime Administrator upon petition of applicant and after the Maritime Administrator is satisfied that the other American-flag operators will not be unduly injured thereby;

6. That applicant should not be permitted to operate the vessels in the coastwise or intercoastal trades;

7. That after charters have been in effect for a period of six months, the Maritime Administrator should review the progress made by applicant in carrying out its new construction program to determine whether sufficient progress has been made to warrant continuation of the charters.

8. That favorable consideration should be given to other applications made by qualified American-flag owners to charter vessels for operation in the coal trade on the same terms and conditions as are granted to the applicant in this case.

# FEDERAL MARITIME BOARD

No. 772

UNITED STATES ATLANTIC AND GULF-PUERTO RICO CONFERENCE ET AL.

*v.*

AMERICAN UNION TRANSPORT, INC., ET AL.

No. 784

AMERICAN UNION TRANSPORT, INC.

*v.*

UNITED STATES ATLANTIC AND GULF-PUERTO RICO CONFERENCE ET AL.

*Submitted September 14, 1956. Decided October 29, 1956*

American Union Transport, Inc., found to be a common carrier by water between United States North Atlantic ports and ports in Puerto Rico.

Tariff No. FMB–F No. 1 of American Union Transport, Inc., by reason of its exclusive f. i. o. rates, found to be unjustly discriminatory in violation of section 14 Fourth of the Shipping Act, 1916, as amended.

Tariff No. FMB–F No. 1 of American Union Transport, Inc., by reason of its failure to specify terminals at which calls would be made, found to be in violation of section 2 of the Intercoastal Shipping Act, 1933, as amended.

Tariff No. FMB–F No. 1 of American Union Transport, Inc., found not to qualify as a proper filing under section 2 of the Intercoastal Shipping Act, 1933, as amended.

Alleged unfiled and unapproved agreement among member lines of United States Atlantic and Gulf-Puerto Rico Conference, within the purview of section 15 of the Shipping Act, 1916, as amended, not shown to exist.

*Odell Kominers*, *Mark P. Schlefer*, and *Robert S. Hope* for United States Atlantic and Gulf-Puerto Rico Conference and member lines.

*George F. Galland* and *Robert N. Kharasch* for American Union Transport, Inc.

*Alan F. Wohlstetter* and *Ernest H. Land* for Trailer Marine Transportation, Inc.

REPORT OF THE BOARD

CLARENCE G. MORSE, *Chairman*, BEN H. GUILL, *Vice Chairman*, THOS. E. STAKEM, Jr., *Member*.

BY THE BOARD:

These two cases arise out of complaints filed by United States Atlantic and Gulf-Puerto Rico Conference and its member lines [1] (the conference) on February 25, 1955, and by American Union Transport, Inc. (AUT), on September 30, 1955, and were consolidated for hearing. Hearings were held before an examiner, who served his recommended decision on May 25, 1956. Exceptions were taken in each of the cases by AUT, but no exceptions were filed by the conference.[2] The matters were argued orally before the Board.

We are in general agreement with the findings and recommendations of the examiner. Exceptions taken and recommended findings not discussed in this report have been given consideration and have been found not related to material issues or not supported by evidence.

The complainants in No. 772 ask the Board to find (1) that respondent AUT is not a common carrier by water in the North Atlantic-Puerto Rico trade, (2) in the event AUT is deemed by the Board to be a common carrier by water in this trade, that its tariff FMB–F No. 1 does not include the essential obligations of a common carrier by water, and (3) that there is existing an unfiled, unapproved agreement between AUT and Trailer Marine Trantportation, Inc. (TMT),[3] in violation of section 15 of the Shipping Act, 1916 (the Act).

Complainant in No. 784 asks the Board to find that there exists an unfiled, unapproved agreement among the conference lines to take joint action to deprive AUT of cargo to drive complainant out of the trade.[4]

*The facts.*—AUT owns two Liberty-type vessels which, prior to May 20, 1954, were engaged in the tramping trade. Poor prospects caused AUT to cast around for more profitable employment, and realizing it could get a contract with Military Sea Transportation Service (MSTS) for the transportation of military cargo to Puerto Rico from United States Atlantic ports, it filed with the Board its Tariff FMB–F No. 1, covering transportation from North Atlantic ports to Puerto Rico on an f. i. o. basis.[5] A contract with MSTS was signed May 25,

[1] Alcoa Steamship Company, Inc. (Alcoa), Bull Insular Line, Inc. (Bull), Lykes Bros. Steamship Co., Inc. (Lykes), and Waterman Steamship Corporation (Waterman).

[2] They did file a letter of protest to the decision with the Secretary of the Board, however, but since our Rules of Practice and Procedure make no provision for filing such a letter. we take no cognizance of it here.

[3] TMT was named as a respondent in No. 772. TMT answered, denying that there is or was in existence an agreement as alleged, but did not participate in the hearings, file a brief, or orally argue its position.

[4] Reparation was demanded but by stipulation of the parties this matter was deferred until the allegations were disposed of.

[5] Cargo loaded, stowed, trimmed, and discharged without expense or risk to the carrier.

1954, covering military cargo on an f. i. o. basis. Without the MSTS contract, AUT indicated that it might not have filed the tariff. AUT serves other ports in the Caribbean area as well as those in Puerto Rico, and on the itinerary of its 16 voyages, which included Puerto Rican ports, between June 1954 and October 1955, San Juan, Puerto Rico, was the last port served. Since these proceedings began, its itinerary has been reversed and San Juan is now its first outbound port. AUT's Puerto Rican cargoes have been predominantly military (95.6 percent to 4.4 percent for commercial cargoes). AUT contends (1) its small commercial carryings are due to the fact that it is new in the trade, (2) its f. i. o. requirement is not attractive to small shippers, and (3) its voyages are not restricted to Puerto Rico but include other ports, and Puerto Rico had been the last area served.

The record indicates that AUT actively solicited cargo, advertised its sailings (through its subsidiary agent), and made its tariff available to anyone who wanted it. Its tariffs were not posted at piers. The only piers served were military piers and piers specified by shippers, no particular terminal being designated in the tariff.

Rule 2 of Tariff FMB–F No. 1 specifies that the "rates * * * cover transportation only," and do not cover costs of "loading, stowage or discharge, or any port service prior to loading or after discharge," and charges for "wharfage * * * [etc.] * * * shall be paid by shippers, or if paid by the carrier, shall be for shippers account."

Rule 4 of the tariff provides that the vessels will call for or discharge cargo "at any safe and accessible pier designated by a shipper or consignee" if the total cargo to be loaded or discharged "at any such pier is of the minimum weight of 125 short tons or minimum measurement of 5000 cubic feet." This minimum, however, does not have to be from a single shipper but many may combine to meet the requirement, and the rule specifically "does not apply to trailer cargo." Rule 6 covers trailerloads and specifies that the minimum trailerload is 20 trailers.

AUT and TMT entered into an agreement on August 30, 1954 (Agreement F. M. B. No. 7993), filed for approval under section 15 of the Act, under which AUT would carry TMT's trailers to Puerto Rico, compensation therefor being one-half of the freight collected by TMT. Before this agreement was approved, and after complainants protested it, the agreement was withdrawn and Tariff FMB–F No. 1 was revised to include trailerload rates, setting a minimum trailerload requirement at a rate which was similar to that embodied in the withdrawn agreement. AUT expected that TMT alone was in a position to take advantage of this tariff provision, but recognized that it was duty bound to accept trailerloads from others. The record shows

that TMT later reduced its rates several times and each time requested AUT to do likewise, but in most instances AUT's trailerload rates were unchanged. At the beginning of this service AUT hauled one trailer without charge "to encourage the shipper," and later hauled nine empty trailers for the same reason.

AUT's contract with MSTS involves rates which, though similar to those in its tariff for commercial cargo, less a volume discount, are less than the conference rates. Alcoa transported some MSTS cargoes from North Atlantic ports to Puerto Rico at regular tariff rates. In November 1955, Alcoa signed a contract with MSTS calling for rates similar to those embodied in the AUT–MSTS contract. Bull had no contract with MSTS but carried military cargo regularly from North Atlantic ports to Puerto Rico at conference rates prior to the AUT contract. Lykes is in the Puerto Rico trade out of Gulf ports only, but contends that AUT's rates and the manner in which they are published could easily affect the flow of cargo from interior points; it claims that AUT's rates may disrupt the stability in the trade, and it is interested only in AUT's status as a common carrier and the propriety of its tariff. Waterman, which, as in the case of Lykes, operates out of the Gulf in this trade, is interested merely in determining AUT's status as a common carrier and the propriety of its tariff.

The conference is organized under Agreement F. M. B. No. 6120, approved by the Board, and its secretary stated that the conference had entered into no other agreement. The conference became concerned about AUT's status in the trade and thought Tariff FMB–F No. 1 was improper, and it urged the Board's Regulation Office to reject it. The conference did not attack AUT's MSTS contract, but Alcoa and Bull did; Waterman and Lykes did not. Several letters were sent by the conference and its members and their attorneys to the Board, the Navy Department, and MSTS, dealing with AUT's status as a common carrier, its Tariff FMB–F No. 1, and the alleged agreement between AUT and TMT. It was insisted that the MSTS contract was contrary to MSTS policy in that a contract was awarded to AUT which, in the opinion of the conference, was not a common carrier, and that the contract with AUT resulted in losses to Alcoa and Bull. For these reasons they asked MSTS to cancel or suspend the contract. Navy and MSTS correspondence indicated that (1) AUT was considered to be a common carrier, (2) whether or not AUT was a common carrier was a matter for the Board, (3) AUT was the only carrier willing to contract on MSTS terms, and (4) similar contracts were available to Bull and Alcoa.

The conference protested to the Board, chiefly, that (1) AUT is not a common carrier in this trade and (2) its Tariff FMB–F No. 1 does not contain a common carrier's obligations to load and discharge cargo. To these protests the Board replied that it accepted the tariff as an initial filing under the Intercoastal Shipping Act, 1933 (1933 Act), and no formal determination has been made by the Board as to whether AUT is a common carrier.

In January 1956, AUT filed Tariff FMB–F No. 3 with the Board, after the hearings had been held, cancelling Tariff FMB–F No. 1. AUT also filed, at the same time, a motion to dismiss the complaint in No. 772 as moot. Complainants in No. 772 protested the tariff and the tariff and the motion were withdrawn. In March 1956, AUT filed Tariff FMB–F No. 4, replacing Tariff FMB–F No. 1. After this tariff became effective on April 12, 1956, AUT again filed a motion to dismiss No. 772 as moot and satisfied. Complainants replied in opposition to the motion.

*Findings and recommendations of the examiner.* The examiner concluded in No. 772 that (1) AUT is a common carrier in this trade, (2) Tariff FMB–F No. 1 does not reflect the essential obligations of a common carrier to load and deliver cargo or provide terminal facilities, and (3) there exists no unfiled, unapproved agreement between AUT and TMT in violation of section 15 of the Act. He further found that since AUT had replaced Tariff FMB–F No. 1 with a tariff which is unobjectionable, it is not necessary to cancel or modify such tariff, and recommended that AUT's motion to dismiss the complaint or any part of it in No. 772, as "moot" and "satisfied", be denied. In No. 784 he found and concluded that no unfiled, unapproved agreement was shown to exist.

*Exceptions.* AUT excepted to the findings and conclusions that its Tariff FMB–F No. 1 does not contain the essential obligations of a common carrier by water and that there was no agreement among the conference members, as AUT alleged.

## Discussion and Conclusions

No exceptions were taken to the examiner's finding and conclusion that AUT is a common carrier by water in this trade. Therefore discussion on this point is unnecessary.

In excepting to the finding that Tariff FMB–F No. 1 does not contain the essential obligations of a common carrier, AUT maintains that its exclusive f. i. o. rates are consonant with law, and that since the tariff is no longer in effect, having been replaced by an unobjectionable tariff, and since the conference asked affirmative relief in

the matter—cancellation of the tariff—the Board should dismiss that portion of the case as "moot." In this connection, AUT filed a motion to dismiss the complaint as "moot" and "satisfied" after the new tariff became effective and before the examiner's recommended decision was served but after the record was completed.

We agree that in failing to undertake its obligations of loading and discharging cargo and furnishing adequate terminal facilities, AUT's Tariff FMB–F No. 1, by reason of its *exclusive* f. i. o. rates applicable to each and every shipper, is unjustly discriminatory to small shippers in violation of section 14 Fourth of the Act, and that by reason of its failure to specify terminals it is in violation of section 2 of the 1933 Act. *Intercoastal Investigation, 1935*, 1 U. S. S. B. B. 400; *Assembling and Distributing Charge*, 1 U. S. S. B. B. 380; *Puerto Rican Rates*, 2 U. S. M. C. 117. We are not here concerned with f. i. o. rates on specific commodities which are susceptible to bulk volume movements where the shippers and consignees themselves control dock facilities.

Although complainant requested that Tariff FMB–F No. 1 be cancelled, that relief is impossible because the tariff has been replaced by an unobjectionable one. Since the record is complete, however, and each of the parties has been fairly and fully heard, and since the tariff is defective, we so declare it to be. *In re Marginal Track Delivery*, 1 U. S. S. B. 234; *Walling* v. *Haile Gold Mines*, 136 F. 2d 102.

The motion to dismiss, which the examiner recommended be denied, is hereby denied, and we further hold that Tariff FMB–F No. 1 does not qualify as a proper filing under section 2 of the 1933 Act.

We agree with the examiner that in No. 784 an unfiled section–15 agreement among the conference lines, as alleged, was not shown to exist. More than an agreement to file a complaint with the Board is necessary to prove the allegation raised. We recognize that the members of the conference had to "agree" to file the complaint in No. 772, but since the conference, as an association, is a "person" under the Act which, pursuant to section 22 thereof, may file a complaint, it would be absurd to say that approval under section 15 is necessary before the "person" could exercise the right granted by section 22.

The remainder of the evidence fails to support the allegation that an unfiled agreement among the conference members existed to drive AUT out of the trade. AUT therefore is not entitled to reparation.

ORDER

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

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No. 772

UNITED STATES ATLANTIC AND GULF-PUERTO RICO CONFERENCE ET AL.

*v.*

AMERICAN UNION TRANSPORT, INC., ET AL.

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No. 784

AMERICAN UNION TRANSPORT, INC.

*v.*

UNITED STATES ATLANTIC AND GULF-PUERTO RICO CONFERENCE ET AL.

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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 its report, which report is hereby referred to and made a part hereof:

*It is ordered*, That American Union Transport, Inc., be, and it is hereby, notified and required hereafter to abstain from the violations of section 14 Fourth of the Shipping Act, 1916, as amended, and from the violations of section 2 of the Intercoastal Shipping Act, 1933, as amended, herein found to have been committed by American Union Transport, Inc.; and

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

BY THE BOARD.

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

# FEDERAL MARITIME BOARD

No. M-69 (Sub. No. 2)

PACIFIC FAR EAST LINE, INC., ET AL.—APPLICATIONS TO BAREBOAT CHARTER GOVERNMENT-OWNED VESSELS

*Submitted October 8, 1956. Decided October 31, 1956*

REPORT OF THE BOARD

CLARENCE G. MORSE, *Chairman*, BEN H. GUILL, *Vice Chairman*, THOS. E. STAKEM, JR., *Member*

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), and others to bareboat charter war-built, dry-cargo vessels from the Government for the carriage of Government-sponsored bulk cargoes and other approved bulk cargoes. Notice of hearing was published in the Federal Register of September 22, 1956, and prior to the hearing, applications for more than 80 vessels were filed by a total of 18 steamship companies.[1] Since the Board received evidence and heard arguments in the original and subsequent proceedings (*Marine Transport Lines, Inc., Et Al.—Charters of War-Built Vessels*, 5 F. M. B. 112, and *Pacific Far East Line, Inc.—Charter of War-Built Vessels*, 5 F. M. B. 136), and since an emergency situation appears to exist, the Board in this proceeding

[1] Pacific Far East Line, Inc. (PFEL), 5 Victorys; Pacific-Atlantic Steamship Co. and/or States Steamship Company (States), 5 Libertys and/or Victorys; American President Lines, Ltd. (APL), 5 Libertys and/or Victorys; West Coast Steamship Company, 5 Libertys and/or Victorys; Shepard Steamship Co., 5 Libertys and/or Victorys; Marine Transport Lines, Inc., and Marine Navigation Company, Inc. (Marine Transport), 5 Libertys; Pope & Talbot, Inc. (P&T), 3 Victorys; American Defense Line, Inc., 1 Liberty; Central Gulf Steamship Corporation, 1 Victory; Coastwise Line (Coastwise), 5 Victorys; Grainfleet Steamship Co., Inc. (Grainfleet), 2 Libertys and/or Victorys; United Maritime Corporation (United Maritime), 5 to 10 Libertys; Veritas Steamship Company, Inc., 2 Libertys; Isbrandtsen Company, Inc. (Isbrandtsen), 7 Victorys; Ocean Carriers Corporation, 10 Libertys; Pegor Steamship Corporation, 5 Libertys; American Mail Line Ltd. (AML), 3 Victorys; Olympic Steamship Co., Inc. (Olympic), 4 Libertys and/or Victorys.

received the evidence and heard oral argument in lieu of briefs. Exceptions to this decision will not be filed.

Opposing the applications were American Tramp Shipowners Association, Inc. (ATSA), and Association of American Shipowners (AASO). American Export Lines, Inc. (American Export), United States Lines Company (U. S. Lines), and A. H. Bull Steamship Company, Inc. (Bull), intervened as their interests appeared.

The Department of Agriculture (Agriculture) estimates that it will authorize the export of some 7,382,000 tons of aid cargo during fiscal year 1957, and the record reveals that International Cooperation Administration (ICA) anticipates an export program of some 1,107,000 tons. Compared with these figures, during the eighteen month period ending in June 1956, Government-sponsored aid cargoes totaled 4,400,000 tons. The largest single aid program yet to be administered by Agriculture is a grain program for India, consisting of three million tons of aid cargo. During fiscal year 1957, 1.5 million tons will be available for export under this program, with a possible carryover of some of it into the first quarter of fiscal year 1958. Agriculture has already authorized the purchase by the Indian Supply Mission (the Indians) of 700,000 tons, most of which has not yet been booked, and within a month or two a purchase authorization for an additional 800,000 tons will be issued.

In addition to this program, the evidence reveals that two fairly large aid programs are to be announced shortly, one to the Mediterranean area and the other to Latin America. Further, the current Japanese aid program, which was to be completed by September 30, has not been completed and there is some doubt that it can all be carried by December 31, 1956. There remains to be shipped in excess of 100,000 tons under this Japanese program, and there is some indication that the Japanese representatives are negotiating for an additional 750,000 tons of grain to be moved during 1957.

The record also indicates that aid cargoes to Pakistan, Formosa, and Indonesia have lagged due to the unavailability of shipping space, and that an agreement between our Government and the Government of Israel for the purchase of grain is imminent.

Approximately 415 voyages will be needed to move Agriculture's cargoes and about 212 voyages will be required for ICA shipments. Of these 627 voyages, 314 should be carried by American-flag vessels.

It is estimated that approximately 1,654,000 tons of the Agriculture cargo may be carried over into fiscal year 1958 due to unforeseen shipping difficulties (lack of shipping space, congested port facilities, etc.), but purchase authorizations for the full quantity will issue nevertheless. Assuming, however, that the entire amount authorized

does not move, and allowing for approximately 20 percent of this cargo to move by liners, it appears that 730,000 tons are to move to Europe, 258,000 tons to the Near East, 2,336,00 tons to the Far East, and 699,000 tons to South America, between September 1, 1956, and June 30, 1957, all in tramp vessels. A Liberty-type vessel would require an approximate 60-day turnaround to Europe, 78 days to the Near East, 100 days to the Far East, and 50 days to South America. Based on this schedule, a Liberty could make five voyages to Europe in ten months (303 days), four to the Near East, three to the Far East, and six to South America. Hence, 415 voyages or 114 vessels are necessary to accommodate the Agriculture cargoes, and based on similar computations, 212 voyages or 55 vessels are necessary to accommodate ICA cargoes, with the total vessels required amounting to 169, of which 85 should be American flag.

Weighed against these requirements, the record discloses that there are but 149 privately owned United States-flag Liberty-type vessels in all operations, and 21 approvals for the transfer of Liberty vessels to foreign flag are now pending. Only 64 Libertys are engaged in the tramping trades. Including Victory and C-type ships, the tramp fleet numbers 101 vessels. There are 19 tramp vessels under long term charter carrying French coal, seven are employed in the ore trade, which is usually long term (a factor making them unavailable for the transpacific grain trade), 24 are now carrying grain, and eight are engaged in the carriage of other bulk cargoes. Thus, of the 101 American-flag tramp vessels, some 58 are now employed on long-term arrangements which will make them wholly or partially unavailable for these aid cargoes.

The difficulty with regard to moving the Indian cargoes is indicative of the current situation. On September 13, the Indians invited c&f tenders for 12 cargoes of grain from grain suppliers requesting American-flag vessels, but with the option of the supplier to furnish foreign-flag vessels in the event American-flag ships were not available. In response to this invitation, only one offer for an American-flag vessel (a tanker) was submitted, and it was accepted. The remaining 11 offers were for foreign-flag vessels, and waivers for foreign-flag employment were issued.

On September 25, the Indians widely solicited charters of American-flag vessels on consecutive-voyage bases. Sixteen offers were received, 11 of which were contingent, however, upon the release of Government-owned vessels to the bidders. The five not contingent upon break-out (including one tanker) did not appear satisfactory to the Indians because they considered the charter hire excessive or because time or place of delivery was unsuitable. The Indian Supply Mission has

made counter offers for these five vessels, and negotiations are continuing for their charter.

Privately owned American-flag vessels are not available at reasonable rates. The rates for vessels offered ranged from $70,000 to $75,000 per month. Some vessels were offered for delivery at places which would require a ballast voyage to put them in proper position. Five Libertys were offered at a charter hire of about $75,000, delivery late November and December on the Pacific coast.

*Statutory findings.* The record clearly establishes that genuine efforts were made to charter privately owned American-flag vessels but that very few are available and certainly not in sufficient quantity to meet the cargo requirements.

*Public interest.* Although the cargoes to be carried are exclusively bulk Government-sponsored cargoes, port-to-port generally, we do not hesitate to conclude, since they are Government-sponsored aid cargoes, that the movement of such cargoes in Government-owned vessels would be in the public interest. See *Pacific Far East Line, Inc., supra*, and *Grace Line Inc.—Charter of War-Built Vessels*, 3 F. M. B. 703 (1951). The failure to authorize Government bareboat charters where American-flag tonnage is not adequate would frustrate our national foreign-aid programs and would result in a disservice to the American merchant marine.

*Adequacy of service and availability of vessels—reasonableness of rates and conditions.* What has been said *supra* answers these inquiries. The Board finds that American-flag service is not adequate to carry its fair share of the cargoes offered, or to be offered, and necessarily that sufficient American-flag vessels are not available for these cargoes at reasonable rates and upon reasonable conditions.

## Discussion

After weighing the estimated cargo to be moved against the current and anticipated American-flag tonnage which will be able to participate in this movement, the Board is of the opinion that 30 Government-owned vessels will fill the required need without adversely affecting the employment of privately owned vessels.

It is noted that immediately prior to this proceeding Isbrandtsen entered into a contract with the Indians, contingent upon the bareboat of vessels from the Government, whereby seven Victory-type vessels would carry rice and grain on a consecutive-voyage basis for one year at rates below the NSA fair and reasonable rates. PFEL has similar commitments with the Japanese, Pakistani, and Indians covering five Victorys at corresponding rates. United Maritime,

which, during the course of this hearing, revised its application from 10 to five Libertys, has made a similar offer to the Indians, and the record establishes that contractual status is imminent. APL, here seeking five vessels, has a contingent contract with the Pakistani Government covering two vessels for single voyages and has offered in on the Indian grain program with five vessels at rates similar to those agreed to by Isbrandtsen, and the record indicates that the offer will be accepted.

Another applicant with an existing contingent contract is Grainfleet, which has agreed to carry grain with a single vessel on a consecutive-voyage basis for one year from Gulf and Atlantic ports to Israel, covering approximately 50,000 tons. In regard to this movement, however, the record shows that American Export is willing and able to carry about 60,000 tons of grain per year to Israel on a bimonthly basis on its regular liner services. A bareboat charter to Grainfleet, therefore, if awarded, should be restricted to movements from Gulf ports and to movements from Atlantic ports only in instances where American Export cannot carry the cargo offered.

In addition to the above, two Pacific coast and Pacific Northwest berth operators, States and AML, seek five Libertys and/or Victorys and three Victorys, respectively. States has offered in on the Indian grant movement but has no contract. States' bid quoted rates which were higher than those of Isbrandtsen, and the record indicates that States will not meet the lower rates. States is primarily interested, however, in cargoes moving in the Korean and Japanese trades. AML, on the other hand, indicated that it would meet Isbrandtsen's rates although it did not submit a bid for the carriage of the Indian grain.

Olympic, P&T, and Coastwise, seeking four, three, and five vessels, respectively, also have offered in on the Indian program. Olympic was advised by the Indians that its bid would receive consideration if the rates were similar to those of Isbrandtsen, and Olympic indicated that those rates would be met. P&T, however, would not agree to such rates. Coastwise, whose offer to the Indians envisaged an operation similar to that contemplated by Isbrandtsen, has received no response to its bid.

With the exception of P&T, which indicated it would not agree to such a condition unless it had a firm contract for at least one year's employment, all of the above applicants have indicated that they will accept any bareboat charters awarded, subject to the condition that a year's charter hire would be the minimum charter hire due the Government unless the charter is terminated by the Government.

Shepard, West Coast, Pegor, Veritas, Ocean Carriers, Central Gulf,

American Defense, and Marine Transport neither offered evidence nor presented witnesses. The record is not clear as to whether they would accept vessels upon the one year's minimum charter hire condition.

It has been noted, *supra*, that five privately owned American-flag vessels were offered to the Indians but that their bids were met with counter offers embodying rates which are lower than the NSA fair and reasonable rates. Where privately owned American-flag vessels are offered to the Indians at the going market level but not in excess of NSA fair and reasonable rates and upon reasonable conditions, no Government-owned vessels should be allowed to carry cargo for the Indians until such privately owned vessels have been employed. The going market level is established by the supply of and demand for privately owned vessels, not by offerings conditioned upon obtaining Government charters.

United States Lines urges that any charter awarded as a result of these hearings should contain sufficient restrictions to cause the inbound voyages to be in ballast. Of particular concern to United States Lines is the fear that Government vessels may overtonnage the eastbound trade from the Far East, resulting in a severe depression of rates on Philippine ore. In *American Coal Shipping, Inc.—Charter of War-Built Vessels*, 5 F. M. B. 154, the charterer was permitted to carry ore inbound because a ballast return voyage would result in an unsuccessful operation. Here, although the record discloses that U. S. Lines' vessels returning from the Philippines have had but about 500 tons free space per voyage, the Board notes that the pro forma voyage results of the proposed charters indicate a modest profit with a ballast return voyage, and mindful of the probable adverse effects on the inbound ore rates if Government vessels are permitted to carry ore inbound, the charters awarded should be restricted to returning home in ballast unless it is shown to the satisfaction of the Maritime Administrator that inbound cargoes would otherwise be declined by owners of privately owned American-flag vessels.

AASO urged that the Board is without authority to award bareboat charters under Public Law 591 for the operations here contemplated, but should instead be governed by section 11 (a) of the Merchant Ship Sales Act of 1946, as amended (the Act), 50 App. U. S. C. A. 1744, which authorizes a Government agency operation for account of the particular department having cargo to move. The Board does not agree with this interpretation of the statute. In *American Export Lines, Inc., Et Al.—Charter of War-Built Vessels*, 3 F. M. B. 451 (1950), section 5 (e) of the Act was found to be

sufficient authority for bareboat chartering vessels for the carriage of Government-sponsored cargoes on other than essential trade routes or services. To the same effect is *American Mail Line Ltd. Et Al.—Charter of War-Built Vessels*, 3 F. M. B. 497 (1951), *Pacific Far East Line, Inc., supra*, and *American Coal Shipping, Inc., supra*. Although a general agency operation may be permissible here, it is not required. In considering the 1950 amendments to the Act, the Merchant Marine and Fisheries Committee of the House of Representatives said:

> * * * notwithstanding the need to put an immediate end to general chartering under the 1946 act, it was also desirable that authority should exist which would permit such chartering in certain special circumstances which now exist or might well arise in the future * * * For example, one private operator has been carrying on a very important service to the Far East to meet military and naval needs of the United States. Since the bulk of the business in this service, depends upon the military and naval requirements in the areas served, and since those requirements are indefinite as to duration, no operator would be justified at this time in purchasing the special-type vessels required. (H. R. 2353, 81st Cong., 2d Sess.)

We feel that the special circumstances the Merchant Marine and Fisheries Committee had in mind are presented here.

## Findings, Certification, and Recommendations

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

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

2. That such services are not adequately served; and

3. 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 services.

The Board further finds that not to exceed 30 Government-owned vessels will fill the present requirements without adversely affecting the employment of privately owned vessels, and that the following restrictions and conditions are necessary or appropriate to protect the public interest in respect of such charters, and to protect privately owned vessels against competition from the chartered vessels:

1. That any charter which may be granted herein be for a one-year period, subject to the right of cancellation by the charterer on 15 days' notice, such right, at the option of the Administrator, to be conditioned upon full payment to the Government of the remainder of one year's charter hire, which will be considered as recoupment of break-

out and lay-up costs, and the right of cancellation by the Government on 15 days' notice;

2. That the charter-hire rate be a fixed sum in an amount determined to be consistent with the policies of the Merchant Ship Sales Act of 1946, as amended, and not less than the prevailing world market charter rate for similar vessels for similar use. If the fair and reasonable NSA time-charter rate, as converted to a bareboat rate, is hereafter determined by the Maritime Administrator to be not less than the prevailing world market charter rate for similar vessels for similar use and consistent with the policies of the 1946 Act, it is recommended the such converted NSA rate be adopted as charter hire applicable to the vessels chartered as the result of this report. "Additional charter hire" based on earnings above 10 percent of capital necessarily employed should be fixed as provided in section 709 of the Merchant Marine Act, 1936;

3. That with reference to break-out, readying, and lay-up costs, the Secretary of Commerce authorize the use of the vessel operations revolving fund for the activation, repair, and deactivation cost provided for in Public Law 890, 84th Congress;

4. That charterers at all times be limited to carrying bulk cargoes outbound and be not permitted to carry any cargo inbound; provided, however, that the privilege of carrying bulk cargoes inbound may be accorded by the Secretary of Commerce upon petition of an applicant and after the Secretary of Commerce is satisfied that the other American-flag operators will not be unduly injured thereby;

5. That charterers be not permitted to operate the vessels in the coastwise or intercoastal trades;

6. That before any vessels are actually chartered as a result of this proceeding, the Secretary of Commerce satisfy himself that no privately owned American-flag vessels have become available to carry the available cargoes at or below the rates hereinabove discussed.

The Board further recommends to the Secretary of Commerce:

7. That the privately owned liner vessels be utilized to the maximum extent possible in moving the Government-sponsored aid cargoes, bearing in mind the ratio that is normally maintained in this trade between liner and tramp vessels, and that, in allocating Government-owned vessels, first preference be given to those shipping companies, both tramp and liner, who normally serve the trade area to which the particular cargoes are consigned, and, in connection therewith, that effort should be made to maintain the relative carrying relationships between liner and tramp vessels;

8. That in the event a charter to Grainfleet is concluded, in addition to the above restrictions the charter be limited to carrying grain out-

bound from the Gulf; and if from Atlantic coast ports also, only after the Maritime Administrator is satisfied that no American-flag berth operator can or will carry the grain.

The record will be held open for the purpose of considering requests from any Government agency which is unable to secure privately owned American-flag vessels at reasonable rates and upon reasonable conditions to transport its cargoes, provided timely advance notice of its definite requirements has been given.

At the opening of this hearing the Board announced that subpoenas would be issued to those members of ATSA who had not complied with the Board's request for data made during the prehearing conference in *Marine Transport Lines, Inc., et al., supra.* Since that announcement, additional data has been received and rather than unduly penalize applicants by delaying this decision until return of such subpoenas, the Board has determined to leave the question of subpoenas open until such time as *Marine Transport* is again reopened.

# FEDERAL MARITIME BOARD

No. M–73

STATES STEAMSHIP COMPANY—APPLICATION TO BAREBOAT CHARTER ONE VICTORY-TYPE DRY-CARGO VESSEL FOR OPERATION ON TRADE ROUTES NOS. 29–30

*Submitted December 12, 1956. Decided December 12, 1956.*[1]

The Board should find and certify to the Secretary of Commerce that the service for which States Steamship Company proposes to bareboat charter one Government-owned, war-built, dry-cargo vessel is required in the public interest; that such service would not be adequately served without the use therein of such vessel, and that privately-owned American-flag vessels are not available for charter on reasonable conditions and at reasonable rates for use in such service.

*Tom Killefer* for applicant.
*Allen C. Dawson* as Public Counsel.

INITIAL DECISION OF A. L. JORDAN, EXAMINER

This is a proceeding under Public Law 591, 81st Congress, upon the application of States Steamship Company for bareboat charter of one (1) government-owned, Victory type, dry-cargo vessel for operation for one voyage on Trade Routes 29–30. Hearing was held on December 10, 1956, pursuant to notice in the Federal Register of December 5, 1956, and oral argument was held before the examiner in lieu of briefs. No one appeared in opposition to the application.

Applicant desires to charter one Victory vessel, the SS *Clarksburg Victory*, or substitute, for operation in its transpacific berth service "A" between ports on the Pacific Coast of the United States and ports in the Far East, Trade Route No. 30.

The vessel sought to be chartered is to take the place of applicant's owned C–2 vessel the SS *Charles E. Dant* presently stranded in Lingayen Gulf, Philippine Islands, by typhoon November 27, 1956, re-

[1] 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).

sulting in loss of this vessel to applicant's berth service involved. This vessel cannot be restored to service earlier than January or February 1957, if ever. It cannot, therefore, take its December loading position. For this reason applicant desires to charter the SS *Clarksburg Victory*, or substitute, for a single round voyage of approximately 60 days duration, beginning on or about December 15, 1956, Pacific Coast delivery. Applicant may seek to charter the vessel for a longer period for this or another of its services.

*Public interest.* Trade Route No. 30 is one of the routes which the Maritime Administrator has determined to be an essential route in the foreign commerce of the United States under section 211 of the Merchant Marine Act, 1936.

*Adequacy of service.* The full capacity of the vessel is obligated by firm commitments and applicant has been turning down cargo for the past 45 days. The cargo committed is oil seeds, pulp, tallow, hides, general cargo, and some MSTS cargo.

*Availability of vessels—reasonable rates.* Applicant has checked the charter market and is advised by its broker, J. H. Winchester & Company, New York, N. Y., that there is no American flag vessel available, regardless of type or rate.

*Discussion.* Counsel for the applicant and Public Counsel state that the three statutory requirements have been met by the applicant and that the application should be granted.

## Findings, Certification, and Recommendations

On the basis of the facts adduced in the record, the Board should find and certify 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 American flag vessels are not available for charter from private operators on reasonable conditions and at reasonable rates for use in such service.

The Board should recommend (1) that any charter which may be granted herein be for the requested period of a single round voyage of approximately 60 days, (2) that the basic charter hire be at a rate of not less than 15 percent of the unadjusted statutory sales price of the vessel, or the floor price, whichever is higher, and (3) that with respect to breakout, readying, and lay-up costs incurred on the chartered vessel, the same policy be applied as was applied in *Grace Line Inc.—Charter of War-Built Vessels*, 5 F. M. B. 143.

# FEDERAL MARITIME BOARD

No. M–69 (Sub. No. 3)

AMERICAN EXPORT LINES, INC., ET AL.—APPLICATIONS TO BAREBOAT CHARTER GOVERNMENT-OWNED VESSELS

*Submitted December 6, 1956. Decided December 18, 1956*

REPORT OF THE BOARD

CLARENCE G. MORSE, *Chairman*, BEN H. GUILL, *Vice Chairman*, THOS. E. STAKEM, JR., *Member*

BY THE BOARD:

This is a proceeding under Public Law 591 of the 81st Congress upon the application of American Export Lines, Inc., and others to bareboat charter war-built dry cargo vessels from the Government for the carriage of Government-sponsored bulk cargoes and other approved bulk cargoes. Notice of hearing was published in the Federal Register of December 1, 1956, and pursuant to such notice, applications for more than 140 vessels were received before the close of business on December 5, 1956, from 28 applicants.[1] All parties who made an appearance at the hearing, with the exception of Polarus Steamship Company, indicated that they would be willing to accept a charter for one year. Counsel for Polarus was unable to state whether or not that applicant would be willing to accept a one year charter.

No parties appeared in opposition to the granting of charters but United States Lines Company and American Tramp Shipowners Association, Inc., intervened as their interests might appear. A. H. Bull Steamship Company, Inc., intervened solely to ask that the use of any vessels chartered in this proceeding be prohibited from use in the domestic trades, including Puerto Rico.

[1] The appendix indicates applicants in this proceeding, together with the number of ships applied for. No appearance was made at the hearing for A. L. Burbank & Company, Central Gulf Steamship Corporation, New Jersey Industries, North American Manufacturers Association, T. J. Stevenson and Company, Stockard Steamship Company, and Terminal Steamship Company. Inadvertently, World Carriers, Inc., was named as an applicant at the hearing.

A representative of the Department of Agriculture (Agriculture) testified that the scope and volume of its Title I, Public Law 480, programs remain substantially as presented in prior hearings under this basic docket number, though some programs which had previously been in negotiation are now firm. Agreements now total over six million tons, and present negotiations will increase this total to 7.5 million tons within the next three or four months. Vessel space for approximately 2.7 million tons has been approved, leaving 4.8 million tons of shipping space to be arranged for the completion of this program within fiscal year 1957 (ending June 30, 1957). They expect there will be a carry-over beyond this date, but hope to move the total volume not later than September 1957.

As a part of this over-all 7.5 million ton movement, substantial new programs for movement of grain under Public Law 480 have been approved since the last hearing under this basic docket number.

On November 13, 1956, a program for 511,000 tons of wheat to Turkey was authorized. Since that time the Turkish Economic Mission has entered the ship market but has been unable to obtain any privately owned American-flag vessels at or below the NSA rate. Two foreign-flag fixtures were made, one with a Turkish-flag vessel and one other at the rate of $1.80 in excess of the NSA rate. At the date of hearing, shipping space for only 20,000 tons of the 511,000 tons in this program had been obtained. The emergency and urgent nature of this program was further supported by testimony of representatives of the State Department and International Cooperation Administration (ICA), who stated that the Turkish grain should receive highest priority and move immediately. It should be available in Turkey for consumption between the present time and the harvesting of the new Turkish grain crop beginning in June of 1957.

On November 8, 1956, a program for 925,500 tons of wheat to Yugoslavia was authorized. Since that time the Yugoslavia Purchasing Mission has entered the ship market and has been unable to obtain any privately owned American-flag vessels at the NSA rate or below. It has obtained three Government bareboat-chartered vessels for 28,500 tons, American-flag liner space for 88,300 tons, and two foreign-flag vessels at rates above the NSA rate. Space for only 143,200 tons has been arranged, leaving in excess of 780,000 tons to be engaged.

Approval by Agriculture is imminent on a program for grain to Brazil, which will require movement within fiscal year 1957 of approximately 600,000 tons. There is furthermore a possibility of increased programs for grain to move to the Mediterranean and the Middle East within the next three months.

The difficulty in obtaining privately owned American-flag vessels for carriage of cargoes in Agriculture programs under Public Law 480 has increased since the prior hearing under this basic docket number in early October. In October, on cargoes to which 50–50 legislation applies, of a total of 609,000 tons moved, only 27.2 percent moved on American-flag vessels whereas 72.8 percent moved on foreign-flag vessels. Foreign-flag fixtures have been substantially the NSA rate or above. The Indian grain movement previously considered under this docket number has not moved as rapidly as had been hoped. The Indian Supply Mission has obtained 14 of the bareboat-chartered Government-owned vessels released as a result of the prior hearing, and desires five or six more.

The testimony is undisputed that privately owned American-flag vessels are not now available at the NAS rate or below for carriage of Public Law 480 cargoes. No party knew of any such vessels available, and none were aware of any privately owned American-flag vessels which were unable presently to find employment. Market rates on bulk commodities reflect the serious shortage of tonnage which has increased since the prior hearing in October. Coal rates from Hampton Roads to the Continent were $10.25 per ton in October and are now $16.75 per ton; grain rates also have increased. The closing of the Suez Canal, acceleration of grain movements under Agriculture programs, together with increasing coal shipments to Europe, have caused the increasing demand for tonnage.

Agriculture estimates a need for the bareboat charter of a minimum of 25 additional vessels for use in service from Atlantic and Gulf ports for the carriage of bulk commodities under its programs. This requirement will continue for at least one year, and is over and above available space on privately owned American-flag tramp or liner vessels.

The testimony shows that of the 30 vessels made available as a result of the prior hearing under this basic docket number for use on the west coast, 5 have been diverted to use on the east coast. There is a continuing urgent need for 30 American-flag vessels for use from the west coast, making a requirement for five additional vessels to be made availale for west coast operations under Agriculture-sponsored programs.

The ICA representative concurred in the immediate need for the 30 vessels required by Agriculture, but stated that because of the immediate emergency nature of the Turkish grain program, all 25 vessels made available for the east coast and the Gulf should be first applied to that program for completion in 4 or 5 months, and should

then be made available for other Agriculture programs. It was the position of Agriculture that, while the Yugoslav program was not of such an extreme emergency nature as the Turkish program, it was sufficiently urgent that vessels should be made available concurrently with the Turkish movement. If all 25 vessels made available to the east coast and the Gulf are first assigned to the Turkish program for 4 or 5 months, Agriculture feels that an additional 10 vessels will be necessary on the east coast and the Gulf for proper carrying out of the Yugoslav and other programs.

A representative from General Services Administration (GSA) testified that it is acting as procurement and transportation agent for the Office of Defense Mobilization (ODM) on a program for bringing in one million tons of ore to the United States from Durban and Lourenco Marques in East Africa within 2 years. This ore should move as quickly as possible, preferably to the Atlantic coast, but delivery to the Gulf would be acceptable. GSA has been attempting to move this cargo for several months and has had difficulty in obtaining full shipload space or space on liner vessels. Some has moved in relatively small parcel lots by tramp vessels. Because of a rail equipment shortage in Africa, GSA desires to arrange for full shipload voyage charters in order to coordinate allocation of rail equipment with assured vessel space. It feels that such a movement could be coordinated with Government bareboat-chartered vessels returning to the United States empty via the Cape of Good Hope. It requests, therefore, that the Board recommend to the Secretary of Commerce that charters granted in this proceeding permit carriage of this inbound ore in the event GSA is unable to obtain space on privately owned American-flag vessels.

## Discussion and Conclusions

Government-owned bareboat-chartered vessels are requested in this proceeding for carriage of Government-sponsored cargoes under Title I, Public Law 480. In accordance with our previous reports under this basic docket number, we find and conclude from the record herein that this service is in the public interest.

The record as summarized, *supra*, clearly supports a finding that American-flag service is inadequate to carry its fair share of these cargoes, and that privately owned American-flag vessels are not now available, and will not be available within the next year, for charter on reasonable conditions and at reasonable rates for use in this service.

The record supports a finding that up to 40 Government-owned vessels will meet the present requirements of the services herein con-

sidered, and may be chartered without adversely affecting the employment of privately owned American-flag vessels.

In connection with the Turkish grain program, certain applicants have negotiated charters with the Turkish Economic Mission, contingent upon obtaining bareboat-chartered Government-owned vessels in this proceeding. Arrow Steamship Company, Inc., has such a contingent arrangement for 8 vessels for 6 months consecutive voyages at NSA rates, American Export Lines, Inc., for 5 vessels, and Federal Bulk Carriers, Inc., for 2 vessels. In addition, the record shows that Arrow has affected a charter party for seven vessels for carriage of Yugoslav grain, contingent on receiving bareboat-chartered Government-owned vessels as a result of this proceeding. By the time allocation of vessels chartered under this proceeding is made to particular applicants, it may be that other such contingent arrangements will have been concluded by other applicants. In considering the various factors which will determine the allocation of chartered vessels to particular applicants, we feel that the mere fact that a particular applicant has obtained a commitment for carriage of these Government-sponsored cargoes conditioned upon the granting of a charter of Government-owned vessels, should not be a conclusive factor in granting or denying particular applications. A sufficient number of vessels will be chartered to provide space for carriage of these cargoes regardless of any prior contingent arrangements.

At the hearing the Board was requested to make a ruling as to the status of those applicants who failed to make an appearance and were not represented at the hearing.[2] As stated by us in *Pacific Far East Line, Inc., Et Al.—Charter of War-Built Vessels*, 5 F. M. B. 177, the proceeding was held open "for the purpose of considering requests from any Government agency which is unable to secure privately owned American-flag vessels at reasonable rates and upon reasonable conditions to transport its cargoes." We feel, therefore, that in this particular instance no prejudice can be said to have resulted from the failure of applicants to appear or be represented at the hearing.

## Findings, Certification, and Recommendations

On the record, the Board finds and hereby certifies to the Secretary of Commerce:

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

2. That such services are not adequately served; and

[2] Footnote 1 lists those applicants who failed to appear at the hearing.

3. 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 services.

The Board further finds that not to exceed 40 Government-owned vessels may be chartered for the services here in considered, without adversely affecting the employment of privately owned vessels, and recommends to the Secretary of Commerce that the following restrictions and conditions are necessary or appropriate to protect the public interest in respect of such charters, and to protect privately owned vessels against competition from the chartered vessels:

1. That any charter which may be granted herein be for a 1-year period, subject to the right of cancellation by the charterer on 15 days' notice, such right, at the option of the Secretary of Commerce, to be conditioned upon full payment to the Government of the remainder of 1 year's charter hire, which will be considered as recoupment of break-out and lay-up costs, and the right of cancellation by the Government on 15 days' notice;

2. That the charter-hire rate be a fixed sum in an amount determined to be consistent with the policies of the Merchant Ship Sales Act of 1946, as amended, and not less than the prevailing world market charter rate for similar vessels for similar use. If the fair and reasonable NSA time-charter rate, as converted to a bareboat rate, is determined by the Secretary of Commerce to be not less than the prevailing world market charter rate for similar vessels for similar use and consistent with the policies of the 1946 Act, it is recommended that such converted NSA rate be adopted as charter hire applicable to the vessels chartered as the result of this report. "Additional charter hire" based on earnings above 10 percent of capital necessarily employed should be fixed as provided in section 709 of the Merchant Marine Act, 1936;

3. That charterers at all times be limited to the primary purpose of carrying Government perishable bulk cargoes outbound, and be permitted to carry bulk cargo inbound; provided, however, that the privilege of carrying bulk cargoes inbound may be accorded by the Secretary of Commerce only upon petition of an applicant and after the Secretary of Commerce is satisfied that other American-flag operators will not be unduly injured thereby. We particularly recommend that the Secretary of Commerce cooperate with charterers and GSA in providing available return space for carriage of ore from Durban and Lourenco Marques in East Africa when privately owned American-flag vessels cannot be utilized.

4. That with reference to break-out, readying, and lay-up costs, the Secretary of Commerce authorize the use of the vessel operations

revolving fund for the activation, repair, and deactivation cost provided for in Public Law 890, 84th Congress;

5. That charterers be not permitted to operate the vessels in the coastwise or intercoastal trades;

The Board further recommends to the Secretary of Commerce:

6. That privately owned liner vessels be utilized to the maximum extent possible in moving the Government-sponsored aid cargoes, and that, in allocating Government-owned vessels, preference be given to those shipping companies, both tramp and liner, who are experienced and qualified to operate the vessels in the services outlined herein; and

7. That—consistent with the policy of the Merchant Marine Act 1936 and the Merchant Ship Sales Act of 1946, to foster the development and encourage the maintenance of a privately owned and operated United States-flag merchant marine—preference be given to applicants who, together with their closely affiliated companies, use predominantly American-flag vessels when operating in the waterborne import and export commerce of the United States.

APPENDIX

| *Name of applicant* | *Type of ships applied for* | *Number of ships applied for* |
|---|---|---|
| American Export Lines, Inc | Liberty or Victory (Liberty preferred) | 10 |
| American Mail Line Ltd | Not specified | ------ |
| American President Lines, Ltd | Victory | 5 |
| Arrow Steamship Company, Inc | Victory | 5/10 |
| Boston Shipping Corp | Liberty | 5 |
| A. L. Burbank & Co., Ltd | Liberty | 5 |
| Central Gulf Steamship Corp | Victory | 2 |
| Federal Bulk Carriers, Inc | Liberty | 2 |
| Grainfleet Steamship Company, Inc | Liberty or Victory | 2 |
| Liberty Navigation & Trading Company | Liberty | 1 |
| Marine Transport Lines, Inc., and Marine Navigation Company, Inc. | Liberty | 10 |
| Martis Steamship Corporation | Liberty | 12 |
| Moore-McCormack Lines, Inc | Victory | 3 |
| New Jersey Industries | Liberty | 6 |
| North American Manufacturers Association | Liberty | 1 |
| Ocean Carriers Corporation | Liberty | 10 |
| | Victory | 1 |
| Pacific Far East Line, Inc | Victory | 2 |
| Pope & Talbot, Inc | Victory | 3 |
| Polarus Steamship Co | Not specified | ------ |
| Starboard Shipping, Inc [1] | Liberty | 5 |
| Bournemouth Steamship Corp [1] | | |
| Falmouth Steamship Corp [1] | | |
| T. J. Stevenson & Co., Inc | Liberty | 10 |
| Shipping Corporation of America | Liberty | 3 |
| Stockard Steamship Corp | Victory or Liberty | 10 |
| Terminal Steamship Company | Liberty | 5 |
| United Maritime Corporation | Liberty | 6 |
| Veritas Steamship Company, Inc | Liberty | 2 |
| Waterman Steamship Corporation | Liberty | 10 |
| Blidberg Rothschild Co., Inc | Liberty or Victory | 3 |

[1] Joint application.

# FEDERAL MARITIME BOARD

No. M–72

ISBRANDTSEN COMPANY, INC., ET AL.—APPLICATIONS TO BAREBOAT CHARTER GOVERNMENT-OWNED VESSELS

*Submitted December 28, 1956. Decided January 9, 1957*

REPORT OF THE BOARD

CLARENCE G. MORSE, *Chairman*, BEN H. GUILL, *Vice Chairman*, THOS. E. STAKEM, JR., *Member*

BY THE BOARD:

This is a proceeding under section 5 (e), Merchant Ship Sales Act of 1946, as amended (50 U. S. C. App. Sec. 1738 (e)), upon the application of Isbrandtsen Company, Inc., and others to bareboat charter war-built dry-cargo vessels from the Government for use in world-wide bulk commodity trade, principally for the carriage of coal to foreign ports, and also for the carriage of such cargoes as shall from time to time be available. Notice of hearing was published in the Federal Register of December 1, 1956, and pursuant to such notice applications for more than 160 vessels were received from 25 applicants.[1] No parties appeared in opposition to the granting of charters, but United States Lines Company and American Tramp Shipowners Association, Inc., intervened as their interests might appear. An initial decision has been issued by the examiner, and exceptions thereto have been filed by A. H. Bull Steamship Company, Inc., and American Export Lines, Inc. Bull has requested oral argument; the request is hereby denied.

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.

We are in agreement with the statutory findings made by the examiner.

[1] The appendix indicates applicants in this proceeding, together with the number of ships applied for.

The record indicates that there is a continuing extreme shortage of American-flag tonnage for carriage of bulk coal to Europe, particularly to France. The Suez crisis has increased the need for the importation of coal from the United States, and estimates of tonnage have increased to about 50 million tons to all of Europe for the year 1957.

A witness for Association Technique de l'Importation Charbonnier (ATIC), which is the representative of the French Government in the importation of all coal to France, testified that the coal import program for France for the year 1957 was raised in November 1956 from 4 million to 7 million tons. The present estimate for 1957 is 8 million tons, and in the opinion of the witness it probably will be raised to a total of about 10 million tons. In June 1956 the rate for coal to Europe was under $11 per ton, and at the time of the hearing it had increased to $16.75. It was the testimony of the ATIC witness that payment of the present high coal rates would seriously injure the economy of France. The Chief of the Shipping Division of the Department of State strongly supported the position that payment of rates on coal to Europe at the present market rates places a burden on the economy of friendly European countries which is contrary to the national interest of the United States. The record shows that Belgium has a need for about 900,000 tons of coal in the first quarter of 1957, and that other friendly European countries have need for substantial imports of United States coal in 1957. A need was shown for about three cargoes of coal monthly to South America to meet the needs of electric and gas utilities in Argentina and Uruguay.

All witnesses testified that they had been unable to obtain privately owned American-flag vessels for use in these services, and the evidence is unrebutted that there is at present an inadequacy of American-flag vessels for carriage of coal from the United States to the areas considered, and that this inadequacy will continue to exist for at least a year.

ATIC has commitments with seven companies for a total of 51 vessels, contingent upon the obtaining of Government-owned vessels. Commitment for ten of these vessels is with American Coal Shipping, Inc. In *American Coal Shipping, Inc.—Charter of War-Built Vessels*, 5 F. M. B. 154, the Board made findings which would permit that company to charter up to 30 vessels. The remaining contingent commitments are for 41 vessels with six companies who are applicants in the instant proceeding.[2] All these conditional commitments are at a rate of $11.75 per ton to Antwerp/Rotterdam and $12.25 to a French port. Conditions are uniform, except that the Isbrandtsen charter

[2] Isbrandtsen, nine; Shepard, six; Luckenbach, ten; Arrow, six; Blidberg, five; and New England Industries, five.

would permit the use of either an American- or foreign-flag vessel while all other charters would require the use of American-flag tonnage only.

A witness for ATIC indicated a probable need for an additional 30–35 vessels, but did not now know for what period they would be needed. The witness stated that ATIC would not at this time enter into any one-year commitments in addition to the 51 vessels presently arranged, and felt he could probably obtain the additional 30–35 vessels in the private market.

In addition to the foregoing contingent commitments to ATIC certain other applicants have "commitments", "offers", "pending arrangements", or have been "approached" by other shippers for carriage of coal,[3] while some applicants without specific business in mind felt that the extreme shortage of available tonnage for carriage of coal would enable them to fully utilize for at least a year the vessels for which they apply.[4]

## Discussion and Conclusions

Based on the evidence of record, the conclusion is inescapable, and we so find, that the services under consideration are in the public interest, that they are not adequately served by American-flag vessels, and that privately owned American-flag vessels are not available for charter on reasonable conditions and at reasonable rates for use in such services.

American Export excepts to the initial decision in that it:

(1) stated that applicants who had secured "conditional commitments" should receive preference over other applicants;

(2) failed to recommend that in allocating Government-owned vessels preference be given those shipping companies, both tramp and liner, who normally serve the trade area to which the particular cargoes are consigned and who are experienced and qualified to operate the vessel in the services outlined;

(3) failed to recommend that preference be given to applicants who, together with their closely affiliated companies, use predominantly

[3] Isbrandtsen, eight vessels—"required" by South American electric and gas utilities; American Export, five vessels—"approached" by French, Italian, and Yugoslav Governments; Boston Shipping, three vessels—"arrangements now pending" with Italy; Starboard, Bournemouth, Falmouth (joint application), five vessels—"an offer" in transatlantic coal trade; Dolphin, five vessels—"commitments" to Antwerp/Rotterdam/north French ports; Traders, five vessels—"commitments" to Antwerp/Rotterdam/north French ports; American Union, two vessels—"fixed commitment" with Belgian company; World Carriers, two vessels—"tentative commitments" to Antwerp, Amsterdam, Rotterdam, Hamburg range. The initial decision, in reaching its total of 69 "more-or-less commitments" on page 4, does not include the five for American Export or the two for World Carriers.

[4] Bull, 20 vessels; Pocahontas, 12 vessels; Waterman, ten vessels.

American-flag vessels when operating in the water-borne import and export commerce of the United States.

Bull excepts to the initial decision in that it:

(1) failed to determine the maximum number of ships that may be required and authorize the Administrator to charter these vessels as needed;

(2) failed to recommend an absolute preference in the allocation of ships to applicants who have no foreign-flag affiliations;

(3) failed to recommend that allocations should be made on the basis of qualification and experience of applicants rather than on the basis of conditional commitments.

In the initial decision the examiner totaled the 41 contingent commitments with ATIC and the 28 various arrangements made for other cargoes by certain other applicants (see footnote 3) and concluded that "the record would sustain the break-out of 69 vessels for the carriage of coal for which there is a more-or-less commitment."

While we agree that specific commitments, offers, arrangements etc., are an indication of the need for charter of Government-owned vessels for carriage of coal, we feel that there are other significant factors which must be considered in determining the number of vessels which may be chartered without seriously affecting the employment of privately owned vessels.

Testimony of witnesses indicates that there are vessels presently available for charter for the carriage of coal, but at rates which are considered unreasonably high. The witness for ATIC stated that "a lot of owners are waiting the last minute for distress cargoes that are badly needed," and he urged caution and care that not too many Government-owned vessels be broken out. He stated also that, while ATIC needed 30–35 additional vessels in the near future, he felt that these could be obtained in the private charter market. It was his further testimony that at least two American-flag owners of private vessels now under charter to ATIC have asked to be released from charter when Government-owned vessels become available, presumably, in his opinion, because a higher rate may now be obtained in the market. We also note that although 15 vessels were certified for charter in *Isbrandtsen Co., Inc.—Charter of War-Built Vessels*, 5 F. M. B. 95, only six were finally chartered because nine privately owned American-flag vessels became available.

In recent charter cases under section 5 (e), Merchant Ship Sales Act of 1946, as amended, the Board has made findings which will permit the charter for one year or more of approximately 120 vessels

for use in the carriage of bulk commodities, primarily grain and coal.[5] A substantial number of these vessels have not yet been placed in operation and their availability has not been fully reflected in the ship charter market. We take note of the fact that additional applications for bareboat charter of Government-owned vessels are now pending before the Board and may result in the break-out of additional vessels.

Although the record supports a finding that there are not now privately owned American-flag vessels available at reasonable rates for carriage of coal cargoes, it is not possible to determine the precise number of Government-owned vessels which may be chartered without seriously affecting the operation of privately owned vessels. A number of the "commitments", "arrangements", etc., previously discussed are most indefinite. We feel that the cumulative effect of authorizing at this time the break-out of as many as 69 vessels, together with the substantial number of other Government-owned vessels which will be made available to the ship charter market in the near future, might seriously affect the use of privately owned American-flag vessels.

We will therefore certify to the Secretary of Commerce[6] that a maximum of 50 Government-owned dry-cargo vessels may be bareboat chartered for use in the services herein considered. Recognizing that this number of vessels is less than the number desired by applicants and witnesses, we leave to the discretion of the Secretary of Commerce the allocation of vessels to particular applicants for use in such services as will best serve the public interest.

The initial decision refers to the statement made by the Board in *American Export Lines, Inc., et al., supra*, that "we feel that the mere fact that a particular applicant has obtained a commitment for carriage of these Government-sponsored cargoes conditioned upon the granting of a charter of Government-owned vessels, should not be a conclusive factor in granting or denying particular applications," but states that in the instant proceeding the examiner believes that applicants "who have shown initiative, diligence, and faith in securing conditional commitments should be rewarded and not be relegated to the same position as the other applicants." We do not disagree—we merely restate, that the fact of a conditional commitment should not

[5] *Isbrandtsen Co., Inc., supra,* 15 vessels; *Grace Line Inc.—Charter of War-Built Vessels,* 5 F. M. B. 143, two vessels; *American Coal Shipping, Inc., supra,* 30 vessels; *Pacific Far East Line, Inc., Et Al.—Charter of War-Built Vessels,* 5 F. M. B. 177, 30 vessels; *American Export Lines Inc., Et Al.—Charter of War-Built Vessels,* 5 F. M. B. 188, 40 vessels.

[6] By Department Order No. 117 (amended), section 6.01, subsection 2, paragraphs (1) and (2), the Secretary of Commerce has delegated his authority under the Merchant Ship Sales Act of 1946, as amended, to the Maritime Administrator. Pursuant to such delegation, references herein to the Secretary of Commerce are also directed to the Maritime Administrator.

be treated as conclusive in the granting of a particular application. Such a contingent commitment may be an indication of special qualifications of a particular applicant—but we do not feel that all other factors should be ignored and that an applicant with a conditional commitment should *ipso facto* be automatically entitled to the charter of the ships for which it has applied.

In *American Export Lines, Inc., et al., supra*, the Board recommended that the Secretary of Commerce, "—consistent with the policy of the Merchant Marine Act of 1936 and the Merchant Ship Sales Act of 1946, to foster the development and encourage the maintenance of a privately-owned and operated United States-flag merchant marine—give preference to applicants who, together with their closely affiliated companies, use predominantly American-flag vessels when operating in the water-borne import and export commerce of the United States." The initial decision, while stating that the general aims of the foregoing recommendation are laudable, refused to make a similar recommendation in this proceeding "inasmuch as no rational criterion or yardstick is provided in the recommendation," citing *Panama Refining Company* v. *Ryan*, 293 U. S. 388 (1935). The principal of the *Panama* case—that delegation of authority by the legislative branch to the executive branch of Government, without any reasonable standards, is an unconstitutional delegation of legislative authority—is completely inapplicable to the recommendation of the Board to the Secretary of Commerce in a charter proceeding under section 5 (e) the Merchant Ship Sales Act, as amended. First the Board grants *no* authority to the Secretary of Commerce—his discretionary authority in granting or denying particular applications for charter of Government-owned vessels is clearly and expressly set forth in the Merchant Ship Sales Act of 1946, as amended. Second, the Secretary of Commerce "is authorized" to follow recommendations made by the Board, but is not required to adopt such recommendations.

Section 5 (e), Merchant Ship Sales Act of 1946, as amended, provides that the Secretary of Commerce may, in his discretion, "either reject or approve the application, but shall not so approve unless in its [his] opinion the chartering of such vessel to the applicant would be consistent with the policies of this Act." Within the clear statement of the purposes and policies of the Merchant Ship Sales Act as stated in section 2 thereof, we feel that our recommendation made to the Secretary of Commerce is well within the discretionary authority granted to him by Congress. We furthermore feel that the recommendation is sufficiently clear and precise to enable the Secretary of

Commerce to follow it. The Merchant Marine Act of 1936, section 804, and the Merchant Ship Sales Act itself, section 10, recognize the reasonableness of "affiliated interests" as a standard and guide. The word "predominantly" has a general and clearly understood meaning (Webster's New International Dictionary (1944); *Matthews* v. *Bliss*, 22 Pick (Mass.) 48), and its reasonableness as a legal standard has been recognized. *Williams* v. *Corbett*, 286 P. 2nd 115 (1955). We will therefore make a recommendation to the Secretary of Commerce in this proceeding similar to that made in *American Export Lines, Inc., et al., supra.*

## Findings, Certification, and Recommendations

On the record, the Board finds and hereby certifies to the Secretary of Commerce:

(1) That the services under consideration are required in the public interest;

(2) That such services are not adequately served; and

(3) 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 services.

The Board further finds that not to exceed 50 Government-owned vessels may be chartered for use in the services herein considered, without seriously affecting the employment of privately owned vessels, and recommends to the Secretary of Commerce the following restrictions and conditions as necessary or appropriate to protect the public interest in respect of such charters, and to protect privately owned vessels against competition from the chartered vessels.

(1) That any charter which may be granted herein be for a 1-year period, subject to the right of cancellation by the charterer on 15 days' notice, such right, at the option of the Secretary of Commerce, to be conditioned upon full payment to the Government of the remainder of one year's charter hire, which will be considered as recoupment of break-out and lay-up costs, and the right of cancellation by the Government on 15 days' notice;

(2) That the charter hire be a fixed sum in an amount determined to be consistent with the policies of the Merchant Ship Sales Act of 1946, as amended, and not less than the prevailing world market charter rate for similar vessels for similar use. If the fair and reasonable NSA time-charter rate, as converted to a bareboat rate, is determined by the Secretary of Commerce to be not less than the prevailing world market charter rate for similar vessels for similar use and consistent with the policies of the 1946 Act, it is recommended that

such converted NSA rate be adopted as charter hire applicable to the vessels chartered as the result of this report. "Additional charter hire" based on earnings above 10 percent of capital necessarily employed should be fixed as provided in section 709 of the Merchant Marine Act, 1936;

(3) That charterers at all times be limited to the primary purpose of carrying *coal* cargoes outbound, and be permitted to carry bulk cargo inbound; provided, however, that the privilege of carrying bulk cargoes inbound may be accorded by the Secretary of Commerce only upon petition of an applicant and after the Secretary of Commerce is satisfied that other American-flag operators will not be unduly injured thereby;

(4) That with reference to break-out, readying, and lay-up costs, the Secretary of Commerce authorize the use of the vessel operations revolving fund for the activation, repair, and deactivation cost provided for in Public Law 890, 84th Congress;

(5) That charterers not be permitted to operate the vessels in the coastwise or intercoastal trades;

The Board further recommends to the Secretary of Commerce:

(6) That, in allocating Government-owned vessels, preference be given to those shipping companies, both tramp and liner, who are experienced and qualified to operate the vessels in the services outlined herein; and

(7) That—consistent with the policy of the Merchant Marine Act, 1936, and the Merchant Ship Sales Act of 1946, to foster the development and encourage the maintenance of a privately owned and operated United States-flag merchant marine — preference be given to applicants who, together with their closely affiliated companies, use predominantly American-flag vessels when operating in the waterborne import and export commerce of the United States. In this regard, we recommend that any contracts of affreightment entered into with these Government-owned vessels not permit substitution of foreign-flag vessels.

## APPENDIX

| *Name of company* | *Number of ships applied for* |
|---|---|
| Isbrandtsen Company, Inc | 17 |
| Shepard Steamship Co | 6 |
| Starboard Shipping, Inc.[1]<br>Bournemouth Steamship Corporation [1]<br>Falmouth Steamship Corporation [1] | 5 |
| Traders Steamship Corporation | 5 |
| Blidberg Rothchild Co., Inc | 5 |
| Polarus Steamship Corporation | -- |
| Pocahontas Steamship Company | 12 |
| American Export Lines, Inc | 5 |
| Arrow Steamship Company, Inc | 10 |
| Boston Shipping Corporation | 3 |
| Veritas Steamship Company, Inc | 2 |
| Martis Steamship Corporation | 10 |
| Ocean Carriers Corporation | 10 |
| Shipping Corporation of America | 3 |
| A. H. Bull Steamship Company, Inc | 20 |
| Luckenbach Steamship Company, Inc | 10 |
| New England Industries, Inc | 12 |
| World Carriers, Inc | 2 |
| Waterman Steamship Corporation | 10 |
| Stockard Steamship Corporation | 10 |
| American Union Transport, Inc | 2 |
| Marine Cross Corporation | 6 |
| Pegor Steamship Corporation | 4 |
| James A. Poll | 3 |
| Dolphin Steamship Corporation | 5 |

[1] Joint application.

# FEDERAL MARITIME BOARD

No. M–74

LYKES BROS. STEAMSHIP CO., INC., ET AL.—APPLICATIONS TO BAREBOAT CHARTER GOVERNMENT-OWNED DRY CARGO VESSELS

*Submitted January 7, 1957. Decided January 9, 1957*

Board finds and certfiies to the Secretary of Commerce that the services considered are required in the public interest and are not adequately served; 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 services; and that not to exceed 35 Government-owned vessels may be chartered for such services, subject to recommended conditions and restrictions.

*Odell Kominers* and *Robert S. Hope* for Lykes Bros. Steamship Co., Inc., Pacific Far East Line, Inc., and Pope & Talbot, Inc.

*Robert F. Donoghue*, *John Mason*, and *Josiah K. Adams, Jr.*, for States Marine Corporation of Delaware.

*Ira L. Ewers* for T. J. Stevenson & Co., Inc.

*Lester N. Stockard* for Levant Line, a joint service composed of Stockard Steamship Corporation and Atlantic Ocean Transport Corporation.

*Francis T. Greene* and *David Simon* for Prudential Steamship Corporation.

*Carl S. Rowe* for American Export Lines, Inc.

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

*Vern Countryman* for American President Lines, Ltd.

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

*Richard J. Gage* as Public Counsel.

REPORT OF THE BOARD

CLARENCE G. MORSE, *Chairman*, BEN H. GUILL, *Vice Chairman*, THOS. E. STAKEM, JR., *Member*

BY THE BOARD:

This is a proceeding under section 5 (e) of the Merchant Ship Sales Act of 1946, as amended, 50 App. U. S. C. sec. 1738 (e), upon the applications of Lykes Bros. Steamship Co., Inc., and others [1] to bareboat charter war-built dry cargo vessels from the Government for operation in berth services. Notice of hearing was published in the Federal Register of December 14, 1956, and hearing was held before an examiner on December 19, 1956. American President Lines, Ltd. (APL), intervened in opposition to the applications and to urge certain restrictions and conditions on use of the vessels if chartered. Pacific Far East Lines, Inc. (PFEL), Pope & Talbot, Inc., Pacific Transport Lines, Inc., States Steamship Company, and American Tramp Shipowners Association, Inc., intervened as their interests might appear, and opposed some applications in part. An initial decision was issued by the examiner, and exceptions thereto have been filed by APL and PFEL. APL has requested oral argument, which is herewith denied.

Subject to the modifications hereinafter made, our conclusions agree with the initial decision, which we adopt and make a part of this report. Exceptions and arguments not hereinafter discussed have been given consideration and found not relevant to material issues or not supported by the evidence.

APL's interest extends to the application of States Marine to charter vessels for berth service on the Gulf Far East leg of its tri-continent service from California, in competition with APL's berth service on Trade Routes Nos. 29 F and 29 E, and to the applications of American Export, T. J. Stevenson, Levant Line, and Prudential to charter vessels for berth service inbound on Trade Route No. 10 in competition with APL's round-the-world berth service.

APL excepts, first, to the examiner's ultimate finding that the above-described services are not adequately served. The record fully supports the conclusion of the examiner as to inadequacy of service on these berth services, and we agree with his conclusions. It is beyond question that "the inadequacy of service contemplated by the statute is inadequacy of all American-flag operations in the service, not merely the inadequacy of the service of a particular applicant or

[1] Lykes Bros. Steamship Co., Inc., 15 Victorys; States Marine Corporation of Delaware 12 Victorys; T. J. Stevenson & Co., Inc., 2 Victorys; Levant Line, 2 Victorys; Prudential Steamship Corporation, 2 Victorys; and American Export Lines, Inc., 2 Victorys.

line." *Am. Pres. Lines, Ltd.—Charter of War Built Vessels*, 3 F. M. B. 646, 648 (1951), quoted in APL's brief in support of exceptions (page 3). That brief, however, significantly excludes the next following sentence of the Board's report in the above case, which states that a "clear showing by an applicant that its American-flag vessels are unable to provide adequate service is some evidence that all American-flag vessels are unable to do so, and *in the absence of evidence to the contrary from competitive or other sources may well be sufficient to support the statutory finding*" (emphasis added). This is such a case. Applicants made a prima facie showing of inadequacy of American-flag service, which is unrebutted on the record. Though APL was a party to the hearing and presented a witness, it failed even to attempt to show that its competing privately owned American-flag service was adequate.

APL excepts, second, to the failure of the initial decision to find that operation of Government-owned chartered vessels on the above services should be restricted to the carriage of commercial bulk and military cargoes. The basis of this contention is that APL, in its present operation of privately owned nonsubsidized vessels, is so restricted. We agree with the reasoning of the examiner that such a contention is without merit. The purpose of this proceeding was for charter of vessels for use in regular berth services, and not for services in bulk carriage. Restrictions on operations of nonsubsidized vessels of APL which involve rights and obligations which do not arise out of any proceeding under the Merchant Ship Sales Act of 1946, as amended, are irrelevant to the issues in this charter proceeding, and no valid reason for such restrictions appears in this record.

APL excepts, third, to the examiner's finding that States Marine would carry Pacific coast top-off cargo on the Gulf/Far East leg of its tricontinent service "if it could be loaded quickly on the chartered vessels and if it could be discharged quickly at one destination port." We agree with APL, and the record shows, that the quoted langauge applies to carriage of inbound cargo from the Far East to the Pacific coast, and not to Pacific coast top-offs on outbound voyages. The initial decision is so modified.We fail to see, however, and APL does not contend, that this minor modification would affect the findings and conclusion of the initial decision.

The foregoing discussion of the exceptions of APL answers the arguments advanced in support of exceptions made by PFEL.

## FINDINGS, CERTIFICATION, AND RECOMMENDATIONS

On this record, the Board finds and hereby certifies to the Secretary of Commerce: [2]

(1) That the services herein considered are required in the public interest;

(2) That such services are not adequately served; and

(3) 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 services.

The Board further finds that up to 35 Government-owned vessels may be chartered for use in the berth services herein considered.

We hereby adopt the restrictions and conditions recommended by the initial decision as necessary or appropriate to protect the public interest in respect of such charters, and to protect privately owned vessels against competition from the chartered vessels. We also recommend that in determining the actual number of vessels to be chartered as a result of this proceeding, the Secretary of Commerce satisfy himself that the operation of such chartered vessels will not be unduly competitive with the operation of privately owned American-flag vessels.

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[2] By Department Order No. 117 (amended), section 6.01, subsection 2, paragraphs (1) and (2), the Secretary of Commerce has delegated his authority under the Merchant Ship Sales Act of 1946, as amended, to the Maritime Administrator. Pursuant to such delegation, references herein to the Secretary of Commerce are also directed to the Maritime Administrator.

# APPENDIX

# FEDERAL MARITIME BOARD

## No. M–74

## LYKES BROS. STEAMSHIP CO., INC., ET AL—APPLICATIONS TO BAREBOAT CHARTER GOVERNMENT-OWNED DRY-CARGO VESSELS

The Board should find and so certify to the Secretary of Commerce that the services considered are required in the public interest, that such services are 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 services.

*Odell Kominers* and *Robert S. Hope* for Lykes Bros. Steamship Co., Inc., Pacific Far East Line, Inc., and Pope & Talbot, Inc.

*Robert F. Donoghue*, *John Mason* and *Josiah K. Adams, Jr.*, for States Marine Corporation of Delaware.

*Ira L. Ewers* for T. J. Stevenson & Co., Inc.

*Lester N. Stockard* for Levant Line, a joint service composed of Stockard Steamship Corporation and Atlantic Ocean Transport Corporation.

*Francis T. Greene* and *David Simon* for Prudential Steamship Corporation.

*Carl S. Rowe* for American Export Lines, Inc.

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

*Vern Countryman* for American President Lines, Ltd.

*Richard W. Kurrus* for American Tramp Shipowners Association.

*Richard J. Gage* as Public Counsel.

### INITIAL DECISION OF A. L. JORDAN, EXAMINER [1]

This is a proceeding under Public Law 591, 81st Congress, upon the applications of Lykes Bros. Steamship Co., Inc., and others to bareboat charter war-built dry-cargo vessels from the Government for operation in berth services. Notice of hearing was published in the

[1] This decision will become the decision of the Board in the absence of exceptions thereto, or Board review (Rules 13 (d) and 13 (h), Rules of Practices and Procedure—18 F. R. 3716).

Federal Register of December 14, 1956, and pursuant to such notice applications were received before the close of business on December 18, 1956, from:

Lykes Bros. Steamship Co., Inc. for 15 Victorys.
States Marine Corporation of Delaware for 12 Victorys.
T. J. Stevenson & Co., Inc. for 2 Victorys.
Levant Line for 2 Victorys.
Prudential Steamship Corporation for 2 Victorys.
American Export Lines, Inc. for 2 Victorys.

Hearing was held on December 19, 1956, pursuant to the notice referred to and oral argument was had before the examiner in lieu of briefs.

American President Lines, Ltd., intervened in opposition to all the applications and to urge certain restrictions on the use of any vessels that may be chartered, as hereinafter discussed. Pacific Far East Line, Inc., Pope & Talbot, Inc., Pacific Transport Lines, Inc., States Steamship Company, and American Tramp Shipowners Association intervened as their interests may appear, some opposing certain applications in part, as hereinafter discussed.

The applications are taken up in the order in which they are above listed.

## Lykes Bros. Steamship Co., Inc.

Lykes desires to charter 15 Victory vessels for operation in its berth services from the Gulf to the United Kingdom, Continental Europe and Baltic Scandinavian ports on Trade Route 21; from the Gulf and South Atlantic to the Mediterranean on Trade Route 13; and from the Gulf to Southeast Africa on Trade Route 15–B. Lykes presently maintains an average of seven and a half sailings a month in these combined services with its 33 owned American flag B1, C1, C2, and Victory vessels, and five Victorys chartered from the Government.

Lykes applies for 15 Victorys to take care of increased cargo offerings by its regular shippers and to assist in the carriage of vast relief programs. Its short supply of tonnage is due (a) to the recent longshoremen's strike finding 26 of its vessels in American ports resulting in delays of two weeks of some of the vessels, (b) recent casualties such as three fires, several strandings and collisions with considerable loss of time for repairs, (c) necessity of strapping 21 C2s between now and September 1957, each to be off-berth 15 days, and (d) annual inspection, sand-blasting, and bottom painting of 9 additional vessels.

Lykes believes there will be a continuing heavy movement of agricultural products for some time to come. Shippers have informed Lykes of their hesitancy in offering these products for sale on account

of their inability to secure freight space, and a good portion of grain, phosphate, sulphur, and other weight inquiries have been placed before Lykes at attractive rates which it could not entertain. It has not been able to lift its share of military cargo for the past three months, and will be forced to make further curtailment in its military space offerings for December and January unless it can acquire additional tonnage.

On Trade Route 21 Lykes has declined 70,000 tons of cargo for December, and 27,000 tons of general cargo for January, and approximately 80,000 tons of phosphate and sulphur for January through June 1957. On Trade Route 13 it declined approximately 56,000 tons of cargo for December, and approximately 148,000 tons for January through March 1957. In addition to the other cargo declined Lykes has not been able to lift half of the MSTS cargo offered it. Lykes is informed that other American flag operators in these services are being offered more of the various types of cargo than they can lift. Lykes believes this situation will continue through August 1957, when the new Government programs start, and that then all the lines together will not be able to handle the amount of cargo offerings from the Gulf.

Homeward, Lykes is booked up with ore for the first quarter of 1957, and has all the ore it could handle through the remainder of 1957. It is informed that the Government wants approximately a million tons of strategic ores from South and East Africa. Lykes is unable to handle all cargoes offered to it homeward from the United Kingdom, Continental Europe, and the Mediterranean with its present tonnage.

Lykes has tried through chartering brokers to secure suitable vessels for these services and the only indication it has had is that there might be one or two C–2s available at $105,000 to $110,000 per month, time charter, which Lykes considers prohibitive for its services.

Lykes desires to charter the 15 Victorys it requests for one year, with delivery at a Gulf port as soon as possible.

### States Marine Corporation of Delaware

States Marine desires to charter 12 Victory vessels for operation, interchangeably, in its berth services:

A. U. S. Gulf-U. K./Europe Service—between U. S. Gulf ports (Brownsville/Tampa range)—and ports in the Bordeaux/Hamburg Range and Liverpool, Trade Route 21.

B. U. S. Gulf-Mediterranean Service—between a U. S. 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, the Azores, and/or ports in the United States South Atlantic, south of Norfolk, and at ports in the West Indies and Mexico, Trade Route 13.

C. Tri-Continent Service—Gulf Far East (returning via Pacific-Europe Service, Pacific/Havana/Gulf Service or Pacific-Atlantic Intercoastal with lumber (as described in Docket S–57), Trade Route not numbered (F. R. January 13, 1955, page 317).

D. Gulf-Pacific Coast Intercoastal (Westbound). I. C. C. certificate of convenience and necessity No. W–1033 (Sub.–No. 2).

States Marine operates in these services, interchangeably, 30 United States flag C–type and Victory–type owned and time charted vessels. In Service A it averages approximately one sailing a month, service B two sailings a month, service C five sailings a month, and service D three to four sailings a month.

States Marine owns eleven of the vessels it operates in these services. The others are time chartered, 5 to 12 months, from American companies which, due to increased demands for vessels, are unwilling to renew time charters except at prohibitive rates of hire in these berth services.

States Marine operates sixty time chartered vessels interchangeably in these and other of its services. It has received redelivery notices on twenty of such vessels for redelivery in the period from December until the latter part of February. Without replacements States Marine would not be able to maintain its present regularity and continuity of service. It operates no foreign flag vessels. It acts as agent for Mitsubishi Shipping Company in the Atlantic-Gulf/Far East services.

States Marine applies for 12 Victorys for replacements as stated above, and because the demand for berth space is rapidly increasing due to the stepped-up agricultural export programs. It estimates, for example, that the export cotton program alone for this season will be over 5 million bales as compared to a little over 2 million bales during the last season.

States Marine has declined firm offerings of something over 300,000 tons of cargo for lack of space through June 1957. Some of this declined cargo has moved but a tremendous backlog remains. States Marine estimates that to move the cotton alone from the Gulf and West Coast would require approximately 21 full sailings a month for 7 months.

Its vessels presently employed in the services for which it requests the Victorys are sailing outbound substantially full, and have been for 6 months prior to this application.

It understands that other berth operators in these trades are loading their vessels to capacity. At the time of the hearing States Marine

had received redelivery notices on its time chartered vessels to such an extent that the 12 Victorys applied for would not replace the vessels it is losing because it cannot renew the charters, and if its application is not granted it cannot offer as much service as it has been offering.

In the Tri-Continent Service, Gulf-Far East leg, States Marine would take Pacific Coast "top-off" cargo if it could be loaded quickly on the chartered vessels and if it could be discharged quickly at one destination port. There is adequate space to move lumber from the Pacific Coast Eastbound and States Marine has no intention of augmenting its eastbound lumber service with the vessels it proposes to charter. As to the Gulf Mediterranean Service the vessels would call at Atlantic ports on their return to the Gulf. States Marine does not desire to carry full cargoes of bulk commodities.

Through chartering brokers, States Marine has canvassed the charter market daily for some time past and has not been able to charter suitable ships. It took the only privately owned Victory ship available a few days before the hearing. It had also taken a C–2 and a Liberty. All three of these, it states, will be operated at a financial loss to States Marine. Chartering brokers have not been able to secure vessels that can be operated at a profit because the rate of charter hire is substantially greater than can be afforded at the current level of freight rates.

States Marine desires to charter the 12 Victorys it requests for one year, with delivery at Atlantic or Gulf ports, preferably Gulf ports, as soon as possible.

T. J. Stevenson & Co., Inc.

Stevenson desires to charter two Victory vessels for operation in its North Atlantic/Mediterranean berth service on Trade Route No. 10. Stevenson presently maintains one sailing a month in this service with its four owned American flag vessels, 2 EC2's and 2 C1B's. It applies for two Victorys because it has a backlog of cargo resulting from the recent longshoremen's strike on the East Coast, and for the past six months it has been continuously declining I. C. A. and United States military cargoes for lack of space. Also, it has on its books more than 20,000 tons of cargo for the National Catholic Welfare Charities which it is unable to handle. This cargo has been offered American flag operators in the Mediterranean who have not been able to accept it. Additionally, it is unable to protect its other shippers. Stevenson believes that cargo requirements on its berth service will continue to increase for the next twelve months and that it will have a serious shortage of vessel space if its application is not granted.

Stevenson is advised by chartering brokers that no privately owned

American Victory is available; and the best that could be done was Libertys for four to six months at $85,000 per month, which was too high to consider for applicant's berth service.

Stevenson desires to charter the two Victorys it requests for a period of one year, with delivery at New York, Philadelphia, Baltimore or Hampton Roads prior to January 31, 1957.

LEVANT LINE, A JOINT SERVICE COMPOSED OF STOCKARD STEAMSHIP CORPORATION (STOCKARD) AND ATLANTIC OCEAN TRANSPORT CORPORATION (ATLANTIC)

Levant desires to charter two Victory vessels (one each for the two corporations) for operation in its berth services from United States South Atlantic and Gulf ports, and from United States North Atlantic ports, to the Azores, Casablanca, Cadiz and the Mediterranean range, on Trade Routes 13 and 10. Levant presently maintains a sailing every 3 or 4 weeks in these services with one Victory owned by Stockard, one Victory owned by Atlantic, and 1 chartered C2 which charter expires January 19, 1957, and cannot be renewed due to sale of vessel by owners. All three are American flag vessels.

Normally, Levant employs two privately owned and from three to four chartered vessels in these services. In addition to increased cargo offerings at present and for the future, Levant's service has been cut from a minimum of fortnightly sailings to about one sailing a month because berth rates do not warrant chartering tonnage at going charter rates. Levant has been refusing general cargo for several months. Its information is that even with all the services there is not sufficient tonnage to serve the Mediterranean. It adopts the space and ship shortage positions stated by Stevenson and Lykes. Levant requests the two vessels in order to re-establish its badly depleted service due to the loss of time chartered vessels it had and its inability to charter other privately owned vessels at rates permitting successful operation in its Mediterranean berth service. It desires to charter the two Victorys it requests for a period of about 6 to 12 months, with delivery at Gulf ports preferably, and as soon as possible.

PRUDENTIAL STEAMSHIP CORPORATION

Prudential desires to charter two Victory vessels for operation in its berth service from United States North Atlantic ports to the full Mediterranean range on Trade Route 10. Prudential presently operates fortnightly in this service with its three owned American flag Victory vessels. It operates no foreign flag vessels. Prior to June 1956 it operated four to six American flag vessels in this service, char-

tered from private owners, to maintain fortnightly sailings. The chartered vessels have been unavailable to Prudential since November 1956. The vessels here applied for would be used to maintain, not increase sailings.

Prudential applies for two Victorys because the present volume of cargo, including commercial and Government movements, makes additional tonnage necessary in order to replace the private charters previously available and to maintain its service. Since July 1956 Prudential has declined 106,225 tons of cargo for lack of space (approximately 60,000 bulk and 46,000 general cargo), not including presently offered I. C. A. cargo to Yugoslavia or Turkey. It has had to decline 2,500 tons for a December 10 sailing, 1,500 tons so far for a December 27 sailing and about the same for a January 1957 sailing. These declinations are not included in the previously declined 106,225 tons. Prudential is constantly turning down cargo for lack of space and it expects offerings to be made in increasing amounts for at least a year. It is also having to shut out inward cargo.

Prudential has canvassed the charter market directly and through brokers and it is unable to secure an offer of charter of any American flag privately owned vessels at any rate of hire. It desires to charter two Victorys for an indefinite period, but not less than a year, with delivery as soon as possible on the Atlantic Coast.

### American Export Lines, Inc.

American Export desires to charter two Victory vessels for operation in its United States North Atlantic Mediterranean berth service on Trade Route No. 10. It operates 22 owned American flag vessels in this service: 16 cargo vessels, 4 combination passenger and cargo vessels, and 2 passenger liners, averaging about 10 sailings a month with the cargo vessels.

American Export applies for two Victorys to enable it to provide service for the recent increase in cargo movement from the United States to the Mediterranean. It has been declining cargo during the last 3 months and its present commitments of bulk and general cargo run to mid 1957 in sufficient quantity, it states, to justify two ships. It needs the vessels principally for the current abnormal cargo movements which it expects to continue for approximately one year. It desires to take care of its customers and to serve its trade route properly.

American Export and its chartering broker have sought to charter suitable privately owned vessels without success. It agrees with the other applicants herein as to vessel availability, and states that it

is practically impossible to secure any type of vessel in the charter market. It desires to charter the two Victorys it requests for one year, with delivery in the North Atlantic area as early as practicable.

Considered next are the positions of interveners. APL's interest is confined to the applications of Levant, American Export, Stevenson, and Prudential for the charter of vessels for operation on Trade Route No. 10, and to so much of States Marine's application as seeks to charter vessels for use in the Gulf-Far East leg of the Tri-Continent service with Pacific Coast top-off. APL points out that under Article II–16 of its subsidy contract it has been restricted in its unsubsidized operations with its owned and chartered vessels to the carriage of bulk and military cargoes, without freedom to solicit general commercial cargo. It states that when an American flag line receives Government aid by subsidy it has been required consistently by the Maritime Administration to use its nonsubsidized vessels so as to not compete with other United States flag vessels. Its position is that if these applications are granted the same restrictions should be applied, or those applied to APL should be removed. If not so removed APL states that applicants should be limited to bulk cargo outbound, and to inbound bulk cargo only with prior approval of the Secretary of Commerce. APL states that the need for more vessels to carry general cargo is not shown and that the applications should not be granted.

PFEL supports APL's position to the extent it applies to the Pacific Coast-Far East Tri-Continent service. States Marine, Prudential, American Export, and Public Counsel oppose APL's position with respect to the restrictions and limitations referred to on the grounds (a) that need for the vessels sought is shown, (b) that imposition of the restrictions and limitations would have the effect of defeating the whole purpose of the applications, (c) that the services are berth services not limited to bulk carryings, (d) that there is no showing of harmful competition to any party, and (e) that the vessels applied for are primarily for replacement of ships lost, or to be lost, to the applicants, and not for expansion of services.

The restrictions and limitations requested by APL are not supported by the record in this proceeding. For this reason and those stated by the parties in opposition to APL's position, summarized above, it is not recommended that said restrictions and limitations be included in any charters that may be granted herein.

Prudential urges that a priority be given in the breaking out of ships for applicants seeking replacements for ships lost from berth services without their fault, particularly a small operator. It de-

sires one ship, two if possible, in order to maintain its normal service, before other lines are permitted to increase their services.

Lykes opposes Prudential's request for preference in allocation of ships on the grounds (1) that it is not an issue in the proceeding, and (2) that there is no evidence to support it. American Export states that if there is to be allocation of ships among applicants, preference should be given on the basis of the ships operating in particular trade routes and sailing frequency, in proportion to the service provided. This question is not an issue under Public Law 591, and there is no evidence in the record indicating that vessels may not be made available promptly if charters are granted. If vessel allocation priority becomes necessary it can be handled administratively.

American Tramp Shipowners Association, Inc., (ATSA) does not oppose the applications as such but it cautions against over-tonnaging the market. It states that the full impact of previously chartered vessels has not been fully realized because most of the vessels allocated are not yet in service and their effect on the market is uncertain. ATSA urges that bareboat chartered vessels should be withdrawn, without penalty to the charterer, at the earliest possible moment should available cargoes diminish to the point where privately owned vessels are forced into an unhealthy competitive position with bareboat chartered vessels. Counsel for ATSA states that the need for vessels is not clear in this proceeding, and certainly, he states, the need is not shown for all the vessels applied for. He states that the premise in large part is Government sponsored cargo. This, he states, was taken care of in Docket No. M–69 (Sub. No. 3) (decided December 18, 1956). Counsel for ATSA further states that if the applications are granted the vessels should be precluded from carrying full shipload lots of bulk commodities, that they should not be allowed to compete with United States privately owned vessels of any type when cargoes become scarce, that they should be returned to the Government when no longer needed, and if the circumstances warrant, the Government should pay the breakout expenses. Public Counsel opposes the condition requested by counsel for ATSA with respect to returning ships without penalty to the applicant if returned sooner than a year. He states that the formula for arriving at charter hire, as stated in recent charter decisions of the Board, should be followed. Upon consideration of the facts of record, summarized herein, and since any charters which may be granted should contain the right of cancellation by either party on 15 days' notice as hereinafter provided, it is not recommended that the conditions requested by ATSA be included in any charters which may be granted herein.

Each applicant through its counsel states that it has met the three

requirements of Public Law 591, and that its application in full should be granted. Public Counsel states that the statutory requirements have been met by all the applicants and that the application should be granted in their entirety.

FINDINGS, CERTIFICATION AND RECOMMENDATIONS

Upon consideration of all the foregoing facts it is concluded and found, and the Board should find and so certify to the Secretary of Commerce:

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

2. That such services are not adequately served; and

3. 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 services.

The Board should recommend:

1. That any charter which may be granted herein be for a 1 year period, subject to the right of cancellation by the charterer on 15 days' notice, such right, at the option of the Secretary of Commerce, to be conditioned upon full payment to the Government of the remainder of 1 year's charter hire which will be considered as recoupment of break-out and lay-up costs, and the right of cancellation by the Government on 15 days' notice;

2. That the charter hire rate be a fixed sum in an amount determined to be consistent with the policies of the Merchant Ship Sales Act of 1946, as amended, and not less than the prevailing world market charter rate for similar vessels for similar use. If the fair and reasonable N. S. A. time charter rate as converted to a bareboat rate is determined by the Secretary of Commerce to be not less than the prevailing world market charter rate for similar vessels for similar use and consistent with the policies of the 1946 Act, such converted N. S. A. rate should be adopted as charter hire applicable to the vessels chartered as the result of this decision. That "additional charter hire" based on earnings above 10 percent of capital necessarily employed be fixed as provided in section 709 of the Merchant Marine Act, 1936;

3. That with reference to break-out, readying, and lay-up costs, the Secretary of Commerce authorize the use of the vessel operations revolving fund for the activation, repair and deactivation cost provided for in Public Law 890, 84th Congress;

4. That any charters granted subsidized applicants herein, namely Lykes and American Export, include provisions to protect the interests of the Government under its operating-differential subsidy agreements with said applicants.

# FEDERAL MARITIME BOARD

No. M–75

COASTWISE LINE—APPLICATION TO CHARTER ONE GOVERNMENT-OWNED VESSEL

*Submitted January 21, 1957. Decided January 28, 1957*

Board finds and certifies to the Secretary of Commerce that the California, Pacific Northwest, British Columbia service is required in the public interest, that it is not adequately served, 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, and that the *Ira Nelson Morris* may be chartered for such service subject to recommended conditions and restrictions.

Motion to dismiss application for want of timely notice denied.

*Robert S. Hope* for Coastwise Line.
*Alan F. Wohlstetter* for Alaska Freight Lines, Inc.
*Richard J. Gage* as Public Counsel.

REPORT OF THE BOARD

CLARENCE G. MORSE, *Chairman*, BEN H. GUILL, *Vice Chairman*, THOS. E. STAKEM, JR., *Member*

BY THE BOARD:

This is a proceeding under section 5 (e), Merchant Ship Sales Act of 1946, as amended, 50 App. U. S. C. A. 1738 (e), upon the application of Coastwise Line (Coastwise) for the bareboat charter of the Government-owned, war-built, dry-cargo vessel *Ira Nelson Morris* for a period of 1 year, for operation between California, Pacific Northwest, British Columbia, and Alaska. Alaska Freight Lines, Inc. (AFL), intervened in opposition to the application. Both AFL and Alaska Steamship Company (Alaska Steam) compete with applicant in the Pacific Northwest-Alaska trade.

The vessel sought has been under charter to Coastwise for approximately 18 months and has been operated in the Pacific coast domestic

trade. *Coastwise Line—Charter of War-Built Vessel*, 4 F. M. B. 597 (1955).

Notice of the hearing was published in the Federal Register of December 18, 1956, and the hearing was held before an examiner, who issued an initial decision. AFL filed exceptions to the findings and conclusions of the examiner.

At the outset of the hearing, counsel for AFL made an oral motion to dismiss the application on the grounds that AFL was not afforded timely notice of the hearing. This type of motion, although made before the examiner, is required by our Rules of Practice and Procedure to be addressed to the Board. It was reduced to a written motion, to which Coastwise has replied, and is still pending.

The examiner found that (1) the service under consideration is in the public interest; (2) the service is not now adequately served; and (3) privately owned American-flag vessels are not available for charter at reasonable rates and upon reasonable conditions.

We are unable to agree with the examiner's finding that the California, Pacific Northwest, British Columbia, Alaska service would be inadequately served without the operation in that trade of the *Ira Nelson Morris*. The evidence adduced to support such a finding is (1) the inability to move 1,000 tons of asphalt from the Pacific Northwest to Juneau, Alaska, in the spring of 1956; (2) the declination of a substantial number of privately owned motor vehicles of armed services personnel during the summer of 1956; and (3) an intra-Alaska shipment of 3,500–4,000 tons of lumber. Since the record fails to show any inadequacy with reference to the Alaska trade, we cannot make the three necessary statutory findings precedent to the award of the charter by the Secretary of Commerce.[1]

This record does require us, however, to look into the California, Pacific Northwest, British Columbia service.

*Public interest.* The operation of a Government-owned vessel by an American-flag charterer in the California, Pacific Northwest, British Columbia trade would be in the public interest. *Coastwise Line—Charter of War-Built Vessel, supra.*

*Adequacy of service.* Coastwise is the only American-flag carrier operating between California, Pacific Northwest, and British Columbia, although it does have competition between California and the Pacific Northwest and between the Pacific Northwest and Alaska.

[1] By Department Order No. 117 (amended), section 6.01, subsection 2, paragraphs (1) and (2), the Secretary of Commerce has delegated his authority under the Merchant Ship Sales Act of 1946, as amended, to the Maritime Administrator. Pursuant to such delegation, references herein to the Secretary of Commerce are also directed to the Maritime Administrator.

That segment of applicant's service relating to Alaska is not under consideration here, however. Applicant has been operating its vessels without any substantial free space for the 9 months immediately preceding the date on which the application was filed. Newsprint is the dominant cargo which applicant moves southbound. There is considerable newsprint available for movement southbound from British Columbia. One newsprint shipper recently requested applicant to increase its service, stating that it has been forced to ship via rail in some instances because vessel space was not available. An additional paper mill will soon begin operations in British Columbia, with a proposed output of approximately 90,000 tons per year, and a mill at Tacoma, Washington, with a substantial output, is not served at the present time. It is also noted that an aluminum producer in British Columbia has ingot to ship to Long Beach, California, and that with additional service Coastwise could expect increased cargoes from this shipper.

Based upon the foregoing, we conclude that the service between California, Pacific Northwest, and British Columbia, without the service of the *Ira Nelson Morris*, would be inadequate.

*Availability of vessels.* The privately owned vessels chartered by applicant are at the rate of about $9,400 per month, and operation at this rate affords applicant a profit. Coastwise has sought to charter privately owned vessels, but the most attractive offer it secured was for a Liberty-type vessel at $15,000 per month for 18 months, a rate which Coastwise deemed exorbitant. On this basis we find, as did the examiner, that privately owned Liberty-type vessels are not available on reasonable conditions and at reasonable rates for use in this service.

## Discussion

AFL's exceptions relate to the finding of inadequacy in the California, Pacific Northwest, British Columbia, and Alaska trade, and since we agree that no inadequacy has been shown as to such service, we will not further discuss AFL's exceptions.

In its motion to dismiss, AFL contends that the notice of hearing was grossly inadequate and successfully deprived AFL of its statutory right to a hearing. It is clear from the record that notice of this proceeding was published in the Federal Register of December 18, 1956, and that at about noon of December 18, 1956, AFL's Washington counsel read this notice. The record is not entirely clear as to how much actual notice he did have, but it is apparent that he had some actual notice sometime prior to December 18, 1956.

From this record alone, we feel that he had sufficient actual notice to inquire further, but we do not make this point determinative. The proceedings provided by section 5 (3) of the Merchant Ship Sales Act of 1946, as amended, do not require a technical hearing procedure. Congress recognized that such a procedure would be impracticable because of the time factor alone. *Report No. 2353 of House Committee on Merchant Marine and Fisheries, 81st Cong., 2d sess.* Whether or not a given period of time constitutes timely notice depends upon the circumstances surrounding the case, including the urgency of the situation and the complexity of the issues. We point out, in passing, that if intervener felt it did not have sufficient time to prepare its case, it should have availed itself of an application for postponement of the hearing pursuant to Rule 7 (e) of our Rules of Practice and Procedure.

In any event, since AFL does not offer a service to British Columbia, the service for which we are making the affirmative statutory findings, it does not appear that AFL could be prejudiced by the failure to be timely notified, and the motion to dismiss is moot.

Fully understanding that the Alaska trade is a seasonal one, we will permit applicant to apply for an extension of any charter granted as a result of this proceeding to include service to and from Alaska.

## Findings, Certification, and Recommendations

On this record, the Board finds and hereby certifies to the Secretary of Commerce:

(1) That the California, Pacific Northwest, British Columbia service is required in the public interest;

(2) That such service is not adequately served;

(3) 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 Board recommends to the Secretary of Commerce that the following restrictions and conditions are necessary or appropriate to protect the public interest in respect of any such charter, and to protect privately owned vessels against competition from chartered vessels:

(1) That any charter which may be granted herein be for a 1-year period, subject to the right of cancellation by either party on 15 day's notice.

(2) That the charter hire be a fixed sum in an amount determined to be consistent with the policies of the Merchant Ship Sales Act of 1946, as amended, and not less than the prevailing world market

charter rate for similar vessels for similar use, and that "additional charter hire" based on eearnings above 10 percent of capital necessarily employed be fixed as provided in section 709 of the Merchant Marine Act, 1936; and

(3) That the charterer be required to operate the vessel in the California, Pacific Northwest, British Columbia trade exclusively.

# FEDERAL MARITIME BOARD

No. M–76

TERMINAL STEAMSHIP COMPANY, INC.—APPLICATION TO BAREBOAT CHARTER ONE LIBERTY-TYPE DRY-CARGO VESSEL

*Submitted February 12, 1957. Decided February 21, 1957*

Board finds and certifies to the Secretary of Commerce that the service under consideration, transportation of sulphur from the Gulf to the Pacific Northwest and lumber from the Pacific Northwest to the North Atlantic, is required 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, subject to recommended conditions and restrictions.

*James K. Knudson* for applicant.
*Allen C. Dawson* as Public Counsel

REPORT OF THE BOARD

CLARENCE G. MORSE, *Chairman*, BEN H. GUILL, *Vice Chairman*, THOS. E. STAKEM, JR., *Member*

BY THE BOARD:

This is a proceeding under section 5 (e) of the Merchant Ship Sales Act of 1946, as amended, 50 App. U. S. C. sec. 1738 (e), upon the application of Terminal Steamship Company, Inc., for bareboat charter of one Liberty-type dry-cargo vessel for one year for use in carrying sulphur from United States ports on the Gulf of Mexico to ports in the Pacific Northwest, and lumber from the Pacific Northwest to North Atlantic ports. Hearing was held on February 7, 1957, pursuant to notice in the Federal Register of January 31, 1957. Oral argument before the examiner in lieu of briefs was authorized, but waived by the parties. No one appeared in opposition to the application. An initial decision has been issued by the examiner and the parties have notified the Board that no exceptions thereto will be filed.

Subject to the modification made hereafter, we agree with the initial decision of the examiner, which we adopt and make a part of this report.

## Findings, Certification, and Recommendations

The Board finds and hereby certifies to the Secretary of Commerce:[1]

1. That the service under consideration, transportation of sulphur from the Gulf to the Pacific Northwest and lumber from the Pacific Northwest to the North Atlantic, is required in the public interest;

2. That such service is not adequately served; and

3. 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 hereby adopt, and recommend to the Secretary of Commerce, that the restrictions and conditions recommended in the initial decision are necessary or appropriate to protect the public interest in respect of any charter, and to protect privately owned vessels against competition from the chartered vessel, except that condition number 1 therein is modified to read as follows:

1. That any charter which may be granted herein be for a two-year period, subject to the right of cancellation by the Government on 15 days' notice, or on shorter notice in the event of emergency, or to comply with a finding of the Federal Maritme Board when annual review of the charter is made pursuant to section 5 (e) of the Merchant Ship Sales Act of 1946, as amended, 50 App. U. S. C. sec. 1738 (e). In the event of such cancellation by the Government, charterer's obligation to pay further charter hire shall cease. In the event charterer terminates the charter prior to expiration of the full period, charterer shall be liable for payment of charter hire for the full 2-year period.

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[1] By Department Order No. 117 (amended), section 6.01, subsection 2, paragraphs (1) and (2), the Secretary of Commerce has delegated his authority under the Merchant Ship Sales Act of 1946, as amended, to the Maritime Administrator. Pursuant to such delegation, references herein to the Secretary of Commerce are also directed to the Maritime Administrator.

# FEDERAL MARITIME BOARD

## No. M–76

## TERMINAL STEAMSHIP COMPANY, INC.,—APPLICATION TO BAREBOAT CHARTER ONE LIBERTY-TYPE DRY-CARGO VESSEL

The Board should find and so certify to the Secretary of Commerce that the service under consideration, transportation of sulphur from the Gulf to the Pacific Northwest and lumber from the Pacific Northwest to the North Atlantic, is required 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.

*James K. Knudson for* applicant.
*Allen C. Dawson* as Public Counsel.

INITIAL DECISION OF A. L. JORDAN, EXAMINER [1]

This is a proceeding under Public Law 591, 81st Congress, upon the application of Terminal Steamship Company, Inc., for bareboat charter of one Liberty-type dry-cargo vessel for one year for use in carrying sulphur from United States ports on the Gulf of Mexico to ports in the Pacific Northwest, and lumber from the Pacific Northwest to North Atlantic ports. Hearing was held on February 7, 1957, pursuant to notice in the Federal Register of January 31, 1957. Oral argument before the examiner in lieu of briefs was authorized, but waived by the parties. No one appeared in opposition to the application.

Applicant presently maintains one sailing each way every 40 to 45 days in this service with its two owned Libertys. With an additional Liberty it would expect to maintain a frequency of one sailing each way every 30 days.

Applicant is a contract carrier in this service and desires to charter one Liberty because it has more cargo, lumber and sulphur, committed by its principal contract shippers for the next twelve months than it can transport in its own vessels. Its principal contract ship-

[1] This decision will become the decision of the Board in the absence of exceptions thereto, or Board review (Rules 13 (d) and 13 (h), Rules of Practice and Procedure—18 F. R. 8716).

pers are City Lumber Company, Inc., Bridgeport, Connecticut (City Lumber), Freeport Sulphur Company, Freeport, Texas (Freeport Sulphur), and Texas Gulf Sulphur Company, New York, N. Y. (Texas Gulf Sulphur).

City Lumber desires to contract with applicant for transportation of 80,000,000 net board feet of lumber during the next 12 months, movement to start as soon as possible. The lumber capacity of a Liberty is 5,750,000 net board feet. The vessel turnaround is approximately 93 days or about 4 round voyages a year per vessel. Therefore, City Lumber offers 11,000,000 net board feet of lumber more than the full annual capacity of 3 Libertys. For lack of adequate space by any water carrier in this service City Lumber had to ship a substantial quantity of lumber by rail in 1956 and will have to do so during 1957 unless additional vessel space is made available. Freeport Sulphur requires space for between 36,000 and 42,000 gross tons of sulphur during 1957, and Texas Gulf Sulphur requires space for approximately 60,000 tons during 1957. The two sulphur shippers require space for approximately 100,000 tons of sulphur during 1957. Applicant's two Libertys will be able to carry about 70,000 tons. These two shippers have committed capacity use of applicant's two Libertys presently in the service and full use of an additional Liberty for the remainder of 1957. In addition to this, it is expected that some sulphur will move by rail, as has been the case in the past year, for lack of vessel space. Applicant is the only water carrier transporting sulphur in this service.

Applicant states that the market for Pacific Northwest lumber in North Atlantic ports is a continuing one, that recently increased overland freight rates on lumber will expand the need for waterborne lumber traffic, that the paper industry is expanding in the Pacific Northwest requiring increasing amounts of sulphur which applicant is only in part able to transport, and that its sulphur-lumber service makes for a balanced 2-way haul which, in turn, provides economical, efficient and nonwasteful transportation.

Applicant's intercoastal operation is authorized by the Interstate Commerce Commission.

Applicant has tried to obtain Libertys on the charter market, but has received no offer. It is advised by steamship brokers C. V. Thavenot & Co., New York, N. Y., Emory Sexton & Co., Inc., New York, N. Y., and A. L. Burbank & Co., Ltd., New York, N. Y., that such vessels are not available at any rate of charter hire either on long term or voyage basis for use in this service.

Applicant desires to charter the one Liberty it requests for 1 year, with delivery in the Gulf area as soon as possible.

Counsel for the applicant and Public Counsel state that the three statutory requirements have been met by the applicant and that the application should be granted.

## Findings, Certification and Recommendations

Upon consideration of all the foregoing facts it is concluded and found, and the Board should find and so certify to the Secretary of Commerce:

1. That the service under consideration, transportation of sulphur from the Gulf to the Pacific Northwest and lumber from the Pacific Northwest to the North Atlantic, is required in the public interest;

2. That such service is not adequately served; and

3. 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 Board should recommend to the Secretary of Commerce that the following restrictions and conditions are necessary or appropriate to protect the public interest in respect of any charter, and to protect privately owned vessels against competition from chartered vessels:

1. That any charter which may be granted herein be for a one year period, subject to the right of cancellation by the charterer on 15 days' notice, such right, at the option of the Secretary of Commerce, to be conditioned upon full payment to the Government of the remainder of one year's charter hire which will be considered as recoupment of break-out and lay-up costs, and the right of cancellation by the Government on 15 days' notice;

2. That the charter hire be a fixed sum in an amount determined to be consistent with the policies of the Merchant Ship Sales Act of 1946, as amended, and not less than the prevailing world market charter rate for similar vessels for similar use, and that "additional charter hire" based on earnings above 10 percent of capital necessarily employed be fixed as provided in section 709 of the Merchant Marine Act, 1936; and

3. That with reference to break-out, readying, and lay-up costs, the Secretary of Commerce authorize the use of the vessel operations revolving fund for the activation, repair, and deactivation cost provided for in Public Law 890, 84th Congress.

# FEDERAL MARITIME BOARD

No. 758

AMERICAN UNION TRANSPORT, INC.

*v.*

RIVER PLATE & BRAZIL CONFERENCES ET AL.

*Submitted January 30, 1957. Decided March 25, 1957*

Respondents found to have violated section 15 of the Shipping Act, 1916, as amended, in failing to file with the Board for approval and in effectuating an agreement prohibiting the payment of brokerage on locomotives shipped from New York, N. Y., to Rio de Janeiro, Brazil.

Complainant found not entitled to reparation as brokerage was not earned, and such payment would result in an indirect rebate to the consignee in violation of section 16 of the Shipping Act, 1916, as amended.

*George F. Galland* and *William J. Lippman* for complainant.
*Elmer C. Maddy* and *George F. Foley* for respondents.

REPORT OF THE BOARD

CLARENCE G. MORSE, *Chairman*, BEN H. GUILL, *Vice Chairman*, THOS. E. STAKEM, JR., *Member*

BY THE BOARD:

This case arises out of a complaint filed under section 22 of the Shipping Act, 1916, as amended (the Act), by American Union Transport, Inc. (AUT), against River Plate & Brazil Conferences and the member lines thereof[1] (the conference), alleging that the conference

[1] The Booth Steamship Company, Limited; Brodin Line (Joint Service of Rederiaktiebolaget Disa; Rederiaktiebolaget Poseidon; Angfartygsaktiebolaget Tirfing); Cia. Argentina de Navegacion Dodero, S. A; Dampskibsselskabet Torm (Torm Line); Flota Mercante Del Estado; Holland Interamerica Line (Joint Service of N. V. Nederlandsch-Amerikaansche Stoomvaart-Maatschappij "Holland-Amerika Lijn"; Van Nievelt, Goudriaan & Co.'s Stoomvaart-Maatschappij N. V.); International Freighting Corporation, Inc., (I. F. C. Lines); Ivaran Lines (Joint Service of A/S Lise; Aktieselskapet Ivarans Rederi; A. S. Besco; Skibsaktieselskapet Igadi); Lamport & Holt Line, Ltd.; Lloyd Brasileiro (Patrimonio Nacional); Mississippi Shipping Company, Inc. (Delta Line); Moore-McCormack Lines, Inc. (American Republics Line); The Northern Pan-America Line, A/S; Norton Line (Joint Service of Rederiaktiebolaget Svenska Lloyd; Stockholms Rederiaktiebolag Svea: Rederiaktiebolaget Fredrika); Southern Cross Line (Joint Service of A/S J. Ludwig Mowinckels Rederi; Westfal-Larsen & Co., A/S).

adopted an agreement on June 12, 1952, neither filed with nor approved by the Board, in violation of section 15 [2] of the Act, pursuant to which brokerage otherwise earned by AUT was withheld by the conference. Reparation in the amount of brokerage withheld is demanded. The conference contends that it did not violate section 15, that the payment of brokerage here would have resulted in a violation of section 16 of the Act, that brokerage was not in fact earned, and that AUT had directly competed with respondents for the very business upon which it now demands brokerage, thereby negating any claim which AUT may have had for the brokerage.

This same controversy was initiated as an antitrust suit in the United States District Court for the Southern District of New York, and was dismissed on the ground that the Board had primary exclusive jurisdiction. *American Union Transport, Inc.* v. *River Plate & Brazil Conferences*, 126 F. Supp. 91 (1954), affd. 222 F. 2d. 369 (2d Cir. 1955).

Hearing was held before an examiner, who served his recommended decision on October 25, 1956. Exceptions thereto were filed by AUT and the conference, and oral argument was heard on January 30, 1957.

*The facts.* AUT is a registered freight forwarder, a broker, owner and charterer of vessels, and a water carrier. The conference, a group of steamship lines, are common carriers by water between ports of the United States and Canada (save the Pacific coast of the United States and Canada, and Newfoundland) and ports in Uruguay, Paraguay, Argentina, and Brazil. The conference operates pursuant to Agreement No. 59, on file with, and approved by, the Board. This agreement provides in part:

> No. 4. No freight brokerage shall be paid in excess of one and one quarter percent (1¼%) on the amount of freight paid in accordance with the tariff.
>
> * * * * * * *
>
> 7. The members of each Conference, * * * shall, at any meeting of the Conference, consider and pass upon the ordinary routine business of the Conference, and upon any matter involving discriminations, tariffs, freights, commissions, brokerages * * * governing south bound transportation * * *.

Rule 10 of respondents' Tariff No. 11 provides:

> *Brokerage.*—Freight brokerage * * * may be allowed only to bona fide brokers whose actual business shall be brokerage and freight between ocean carriers and the general shipping public, * * * freight brokerage shall be paid only on the following understanding which shall be written or stamped on all brokerage bills:
>
> "In compliance with Section 16 of the Shipping Act, 1916, payment by the carrier and acceptance of freight brokerage by the broker are on the strict under-

[2] See appendix.

standing that no part of the brokerage shall revert to the shipper or consignee, and that the business of the broker is in no sense subsidiary to that of the shipper of consignee * * *."

The Estrado de Ferro Central do Brazil (Central), an instrumentality of the Government of Brazil, purchased 120 locomotives and spare parts therefor from Baldwin-Lima-Hamilton Corporation, International General Electric Company, and Montreal Locomotive Works, Ltd. The general agent of Lloyd Brasileiro (Lloyd), a member of the conference and a respondent herein, another instrumentality of the Brazilian Government, acted as Central's fiscal agent in the transaction. Upon learning of the purchase, both AUT and the conference attempted to secure the business of transporting the locomotives. Each was aware that the other was competing for the business but neither was aware of the rates quoted by the other. The rates offered by the conference were accepted by Central.

On May 7, 1952, the conference quoted rates to Central, applicable only where "(t)he Conference will receive the contract for transportation of the total of 120 locomotives." [3] On May 13, 1952, Lloyd advised Central it would "undertake transportation of the locomotives purchased by your railroad * * * in accordance with the * * * [offer] laid down in the letter of 7th inst. from the same Conference." On May 14, 1952, Lloyd was "entrusted with the transportation of the 120 Diesel-electric locomotives * * * at the freight rates submitted in the letter of the Freight Conference * * *." This letter also advised Lloyd that Central (the consignee) had decided to appoint AUT as "its broker" in charge of arranging the shipments.

On May 16, 1952, Central advised AUT that it had decided "to entrust Ocean Transportation of the 120 diesel electric locomotives under construction in the States and Canada for the Central to Lloyd Brasileiro as members of the Freight Conference and at the price quoted to this railroad in a letter of seventh instant by the Conference. Likewise it was decided to appoint American Union Transport Inc., as broker in charge of negotiation and arrangement in connection with the shipments by Lloyd Brasileiro or another member of the Conference, without any charge to Central."

All the locomotives thus were to move via conference vessels pursuant to the understanding between Central and the conference, and all arrangements for their shipment were to be handled by AUT without any charge to Central therefor, pursuant to the understanding between Central and AUT.

[3] No mention is made therein as to the spare parts.

Subsequent to the above letters but prior to the time any of the locomotives were shipped, the conference, at a special joint executive meeting on June 12, 1952, considered whether or not brokerage would be paid on the locomotives, and in view of the fact that AUT had competed with the conference for this business, and since the business was closed with Central by the conference directly, concluded that no brokerage would be payable to AUT. This action,[4] dated June 12, 1952, was not filed with the Board for approval. AUT was not advised of the conference action until its bills for brokerage to Moore-McCormack Lines, Inc., were returned, unpaid, on October 14, 1952, with the explanation that the line could not pay it due to the conference action of June 12, 1952. AUT protested the action to the conference chairman, who replied that the record failed to show that AUT rendered any services to merit brokerage.

All the locomotives which were shipped out of New York moved via Lloyd vessels, and the shipments out of Montreal, Canada, were carried by Moore-McCormack Lines, Inc., Lamport & Holt Line, Ltd., and International Freighting Corporation, all conference members.

Central purchased spare parts for the locomotives from the manufacturers, and these were shipped along with the locomotives. Brokerage on the spare parts was paid by the lines in some, but not in all, instances.

Pursuant to its understanding with Central, AUT as freight forwarder coordinated the manufacturer's delivery dates with the conference's sailing schedules, supervised overland transportation from the manufacturer to the carrier, reserved space, made actual bookings, prepared bills of lading, documented shipments for export, arranged for certification of consular invoices, delayed overland transporta-

[4] On June 11, 1952, the conference chairman advised all members:

"A Special Joint Executive meeting of the Conference is called for 2:30 P. M., THURSDAY, June 12th to determine whether or not Brokerage shall be paid to American Union Transport Company, subsidiary, or associated companies on the 120 Locomotives closed in Rio with the Central Railroad of Brazil for which, we are informed, the American Union Transport now has been appointed freight forwarder.

"In view of the fact that the American Union Transport Company and/or its associates negotiated for these locomotives as a competitor carrier, underquoting existing Conference rates, forcing the Conference to markedly reduce its rates to secure this business, it is believed by several lines that even though they have been appointed freight forwarders by the Central Railroad of Brazil, they are performing no service whatsoever for our member lines and therefore are not entitled to brokerage."

The minutes of this meeting, as signed by the chairman, reveal:

"The Chair advised this meeting had been called to consider whether or not brokerage should be paid on the 120 Locomotives closed for account of Conference members by direct negotiation of Conference representatives with the Central Railroad of Brazil.

"After discussion it was proposed that no brokerage be paid on the 120 Locomotives closed direct in Brazil with the Central Railroad of Brazil by Conference representatives, and on ballot vote the proposal was approved.

"On motion, seconded and carried, the meeting thereupon adjourned."

tion where necessary to avoid railroad demurrage, and prepared export declarations.

In accordance with the directions of Central, AUT booked on Lloyd vessels all of the locomotives which moved out of New York.

On the Montreal shipments, AUT advised Central of the availability of vessels, but the record fails to show that in any instance the actual designation of a carrier was made by AUT; on the contrary, it is clear that Central reserved to itself the right to designate the vessel.[5]

The record clearly establishes that respondents have been content in the past to pay brokerage wherever the forwarder-broker was merely "identified with the cargo."

## Findings and Recommendations of the Examiner

The examiner concluded that (1) the action of the conference of June 12, 1952, was an agreement within the meaning of section 15 of the Act, which was not filed with nor approved by the Board, and that in its execution, the conference violated section 15; (2) AUT earned brokerage on the locomotives and parts shipped out of New York; (3) the refusal of Lloyd to pay brokerage was not in the exercise of its own managerial discretion; and (4) the transportation of the locomotives and spare parts from Montreal to Rio de Janeiro was not within the Board's jurisdiction. The examiner also recommended that the Board order the conference to pay AUT reparation in the amount of $7,330.41, with interest, and that the violation of section 15 be referred to the Department of Justice for appropriate action.

*Exceptions*

AUT excepted to the examiner's conclusion that the Board was without jurisdiction as to the shipments originating in Montreal, on the ground that the conference's basic agreement, as approved, pertained to Canadian as well as United States ports, and further, that the wrongful act—the effectuation of the unfiled section-15 agreement—occurred within the jurisdiction of the Board and only the damages flowing therefrom occurred in Canada. AUT also claims that both the Board and respondents are estopped from asserting that we have no jurisdiction over the Canadian shipments in view of the positions taken by the Board and the conference when this matter was argued before the courts.[6]

[5] By letter of August 5, 1952, Central advised AUT that in the event Lloyd had no vessel available, AUT was to advise Central of available conference vessels, after which "a reply will be promptly sent to you, authorizing or not the shipment on the reported vessel * * *."

[6] Both the Board and respondents there argued that the matters set forth in the complaint were within the exclusive primary jurisdiction of the Board, but the complaint

Respondents contend that (1) their action of June 12, 1952, was within the scope of their approved basic agreement, (2) AUT forfeited any right to brokerage by acting contrary to the best interests of the conference when it competed, as a carrier, with the conference for the business in the first instance, and (3) AUT is not entitled to brokerage on the carryings made by Lloyd because, in refusing to pay the brokerage, Lloyd was merely exercising its own independent managerial discretion.

## Discussion and Conclusions

We first inquire whether the conference action of June 12, 1952, constituted an agreement, or a modification of an agreement, required to be filed with the Board for approval prior to its effectuation under section 15 of the Act, or whether it was merely a routine action taken within the scope of the basic agreement. While it is true that the conference's tariff rule permits the member lines to pay brokerage—when earned—at their discretion, historically the respondents have been paying brokerage to forwarder-brokers where such person has merely been "identified with the cargo." The conference action of June 12 thus amounted to a new course of conduct for its members in relation to the payment of brokerage, i. e., it prohibited the payment of brokerage regarding specified shipments. It represents therefore a modification of an existing agreement which, because it was calculated to control, regulate, prevent, or destroy competition, and provided for an exclusive, preferential, or cooperative working arrangement, was required by section 15 to be filed for Board approval prior to its effectuation.

Although we indicated in *Agreements and Practices re Brokerage*, 3 U. S. M. C. 170 (1949) (Docket No. 657),[7] that we would not object to the establishment by conferences of reasonable rules and regulations preventing the payment of brokerage which would be in violation of the Act, we neither intended to grant, nor could we grant, advance approval of a rule or regulation concerning the payment of brokerage directed solely at one forwarder-broker or particular shipment. Had the conference action of June 12, 1952, been one of general and prospective applicability and by its terms designed to prohibit the payment of

merely alleged that the locomotives were "shipped from North Atlantic ports to Brazil" and there was nothing before the court to indicate that any of the shipments originated in Canada.

[7] "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" (page 177).

brokerage which would be in violation of the Act, it would have fallen within the meaning of our language in Docket No. 657, but that issue is not presented here. We note that the approved basic agreement authorized respondents to "consider and pass upon * * * any matter involving * * * brokerages." Approval of that language did not constitute a "cover of authority" under which any future agreements by respondents concerning brokerage were given prior approval. Compare *Isbrandtsen Co.* v. *United States*, 211 F. 2d 51 (1954).

Since the conference action did constitute an agreement, or a modification of an agreement, required to be filed for approval, and since it was not filed and was effectuated by respondents, section 15 of the Act was violated. In *Pacific Westbound Conference* v. *Leval & Co.*, 269 P. 2d 541, 543 (1954), the Supreme Court of Oregon said:

> Section 814 of Title 46 U. S. C. A. [section 15 of the Act], hereinbefore set out, provides that the term "agreement" as used in the act includes "understandings" and "other arrangements", and that all agreements, modifications or cancellations made subsequent to the organization of the Commission under the act shall be lawful only when approved by the Commission and that it shall be unlawful, directly or indirectly, to carry out any agreement or understanding or practice until approved. (underscoring is original).

See also *Isbrandtsen Co.* v. *United States*, *supra*, and *River Plate and Brazil Confer.* v. *Pressed Steel Car Co.*, 124 F. Supp. 88 (1954). Whether or not we would approve a similar agreement if it had general, prospective application we need not here decide.

We next consider whether the payment of brokerage to AUT by the conference would have been in violation of section 16 of the Act.[8] As we have seen, AUT performed freight-forwarding service for the consignee without compensation and relied upon brokerage from the carriers for its full compensation, i. e., for its services as a freight forwarder and for its service, if any, as a broker. Under this arrangement, the consignee was to have property transported at less than the rate of the transportation therefor, together with the cost of the incidental services in connection therewith. This is the evil which Congress had in mind when it stated that it shall be "unlawful for any * * * consignee, forwarder, broker * * * knowingly and willfully, directly or indirectly, * * * by any * * * 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."[9] The waiving of a freight-forwarding fee from the consignee and the collection thereof from the carrier under the guise of brokerage would be an indirect rebate to the consignee to the extent

[8] See appendix.
[9] Section 16 of the Act.

that the brokerage payment included the cost of the freight-forwarding services, and therefore an "unjust or unfair device or means."

Since, on this record, it is clear that AUT performed services for Central gratis, and expected compensation therefor from the carriers in the nature of brokerage payments, the payment of such brokerage to AUT would have resulted in an indirect rebate to Central, which we could not permit. Even if brokerage were otherwise recoverable we would not order it paid where such payment would countenance a violation of section 16 of the Act and thus be illegal. In *Keogh* v. *C. & N. W. Ry. Co.*, 260 U. S. 156 (1922), the Supreme Court denied the award of treble damages to a shipper on the theory that such an award "might, like a rebate, operate to give him a preference over his competitors." See also *Terminal Warehouse* v. *Penn. R. Co.*, 297 U. S. 500, 511 (1936). The fact that the consignee here was a Government agency has no bearing on the issue. We find nothing in the Act which exempts from the provisions of section 16 any designated shipper or class of shippers. Although the provisions of section 16 prohibit the payment of brokerage in this case, brokerage could not be recovered here, section 16 notwithstanding, simply because brokerage was not earned. Brokerage has been defined as securing cargo for the ship. *Agreement No. 7790*, 2 U. S. M. C. 775 (1946). Clearly, on this record, AUT did not secure the cargo for the ship. On the contrary, it is apparent that the transportation was sold directly by the conference to Central, and that Central reserved to itself the right to select the individual carrier in every instance. Of all the services performed by AUT in connection with these shipments—arranging overland transportation to shipside, coordinating manufacturer's delivery dates with steamer sailings, procuring consular invoices, customs declarations, and export permits, reserving space, booking the cargo, preparing bills of lading, and advising Central when to expect shipments—only the preparing of bills of lading may be construed to be the performance of a duty which is the carrier's, and that duty on the carrier arises only after the shipper or his agent supplies the carrier with a complete description of the goods to be shipped. The other functions performed by complainant cannot be said to be functions which, in the absence of AUT's performing them, would be performed by the carriers. They were ordinary freight forwarder services. The duty to bring the locomotives alongside the vessel, ready for shipment, is a duty of the shipper and not the ship. We must conclude, therefore, that brokerage was not earned by AUT with regard to any of these locomotives.

As we stated in *Pacific Coast European Conf.—Payment of Brokerage*, 4 F. M. B. 696 (1955), since it is desirable that a more definitive guide be established whereby conferences may readily distinguish between routine agreements which need not be filed with the Board and those which require specific approval under section 15, a rulemaking proceeding for the definition of such agreements will be initiated.

In view of the want of clarity in prior Board decisions pertaining to both the requirements of filing of agreements under section 15 and the waiving of freight-forwarding fees where brokerage is to be collected, we shall not take any action against any of the parties herein aimed at the collection of penalties provided for in sections 15 and 16 of the Act.

As to AUT's claim for reparation in the amount of brokerage withheld by respondents on the spare parts, without considering whether section 16 would prohibit an award, we find and conclude that AUT has failed to prove that it is entitled to such payment by reason of having secured such cargoes for the vessels.

In view of the foregoing, we find it unnecessary to discuss respondents' contention that AUT forfeited any claim it may have had to brokerage by competing with the conference initially contrary to the conference's best interest.

Although what we have said above obviates decision or comment on the contention of complainant that we are now estopped from declaring that we have no jurisdiction over shipments originating in Canada and destined for South America, we wish to point out that this agency's jurisdiction is as set out in statute, and we cannot, by our own act or omission, enlarge or divest ourselves of that statutory jurisdiction.

Other contentions and arguments advanced by the parties have been considered but have not been specifically mentioned as they do not affect the foregoing conclusion.

An appropriate order will be entered.

SECTION 15. 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.

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 sec-

tions 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.

SECTION 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.

ORDER

At a Session of the FEDERAL MARITIME BOARD, held at its office in Washington, D. C., on the 25th day of March A. D. 1957

No. 758

AMERICAN UNION TRANSPORT, INC.

*v.*

RIVER PLATE & BRAZIL CONFERENCES ET AL.

These matters 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 having made and entered of record its report, which report is hereby referred to and made a part thereof:

*It is ordered*, That respondents River Plate & Brazil Conferences and the member lines thereof be, and they are hereby, notified and required to hereafter abstain from concerted action herein found to be in violation of section 15 of the Shipping Act, 1916, as amended;

*It is further ordered*, That the request of American Union Transport, Inc., for the award of reparation be, and its is hereby, denied; and

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

By the Board.

(Sgd.) JAMES L. PIMPER,
*Secretary.*

# FEDERAL MARITIME BOARD

No. 767

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

*Submitted October 30, 1956. Decided March 29, 1957*

Nonconference brokerage rule in respondents' tariff found unjustly discriminatory and unfair as between carriers and shippers and detrimental to the commerce of the United States, and disapproved.

Provisions of respondents' brokerage Rule 21, which prohibit payment of brokerage or limit payment of brokerage to less than 1¼ percent, not ordered cancelled or modified pending outcome of general investigation of brokerage practices to be conducted by Board.

*Chalmers G. Graham* and *Leonard G. James* for respondents.

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

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

*Benjamin M. Altschuler* for Customs Brokers & Forwarders Association of America, Inc.

*George F. Galland* and *Robert N. Kharasch* for American Union Transport, Inc.

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

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

*John Mason* and *Edward Schmeltzer* as Public Counsel.

REPORT OF THE BOARD

CLARENCE G. MORSE, *Chairman*, BEN H. GUILL, *Vice Chairman*, THOS E. STAKEM, JR., *Member*

BY THE BOARD

This proceeding, instituted by order of the Board dated October 22, 1954, is an investigation to determine whether the brokerage rule

in the tariff of the Pacific Coast European Conference (the conference) may be in violation of the Shipping Act, 1916, as amended (the Act).

The Board's order designated the member lines of the conference as respondents,[1] and recited:

(a) that respondents are parties to approved Agreement No. 5200, which permits, among other things, joint establishment, regulation, and maintenance of uniform practices relating to rates and the payment of brokerage;

(b) that Rule 21 of conference Tariff No. 12[2] was amended effective September 29, 1954, by addition of the following provision:

Member lines MUST refuse to pay brokerage to any Broker who solicits for, or receives brokerage from, a non-conference line competitor and such broker will be excluded from the Conference's list of Approved Freight Brokers. [This portion of Rule 21 is hereinafter referred to as "the amendment to the rule" or "the nonconference brokerage rule"];

(c) that Rule 21, including the amendment thereto, may be in violation of sections 15, 16, and 17 of the Act.[3]

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[1] Appedix A lists the respondents.

[2] Rule 21, prior to the amendment of September 29, 1954, generally provided, so far as herein pertinent:

(1) that brokerage may be paid only to firms whose names appear on the approved brokers list maintained by the conference;

(2) that brokerage is not payable on heavy lift and extra length charges;

(3) that brokerage paid on certain specified commodities shall not exceed the following amounts:

(a) grain, grain products and flour—¾ percent

(b) lumber products, except hardwood logs—1 percent

(c) open rate commodities, N. O. S.—1 percent

(d) net rate cargo—no brokerage payable

(4) that on all other cargo brokerage may be paid at 1¼ percent.

Appendix B quotes entire Rule 21, as amended.

[3] Section 15: "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.

The Board's order then directed respondents to show cause why Rule 21, including the amendment thereto, should not be modified or cancelled, or failing such modification or cancellation, why the Board should not disapprove or cancel its approval of Agreement No. 5200.[4]

Answer was filed by the conference, denying that any portion of Rule 21 was in violation of the Act, and the following parties intervened: Pacific Coast Customs and Freight Brokers Association, Los Angeles Customs and Freight Brokers Association, Inc., New York Freight Forwarders and Brokers Association, Customs Brokers and Forwarders Association of America, Inc., American Union Transport, Inc., Isbrandtsen Company, Ltd., and Mitsui Steamship Company, Ltd.[5]

Hearings were held in San Francisco from January 25 through February 3, 1955, resulting in 1,402 pages of testimony and the intro-

"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.

"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."

Section 16, as herein 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."

Section 17, as herein applicable:

"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."

[4] This order cancelled a prior order of the Board dated and served October 19, 1954, which raised the question as to the lawfulness of the *amendment* to Rule 21 only; ordered the respondents to show cause within 20 days why the basic conference agreement should not be disapproved; and ordered that, unless the amendment to the rule be withdrawn not later than November 1, 1954, prior approval of Agreement No. 5200 would be immediately revoked.

[5] Subsequent to the hearing and filing of briefs, Mitsui Steamship Company, Ltd., was permitted to withdraw as a party, and has become a member of the conference.

duction of 50 exhibits.[6] Briefs were filed, and the recommended decision of the examiner was served on July 3, 1956.

Relying on prior decisions of predecessors of the Board, which held that concerted prohibitions against payment of brokerage, or concerted limitations on payment of brokerage below 1¼ percent, are detrimental to the commerce of the United States,[7] the examiner found and concluded that the provisions of Rule 21 which so prohibit and limit payment of brokerage are similarly detrimental to the commerce of the United States within the meaning of section 15 of the Act. He recommended that the conference be directed to eliminate such provisions from Rule 21. The recommended decision further found that such provisions of Rule 21 were not otherwise in violation of sections 15, 16, or 17 of the Act. The examiner found that the amendment to the rule (the nonconference brokerage rule) was similarly detrimental to the commerce of the United States as a concerted prohibition against payment of brokerage, but he made no findings as to whether the amendment violated sections 16 or 17 of the Act. Exceptions were filed by the parties and oral argument was held before the Board. Exceptions taken and recommended findings not discussed in this report have been found not related to material issues or not supported by the evidence.

## Testimony and Evidence

The conference is an association of common carriers by water operating from Pacific coast ports of the United States to the United Kingdom and Europe under approved Agreement 5200. The confer-

[6] Subsequent to the hearing the intervener freight forwarder and broker associations and Mitsui filed motions for interim order, requesting the Board to find the amendment to the rule to be an unapproved agreement between carriers within the meaning of section 15 of the Act, and to direct respondents not to effectuate the amendment to the rule during the pendency of this proceeding and to require respondents to restore any brokers to the approved list who had been removed therefrom as a result of said amendment to the rule. Oral argument was had, briefs were filed, and by a report dated November 30, 1955, and order dated December 23, 1955, the Board found the amendment to the rule to be an unapproved agreement between carriers within the meaning of section 15 of the Act; declared that it was a violation of section 15 for respondents to effectuate said amendment to the rule; and declared that the Board has no power to suspend an approved or unapproved agreement between carriers. In denying petitions for reconsideration of said report and order, the Board by report and order dated June 29, 1956, modified its prior report on motions for interim order, and declared that the Board does have power to suspend an *unapproved* agreement between carriers, and therein ordered respondents to cease and desist from effectuating any or all provisions of the amendment to the rule. Pursuant to that order, the amendment to the rule now in respondent's tariff is marked suspended until further notice.

[7] *Agreement No. 7790,* Docket No. 645, 2 U. S. M. C. 775 (1946); *Agreements and Practices* re *Brokerage,* Docket No. 657, 3 U. S. M. C. 170 (1949); *Joint Committee etc.* v. *Pacific W/B Conference,* Docket Nos. 718, 719, 4 F. M. B. 166 (1953). These proceedings are sometimes hereafter referred to by docket number only.

ence uses an exclusive-patronage contract/noncontract dual-rate system, whereby shippers who sign an agreement with the conference to ship all their cargoes in this trade exclusively by conference line vessels receive a lower freight rate than do shippers who do not sign such exclusive-patronage contracts.

The conference chairman testified that brokerage has been paid in the Pacific coast European trade since the inception of the conference in 1919 or 1920. The present prohibitions and limitations on brokerage have been in effect in substantially the same form since that time. In Docket No. 657 the Maritime Commission declared that concerted prohibitions against payment of brokerage and limitations on payment of brokerage to less than 1¼ percent were detrimental to the commerce of the United States within the meaning of section 15 of the Act, and directed the carriers and conferences in that proceeding (all outbound conferences and their member lines in the United States foreign trade which had prohibitions on payment of brokerage, except the Pacific Coast European Conference) to remove such prohibitions and limitations. It is the testimony of the conference chairman in the present proceeding that, since the conference was not named as a respondent in Docket No. 657, the prohibitions and limitations below 1¼ percent contained in Rule 21 were unaffected by the prior decision and have remained in effect. No other conference covering an outbound trade from the United States now has such prohibitions and limitations on payment of brokerage.

The record shows that brokerage practices and payments of brokerage herein considered involve individuals and firms who act as forwarders in rendering services to shippers, and also as brokers in rendering services for carriers. The intervening associations and their witnesses are hereinafter referred to as "forwarder-brokers."

There is nothing in the record indicating that forwarder-broker activities and services in this trade are substantially different from forwarder-broker activities and services in any of the other outbound trades of the United States.

No commodity on the Net Rate list (commodities on which no brokerage is payable) has been removed from that list since 1928, and none of the items on which less than 1¼ percent brokerage is payable have been changed, although in 1948 the conference considered adding to the commodities on which less than 1¼ percent brokerage would be payable. The conference chairman testified that all provisions of Rule 21 prohibiting payment of brokerage or limiting payment of brokerage to less than 1¼ percent, were determined

prior to his tenure as conference chairman, and he was therefore unable to state why the particular commodities or brokerage rates had been determined.

The forwarder-broker interveners testified that all the services they render in handling a shipment as a forwarder are of benefit to both the shipper and carrier. They are unable to distinguish between their activities as brokers and as forwarders. They testified that the services provided by forwarders generally include one or more of the following activities: (1) obtain option for space on carrier; (2) book the cargo; (3)arrange for and coordinate movement from shipper's plant to shipside; (4) prepare and deliver the bill of lading; (5) prepare the export declaration and clear it through customs; (6) advance money for payment of freight charges; (7) recondition or repackage cargoes as necessary to meet requirements for loading; (8) supply shippers with information regarding rates, sailing schedules, etc., of ocean carriers; (9) arrange for special loading equipment as necessary; and (10) arrange for cargo insurance.

The forwarder-brokers testified that they earned and were entitled to receive brokerage payments from the carrier in connection with any shipment where they rendered any or all of these services. They felt that each of these activities is part of the over-all activity of "securing cargo for the vessel". They contended that payment of brokerage should not be limited solely to a situation where they secure the cargo for a particular carrier, and that brokerage is earned and is payable if they do no more than simply prepare the bill of lading or render any one of the other forwarder services.

The record shows that when services are provided by forwarder-brokers (either the service of securing cargo for a particular carrier or vessel or any of the services rendered as forwarder for the shipper) in connection with commodities on which brokerage is prohibited or limited to less than 1¼ percent, such services are substantially similar to the services provided in connection with other commodities on which 1¼ percent is payable.

While particular carriers do occasionally request a broker to solicit cargo for a particular sailing, such solicitation is relatively rare. It was the testimony of one forwarder-broker witness that his solicitation of shippers is to obtain business for his own account and not for the account of particular carriers. After obtaining business for his own account he offers cargoes to the carriers in return for a brokerage fee. It was the testimony of the forwarder-brokers that if brokerage were only payable in the case where a carrier specifically

asks that they solicit cargo for a particular vessel or line, they would be entitled to receive brokerage very seldom.

Brokerage received by certain forwarder-brokers from carriers in this trade amounts to from 20 to 40 percent of their total revenues received from all brokerage and forwarding activities. It is the contention of these interveners that approval by the Board of the prohibitions and limitations now in Rule 21 would lead to further limitations and prohibitions by this and other conferences, and would result in the loss of substantial revenues and "slow death" to the forwarder-broker industry. Such a result, they contend, would lead inevitably to detriment to the commerce of the United States as found in Docket No. 657.

It is the position of the forwarder-brokers that the Board should follow the decision in Docket No. 657 and should declare that the portions of Rule 21 which prohibit payments of brokerage or limit brokerage to less than 1¼ percent are unlawful.

It was the contention of the conference that a brokerage service should be strictly defined as "securing cargo for the vessel", in accordance with the definition contained in the decision in Docket No. 657, and that none of the forwarding activities rendered for shippers, however beneficial to the carrier, entitle a forwarder-broker to receive brokerage. The record shows, however, that in this trade, as to cargoes on which brokerage is payable under the conference rule, the member lines have consistently been paying brokerage automatically and without any determination as to whether the forwarder-broker had secured the cargo for the vessel, or in fact what, if any, particular services may have been rendered.

The conference recommends that Rule 21 be modified to (1) define brokerage service as "securing cargo for the ship", (2) permit payment of brokerage only when such a service is rendered, and (3) permit payment of brokerage only when a shipper asks that brokerage services be employed, and provide the brokerage charge then be added to the freight charges paid by the shipper.

The nonconference brokerage rule was filed as an amendment to Rule 21, to be effective September 29, 1954. The conference chairman testified that the purpose of the nonconference rule was to control and eliminate nonconference competition in the trade. It was aimed primarily at Mitsui, which entered this trade to Europe as a nonconference line in September 1953. Mitsui has been attempting to attract business away from the conference lines by charging freight rates consistently lower than the rates charged by the conference lines, and by paying brokerage in excess of the 1¼ percent maximum rate

paid by the conference lines. The only other nonconference liner competition is provided by Isbrandtsen on its service from the Pacific coast to the Mediterranean, but this competition is relatively minor inasmuch as the conference lines primarily serve Europe through the Atlantic.

Until Isbrandtsen entered the trade to the Mediterranean and Mitsui entered the trade to Europe in 1953, there had never been any nonconference liner competition in this trade, the competition being limited to occasional tramp vessels. A brokerage rule had been issued by the conference in 1932, stating that:

> The payment of brokerage by any lines or parties to this agreement is contingent upon individual freight brokers, exclusively supporting conference lines and affiliated lines.

This rule continued in effect until approximately 1941. When the brokerage rule was reissued after the war, this particular portion was omitted. There is nothing in the record to indicate that this 1932 rule was ever applied except in connection with three particular tramp sailings which were the original reason for the adoption of the rule.

The names of four brokers were removed from the approved list of brokers for having acted as forwarders in connection with shipments which moved via Mitsui Line, although the brokers informed the conference that they had neither solicited for nor received brokerage from Mitsui. Other forwarder-brokers were under an immediate threat of removal from the approved list because of allegedly having acted as a forwarder and/or broker in connection with shipments via Mitsui.

It was the interpretation of the conference chairman that any broker who received brokerage from a nonconference line would be removed from the conference approved list of brokers and could not thereafter receive brokerage payment from member carriers. It was his further interpretation that if a broker on the conference approved list acted solely as a forwarder on a shipment via a nonconference line, and neither solicited for nor received brokerage from the nonconference line, the broker would still be removed from the approved list, and it appears from the record that this interpretation of the rule is the one applied by the conference in removing the four brokers from the approved list.

Enforcement of the nonconference rule as interpreted by the conference chairman would mean that any forwarder-broker who provided any brokerage or forwarding service in connection with a shipment, however small, via a nonconference line vessel would then be removed from the conference approved list of brokers and would be

barred from collection of any brokerage payments from any conference line. The conference did not have any procedure for reinstatement of a broker once removed from the list.

The conference chairman indicated that there were certain limited exceptions he would make in application of the rule. It would not be enforced when the particular commodity involved was not under contract/noncontract rates in the tariff. It would not be applied where the conference had granted a waiver to a contract shipper permitting use of a nonconference line on a particular shipment. The conference chairman had not made up his mind whether it would be applied if the shipment via the nonconference line was made by a shipper who did not have an exclusive-patronage contract with the conference. These limited exceptions to application of the nonconference rule had not been communicated to forwarder-brokers, except in isolated instances where a particular inquiry had been made by a forwarder-broker.

Forwarder-broker witnesses testified that, because a substantial portion of their income is derived from brokerage paid by conference lines, their business could not survive if they were removed from the approved list and denied any brokerage payments from those lines. It was their unanimous testimony that if the amendment is approved as lawful by the Board, they will have no alternative except to refuse to handle any shipments either as forwarder and/or broker which move via a nonconference line. Their services would, as a practical matter, become unavailable to any nonconference carriers in the trade, and to any exporters desiring to ship via such a nonconference line.

## Discussion and Conclusion

Much testimony and argument in this proceeding has been directed to the problem of defining "brokerage" and "brokerage services", and to determining what services a forwarder-broker must render to the carrier in order to be entitled to a brokerage fee from the carrier. We feel that such problems, while of interest and importance to the Board as discussed hereafter, are not relevant to the issues of whether the provisions of Rule 21 may be in violation of sections 15, 16, or 17 of the Act, as raised in the Board's order to show cause in this proceeding.

We think it sufficient to point out that the Board and its predecessors have clearly stated that a brokerage fee is earned only "as compensation for securing cargo for the ship" (Docket Nos. 645, 657,

718, 719); have recognized that brokerage may be paid to the same persons who act as freight forwarders (Docket Nos. 645 and 657); and have recognized that, while forwarding services rendered for the shipper are of benefit to the carrier, such benefit is incidental, and the only real service rendered for the carrier is "securing cargo for the ship" (Docket No. 657).

Whether or not the member lines of this conference and the forwarder-brokers have properly followed these clear pronouncements of the Board and its predecessors in their practices relating to payment of brokerage is not determinative of whether Rule 21 and the amendment thereto may be in violation of sections 15, 16, or 17 of the Act.

*Prohibitions on payment of brokerage and limitations on payment of brokerage to less than 1¼ percent.* We first consider the provisions of Rule 21 which prohibit payment of brokerage or limit payment of brokerage to less than 1¼ percent on certain items.

The Board and its predecessors have previously held that any concerted prohibition against the payment of brokerage is detrimental to the commerce of the United States (Docket Nos. 645, 657, and 718, 719); have found that any limitation on brokerage below 1¼ percent "would circumvent our finding and result in the detriment condemned" (Docket Nos. 657, and 718, 719); and have condemned concerted prohibitions on payment of brokerage on long-length and heavy-lift charges (Docket Nos. 718, 719).

The Commission's decision in Docket No. 657 was based upon an investigation on the Board's own motion, in which 21 outbound conferences and their member lines were made respondents. It is clear from an analysis of that case that the Commission, after a broad study of forwarder-broker activities in virtually all the outbound foreign trades of the United States, came to the conclusion that to permit any concerted prohibition or limitations on payment of brokerage to less than 1¼ percent would, in over-all effect, and over a period of time, deprive the forwarding industry of substantial revenues and would therefore be detrimental to the commerce of the United States. There was not a finding that any particular prohibition or limitation on brokerage payments by any one conference would, by itself and without reference to similar practices by other conferences, be detrimental to the commerce of the United States.

In upholding the action of the Commission in Docket No. 657, the United States District Court for the Southern District of New York clearly recognized that it was the over-all and continuing effect

of such prohibitions and limitations which would be detrimental to the commerce of the United States, rather than the effect of any particular prohibition or limitation of any one conference in any one trade. *Atlantic & Gulf/West Coast, etc.* v. *United States*, 94 F. Supp. 138 (S. D. N. Y. 1950).

In the *Atlantic & Gulf* case certain of the respondent conferences had argued that, as to their particular trades, there was no evidence to support the finding that their particular prohibitions and limitations would be detrimental to the commerce of the United States. The court rejected that argument and stated at page 141:

> It seems clear to us that there is substantial evidence in the record before the Commission to sustain its findings that forwarding activities have developed American commerce, that the forwarding industry is an integral part of the commerce of the United States, that forwarders, when earning and collecting brokerage are doing so in return for services to the carrier and that agreements not to pay brokerage result in detriment to the commerce of the United States. Plaintiffs urge, however, that whatever the state of the evidence with regard to other carriers and conferences, there was, as to them and the trades in which they are engaged, no evidence sufficient to support the commission's findings and order.
>
> It is true that there is relatively little evidence in the record bearing directly upon plaintiffs' trades. Thus at the outset we have to consider whether evidence relating to the foreign forwarding and carrying industries as a whole may validly be used to support findings and an order affecting these plaintiffs. We believe that it may. It was not necessary to have evidence as to plaintiffs' specific conferences. It was proper for the Commission to make rational inferences from experiences in other segments of the industry and to apply them to the segment here involved. This the Commission did.

In Docket Nos. 718, 719, the Board condemned certain particular prohibitions on payment of brokerage of one conference, relying on its findings and conclusions in Docket No. 657, without any finding of actual detriment to the commerce of the United States by the particular prohibitions therein considered.

In the instant proceeding the record does not show, and will not support a finding, that the particular prohibitions and limitations below 1¼ percent on payment of brokerage contained in Rule 21, by themselves and without reference to brokerage practices which might be followed by other conferences, have seriously affected the forwarding industry or been detrimental to the commerce of the United States. The record herein does support a finding that forwarder-broker practices and activities in this Pacific coast European trade are not substantially different from forwarder-broker practices and activities in all other outbound trades in the foreign commerce of the United States. The record further shows that when the brokerage service

of securing cargo for the ship is provided in connection with commodities on which brokerage is prohibited or limited to less than 1¼ percent, such brokerage service is substantially similar to the brokerage services provided in connection with other commodities on which 1¼ percent is payable. It is further clear from the record that the prohibitions and limitations on brokerage to less than 1¼ percent, contained in Rule 21, are similar to the concerted prohibitions and limitations condemned by the Commission in Docket Nos. 657 and 718, 719.

It follows that if we are to find that the prohibitions and limitations on brokerage to less than 1¼ percent, contained in Rule 21, are proper and are not detrimental to the commerce of the United States within the meaning of the cases cited, we must overrule or modify some of the basic findings and conclusions therein.

Without relying on any facts reported therein, we note that the Report of the House Committee on Merchant Marine and Fisheries, based on its investigation into the activities of foreign freight forwarders and brokers (H. Rept. No. 2939, 84th Cong., 2d sess.) recommended at page 56:

> That in view of the questions which have been raised in this inquiry, and the testimony of various witnesses in connection therewith, the Federal Maritime Board study the effects of the decision, *Agreements and Practices Pertaining to Brokerage and Related Matters*, docket No. 657 (3 U. S. M. C. 170) (decided 1949).

As previously stated, we feel that questions as to the proper definition of "brokerage" and "brokerage services", and what particular services entitle a forwarder-broker to a brokerage fee, are not relevant to the particular issues raised by the show-cause order. We are aware from the record in this proceeding, however, that the forwarder-brokers and conference lines in this trade have not followed the clear pronouncements of the Board and its predecessors in prior decisions. The forwarder-brokers insist that they earn and are entitled to brokerage regardless of whether or not they secure the cargo for the carrier; that they consider all the services rendered as forwarder for the shipper to be also "of benefit" to the carrier, and that any forwarder service entitles them to receive brokerage from the carrier; and that they find it impossible, or are unwilling, to distinguish between their activities as forwarder for the shipper and their activities as broker for the carrier. It is apparent from the record that the member lines in this conference have, except as to commodities on which brokerage has been prohibited by Rule 21, been paying brokerage automatically and without determination as to whether

the forwarder-broker secured the cargo for the particular carrier, or in fact what, if any, particular services may have been rendered. It was the position of the conference that member lines were forced by economic necessity to pay automatic brokerage because of the volume of cargoes which forwarder-brokers control as agents for shippers. The conference lines question whether an individual carrier is really "free within limits to pay brokerage or not as its individual managerial discretion dictates," as found in Docket No. 657 at p. 177, and question the extent to which forwarders really develop commerce and secure new business.

The instant proceeding involves a record as to brokerage practices in only one conference in the outbound foreign commerce of the United States, whereas the record on which the decision in Docket No. 657 relied included a comprehensive analysis of brokerage practices and activities in many such conferences and trades, and considered the full scope of the foreign commerce of the United States. It appears from the limited record in this proceeding that certain of the premises on which the Maritime Commission based its findings and conclusions in Docket No. 657 may not generally be true today, and the beneficial results which were expected from that decision may not have come about. On the limited record developed, however, we are unable to make findings and reach conclusions which would modify or overrule the decisions in Docket Nos. 657 and 718, 719.

We will institute on our own motion, however, a general investigation into brokerage and forwarding activities and practices of carriers and forwarders in the foreign commerce of the United States, to reconsider the extent to which conferences may properly prohibit or limit brokerage payments without detriment to the commerce of the United States, and to consider the extent to which the Board may control or limit the payment of brokerage by individual carriers.

The prohibitions and limitations on payment of brokerage to less than 1¼ percent, contained in Rule 21, have been in effect in this trade for many years. There is no showing in this record that these particular prohibitions and limitations actually have resulted in specific detriment to the commerce of the United States, or that any such detriment is now threatened. In fact, the record shows that these particular prohibitions and limitations apply to relatively few commodities and do not, by themselves, vitally affect the forwarding industry.

As previously stated, we intend to institute an investigation which will reconsider and finally determine the lawfulness of such concerted

prohibitions and limitations on brokerage payments. Pending the outcome of that investigation, we feel that the status quo should be maintained and that brokerage practices of long standing in this trade, and which have not been shown to be, by themselves, detrimental to commerce, should not be disrupted. We will therefore not require respondents to modify or cancel the provisions of Rule 21 which prohibit or limit payment of brokerage to less than 1¼ percent, pending the outcome of such investigation. Whatever determinations and conclusions as to the lawfulness or unlawfulness of concerted prohibitions and limitations on brokerage are reached by the Board at the conclusion of that investigation, will be applied to concerted action of this conference and equally to concerted action of all other conferences and trades.

*Nonconference brokerage rule.* We next consider the amendment to Rule 21, the nonconference brokerage rule. This rule has been previously found to be an agreement, or amendment to an agreement, which, under section 15 of the Act, must be approved by the Board prior to its effectuation (see footnote 6). The record supports a finding that the nonconference brokerage rule, as interpreted and applied by the conference, would result in unjust discrimination and be unfair as between carriers and shippers, and would operate to the detriment of the foreign commerce of the United States, within the meaning of section 15 of the Act.

The nonconference rule, as written, would appear only to prohibit member lines from paying brokerage to any broker "who solicits for or receives brokerage from a nonconference line competitor". The record clearly shows, however, that this nonconference brokerage rule has been expanded by the conference in its application and implementation to prohibit payment of brokerage to a forwarder-broker who had neither solicited for nor received brokerage from a nonconference line but who had delivered cargo to a nonconference line solely in carrying out forwarding duties at the direction of a shipper. The agreement between carriers which we must consider in this proceeding is the one actually shown by the record to be in existence and which has been implemented by the conference. We are not called upon to consider the rule as written but which the record shows has never in fact been applied by the conference.

The distinction between this nonconference brokerage rule as written and the rule as applied by the conference was clearly recognized by the United States Shipping Board Bureau in one of the earliest cases in which brokerage practices and activities of conferences were

considered. In *In Re Gulf Brokerage and Forwarding Agreements*, 1 U. S. S. B. B. 533 (1936), it was stated at page 535:

> If the suggestions here made are followed, care should be taken both in the modification of the conference agreements and in the agreements covering forwarding services to keep brokerage activities and forwarding activities separate. Although it may be proper to refuse to pay brokerage to any broker who solicits for a competitor or receives brokerage from a competitor, the Department will not approve agreements under which the forwarder, whether also a broker or not, would refuse to handle as a forwarder shipments as to which routing by a competing carrier has been specified by the shipper.

The following discussion of the nonconference brokerage rule considers the effects of the rule as actually applied and enforced by the conference.

The two nonconference lines which operated in this trade received, in one case approximately 80 percent and in the other case virtually all, their cargoes in this trade through forwarder-brokers. In the event the nonconference brokerage rule should be fully enforced, it is apparent that all brokers and forwarders who handle shipments in this trade would be forced to elect to (1) serve the conference lines exclusively in order to earn brokerage from them, (2) serve nonconference lines only, or (3) serve both conference and nonconference lines and be barred from collecting brokerage from any conference lines. Because of the much greater relative importance of the income received as brokerage from the conference lines than that received from the nonconference lines, it was the unanimous position of the forwarder-broker witnesses that their only practical choice would be to refuse to handle, as either forwarder or broker, any shipments moving on a nonconference vessel.

This would lead to the result that nonconference lines would be foreclosed from obtaining cargo through brokers or forwarders in this trade. The nonconference lines would be faced with the alternatives of (1) continuing to operate as independents in the trade with substantially reduced carryings, (2) withdrawing from the trade, or (3) joining the conference. To force alternatives (2) or (3) on the nonconference lines was the avowed purpose of the conference in instituting the amendment to the rule.

Furthermore, many shippers who do not retain their own export department require the use of forwarders in handling their export shipments. While certain of such shippers may now be restricted to use of conference vessels by reason of having signed exclusive-patronage contracts with the conference, other shippers may desire for individual business reasons to make use of forwarders and ship via nonconference vessels in this trade. Such shippers would, by opera-

tion of the nonconference brokerage rule as interpreted by the conference witness, be deprived of the services of forwarders on their shipments in this trade.

It is clear from the record, and admitted by the conference, that the purpose of the nonconference brokerage rule was to reduce or eliminate nonconference competition (primarily Mitsui) by forcing such carriers either to join the conference or to withdraw from the trade. The question thus presented is whether the Board, on the basis of the facts as developed in this hearing, should approve this nonconference brokerage rule.[8]

From the foregoing analysis it is apparent that operation of the nonconference brokerage rule is inherently and by design discriminatory as between carriers and shippers. It would foreclose a nonconference line from obtaining cargoes through *forwarders* in this trade, and shippers who desire to ship nonconference in this trade would be deprived of the services of *freight forwarders*. It is "prima facie" discriminatory in the same manner in which the Board and the courts have founded the dual-rate system to be "prima facie" discriminatory. *Contract Rates—Trans-Pacific Freight Conf. of Japan*, 4 F. M. B. 744 (1955); *Contract Rates—Japan/Atlantic-Gulf Freight Conf.*, 4 F. M. B. 706 (1955); *Swayne & Hoyt, Ltd.* v. *U. S.*, 300 U. S. 297 (1937). It would appear, however, that the nonconference brokerage rule involves black-listing of forwarders-brokers for their independent activities as forwarding agents for shippers, and embodies some of the characteristics of a secondary boycott. Approval by the Board of such concerted conduct with consequent exemption from the antitrust laws must of necessity be subject to the language of the court in *Isbrandtsen Co.* v. *United States*, 211 Fed. 2d 51 (D. C. Cir. 1954), which stated at page 57,

> The condition upon which such authority is granted is that the agency entrusted with the duty to protect the public interest scrutinize the agreement to make sure that the conduct thus legalized does not invade the prohibitions of the anti-trust laws any more than is necessary to serve the purposes of the regulatory statute.

We find nothing in this record which would justify such prima facie discrimination and apparent invasion of the prohibitions of the antitrust laws.

We therefore find on the record that the nonconference brokerage rule herein considered would be unjustly discriminatory and unfair

[8] Section 15 of the Act provides that the Board shall approve an agreement "controlling, regulating, preventing, or destroying competition," which is not "unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors," and that does not "operate to the detriment of the commerce of the United States," or is not "in violation of this Act."

as between carriers and shippers and would operate to the detriment of the foreign commerce of the United States, within the meaning of section 15 of the Act. We are unable, therefore, to grant approval under section 15 to such rule.

We have not considered whether a rule which would merely prohibit *payment of brokerage to a broker who actually solicits for or receives brokerage payments from* a competing nonconference line, would be unjustly discriminatory or unfair as between carriers and shippers or would operate to the detriment of the commerce of the United States. As indicated by the Board's predecessor in *In Re Gulf Brokerage and Forwarding Agreements*, *supra*, such a rule might under certain circumstances be shown to be proper and might be approved.

In view of our findings and conclusions, it is unnecessary to discuss or consider whether any portions of Rule 21, including the amendment thereto, are in violation of sections 16 or 17 of the Act.

For the reasons previously stated, respondents may continue in effect the provisions of Rule 21 which prohibit payment of brokerage or limit payment of brokerage to less than 1¼ percent, pending our final decision in the investigation we will order as to the lawfulness of such provisions. We will disapprove, however, this nonconference brokerage rule.

An appropriate order will be entered.

# FEDERAL MARITIME BOARD

No. M–77 (Sub. No. 1)

ISTHMIAN LINES, INC.—APPLICATION TO BAREBOAT CHARTER GOVERNMENT-OWNED DRY-CARGO VESSELS

*Submitted April 9, 1957. Decided April 22, 1957*

Board finds and certifies to the Secretary of Commerce that the services under consideration are required in the public interest; that such services are 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 services.

*Richard W. Kurrus* for Polarus Steamship Company and American Tramp Shipowners Association.

*Francis T. Greene* and *Whitman Knapp* for Prudential Steamship Corp.

*Ira L. Ewers*, *Robert H. Duff*, and *William B. Ewers* for Mathiason Steamship Corporation and Moore-McCormack Lines.

*Garrett Fuller* for West Coast Steamship Company.

*Odell Kominers* and *Robert S. Hope* for Pope & Talbot, Inc., Coastwise Line, and Pacific Far East Line, Inc.

*John Mason* and *Josiah K. Adams* for Isthmian Lines, Inc.

*Donald McCleay* for Mississippi Shipping Company, Inc.

*John Sheneman* and *Charles H. Vaughn* for Arrow Steamship Company.

*Joseph A. Klausner* for Boston Shipping Corporation.

*William J. Lippman* for Paroh Steamship Corporation.

*Ronald A. Capone* for United States Lines.

*Frank B. Stone* for American Export Lines, Inc.

*John Regan* for General Services Administration.

*Allen C. Dawson* as Public Counsel.

REPORT OF THE BOARD

CLARENCE G. MORSE, *Chairman*, BEN H. GUILL, *Vice Chairman*, THOS. E. STAKEM, JR., *Member*

BY THE BOARD:

This is a proceeding under section 5 (e), Merchant Ship Sales Act of 1946, as amended (50 U. S. C. App. 1738 (e)), upon the application of Isthmian Lines, Inc. (Isthmian), to bareboat charter eight victory-type war-built dry-cargo vessels for operation interchangeably in its berth services—Gulf-Atlantic/India, Pakistan and Ceylon, and Atlantic-Gulf/Persian Gulf. Hearing was held on February 25, 26, and 27, 1957, pursuant to notice published in the Federal Register on February 9, 1957, and oral argument was held before the examiner in lieu of briefs. An initial decision has been issued by the examiner and exceptions thereto have been filed.[1]

The initial decision found and concluded:

(1) That the services under consideration are required in the public interest;

(2) That such services are not adequately served; and

(3) 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 services.

We agree with these statutory findings. Exceptions and arguments not hereafter discussed have been given consideration and found not relevant to material issues or not supported by the evidence.

Isthmian presently operates 24 owned United States-flag C–3 type vessels and one time-chartered United States-flag Liberty vessel in five services, two of these being the services for which it applies for the eight vessels:

(a) Gulf-Atlantic/India, Pakistan and Ceylon; and

(b) Atlantic-Gulf/Persian Gulf.

Both of these services are on essential Trade Route No. 18. Upon reopening of the Suez Canal each service will include calls at eastern Mediterranean ports, and full service to Red Sea ports will be resumed. Four owned ships are presently used in each service and a frequency of about one sailing per month is being maintained. Prior to the

[1] The Isthmian application was heard, and the initial decision was issued in Docket No. M–77, *Prudential Steamship Corp., et al., Applications to Charter Dry Cargo Vessels*, wherein other applications were also considered. By order dated April 9, 1957, the Board severed the Isthmian application from the other applications in Docket No. M–77; designated the Isthmian application proceeding as Docket No. M–77 (Sub. No. 1); and stated that said proceeding stands submitted to the Board for final decision. The proceeding in Docket No. M–77, with respect to the other applications, has been reopened for additional hearings and issuance of another initial decision.

closing of the Suez Canal and certain adjustments made in scheduling, Isthmian had averaged in the years 1952 through 1956 approximately 18 sailings per year in the Gulf-Atlantic/India, Pakistan and Ceylon service, and 17 sailings in the Atlantic-Gulf/Persian Gulf service. Additional turnaround time resulting from the Suez closing, the unavailability of chartered ships previously used, and an American Bureau of Shipping requirement for strapping of vessels have contributed to the reduction in sailing frequency on these services. Isthmian desires to increase the frequency in each service to 24 sailings per year by the addition of the eight vessels under consideration.

The record shows that applicant has endeavored to obtain suitable vessels for use in these services since December 1956, but has been unsuccessful. Victory vessels or other fast vessels are required to maintain these berth services, and applicant has been able to secure only one American-flag Liberty ship, which was chartered for one round voyage only. One privately owned vessel under bareboat charter for 2 years had been operated in these services until the recent expiration of the charter, when Isthmian was unable to renew it. This vessel has been replaced by a vessel withdrawn from Isthmian's Atlantic-Gulf-Pacific/Far East service.

In the middle of 1956 Isthmian discontinued its eastbound round-the-world service and established a new service from Atlantic-Gulf and Pacific ports to the Far East. In connection with this new service, it charters out certain of its vessels to its parent company, States Marine Lines, but the evidence shows that while four ships are so chartered, Isthmian has chartered four vessels from States Marine. There appears to have been no diminution of ships available to Isthmian by virtue of such chartering, and nothing in the record indicates that Government-owned vessels will replace tonnage chartered out to States Marine. Isthmian's witness testified that this service would continue to require the eight privately owned vessels now providing the service, as well as the eight Government-owned chartered vessels. He also testified that when the vessels in this service again use the Suez Canal, the same frequency of service can be maintained with only seven privately owned vessels and the eight Government-owned chartered vessels. One of the company's privately owned vessels could then be returned to the Atlantic-Gulf-Pacific/Far East service.

Applicant's vessels in these services have been sailing outbound fully loaded since July 1956, and there is a continuing backlog of cargo. Offerings in excess of 150,000 tons of cargo for berth line carriers have been declined recently for lack of vessel space, and applicant's witness estimated that there has been an increase in commercial offerings

in these services of approximately 50 percent in recent months. Charter of these Government-owned vessels would further aid in the homeward carriage of strategic materials, such as manganese and other ores moving from India.

The services for which applicant desires to use the Government-owned vessels are on a trade route declared essential by the Maritime Administrator under section 211 of the Merchant Marine Act, 1936. The services clearly are in the public interest.

The record shows that there is a need for additional sailings in these services; that applicant's vessels have been sailing full for at least 6 months; that firm offerings in excess of 150,000 tons of cargo recently have been declined for lack of vessel space; and that there is a continuing backlog of cargoes to be moved. The record fully supports a finding that the services herein considered are not adequately served.

The record further indicates that applicant has been unable to find privately owned American-flag vessels available for charter on reasonable conditions and at reasonable rates for use in these services.

## Findings, Certification, and Recommendations

On the basis of the record developed, the Board finds and hereby certifies to the Secretary of Commerce: [2]

(1) That the services considered are required in the public interest;

(2) That such services are not adequately served; and

(3) 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 services.

The Board recommends to the Secretary of Commerce that the following restrictions and conditions are necessary or appropriate to protect the public interest in respect of any such charter, and to protect privately owned vessels against competition from chartered vessels:

(1) In accordance with the revised charter basis announced by the Maritime Administrator on February 14, 1957, provision should be made for the Government to pay, out of the vessel operations revolving fund, subject to the availability of funds, the expenses of breakout and lay-up, provided the charterer assumes the obligation to pay charter hire at the existing basic rate for a period of 18 months for

[2] By Department Order No. 117 (amended), Section 6.01, subsection 2, paragraphs (1) and (2), the Secretary of Commerce has delegated his authority under the Merchant Ship Sales Act of 1946, as amended, to the Maritime Administrator. Pursuant to such delegation, references herein to the Secretary of Commerce are also directed to the Maritime Administrator.

Victory-type ships, or 24 months for Liberty-type ships. The Secretary of Commerce shall have the right to terminate on 15 days' notice, or on shorter notice in the event of emergency, or to comply with a finding of the Federal Maritime Board when annual review is made pursuant to section 5 (e) of the Merchant Ship Sales Act of 1946, as amended (50 U. S. C. App. 1738 (e)). In the event of such cancellation by the Government, charterer's obligation to pay further charter hire shall cease. In the event charterer terminates the charter prior to expiration of the full charter period, charterer shall be liable for the payment of hire for the full charter period;

(2) That the charter hire be a fixed sum in an amount determined to be consistent with the policies of the Merchant Ship Sales Act of 1946, as amended, and not less than the prevailing world market charter rate for similar vessels for similar use, and that "additional charter hire" based on earnings above 10 percent of capital necessarily employed be fixed as provided in section 709 of the Merchant Marine Act of 1936; and

(3) That for the term of any charter granted hereunder, the charterer be required, so long as applicant's vessels are not using the Suez Canal, to maintain and operate at least eight privately owned American-flag vessels in these services, and for any period during which charterer's vessels use the Suez Canal, to maintain and operate at least seven privately owned American-flag vessels in these services.

# FEDERAL MARITIME BOARD

No. 792

AGREEMENT AND PRACTICES PERTAINING TO LIMITATION ON MEMBERSHIP—PACIFIC COAST EUROPEAN CONFERENCE (AGREEMENT NO. 5200)

*Submitted March 14, 1957. Decided April 25, 1957*

Agreement to impose condition on admission to conference membership, that applicant withdraw from litigation before the Board in which applicant's position is opposed to position of conference, found to be a new agreement or modification to an agreement, effectuated prior to approval, in violation of section 15 of the Shipping Act, 1916.

*Leonard G. James* for respondents.
*Alan F. Wohlstetter* for Mitsui Steamship Co., Ltd.
*Edward Aptaker* as Public Counsel.

REPORT OF THE BOARD

CLARENCE G. MORSE, *Chairman*, BEN H. GUILL, *Vice Chairman*, THOS. E. STAKEM, JR., *Member*

BY THE BOARD:

This is an investigation undertaken on the Board's own motion for the purpose of determining whether respondents, Pacific Coast European Conference (the conference) and its member lines,[1] have violated section 15 of the Shipping Act, 1916 (the Act),[2] in imposing a

[1] See appendix.

[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.

condition on the admission of Mitsui Steamship Co., Ltd. (Mitsui), to conference membership. The Board's order of April 5, 1956, directed respondents to show cause why the Board should not:

1. Find that the carrying out by the conference of its agreement without Board approval, to admit Mitsui to conference membership on condition that it withdraw from certain proceedings pending before the Board in which its position is opposed to that of the conference, is a violation of section 15 of the Act.

2. Find that the agreement to impose such condition should not be approved since it is unjustly discriminatory or unfair as between carriers or detrimental to the commerce of the United States within the meaning of section 15 of the Act.

3. Order the condition to be cancelled by the conference.

Hearing was held before an examiner in San Francisco on August 6 and 7, 1956, and a recommended decision in the matter was served on December 7, 1956.

The examiner found that the agreement to admit Mitsui to membership in the conference on condition that Mitsui withdraw from certain proceedings pending before the Board in which Mitsui's position is opposed to that of the conference, (a) was within the authority of the approved conference basic agreement; (b) was not a new agreement or amendment to an agreement, within the purview of section 15 of the Act, which would require approval by the Board before being effectuated; and (c) the carrying out of such agreement was not shown to have been in violation of section 15. The examiner further found that the agreement was not shown to be unjustly discriminatory or

"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.

"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."

unfair as between carriers or detrimental to the commerce of the United States, within the meaning of section 15, and that the agreement has been cancelled, thereby rendering all issues in the proceeding moot. He recommended that the proceeding be discontinued.

Public Counsel has filed exceptions to the recommended decision. 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.

## Findings of Fact

1. The conference is a voluntary association of common carriers by water operating from ports on the Pacific coast of the United States to ports in Europe pursuant to its basic conference agreement No. 5200, which has been approved under section 15 of the Act.

2. Mitsui is a common carrier by water. It entered this trade in September 1953 and operated an independent service until it was admitted to membership in the conference, effective February 1, 1956.

3. On August 18, 1955, Mitsui announced its intention to apply for membership in the conference, without departing from the positions advocated by it in proceedings then pending before the Board. At the time, both Mitsui and the conference were parties to proceedings pending before the Board in which Mitsui took positions substantially contrary to the positions of the conference (Docket Nos. 764, 767, 773).[3]

[3] In Docket Nos. 764, 773, a complaint proceeding, Mitsui took the position that the shippers' exclusive-patronage contract used by this conference did not cover shipments of goods sold by contract signatory shippers on f. o. b. or f. a. s. terms, and that such an interpretation by the conference was in violation of the Act and had been effectuated without Board approval in violation of section 15. The conference took Board approval in an opposite position, arguing that such interpretation of its shippers' exclusive-patronage contract was lawful, and was not a new agreement or amendment to an agreement within the purview of section 15. The Board found and concluded that this conference's interpretation of its shippers' exclusive-patronage contract was a new agreement, or amendment to an agreement, within the purview of section 15 of the Act, that such interpretation had never been filed with and approved by the Board, and that this conference had effectuated such agreement without Board approval, in violation of section 15. *Mitsui Steamship Co.* v. *Anglo Canadian Shipping Co.*, 5 F. M. B. 74 (1956).

In Docket No. 767, an investigation instituted on the Board's own motion, Mitsui intervened and contended that a new amendment to this conference's tariff rule on brokerage, which limited payment of brokerage to brokers who solicited for conference lines only, was unlawful and had been effectuated without Board approval, in violation of section 15. This conference took an opposite position, arguing that since the approved basic agreement contained a provision permitting the conference to make rules and regulations pertaining to brokerage, that the new amendment to the brokerage rule was within the scope of authority in the approved basic agreement, and did not require separate approval under section 15. The Board rejected the conference contention and held that the amendment to the tariff was a new agreement or amendment to an agreement within the purview of section 15, that the amendment was not within the scope of authority of the approved basic agreement, and that such agreement had been effectuated by this conference before Board approval, in violation of section 15. *Pacific Coast European Conf.—Payment of Brokerage*, 4 F. M. B. 696 (1955).

4. On November 30, 1955, Mitsui made formal application for conference membership, supplying the details of information called for in the conference's regular membership application form, and requested the conference to arrange for membership to become effective commencing with the loading of Mitsui's MS *Hodakasan Maru* about February 3, 1956. This standard membership application form has been in effect and used by the conference for a number of years. A copy of the completed application was supplied to the Board.

5. Mitsui's application was first considered on December 14, 1955, by the conference Advisory Committee, which handles matters of "more than mere routine value to the conference." On this date, following the Advisory Committee meeting, the conference chairman advised Mitsui by night letter that the:

> Committee unanimously views Mitsui's continuation as a party to litigation before Federal Maritime Board constitutes an illogical and untenable situation. Therefore committee urgently request that you reconsider your position and that conference be given an undertaking that Mitsui will withdraw from such litigation in order not endanger favorable action on its application at Special Conference Meeting convening Friday December 16th.

Mitsui replied by telegram requesting the conference to consider at the December 16th meeting its application as then filed, stating that its application complied in all particulars with the application form furnished by the conference, and accordingly that Mitsui expected prompt and favorable action on its application.

6. The full conference considered the application on December 16, 1955, and on that date advised Mitsui and the Board that the conference had adopted the following resolution:

> Resolved that Mitsui Steamship Co., Ltd., be admitted to membership pursuant to its application of November 30, 1955 to become effective February 1, 1956 and upon receipt by the Conference office of satisfactory information that Mitsui has withdrawn from pending litigation in which its position is opposed to that of the Conference.

On December 21, 1956, Mitsui sent the following letter to the Board:

> The Mitsui Steamship Co., Ltd. on November 30, 1955, filed an application for membership in the Pacific Coast European Conference.
>
> By telegram dated December 16, 1955, confirmed by letter of the same date, the Mitsui Line was advised that at a special Conference meeting held on December 16, 1955, the following resolution had been adopted:
>
> "RESOLVED THAT MITSUI STEAMSHIP COMPANY LTD. BE ADMITTED TO MEMBERSHIP PURSUANT TO ITS APPLICATION OF NOVEMBER 30, 1955, TO BECOME EFFECTIVE FEBRUARY 1, 1956, AND UPON RECEIPT BY THE CONFERENCE OFFICE OF SATISFACTORY INFORMATION THAT MITSUI HAS WITHDRAWN FROM PENDING LITIGATION IN WHICH ITS POSITION IS OPPOSED TO THAT OF THE CONFERENCE."

Accordingly the Mitsui Line withdraws from various litigation pending before the Federal Maritime Board in which its position may be opposed to that of the Pacific Coast European Conference.

Two days later the conference chairman, by letter, with a copy to the Board, advised Mitsui that its action of December 21 was

considered satisfactory information that Mitsui Line has withdrawn from litigation in which its position is opposed to that of the Conference,

and that

In order to make Mitsui Line's admission effective as of February 1, 1956, [date requested by Mitsui] it will be necessary for a representative of Mitsui to sign a counterpart of the Conference Agreement and to deposit with this office an admission fee in the amount of $1,000.00 as required by Articles 10 and 11 of the Conference Agreement.

7. On December 28, 1955, the Board's Regulation Office informed the conference and Mitsui that it considered the agreement among the member lines adopting the condition on Mitsui's admission to the conference and Mitsui's acceptance of such condition to be a new agreement or amendment to an agreement within the purview of section 15 of the Act, and that such agreement should be approved by the Board before being made effective.

8. On January 7, 1956, the conference informed the Regulation Office and Mitsui that it was unable to concur in the view of the Regulation Office that the agreement is within the purview of section 15, and that:

Since Mitsui Line has now met the qualification and placed itself on equal terms with the present members, it is fully qualified for membership under the Conference agreement and has been admitted effective as of February 1, 1956.

9. By letter of March 5, 1956, the Board wrote to the conference stating

At this time, and without a hearing, the Board is of the view that the condition may not be a "just and reasonable cause" within the meaning of Section 10 of your basic Conference Agreement for denial of membership, and that it further may be unjustly discriminatory or unfair as between carriers, and operate to the detriment of the commerce of the United Statse.

You are, therefore, notified that unless you withdraw the above mentioned condition on Mitsui's membership in your Conference within twenty days of receipt of this letter, the Board will institute a proceeding on its own motion to determine, after opportunity for hearing, whether such condition to membership is within your basic agreement and is unjustly discriminatory or unfair as between carriers or operates to the detriment of the commerce of the United States, or will take such other action as may be available to it.

10. On the same date, the Board informed Mitsui and the conference that Mitsui's letter of December 21, 1955, withdrawing from

certain litigation, did not comply with the withdrawal procedure set forth in the Board's Rules of Practice and Procedure, particularly Rule 6 (c) thereof.

11. On March 23, 1956, the conference replied to the Board's letter of March 5, 1956, stating that it felt that the admission of Mitsui was proper in all respects and that it disagreed with the position stated in the Board's letter of March 5, 1956. Mitsui, by letter to the conference dated March 22, 1956, stated that it considered the conference's letter of March 23, 1956, to the Board as being inaccurate in several respects and not responsive to the Board's letter of March 5, and stated that Mitsui's withdrawal from the litigation referred to could not be characterized as "voluntary."

12. Further concerning the Board's letter of March 5, 1956, to the conference, the conference on April 2, 1956, telegraphed the Board that it believed the matter might be worked out amicably among the parties, and that withdrawal of the condition referred to would be further considered by the conference as soon as possible. Before such consideration was given, and between April 2 and April 5, 1956, the Chief of the Regulation Office telephoned the conference chairman, by direction of the Board, and informed the conference (1) that its communications on the subject were not considered satisfactory, (2) that an order had been adopted directing the conference to show cause why the carrying out of the "condition" was not violative of section 15, and why the Board should not disapprove it as being an agreement imposing conditions unjustly discriminatory or unfair as between carriers, or operating to the detriment of the commerce of the United States, and (3) that the order would not be served if the condition was cancelled prior to close of business in Washington by April 10, 1956.

13. On April 9, 1956, at a special meeting of the conference, the conference again considered the matter. A vote was taken on the following motion:

> That the Conference suspend the condition imposed on the admission of Mitsui Line pending a determination by the Federal Maritime Board of whether such condition constitutes a Section 15 Agreement or is within the scope of Article 10 of the Conference Agreement covering admission of new members.

This motion failed to carry and the conference then voted upon the following motion:

> That the following message be dispatched by Chairman McArt to the Federal Maritime Board, Washington:
>
> "The Pacific Coast European Conference, although not conceding that the condition under which the Mitsui Line was admitted to membership constitutes an Agreement under Section 15, or is violative thereof, is willing to rescind

said action, and hereby cancels the condition under which Mitsui was or is to withdraw from litigation pending before the Federal Maritime Board and involving this Conference."

This second motion was defeated, and on another vote, by secret ballot, the first motion was passed and forwarded to the Board.

14. The conference action of April 9, 1956, suspending the condition was not considered by the Board as being in compliance with its request of March 5, 1956, to withdraw the condition to Mitsui's membership in the conference, and on April 13, 1956, the Board served its show-cause order of April 5, 1956, initiating this proceeding.

15. On May 16, 1956, oral argument was held before the Board in Docket Nos. 764, 773, which was one of the proceedings from which Mitsui had been required to withdraw by the conference as a condition to membership. Counsel for Mitsui participated in this argument to a very limited degree only. As a result of the activities of counsel for Mitsui in appearing at the oral argument, as well as Mitsui's actions in connection with the instant proceeding, the conference, at meetings on June 5, 6, and 7, 1956, adopted the following motion:

That Conference Chairman and Conference Counsel be directed to prepare and send to Mitsui Line's representative in New York a letter requesting them to refile their notice of withdrawal from pending cases in which they have opposed the Conference's position, such notice to be submitted to the Board in accordance with the contents of the Board's letter of March 5, 1956, to Mitsui Line, and a copy thereof to be furnished the Conference office.

Be it further Resolved, That a copy of this resolution be furnished the Federal Maritime Board at its offices in Washington, D. C. and to Mitsui Line.

No copy of this resolution was at that time forwarded to the Board.[4]

16. On June 8, 1956, the conference wrote to Mitsui notifying it of the foregoing motion, and further stating:

Pursuant to the motion, this letter is *a request to you to submit to the Federal Maritime Board, as promptly as possible, your withdrawal in proper procedural form from the cases now pending before the Board in which your position has been opposed to that of the other Conference members.* I also request that your (sic) furnish a copy of your withdrawal to this office.

It is considered that withdrawal of Mitsui from these cases will serve the best interest of all Conference members in the outcome of these proceedings. Hence, in behalf of the Conference members, *I urge that you take every step to discontinue immediately your participation in these cases against the Conference of which you are now a member. Prompt action on your part to accomplish such withdrawal will help to terminate the uncertainty with regard to your membership which has been the subject of allegations of Federal Maritime Board officials.* It will also terminate conflicting statements between your agents and your counsel in which the former have indicated your withdrawal

[4] Copy of this resolution was received as part of the conference minutes by the Regulation Office of the Board three months later—August 8, 1956—one day after the hearing in this proceeding had concluded.

from opposition to the Conference in contrast to continuing opposition expressed by your counsel. The welfare of all concerned would seem to depend upon your clarifying your position in these cases at the earliest possible moment. (emphasis added).

No copy of this letter to Mitsui was forwarded to the Board.

17. On June 21, 1956, Mitsui replied to the conference's letter of June 8, 1956, stating that it shared the objective of the conference to terminate the litigation referred to, desired specific guidance as to procedure, and suggested that the conference's counsel be requested to submit for Mitsui's action a draft of a withdrawal from such proceedings.

No copy of this letter was forwarded to the Board.

18. The record does not show whether the requested guidance was furnished, but on June 29, 1956, Mitsui filed motions in Docket Nos. 767, 764, and 773 for termination of the proceedings with respect to it. In Docket No. 767 the motion was granted by the Board's order of July 30, 1956. In Docket Nos. 764 and 773 (consolidated), the motion to terminate was received by the Board on the same day its final report in these cases was served—June 29, 1956—the Board having made its decision in the consolidated proceeding on June 8, 1956. The motion to terminate was therefore considered moot.

19. On July 12, 1956, the conference issued a call for a special meeting for July 17, 1956, in which item No. 1 was to be a vote on a resolution regarding Mitsui's membership. At the meeting the following resolution was put to a vote:

Whereas, Mitsui Line having been admitted to membership in the Pacific Coast European Conference effective as of February 1, 1956, conditioned upon the taking of such action, satisfactory to the Conference, as might be necessary to effect its withdrawal from proceedings before the Federal Maritime Board in which its position was opposed to that of the Conference, and

Whereas, Mitsui has filed motions with the Board in accordance with the contents of the Board's letter to Mitsui dated March 5, 1956, said motions, copies attached, requesting the Board to terminate the proceedings in Dockets 764 and 773 and Docket 767 with respect to Mitsui,

Now, therefore, be it Resolved, That the Conference hereby records that the condition imposed upon Mitsui's membership has been fulfilled, and said condition is no longer of any force or effect, and

Be it further Resolved, That a copy of this resolution be furnished the Federal Maritime Board at its offices in Washington, D. C. and to Mitsui Line.

This resolution failed to pass and the conference then passed the following motion:

It is resolved that the condition imposed upon Mitsui's membership is hereby cancelled, and that it is further resolved that a copy of this resolution be furnished the Federal Maritime Board at its offices in Washington, D. C. and to Mitsui Line.

By letter of July 25, 1956, the motion was communicated to the Board.

20. The only provision in the basic conference agreement which refers to requirements of admission to conference membership are Articles 10 and 11, which state:

Article 10. MEMBERSHIP. Any person, firm or corporation regularly operating, or giving substantial and reliable evidence of intention to operate regularly, as a common carrier by water in the trade covered by this Agreement may become a member of the Conference upon the agreement of the parties as provided in Article 8 and by affixing his, their or its signature hereto, or to a counterpart hereof. No eligible applicant shall be denied membership except for just and reasonable cause and no membership shall become effective until notice thereof has been sent to the governmental agency charged with the administration of Section 15 of the U. S. Shipping Act, 1916, as amended.

Article 11. Each person, firm or corporation, exclusive of present membership or associate membership, shall, at the time of admission, deposit with the Conference, the sum of One Thousand Dollars ($1,000.00) as an admission fee.

21. Article 14 of the basic agreement provides that

If in the opinion of the Conference members failure to observe the Conference Agreement or Conference rules, regulations or tariffs, in a particular case, or cumulatively, jeopardizes the accomplishment of the basic purposes of this Agreement, the offending party may be expelled from the Conference.

and that

No expulsion shall become effective until and unless notice thereof with a detailed statement of the reason or reasons therefor and the record vote of the member lines thereon, shall have been mailed to the governmental agency charged with the administration of Section 15 of the United States Shipping Act, 1916, as amended.

22. There is nothing in the approved basic agreement which states that a carrier, otherwise qualified, must discontinue any litigation opposed to a position of the conference, and there is nothing in the standard application for membership which indicates such a condition on membership.

23. At the hearing the conference chairman appeared as a witness and presented the position of the conference as follows:

(a) Admission of new members must always be on "exactly equal terms" with all other members. If Mitsui had been admitted while continuing its position in opposition to the conference position in respect to the F. O. B. and F. A. S. shipments in Docket Nos. 764/773, and the payment of brokerage in Docket No. 767, Mitsui's position would be quite different from that of the other members.

(b) No member line may sue the conference in connection with any matter which has been agreed to by the conference, and no member line may file a

complaint against the conference with a regulatory agency such as the Federal Maritime Board. If any member line filed a complaint before the Board it would have to withdraw from membership in the conference. The basis for this is that member lines must conform to the practices and activities which are agreed to by the conference, as provided in Articles 1 and 2 of the basic agreement which read 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 cargoes 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."

"2. No party hereto shall engage, directly or indirectly, in the aforementioned transportation under terms, conditions and/or rates different from those agreed upon by and between the members hereto * * *"

(c) The purpose of imposing the condition on Mitsui's admission to the conference was to put Mitsui on the same basis as all other members, bound by the decisions and thereby bound by the position of all other members. The only other course would have been to refuse membership to Mitsui.

(d) It was the desire of the conference to dispose of the litigation referred to, since the effect on the conference of having one member suing the rest of the members, in matters of such high importance to the conference as those involved in such litigation, would create an intolerable situation.

(e) If Mitsui had become a member of the conference without withdrawing from such litigation it would have continued to litigate its position therein against the conference; a privilege no member has, since on becoming a conference member a line gives up any right to take independent action with respect to rates, tariff rules, or whatever it may be, under the conference agreement, as all members agree to be bound by the decisions of the conference.

24. The record shows that Mitsui fully complied with and gave satisfactory answers to all questions asked in the standard application form, including the answer that "We have made no cargo commitments for carriage beyond February 1st, 1956, which are at variance with Conference rates, terms or conditions." Mitsui signed the basic conference agreement whereby it agreed not to "engage, directly or indirectly, in the aforementioned transportation under terms, conditions and/or rates different from those agreed upon by and between the members hereto." There is nothing in the record to show that Mitsui would have failed to live up to such agreement even with respect to matters wherein Mitsui had taken a position before the Board contrary to the position of the conference. The conference chairman testified that he had nothing to indicate that Mitsui would have done other than honor the conference interpretation of the shippers' rate agreement with respect to f. o. b. and f. a. s. shipments.

## Issues

The issues raised by the show-cause order are as follows:

1. Was the agreement of the conference lines to admit Mitsui to conference membership on condition that it withdraw from certain proceedings before the Board in which its position was opposed to that of the conference, an agreement or modification of an agreement requiring Board approval prior to its effectuation, and if so, was the agreement effectuated without Board approval, in violation of section 15 of the Act?

2. Was said condition on Mitsui's admission to membership unjustly discriminatory or unfair as between carriers or detrimental to the commerce of the United States within the meaning of section 15 of the Act?

3. Should the Board order the "condition" cancelled by the conference?

*Contentions of the parties.* Respondents' counsel contends that the agreement imposing this condition on Mitsui's admission to the conference is not one requiring separate approval by the Board under section 15 of the Act; that the action affected Mitsui solely as a conference member and concerned only intraconference relationships; that the sole purpose was to place Mitsui on equal terms with the other members; that the action was a decision within the scope of the approved basic conference agreement; and that the condition was not unjustly discriminatory or unfair as between carriers or detrimental to the commerce of the United States.

Respondents' counsel further states that the legislative history of the Act shows that section 15 was never intended to authorize or require administrative approval by the Board of conference rules, regulations, activities, practices, decisions, or any concerted action other than conference agreements under which the carriers propose to be governed in the activities expressly enumerated in section 15, and that the activities of conferences themselves are not intended by that section to be subject to prior administrative approval.

Respondents' counsel contends that since the basic conference agreement provides that all members shall abide by the rules and regulations of the conference, including such matters as the conference considers "necessary or desirable to further the ends of the conference as set forth herein," the conference could not lawfully admit Mitsui without such a condition; that the Board and its predecessors have permitted conferences to impose as a condition on membership that applicants withdraw from any contractual commitments they may have upon rates, terms, and conditions different from those agreed

upon by the conference lines (citing *Application of G. B. Thorden for Conference Membership*, 2 U. S. M. C. 77 (1939)); and that this condition on Mitsui's admission to the conference is such a condition.

Counsel for respondents further contends that continued opposition by Mitsui on the vital matters involved in Docket Nos. 767 and 764, 773, would have been "just and reasonable cause", under Article 10 of the conference agreement, for denial of membership, and that to permit Mitsui to receive the benefit of open conference discussions with respect to the conference's defense of cases in which Mitsui was opposed to the conference, would have been an "intolerable situation."

Counsel for respondents finally states that the Board had characterized conferences as "voluntary associations"; that it has been judicially settled that a voluntary association may place conditions on membership necessary to preserve the association and its objectives; and that membership has been considered by the courts as a privilege which the voluntary association may accord or withhold at its pleasure, and the courts have decided not to interfere to compel the admission of a person not regularly elected.

Mitsui took no position on the issues.

Public Counsel contends that the condition on Mitsui's membership is a sufficiently important and unorthodox matter as to constitute a section-15 agreement which requires specific filing with and approval by the Board, and since there has been no Board approval, effectuation by the conference has been violative of section 15.

Public Counsel states that there is nothing in the approved basic agreement which authorizes the imposition of the condition; that nothing in the historical practice of the conference contemplated the imposition of the condition; that it has been the consistent policy of the Board that common carriers must be free to join conferences; and that if conference agreements are unreasonably exclusory they must be disapproved.

It is the contention of Public counsel that the condition imposed on Mitsui's admission to the conference introduces an entirely new scheme of membership standards not embodied in the basic agreement, and that the Board has authority to determine as a matter of law whether an agreement between carriers has been authorized by an approved basic agreement.

Public Councel states that the agreement has been effectuated without Board approval, in violation of section 15; that such violation has been consciously flagrant and deliberate; and that respondents should be penalized as provided by section 15.

## Discussion and Conclusions

We consider, first, the question of whether the agreement between the member lines of this conference to impose upon Mitsui, as a prerequisite to its admission to conference membership, the condition that it withdraw from litigation pending before this Board wherein Mitsui's position was opposed to that of the conference, is an agreement, or modification to an agreement, which requires filing with and approval by the Board under section 15 of the Act.

If the imposition of the condition is an agreement or modification to an agreement

(1) fixing or regulating transportation rates or fares, or

(2) giving or receiving special rates, accommodations, or other special privileges or advantages, or

(3) controlling, regulating, preventing, or destroying competition, or

(4) pooling or apportioning earnings, losses, or traffic, or

(5) allotting ports or restricting or otherwise regulating the number and character of sailings between ports, or

(6) limiting or regulating in any way the volume or character of freight or passenger traffic to be carried, or

(7) in any manner providing for an exclusive, preferential, or cooperative working arrangement

then it must, under section 15 of the Act, be filed with and approved by the Board prior to effectuation.

The questions of whether the Board may, under section 15, approve such agreement, is irrelevant to this question, and will be discussed separately hereafter.

We feel that the agreement to impose this condition on Mitsui's admission to conference membership is clearly an agreement or modification to an agreement, controlling, regulating, preventing, or destroying competition, and a preferential or cooperative working arrangement, within the meaning of section 15.

Under conference agreements, competing carriers in a particular trade fix and establish uniform rates and charges for transportation and uniform rates and charges for brokerage payments, abide by uniform tariff rules and regulations, and establish uniform rules and regulations for carrying out the provisions of the conference agreement. Such conference agreements have been recognized by Congress as necessary and desirable in order to maintain stability of rates and adequacy of service in our foreign commerce. Congress has provided, therefore, that the Board may, under the authority of and in accordance with the provisions of section 15 of the Act, approve agree-

ments between carriers and thereby exempt such agreements from the operations of the antitrust laws.

Where concerted action under conference agreements is approved by the Board, it is apparent that the degree to which common carriers operating in the trade are free to enter the conference and operate under the conference system, vitally affects the extent to which conference agreements control and regulate competition. The Board has consistently recognized that admission or nonadmission of an applicant to conference membership directly affects the competitive conditions in a particular trade.

The Board's predecessor has stated that:

> the failure to admit complainant to conference membership, including participation in shippers' contracts entered into pursuant to said agreement, resulted in the agreement and contracts being unjustly discriminatory and unfair as between complainant and defendants, thus subjecting the agreement to disapproval or modification under section 15 of the Shipping Act, 1916, as amended. (*Sprague S. S. Agency, Inc.* v. *A. S. Ivarans Rederi*, 2 U. S. M. C. 72, 76 (1939)).

To the same effect see also *Phelps Bros. & Co., Inc.* v. *Cosulich-Societa, Etc.*, 1 U. S. M. C. 634 (1937); *Waterman S. S. Corp.* v. *Arnold Bernstein Line*, 2 U. S. M. C. 238 (1939); *Cosmopolitan Line* v. *Black Diamond Lines, Inc.*, 2 U. S. M. C. 321 (1940); *Black Diamond S. S. Corp.* v. *Cie M't'me Belge* (*Lloyd R.*) *S. A.*, 2 U. S. M. C. 755 (1946).

The Board and its predecessors have consistently treated conditions effecting admission to conference membership as agreements or modifications to agreements, which require approval or disapproval under the provisions of section 15 of the Act. (Cases cited in previous paragraph, and *Pacific Coast European Conference*, 3 U. S. M. C. 11 (1948)).

*Pacific Coast European Conference*, *supra*, is particularly applicable to this problem because it clearly indicates (a) that the Maritime Commission and this conference itself have recognized that imposition of conditions on admission to membership are agreements or modifications to an agreement which are required to be filed with and approved by the Board under section 15; (b) that in fact agreements by this conference imposing conditions on admission to membership have been filed for approval under section 15; and (c) that under the authority of section 15 the Commission required this conference to modify its agreement pertaining to conditions on admission of new members. The decision in that case states at page 12:

> This is an investigation instituted upon our own motion to determine (1) whether a *proposed modification* (Agreement No. 5200–2) to Article 11 of Pacific

Coast European Conference Agreement (Agreement No. 5200) increasing the admission fee of members from $250 to $5,000 should be approved; (2) whether Agreement No. 5200 should be cancelled or modified because of the restrictions contained in Article 10 thereof, *which limited admission to the conference* to those persons, firms, or corporations regularly engaged as common carriers by water in the trade covered by the agreement * * *. (emphasis added).

The Commission found the increase in admission fee, item (1) above, was so high as to be unjustly discriminatory and detrimental to the commerce of the United States, and disapproved Agreement 5200–2; as to item (2) above, the Commission stated at page 12:

Since the hearings, respondents filed, and the Commission approved, Agreement No. 5200–4, which modified Article 10 by eliminating the restriction mentioned above so that common carriers regularly engaged *or giving substantial and reliable evidence of intention of operating regularly* in the trade may qualify for membership in the conference. That issue will not be considered further.[5]

The record further shows that a modification to Article 11 which would increase the admission fee to this conference from $250 to $1,000 was filed with the Board by this conference for approval as Agreement No. 5200–10, and was approved by the Board on May 17, 1949.

We think that the addition of a new condition on admission to membership in the conference is as much a "modification" of the conference agreement as the changing of a condition already written into such agreement. In both situations the agreement is "modified" to the extent that conditions for admission to membership are changed.

The condition imposed on Mitsui's admission to the conference forced Mitsui to either (a) continue as a party in litigation before the Board, wherein its position was opposed to that of the conference, and thereby be denied admission to conference membership, or (b) withdraw from such litigation and thereby qualify for conference

[5] In recognition of the fact that restrictions on conference membership will have a real effect on competition in a trade, the Board and its predecessors have repeatedly refused to approve conditions and restrictions on membership other than such a requirement of operating, or giving intention to operate, regularly in the trade. See cases cited, *supra*. In the *Black Diamond* case, at page 759, the Commission stated:

"A proper clause for the admission of new members, in line with the clause insisted upon by us in new agreements submitted for our approval, would be somewhat as follows:

'Any common carrier by water as defined in section 1 of the Shipping Act, 1916, as amended, 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 between ports within the scope of the agreement, may hereafter become a party to this agreement * * *.' "

For other indications of this consistent policy that conference membership must be open to any qualified line without restriction, see *Isbrandtsen Co.* v. *N. Atlantic Continental Frt. Conf. et al.*, 3 F. M. B. 235 (1950); *Contract Rates—Japan/Atlantic—Gulf Freight Conf.*, 4 F. M. B. 706 (1955); the dissent of the Chairman in *Contract Rates—Trans-Pacific Freight Conf. of Japan*, 4 F. M. B. 744 (1955).

membership. This was the clear and obvious intent and purpose of the conference in imposing such a condition.

To the extent Mitsui might be precluded by the condition from joining the conference, the condition clearly controlled and regulated competition in the trade. To the extent it forced Mitsui to withdraw from pending proceedings before the Board and deprived Mitsui of its right to continue as a party in proceedings before the Board [6] in which Mitsui argued that certain competitive practices of this conference were unlawful under the Act, it is equally apparent that the condition was calculated to have an effect upon competitive practices in the trade.

It is furthermore apparent that respondents themselves recognize that the condition imposed on Mitsui's admission to the conference was calculated to have an effect on competitive conditions in this trade, and that the condition was part of this conference's "efforts to meet nonconference competition." The first sentence in respondents' brief states at page 1:

> This [Board investigation in Docket No. 792] is one of several cases brought against the Pacific Coast European Conference *to restrict its [the conference's] efforts to meet non-conference competition.* (emphasis added.)

From the foregoing analysis we find and conclude that the agreement to impose this condition on the admission of Mitsui to membership in this conference was an agreement between carriers, or modification of an agreement between carriers, controlling, regulating, preventing, or destroying competition, and a preferential or cooperative working arrangement within the meaning of section 15 of the Act, which requires approval by the Board prior to effectuation.

We next consider whether the agreement to impose the condition has been filed with and approved by the Board as required by section 15.

It is apparent from the record that this agreement itself has never been presented to the Board for approval or disapproval and has never been separately approved by the Board. The argument advanced to support the contention that the agreement is one which has properly been approved by the Board, is that the condition was merely a routine action of the conference to place Mitsui on equal terms with all other conference members; that as a conference member Mitsui must be bound by all rules and regulations agreed to by the confer-

[6] Section 22 of the Act provides that "any person may file with the board a sworn complaint setting forth any violation of this Act by a common carrier by water * * *." We think such statutory right necessarily includes the right to carry such a complaint through full legal process to a final conclusion.

ence; and that the action was a decision within the cover of authority of the existing approved basic conference agreement.

The basic conference agreement contains no provision that an applicant for membership in the conference must withdraw from pending litigation in which its position is opposed to that of the conference. The standard application form which has been used by this conference for many years, and which was fully completed by Mitsui, does not indicate the existence of any such condition on membership. The record fails to show any instance where such a condition was imposed upon an applicant as a requirement for admission to this conference.[7] The only reference to conditions on admission to conference membership are contained in Articles 10 and 11 of the basic conference agreement.

It is true that in order to become a member of the conference an applicant carrier, when signing the conference agreement, agrees to be bound by the terms thereof, together with the conference uniform tariff rates, rules, and regulations. It is apparent that if a member line, in connection with its transportation activities, refuses or is unable to abide by any provisions of the agreement, tariff rates, or rules and regulations, it may be expelled from the conference, and in like manner an applicant who refuses or is unable to abide by the agreement and the uniform tariff rates, rules, and regulations may be properly denied admission to the conference. The Board and its predecessors have specifically held such actions by conferences to be proper and within the scope of their approved basic agreements.

In *Practices of Fabre Line and Gulf/Mediterranean Con.*, 4 F. M. B. 611 (1955), Fabre Line had been expelled from the conference because it violated specific provisions of the conference agreement. In approving such expulsion the Board stated at page 642:

> 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 ap-

[48] Prohibited under revised Article 5 of Agreement No. 134.
[49] Prohibited under Article 4 of Agreement No. 134 as supplemented by tariff regulations.
[50] Prohibited under Article 3 of Agreement No. 134.

[7] The argument that *Willy Bruns* v. *C. G. T.*, Docket No. 746, is a situation where this conference imposed such a condition on admission to membership, is completely untenable. In that proceeding, Willy Bruns filed a complaint with the Board seeking an order for the conference to admit it to membership. Prior to hearing, the conference admitted complainant to the conference and the complaint, thereby being satisfied, was dismissed.

proved agreement between carriers and was not in violation of section 15 of the 1916 Act.

In *Application of G. B. Thorden for Conference Membership*, *supra*, Thorden Lines had existing contracts under which it was committed to the carriage of cargoes at rates different from the agreed uniform conference tariff rates. The Maritime Commission stated at page 81:

> By the terms of the conference agreement it is provided that the members of the conference will charge and collect all freight and other charges for the transportation of merchandise carried by any vessels owned, chartered, or operated by them * * * "strictly in accordance with the rates, regulations, and charges which may be adopted by the conference." By their assumption of the Philipsons' contract and the making of the additional contracts referred to herein, Thorden Lines have placed themselves in the position of being unable to conform fully and unreservedly to the agreement of the conference to which they seek admission.

And at page 82:

> We find, in view of the contract situation in which Thorden Lines are involved, that they are not shown to be eligible for equal membership in the conference and that the record does not justify disapproval of the conference agreement.

If it were shown that Mitsui, in carrying out its transportation activities, would not or could not abide by some provision of the conference agreement, or a rate in the tariff, or any of the conference rules and regulations, then it is apparent from the foregoing that the conference could have refused admission to membership and such action would have been recognized by the Board as within the scope of the approved basic agreement. The record fails to show that Mitsui, in carrying on its shipping activities in this trade, intended to do other than abide by all the provisions of the conference agreement, tariff rates, and conference rules and regulations. Mitsui made such a representation to the conference in its application for membership, and it later signed the conference agreement without reservation. The conference chairman testified that he had no indication from Mitsui that it would do other than abide by its commitments to the conference.

The record shows only that if the condition had not been imposed by the conference Mitsui might have continued to argue before the Board the positions it had previously taken in Docket Nos. 764, 773 regarding f. o. b., f. a. s. shipments, and in Docket No. 767 regarding the conference rules in connection with payment of brokerage. Although Mitsui's position in those proceedings was opposed to that of the conference, there is no indication that Mitsui, in carrying on its

shipping activities, would not adhere to the existing conference interpretation, rules, and regulations as to f. o. b., f. a. s. shipments and as to payment of brokerage.[8]

The condition of Mitsui's admission to the conference was not required, therefore, in order to assure that Mitsui, in connection with its transportation activities, would abide by the conference agreement, tariffs, or rules and regulations.

The condition placed on Mitsui's admission to the conference forced Mitsui to either withdraw from pending litigation before the Board and thereby qualify for membership in the conference, or in the alternative, continue as a party in litigation before the Board and thereby be refused admission to the conference. We see only a difference in degree between such a condition for membership and a condition that no conference member may file a complaint with the Board or take part in proceedings before the Board where its position is opposed to that of the conference.

The conference chairman also could see little if any difference between these two situations. He clearly testified that no member line may file a complaint against the conference before the Board, or take a position before the Board in opposition to an agreed position of the conference. If a member line filed such a complaint it would be expelled from the conference. Therefore, he contended, to admit Mitsui to membership while arguing positions before the Board in opposition to the conference would place Mitsui in a position substantially different from the other member lines. The recommended decision follows this rationale.

This reasoning appears to be based on the premise that there is now understanding or arrangement between the member lines that no member line may file such a complaint with the Board. The record does not support the statement that such an agreement, understanding, rule, or regulation exists, or that the member lines of this conference have ever entered into such an understanding or agreement, or adopted any such rule or regulation. No such agreement has ever been presented for approval under section 15, and none has been granted approval under that section. Section 22 of the Act, as observed in footnote 6, provides:

> that any person may file with the board a sworn complaint setting forth any violation of this Act by a common carrier by water * * *.

The Board, in carrying out its regulatory functions, relies to a large extent on the filing of complaints by private parties under

[8] Respondents argue that this condition on Mitsui's admission to the conference is a situation analogous to that presented in the *Thorden* case, *supra*. We think our analysis herein clearly distinguishes the two situations.

section 22. We would not approve an agreement between carriers which would interfere with the statutory right of "any person" to complain to the Board of activities which may be violative of the Act, and which might interfere with the Board's carrying out of its regulatory functions.

We do not agree, therefore, that imposition of this condition on Mitsui was required under the provisions of the conference agreement in order to place Mitsui on equal terms with other conference members, by reason of the fact that other members could not file a complaint before the Board.

Respondents contend that (a) the approved basic agreement contains a provision that all members of the conference shall be bound by all decisions of the conference which, "in the opinion of the members of the conference, are necessary or desirable to further the ends of the conference as set forth herein" (Agreement No. 5200, Article 6); (b) their positions in Docket Nos. 764, 773, and 767 were "necessary or desirable to further the ends of the conference as set forth" in the basic agreement; and (c) imposition of the condition was within the scope of the conference agreement and no further approval was required under section 15.

The recommended decision of the examiner found and concluded that, since the approved basic agreement contained a provision that "no eligible applicant shall be denied membership except for just and reasonable cause", and since this condition was "just and reasonable," it was within the cover of authority of the approved basic agreement and no separate approval under section 15 was therefore required. From this reasoning it would necessarily follow that if this condition were found to be *not* "just and reasonable", the agreement to impose the condition would *not* be within the cover of authority of the approved basic agreement and the imposition of the condition would have been a violation of section 15.

Under such a "cover of authority" doctrine, until the Board makes a final determination, after a full evidentiary hearing, as to whether an agreement to impose a particular condition may be "just and reasonable," neither the Board, the conference members, nor anyone else would know whether such an agreement should have been filed with and approved separately by the Board under section 15. The instant proceeding is an example of the problems which such a theory would create. Here the condition already has been imposed against Mitsui and the agreement between carriers has been effectuated and completed. After a full evidentiary hearing, and over a year after the agreement has been carried out, the Board, if it should

follow this cover-of-authority doctrine, would now determine retroactively whether the condition was "just and reasonable", and therefore lawful when effectuated, or was "unjust or unreasonable", and therefore unlawful when effectuated prior to filing with and approval by the Board, in violation of section 15. Under different circumstances an agreement might be in effect for substantially longer than one year before the Board could determine, after an evidentiary hearing, that it was not within the scope of authority of general language contained in the basic agreement and therefore retroactively unlawful. We think such a theory is inconsistent with the regulatory powers vested in the Board; is not contemplated by section 15; and has been rejected by the courts and the Board in recent decisions.

Prior to the decision of the Court of Appeals in *Isbrandtsen Co.* v. *United States*, 211 F. 2d 51 (D. C. Cir. 1954), activities of the general character of this condition were often considered to be routine actions within the cover of authority of the approved basic agreement and not requiring separate approval under section 15. See *Pacific Coast European Conf.—Payment of Brokerage*, *supra*, page 703.

In the *Isbrandtsen* case, *supra*, the court laid down a judicial standard for determining agreements which require specific approval under section 15 as distinct from routine conference activities flowing from approved basic conference agreements. The Board in that proceeding argued to the court that approval of a basic conference agreement which authorized the fixing of rates conferred a scope of authority within which conference carriers might, without separate Board approval, institute a dual-rate system, and that such a system was therefore a lawful and routine action without separate Board approval. The court rejected this argument, stating at page 56:

> "Agreements" referred to in the Shipping Act are defined to include "understandings, conferences, and other arrangements." Clearly, a scheme of dual 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.[9]

[9] Although the approved conference agreement considered in the *Isbrandtsen* case contained no language which provided for the institution of the dual-rate system, the Board has recently indicated that the *Isbrandtsen* case would have reached the same result even if the approved basic agreement contained specific language authorizing the institution of a dual-rate system.

Since the *Isbrandtsen* case the Board has on at least three occasions considered whether certain practices and agreements of conferences were routine activities within the scope of the approved basic agreement, or were new agreements, or modifications to an agreement, which required separate approval under section 15. Two of these proceedings involved respondent conference. In *Pacific Coast European Conf.—Payment of Brokerage*, *supra*, the Board stated at page 703:

> 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.

Again, in *Mitsui Steamship Co.* v. *Anglo Canadian Shipping Co.*, *supra*, the Board stated at page 92:

> * * * *and since the new agreement has a secondary effect on nonsignatory buyers, not the natural and logical result of the agreement as written,* we find that the new conference interpretation is an agreement or a modification of an approved agreement between carriers which requires specific approval under section 15 of the Act, and which has been effectuated prior to such approval in violation of section 15. (emphasis added)

In *American Union Transport* v. *River Plate & Brazil Confs.*, 5 F. M. B. 216 (1957), the conference argued that concerted action it had taken with respect to brokerage was within the scope of authority of the approved basic agreement which authorized the member lines to "consider and pass upon * * * any matter involving * * * brokerages." The Board rejected this cover-of-authority argument, citing the *Isbrandtsen* case, *supra*, and stating at page 222:

> Approval of that language did not constitute a "cover of authority" under which any future agreements by respondents concerning brokerage were given prior approval.

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In *Secretary of Agriculture* v. *N. Atlantic Cont'l Frt. Conf.*, 5 F. M. B. 20 (1956), the Board stated at page 25:

> Article 3 of the basic agreement specifically provides for establishment of dual rates and authorizes the conference chairman or secretary to negotiate and execute such dual-rate contracts in the manner as may be authorized by the conference.

and at page 37:

> The conference has not considered its filing under General Order 76 to be a filing for approval under section 15 of the Act, arguing that the earlier approval of the basic agreement with its provision for dual rates makes any further approval unnecessary. The conference overlooks the facts, however, that it does not presently employ the dual-rate system and that its present filing is an application to institute or at least to reinstitute a dual-rate system. To this extent, we are unable to distiguish these circumstances from those before the court in *Isbrandtsen Co.* v. *United States et al,* 211 F. 2d 51 (D. C. Cir. 1954), where an agreement to institute dual rates was held to be an agreement or modification of an agreement between carriers which required approval under section 15.

We do not consider past approval of Article 10, including its reference to "just and reasonable cause" for denial of conference membership, to be a continuing pre-approval of any new or modified condition on membership which may hereafter be found to be "just and reasonable." Nor do we consider past approval of Article 6, including its provision that all members shall be bound by conference rules and regulations which, "in the opinion of the conference, are necessary or desirable to further the ends of the conference," to be a continuing pre-approval of any condition on admission to membership later found to be "necessary or desirable to further the ends of the conference."

Under the standards laid down in the foregoing cases, we think it apparent that the agreement among the member lines of this conference to impose this condition on Mitsui's admission to the conference cannot be considered a routine action within the cover of authority of the approved basic agreement.[10] It cannot be considered an "interstitial sort of adjustment;" it clearly creates an entirely new scheme of membership requirements not embodied in the basic agreement.[11] It modifies the standards of admission to conference membership in a manner which "is not the natural and logical result of the agreement as written." [12] To the extent it creates restrictions on admission to conference membership, or interferes with the statutory right of a "person" to complain to the Board of competitive practices violative of the Act, it clearly affects more than purely intraconference competition.[13]

We find and conclude, therefore, that this agreement among the member lines of this conference to impose this condition on Mitsui's admission to the conference, is an agreement or modification to an agreement, within the purview of section 15, which has not been approved by the Board, and which may not lawfully be effectuated without our prior approval.

In reaching this conclusion it has not been necessary to consider whether the agreement is "just and reasonable," [14] "unjustly discrim-

[10] The record shows that the agreement to impose this condition was not considered "routine" by the conference. Testimony shows that the condition was first considered and acted upon by the conference Advisory Committee, which handles matters of "more than mere routine value to the conference."

[11] *Isbrandtsen Co.* v. *United States, supra.*

[12] *Mitsui Steamship Co.* v. *Anglo Canadian Shipping Co., supra.*

[13] *Pacific Coast European Conf.—Payment of Brokerage, supra.*

[14] We feel that "just and reasonable" is virtually coextensive with "unjustly discriminatory or unfair" or "detrimental to the commerce of the United States", as used in section 15. If found "just and reasonable", an agreement will probably be approvable under section 15; if "unjust and unreasonable", it will probably not be approvable. Counsel for respondents appears to agree with this analogy, as indicated on page 14 of his brief, which states:

inatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competititors," or operates "to the detriment of the commerce of the United States," or is "in violation of this Act." These are factors to be considered in determining whether the Board shall, under section 15, approve or disapprove the agreement—they are not factors to be considered in determining whether the agreement is one which must be filed with and approved by the Board.

This distinction has been clearly recognized by the Board in cases previously cited. In Docket No. 767, *supra*, the Board, after determining as a matter of law that the brokerage rule therein considered was an unapproved section-15 agreement, stated at page 703:

> 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 to an agreement within the meaning of section 15 which may not be effectuated without our prior approval.

In *Mitsui Steamship Co.* v. *Anglo Canadian Steamship Co.*, *supra*, the Board found the conference's new interpretation of its shippers' rate agreement to be an agreement, or modification to an agreement, within the purview of section 15, and stated at page 92:

> It is unnecessary for us here to consider whether the new conference interpretation is detrimental to the commerce of the United States. Detriment to the commerce of the United States is a ground for disapproval of a section-15 agreement.

In Docket No. 767, *supra*, the Board reached a further conclusion which we think is sound and consistent with our conclusions herein. That proceeding held that the Board could determine "as a matter of law," and without the necessity for an evidentiary hearing, whether a particular agreement is one which comes within the purview of section 15 of the Act, requiring filing with and approval by the Board prior to effectuation. The Board stated at page 703:

> 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

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> * * * it is evident that just and reasonable cause is a question of fact and as an issue is not distinguishable from that set forth in the Board order as the second issue in this proceeding [is the agreement unjustly discriminatory or unfair or detrimental to commerce].
>
> The examiner's recommended decision also adopts this analogy in finding, first, that the agreement is "just and reasonable" and therefore within the scope of the basic agreement, and then finding that, since it is "just and reasonable," the condition is not unjustly discriminatory or unfair or detrimental to the commerce of the United States.

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 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.

In its report on reconsideration in the same proceeding (5 F. M. B. 65), the Board further held that it has authority to stay or suspend the effectuation of such an unapproved section-15 agreement.

If the Board's declaration of a violation of section 15 must await the results of a determination as to whether a particular agreement may be "just and reasonable," or is within the scope of some other general or vague standard contained in the basic agreement, then the Board will lose much of the regulatory power which it properly exercised in Docket No. 767.

We next consider whether this agreement has been effectuated by respondents without prior approval of the Board, in violation of section 15.

In accordance with the condition attached to its admission to the conference, Mitsui notified the Board on December 21, 1955, that it "withdraws from various litigation pending before the Federal Maritime Board in which its position may be opposed to that of the Pacific Coast European Conference." The conference on December 23, 1955, notified Mitsui that this was "satisfactory information that Mitsui has withdrawn from pending litigation," and that upon execution of the conference agreement and payment of the admission fee, Mitsui would be admitted to membership effective February 1, 1956. On January 7, 1956, the conference notified the Board that:

Since Mitsui Line has now met the qualifications and placed itself on equal terms with the present members, it is fully qualified for membership under the conference agreement and has been admitted effective as of February 1, 1956.

Although subsequent to such admission the conference notified the Board on April 9, 1956, that the conference "suspended" the condition, it is apparent from the record that the conference considered that, as a practical matter, Mitsui would take no further part in the proceedings and that the condition was already an accomplished fact. When counsel for Mitsui later appeared in oral argument before the Board in Docket Nos. 764, 773 for a limited purpose only and not to participate actively in the case, the conference, as a result of such appearance, again insisted that Mitsui refile its notice of withdrawal and discontinue its participation in proceedings before the Board wherein its position was opposed to that of the conference. This Mitsui did, and its motion to terminate the proceeding as to it

was granted in Docket No. 767, and in Docket Nos. 764, 773 was treated as moot since the Board report therein had been issued.

We conclude that this agreement between carriers was effectuated by respondents prior to approval by the Board, in violation of section 15.

Having concluded that the agreement to impose the condition has not been approved and was effectuated in violation of section 15, Board Member Stakem feels it is unnecessary for the Board to determine whether the agreement should be disapproved as unjustly discriminatory or unfair or detrimental to the commerce of the United States, within the meaning of section 15. Vice Chairman Guill feels the Board should make a specific finding on this issue, and his views are set forth in a separate concurring opinion.

We recognize that past requirements as to what agreements should be filed for separate approval under section 15 have not been precisely defined, and we have proposed that a rule-making proceeding be instituted to more specifically define the types of agreements which require our approval under section 15 before effectuation. See Docket No. 767, *supra*, page 704.

We recognize further that the Board, in the proceedings from which Mitsui was required to withdraw, did not terminate those cases but carried them through to a final conclusion. No rights have therefore been substantially affected by the particular violation of section 15 herein found.

In view of the foregoing, and in the exercise of the administrative discretion vested in us, we will not in this particular proceeding take any action aimed at collection of penalties provided in section 15.

An appropriate order will be entered.

Vice Chairman Guill, concurring:

I concur in the foregoing opinion subject to the following additional comments.

Having concluded that the imposition of the condition prior to Board approval was unlawful and in violation of section 15, I recognize that it is not essential to the disposition of this proceeding to determine whether the condition is unjustly discriminatory or unfair, or detrimental to the commerce of the United States i. e., should this agreement be approved or disapproved by the Board under the standards of section 15. I think it appropriate, however, for the guidance of this and other conferences to state my views on this issue.

In my opinion this agreement is clearly unjustly discriminatory and unfair and detrimental to the commerce of the United States within the meaning of section 15. It should be expressly disapproved.

Respondents argue that since the conference is a "voluntary association" it may set its own rules and regulations on admission to membership without interference from the Board; that such membership is a privilege which the voluntary association may accord or withhold at its pleasure; that the courts have decided not to compel the admission of a person not regularly admitted; and that this condition on Mitsui's admission therefore was just and reasonable and not unjustly discriminatory or unfair as between carriers or detrimental to the commerce of the United States (citing numerous cases for these propositions of law).

I do not disagree with these general statements of law as applied to voluntary associations such as the "Building Trades Council of Sacramento", "Ancient Egyptian Arabic Order of the Mystic Shrine", "American Society of Composers, Authors & Publishers", "American Association of University Women", and "North Central Association of Colleges and Secondary Schools," which were considered in the cases cited by respondents. See brief of respondents in this proceeding, page 18.

I do think, however, that these arguments are patently wrong and inapplicable to regulatory proceedings involving shipping conferences organized and functioning under the jurisdiction of the Board pursuant to the Act, and particularly section 15 thereof.

Competing carriers under a conference system are permitted, with proper approval and regulation by the Board, as set forth in section 15, to fix rates, to set uniform competitive practices, and to control and limit competition in other ways. Such concerted actions would manifestly violate the antitrust laws except for the fact that proper Board approval under section 15 exempts them from operation of those laws. Conference control and regulation of competition is permitted by virtue of Board approval—without such Board approval it would be unlawful. Being thus exempt from the operation of the antitrust laws, and subject to the continuing jurisdiction of the Board, a conference obviously is not free to set whatever conditions for membership it may deem appropriate.

The Board and its predecessors continually have recognized that conference membership should be open to any common carriers engaged in, or giving substantial evidence of intention in good faith to engage regularly in the trade, and repeatedly have refused to permit other restrictive conditions on admission to conference membership. See cases cited at pages 260 and 261, *supra.*

I think, furthermore, that certain aspects of this condition on Mitsui's admission to membership are particularly objectionable. As

previously pointed out, section 22 of the Act provides that "any person may file with the Board a sworn complaint setting forth any violation of this Act by a common carrier by water." This statutory right necessarily includes the right to carry such a complaint through full legal process to a final conclusion.

In carrying out its regulatory functions under the Act, the Board has relied to a large extent on the filing of complaints by private parties under section 22, and such complaint proceedings are an integral part of the regulatory scheme embodied in the Act. An agreement among carriers which deprives any "person" of a statutory right to complain to the Board, and which would interfere with the exercise of the Board's regulatory powers, is clearly unjust and unreasonable, and detrimental to the commerce of the United States. Such an agreement should not, therefore, be approved by the Board.

The condition imposed on Mitsui's admission to the conference was complied with by Mitsui, and the proceedings from which Mitsui was required to withdraw have been decided by the Board. Cancellation of the condition after its purpose has been accomplished was a moot and useless action by the conference.

To the extent respondents may understand that the condition on Mitsui's admission to membership is a continuing condition to be applied to any new or existing member, I feel we should expressly disapprove such an understanding.

Chairman Morse, dissenting:

I dissent. The decision of the majority begs the main issue.

Article 10 of the basic agreement establishes the conditions applying generally to applications for membership and then declares that no eligible applicant shall be denied membership "except for just and reasonable cause." This latter is the phrase which requires interpretation. In my view, the majority opinion does not interpret this phrase; it disregards the phrase. In substance, the majority opinion declares that if a given conference action amounts in fact to a modification or amendment of its basic agreement, such action must be submitted to the Board for prior section-15 approval even though the action was clearly and admittedly taken within the scope and authority of a previously approved basic agreement. In my view, under the facts presented in this case, we do not have a modification or amendment of the basic agreement unless we find the condition on membership to be unjust or unreasonable.

A denial of membership could be made by the conference in the first instance or by the Board, but from the context it is obvious that the phrase has reference to denial by conference action rather

than Board action. I reach this conclusion because it seems clear that the action of our predecessors in approving the basic agreement, including the phrase in question, gave the conference the right to exclude applicants for just and reasonable cause.

We are not here dealing with the principle of "cover of authority." Here, the authority in the first instance to establish "just and reasonable" cause was clearly and specifically granted to the conference.

Nor are we here dealing with a proposed modification or amendment of an existing agreement as in *Pacific Coast European Conference*, *supra*, and as such, one which requires a section-15 approval. Here, the conference was acting under the specific authority granted to it by the basic agreement. Whether it acted properly is for our ultimate determination, but it is clear that the conference did not purport to modify or amend the basic agreement.

I am not concerned here with the question whether it was *wise* to give the conference the authority to establish, in the first instance, just and reasonable cause for exclusion. I am not concerned because that question was answered affirmatively by our predecessors, and accordingly we have only its interpretation for consideration, not whether this Board would have approved or disapproved such general authority had the agreement been submitted to us for approval under section 15. I say "in the first instance" hereinabove because the conditions to membership established by the conference within its "just and reasonable" authority would be subject to our review in all events, as are other actions taken by conferences, and must meet the standards of the Act.

Accordingly, I assert that if a given condition imposed by the conference is found by the Board to be "just and reasonable cause," then there is no new agreement or amendment or modification of an existing agreement within the meaning of section 15, but on the contrary, it is an action taken by the conference within the framework of its approved agreement. On the other hand, if we find a condition attached by the conference to a membership application not to be "just and reasonable cause," it would then follow that such condition would constitute a new agreement or a modification of an existing agreement within the intent of section 15, and must be submitted for Board approval within the framework of section 15. The critical question is whether the condition here under consideration constitutes in fact "just and reasonable cause." The conference may propose the condition but the final determination whether it is just and reasonable is vested in the Board, and if not just and reasonable, whether it is approvable under section 15.

Today's action means that any conference which elects to take action ex parte in reliance upon such broad language in its basic agreement as "just and reasonable cause," or the like, now does so at its peril on two scores: first, on the hazard, which has always existed, that the Board may disagree and conclude the action was not in fact "just and reasonable cause;" and second, on the hazard that the Board may conclude the action taken was not "just and reasonable cause," not because the action was unjust or unreasonable in fact, but because of (1) a feeling or belief in the present Board that it was unwise on the part of the predecessors to the present Board to have granted such authority to the conference, or (2) a desire by the present Board to have more direct control of conference activities.

I do not necessarily disagree with the ends sought, but I disagree with the means used to achieve those ends. I can understand, even though I may disagree with, the view that the particular condition to membership imposed here was not in fact "just and reasonable cause." The decision of the majority makes it unnecessary to decide that matter. Under such a view, section-15 approval would be required because the condition was not one falling within the framework of the basic agreement. I cannot condone the view that, irrespective of whether the condition was in fact "just and reasonable cause," for policy reasons we should, in effect, repudiate our previous section-15 approval of the basic agreement which permits the conference to establish "just and reasonable" conditions without seeking prior section-15 approval, and instead now require section-15 prior approval to truly "just and reasonable" membership conditions.

I am concerned with the breadth of actions taken by conferences acting within such broad and general provisions contained in many approved agreements. I think it a healthy thing that conferences be required to work more closely with the Board. There is a public responsibility owed by the conferences. In my opinion, conferences are not only affected with a public interest but, being exempt, under certain conditions, from the antitrust laws, they should be scrupulous to observe all rules in order to safeguard their favored status. But the public interest requires not only that conferences abide by governing laws but equally that conferences and other persons may rely upon the integrity of Board actions.

I would initiate a proceeding to modify this and similar agreements, by deleting the phrase "just and reasonable cause" and either spell out specifically what causes constitute grounds for exclusion, or alternatively require that all proposed exclusions be submitted to the Board prior to final action being taken by the conference. In the

meantime, I would not repudiate an approved agreement which, like many others having similar broad language covering all types of conference activities, has been in effect for many years.

As the matter now stands, I would not know and I think no one else would know how to counsel a conference other than to advise it to file with the Board for section-15 approval *every* action taken, regardless of the provisions of the approved basic agreement.

## APPENDIX

*Regular members, Pacific Coast European Conference:*

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, Skibsaktieselskapet Ogeka (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)
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
Hanseatische Reederei Emil Offen & Co./Vaasan Laiva Oy (Hanseatic-Vaasa-Line)
Willy Bruns G. m. b. H. Reederei (German Fruit Line)
Mitsui Steamship Co., Ltd.

*Associate member, Pacific Coast European Conference:*

American President Lines, Ltd.

# FEDERAL MARITIME BOARD

No. 771

BANANA DISTRIBUTORS, INC.

*v.*

GRACE LINE INC.

No. 775

ARTHUR SCHWARTZ

*v.*

GRACE LINE INC.

*Submitted November 19, 1956. Decided April 29, 1957*

Respondent found to be a common carrier of bananas from Ecuador to United States Atlantic ports.

Respondent's contracting all of its refrigerated space to three shippers to the exclusion of complainants and their supporting interveners, found to be unjustly discriminatory in violation of sections 14 and 16 of the Shipping Act, 1916.

The institution by respondent of forward-booking arrangements of two year periods, under which respondent's refrigerated space would be equitably prorated among existing shippers and complainants and their supporting interveners, would be consistent with common carriage and not unjustly discriminatory in violation of sections 14 and 16 of the Shipping Act, 1916.

*Marvin J. Coles*, *Francis B. Goertner*, and *Richard W. Kurrus* for Banana Distributors, Inc., and *John J. O'Connor, Jr.*, and *John J. Foley* for Arthur Schwartz, complainants.

*John H. Hanrahan, Jr.*, *John J. McElhinny*, and *Francis A. Wade* for Stanley Grayson, *Robert F. Martin* for Robert Martin Associates, *Maurice Finkelstein*, *Thomas J. Beddow*, and *Douglass Hunt* for Irving B. Joselow and Compania Frutera Sud Americana (Ecuador) S. A., and *George F. Galland* and *William J. Lippman* for Philip R. Consolo, interveners.

*Lawrence J. McKay*, *Arthur Mermin*, and *James E. Greeley* for respondent.

*Robert Blackwell* as Public Counsel.

REPORT OF THE BOARD

CLARENCE G. MORSE, *Chairman*, BEN H. GUILL, *Vice Chairman*, THOS. E. STAKEM, JR., *Member*.

By the Board:

These two cases arise out of complaints filed by Banana Distributors, Inc. ("Banana Distributors"), and Arthur Schwartz ("Schwartz"), alleging that Grace Line Inc. ("Grace"), a common carrier by water between Ecuador and Atlantic coast ports, refused to carry complainants' bananas in its refrigerated ("reefer") space, in violation of sections 14, 15, and 16 of the Shipping Act, 1916 ("the Act"), and of sections 1 and 2 of the Sherman Antitrust Act ("the Sherman Act").[1]

Schwartz and Stanley Grayson ("Grayson") intervened in No. 771; Banana Distributors intervened in 775; Irving B. Joselow ("Joselow"), Compania Frutera Sud Americana (Ecuador) S. A. ("Frutera"), Philip R. Consolo ("Consolo"), Robert Martin Associates ("Martin"), and Public Counsel intervened in both proceedings. Grayson and Martin substantially supported the contentions of complainants whereas Joselow and Frutera supported the position of Grace. Consolo intervened only as his interests appeared.

The cases were consolidated for hearing, and the examiner served his recommended decision on June 1, 1956. Exceptions to this decision were filed by Grace, Joselow, Frutera, and Consolo. Replies to the exceptions were filed by complainants and Public Counsel, and the matters were argued orally before the Board.

The Board is in general agreement with the examiner. Exceptions taken and recommended findings not discussed in this report have been given consideration and have been found either not related to material issues or not supported by the evidence.

Complainants ask the Board to (1) declare the contract between Grace and the existing banana shippers in this trade contrary to law and void, (2) direct Grace to desist from further carrying out the illegal contracts, (3) require Grace to allot reefer space to complainants in an amount deemed fair and reasonable by the Board, and (4) award other relief which the Board deems proper.[2]

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[1] Complainant in No. 771 abandoned the Sherman Act allegations in its brief.

[2] Although reparation was demanded, all parties agreed to defer this question.

Grace opposes these demands, contending that (1) it is a contract carrier of bananas in this trade, and therefore its banana operations are not subject to the Act, and (2) the Board is without jurisdiction to determine the validity of its banana contracts in the light of the Sherman Act.

## The Facts

Respondent is the only U. S.-flag operator offering a common carrier berth service on Trade Route No. 2, and is a party to an operating-differential subsidy agreement with the Board covering this service. In this service, Grace operates three freighters with approximately fortnightly sailings and six combination passenger-cargo vessels with weekly sailings, all of which vessels have reefer facilities. United Fruit Company and Standard Fruit Company have vessels plying this trade route, but they carry bananas as exclusively proprietary cargo. Grancolombiana Line and Chilean Line, both foreign-flag operators, operate berth line vessels with reefer space in this trade, but Grancolombiana calls at Philadelphia before New York City, and due to infrequent or irregular service Chilean Line is not a satisfactory banana carrier.

All of the bananas carried by Grace from Ecuador to New York since the inception of its reefer service on Trade Route No. 2 in 1934 have been by contract, and bananas are the only product carried on a contract-carrier basis; every other commodity is carried as common carriage.

At present, three shippers [3] utilize all of Grace's reefer space under two-year contracts, and the contracts are renewable, at the option, however, of the carrier.

Each shipper has exclusive use and control of individual compartments. The shipper loads the vessel at Guayaquil, Ecuador, at his own risk and expense, and unloading is performed by Grace at the risk of and for the account of the shipper. Grace follows the shipper's temperature control instructions en route. Except in rare instances, all shippers have requested that their bananas be transported at the same temperature.

Loading of bananas at Guayaquil is difficult. Port limitations necessitate loading offshore from barges. The vessel is available for loading at Guayaquil for about 12 hours only. Each shipper moves his bananas shipside by barge, where gangways are erected into side ports and loading is accomplished manually. When one shipper completes his loading and stowing another shipper draws his barges alongside and the entire operation is repeated.

[3] Joselow, Frutera, and Consolo.

Growing, shipping, and marketing of bananas, due to the nature of the commodity itself, requires a carefully synchronized operation. Bananas grow quickly, and once cut from the plants are subject to rapid ripening. A shipper requires an assured amount of space in order to integrate his entire operation properly. There are no shoreside refrigerated warehouses in Guayaquil, and refrigeration does not prevent the normal ripening process. Shippers rigidly inspect bananas prior to their loading and stowing in order to prevent the shipment of overripe or sigatoka-diseased bananas since they could adversely affect otherwise "healthy" bananas. Each shipper strives to have his fruit reach destination as green as possible.

On this trade route Grace carries Chilean fruit northbound in its reefer space during the Chilean fruit season, thereby reducing the space otherwise available for bananas. There is no commingling of Chilean fruit with bananas due, in part, to the difference in temperature requirements between the Chilean fruit and bananas. The Chilean fruit, although carried under terms of common carriage, is carried subject to "special arrangements" with the shippers.

Banana Distributors is an experienced importer and distributor of bananas. At present, this complainant imports a substantial quantity of bananas from Panama and, as the New York agent for Consolo, distributes Ecuadorian bananas. This complainant has requested reefer space of Grace since 1953, but each request has been positively denied. Schwartz has been connected with the banana business since 1928 and his business reputation is good. He has requested space since 1946 but his requests have been denied. Grace offered Schwartz reefer space on the cargo vessels but because these vessels could offer a fortnightly service only, he refused it. Although Schwartz has had financial difficulties there is no evidence that respondent denied him space for this reason.

Grayson has been in this business since 1942 and has had considerable experience importing bananas. At present not an importer, he is associated with others in a wholesale banana business in New York. Although he himself cannot finance a banana operation from Ecuador, he can obtain the necessary backing if he can secure space. He has requested reefer space from respondent since 1945, to no avail.

Martin has had limited experience in the banana trade, but is presently associated with others in a proposed banana importing project. One of his associates has had experience importing bananas from Ecuador. Grace has refused Martin reefer space since 1954. This intervener apparently has sufficient financial backing to engage in this trade and has agreed to post a performance bond with Grace.

## Findings and Recommendations of the Examiner

The examiner concluded upon the record that (1) Grace is a common carrier of bananas in this trade, and (2) the denial of reefer space to complainants and supporting interveners resulted in unjust discrimination, in violation of sections 14 and 16 of the Act. He recommended that (1) the Board order Grace to cancel its existing contracts with the three banana shippers in this trade, (2) the Board order Grace to prorate its reefer space on a fair and reasonable basis among existing shippers, complainants, and interveners under two-year forward-booking arrangements, and (3) the Board hold the record open for a certain period in which Grace might accomplish these directives.

The examiner also recommended that, in view of his finding that Grace's operations in the premises resulted in violations of sections 14 and 16 of the Act, it was unnecessary to make any findings respecting possible violations of the Sherman Act. No findings as to any violations of section 15 of the Act were made inasmuch as agreements between carriers and shippers—the contracts or agreements here—do not fall within the purview of this section.[4]

## Exceptions

Respondent excepted to the findings and conclusions of the examiner, contending that (1) it is a contract carrier of bananas in this trade, (2) its exclusion of complainants and others from participation in its reefer space was not in violation of sections 14 and 16 of the Act, and (3) the recommendation that a 2-year forward-booking arrangement be adopted in the banana trade is not common carriage but is a form of contract carriage and at any rate would be unworkable. The exceptions of Joselow, Frutera, and Consolo present no issues not raised by Grace.

Complainants, their supporting interveners, and Public Counsel urge the adoption by the Board of the recommended decision.

## Discussion and Conclusions

It is acknowledged that banana shippers have made substantial investments in their trade, that the entire operation, from grower in

[4] Complainant in Docket No. 771 alleged that Grace, as a member of the steamship conference covering this trade, under an agreement approved by the Board (F. M. B. Agreement No. 3302), operated contrary to the terms of the conference agreement and hence in violation of section 15. However, complainants did not pursue this argument in its brief, and since neither the conference nor the members thereof were parties to these proceedings, no determination of the issue is here made.

Ecuador to retailer in the United States, requires careful coordination, that bananas ripen rapidly, that care in shipment is essential, that the fruit is highly perishable, and that loading is difficult and must be accomplished within a relatively short time. On the other hand, the record clearly indicates that bananas are readily available to newcomers to the trade, that bananas from different plantations have been successfully mixed in a single compartment, that all exporters carefully inspect the fruit before loading, and that carrying temperatures seldom vary. No doubt loading and stowing difficulties will increase as the number of shippers increase, but this factor is present in every trade and is no excuse for the carrier discriminating against some shippers in favor of a few.

On the whole, this record supports the conclusion that bananas are susceptible to common carriage, and it follows that respondent, a common carrier of general cargo, has carried under contract a commodity which is capable of being and should have been carried under terms of common carriage.

The so-called specialty cases relied upon by Grace as authority to except bananas from common carriage are not sufficient to bring this commodity into that class. Indeed, the cases most prominently urged upon the Board, the *Express Cases*, 117 U. S. 1,601 (1886), and the *Voigt*[5] case, are completely inapplicable: they deal with the question whether a common carrier obligation is owed by one common carrier to another common carrier who is a shipper; in each case the Court indicated that a different result might have been reached had a normal shipper-carrier relationship been presented. For example, in the *Express Cases*, at page 28, the Court said:

> If the general public were complaining because the railroad companies refused to carry express matter themselves on their passenger trains, or to allow it to be carried by others, different questions would be presented.

Further, none of the specialty cases cited indicates that a common carrier could, in carrying the specialty under contract, unjustly discriminate against other shippers similarly situated. In *U. S.* v. *Contract Steel Carriers*, 350 U. S. 409 (1956), the Supreme Court upheld the contention of a duly licensed contract carrier that he was not operating as a common carrier where he confined his services to the specialty set forth in his license although his operation contained many of the attributes of common carriage. Here, however, we are concerned with the duties and obligations owed by a common carrier to the shipping public rather than those owed by a contract carrier.

[5] *Baltimore & Ohio Railway* v. *Voight*, 176 U. S. 498 (1900).

The Board agrees with the examiner that the specialty cases are inapplicable.

Other than those involving common carrier-common carrier relationships, the specialty cases cited by respondent involve commodities which, by their very nature, are not capable of being carried under the terms of common carriage,[6] and since they dealt with the question of liability they do not stand for the proposition that other shippers similarly situated could legally be denied space. It is therefore unnecessary for us to examine the authorities which say that a common carrier may at the same time and with the same facility be both a common carrier and contract carrier.

We next inquire into whether respondent excluded complaints and their supporting interveners from participation in respondent's reefer space in violation of sections 14 and 16 of the Act. As set forth above, the record discloses no convincing reason why any of these parties were denied space. We must assume, in view of the voluminous record, that had there existed valid reasons for Grace, as a common carrier, to deny these applicants space, they would have been presented; in the absence of such reasons we must conclude, as did the examiner, that complainants and interveners were qualified banana shippers. Having demanded and been refused such space by respondent, it is not necessary that complainants and interveners prove that they actually tendered bananas for shipment. Such tendering, under the circumstances, would have been futile, idle, and legally unnecessary. *Philip R. Consolo* v. *Grace Line Inc.*, 4 F. M. B. 293 (1953), citing *Atlantic Coast Line R. Co.* v. *Geraty*, 166 Fed. 10 (4th Cir. 1908). Therefore, on the basis of this record, we find that respondent's refusal to carry bananas for complainants and interveners constituted a violation of sections 14 and 16 of the Act.

It is obvious that respondent cannot satisfy all the reefer space desires of its present shippers and those of complainants and their supporting interveners, and thus arises the problem of providing a plan, consistent with common carriage, of allocating space to qualified banana shippers.

First, where the demand for space exceeds the supply, the law is clear: a common carrier must equitably prorate its available space among shippers. *Penna R. R. Co.* v. *Puritan Coal Co.*, 237 U. S. 121 (1915); *Patrick Lumber Co.* v. *Calmar S. S. Corp.*, 2 U. S. M. C.

[6] *Dickenson* v. *Great Northern Ry Co.*, 18 Q. B. D. 176 (1886) (dogs); *Honeyman* v. *Oregon & C. R. R. Co.*, 13 Or. 352, 10 P. 628 (1886) (dogs); *Farmers and Mechanics Bank* v. *Champlain Transportation Co.*, 16 Vt. 52 (1844) (bank bills); *Cleveland, C., C. & St. L. Ry Co.* v. *Henry*, 170 Ind. 94, 83 N. E. 710 (1908) (circus cars); *Roberts* v. *Chicago & R. I. & P. R. Co.*, 99 F. Supp. 895 (D. Minn. 1951) (Pullman cars); *United States* v. *Louisville & Nashville Railroad Co.*, 221 F. 2d 698 (6th Cir. 1955) (silver).

494 (1941). Equitable proration of space alone, however, in view of the economic factors inherent in this trade, is not a panacea. And it was with these economic factors in mind that the examiner recommended the adoption of a forward-booking arrangement.

Grace argues that the recommendation of a forward-booking system is an admission that bananas do constitute a specialty. We need go no further than respondent's own operation on this very trade route to dispose of the argument that forward booking justifies the finding of a specialty: during the Chilean fruit season Grace, as a common carrier, transports this fruit under forward-booking arrangements, and when the fruit offered exceeds the available space, the space is prorated among the shippers.

Grace further contends that there is no justification in law for a forward-booking system of the character and duration recommended. Forward booking is not new to common carriage. *Ocean S. S. Co.* v. *Savannah Locomotive Works & Supply Co.*, 131 Ga. 831, 63 S. E. 577 (1909). It is, then, the duration of the system with which we must be concerned. We are mindful that once the system is initiated, qualified applicants for space would be foreclosed from any proration in the space until the end of any given period. Although this is not a desirable result, in view of the economic problems presented here we believe that the 2-year duration can be characterized as "reasonable" and is a system, compatible with common carriage, which affords existing importers the protection they require while providing a reasonable opportunity for prospective shippers to engage in the trade.

Grace contends that the commingling of bananas of different shippers in the same compartment might result in increased damage claims based upon the arrival of spoiled fruit. Although we recognize that the intermingling of ripe and sigatoka-diseased bananas might adversely affect otherwise healthy bananas, in view of the facts of record—(1) good quality bananas are plentiful in Ecuador, (2) only Gros Michel bananas are exported from Ecuador, (3) all such bananas move at the same carrying temperature, (4) all shippers rigidly inspect their fruit prior to loading, and (5) shippers desire to get their bananas to their destination in as green a condition as possible—coupled with the absence of any evidence tending to indicate that complainants and their supporting interveners would operate differently from Grace's present shippers, we believe that the possibility of damage is seemingly remote. We also recognize that other perishable fruits and vegetables are commingled in cooled or refrigerated spaces. We conclude that applicants and their support-

ing interveners should not be excluded from participation in Grace's reefer space in this trade. We will leave to the parties the making of any necessary and practical arrangements designed to minimize or eliminate the commingling of bananas of several shippers.

In view of the foregoing, the Board adopts the examiner's recommendation that Grace prorate its reefer space, upon a fair and reasonable basis, among existing shippers and complainants and their supporting interveners, under forward-booking arrangements of 2 years. To this end, Grace shall cancel its existing contracts with three banana shippers and offer reefer space, upon reasonable notice, fairly and equitably, under two-year forward-booking arrangements, to all qualified shippers.

Grace may require prospective shippers in this trade to post a bond covering the space assigned, and may otherwise establish reasonable rules covering dead freight, inspection, and loading and stowing, which prospective shippers must meet in order to qualify as users of space.

At the end of any forward-booking period, in the event that additional qualified importers desire reefer space, it will be incumbent upon respondent to reallocate space to existing importers and the new applicants upon a fair and reasonable basis.

No order will be entered at this time. Within 30 days after the service of this report and after seven days' advance service upon respondent, complainants shall submit an appropriate order, on matters other than reparation, for our approval. Hearing on the question of reparation, if required, will be set by the examiner.

ORDER

At a Session of the FEDERAL MARITIME BOARD, held at its office in Washington, D. C., on the 19th day of August A. D. 1957

No. 771

BANANA DISTRIBUTORS, INC.

*v.*

GRACE LINE INC.

No. 775

ARTHUR SCHWARTZ

*v.*

GRACE LINE INC.

These cases being at issue upon complaints and answers on file, and having been duly heard on a joint record with respect to issues other than reparation, and the Board on April 29, 1957, having made of record a report stating its conclusions, decision, and findings therein, which report is hereby referred to and made a part hereof:

*It is ordered*, That respondent Grace Line Inc. be, and it is hereby, notified and required to cease and desist and to abstain from entering into, or continuing, or performing any of the contracts, agreements, or understandings for the carriage of bananas found herein to be in violation of sections 14 and 16 of the Shipping Act, 1916, as amended, not later than October 1, 1957;

*It is further ordered*, That respondent, within 10 days after the date of service of this order, shall offer to its present shippers and to all qualified shippers, including complainants and their supporting interveners, upon a fair and reasonable basis and upon reasonable notice, refrigerated space for the carriage of bananas on respondent's vessels from Ecuador to United States Atlantic ports, for a period not to exceed 2 years, said period to begin not later than October 1, 1957, and shall thereafter offer, for periods not to exceed 2 years, refrigerated space available for such carriage;

*It is further ordered*, That respondent shall employ uniform, fair, and reasonable standards in determining the qualifications of applicant shippers, and in exercising its judgment in this regard, respond-

ent shall take into consideration (1) applicant's financial capacity to engage in the banana business on a scale proportionate to the refrigerated space requested; (2) applicant's ability to arrange for the purchase, loading, and stowage of the bananas to be shipped, and (3) applicant's ability to arrange for the discharge of bananas; and to this end, respondent may require applicant shippers to provide verified information sufficient to enable respondent to make the necessary determinations;

*It is further ordered*, That respondent be, and it is hereby, notified and required to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with the receiving, handling, stowing, transporting, carrying, and discharging of bananas on its vessels, which regulations and practices may include the following requirements: (a) each shipper shall furnish and maintain as security for the performance of all of its obligations under the 2-year forward booking a deposit in cash, negotiable securities, or a bond satisfactory to respondent equal to 12½ percent of the total minimum freight charges due under said forward booking; (b) no shipper shall be permitted, without the approval of respondent, to assign the forward booking or otherwise transfer any rights secured by him under said forward booking; (c) the payment by the shipper of dead freight of up to 90 percent of complete utilization of space assigned; (d) loading, stowing, and unloading shall be at the expense and risk of the shipper, respondent to have the right to designate the stevedore or itself to perform the necessary stevedoring at the port of discharge; (e) during the Chilean fruit season respondent may proportionately reduce the refrigerated space assigned to banana shippers, without discrimination, upon reasonable notice, to permit the carriage of Chilean fruit; (f) the treatment as a single shipper those individuals, partnerships, or corporations who are affiliated with each other to the extent of 10 percent or more common ownership;

*It is further ordered*, That respondent shall file with the Board (a) copies of the 2-year forward bookings entered into hereunder, (b) the regulations and practices adopted by respondent relating to the receiving, handling, stowing, transporting, carrying, and discharging of bananas, and (c) the criteria used by respondent in determining what applicant shippers are qualified;

*It is further ordered*, That these cases be held open for further proceedings on the claims of complainants for reparation, if any.

By the Board.

(Sgd.) JAMES L. PIMPER,
*Secretary.*

# FEDERAL MARITIME BOARD

## MARITIME ADMINISTRATION

No. S-52

AMERICAN PRESIDENT LINES, LTD.—APPLICATION FOR PERMISSION UNDER SECTIONS 805 (a) AND 605 (c) OF THE MERCHANT MARINE ACT, 1936, TO CALL ITS TRANSPACIFIC VESSELS AT HAWAII

No. S-55

PACIFIC FAR EAST LINE, INC.—APPLICATION FOR PERMISSION UNDER SECTION 805 (a) OF THE MERCHANT MARINE ACT, 1936, TO CALL ITS TRANSPACIFIC VESSELS AT HAWAII

*Submitted April 8, 1957. Decided May 10, 1957*

To permit Pacific Far East Line, Inc., to carry cargoes between ports in Hawaii and ports in California, Oregon, and Washington on unsubsidized transpacific voyages with cargo vessels would result in unfair competition to an operator engaged exclusively in the coastwise or intercoastal service, and would be prejudicial to the objects and policy of the Merchant Marine Act, 1936. Application for such permission under section 805 (a) of the Merchant Marine Act, 1936, denied.

*Odell Kominers* and *J. Alton Boyer* for Pacific Far East Line, Inc.

*Peter N. Teige* and *George Wick, Jr.*, for American President Lines, Ltd.

*Alvin J. Rockwell*, *Willis R. Deming*, *Alan B. Aldwell*, *Ernest K. Kai*, and *Robert G. Dodge* for Matson Navigation Company.

*James L. Adams*, *Gilbert C. Wheat*, *Gordon L. Poole*, and *Tom Killefer* for Pacific Transport Lines, Inc., and States Steamship Company.

*Allen C. Dawson* as Public Counsel.

## REPORT OF THE BOARD AND MARITIME ADMINISTRATOR

CLARENCE G. MORSE, *Chairman and Maritime Administrator*, BEN H. GUILL, *Vice Chairman*, THOS E. STAKEM, JR., *Member*

BY THE BOARD AND MARITIME ADMINISTRATOR:

This proceeding arises out of applications filed by American President Lines, Ltd. ("APL"), and Pacific Far East Line, Inc. ("PFEL"), for written permission under section 805 (a) of the Merchant Marine Act, 1936, as amended ("the Act"),[1] to provide service between the west coast of the United States and Hawaii.

APL filed two applications dated July 30, 1954, seeking permission to call certain of its vessels at Hawaii. One related to domestic trade and the other principally to foreign trade. The Board referred for hearing (Docket No. S-52) only so much of these applications as sought (a) written permission under section 805 (a) of the Act to carry domestic cargoes between California and Hawaii in APL's subsidized cargo vessels operating on Trade Route No. 29 ("Route 29"),[2] Freight Service F, and (b) authorization under section 605 (c) of the Act to lift and discharge at Hawaii with these vessels cargoes to and from foreign ports within the trading area of Route 29.

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[1] Section 805 (a) of the Act is as follows:

"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 intercostal operations; and whosoever shall violate this provision shall be guilty of a misdemeanor."

[2] California ports/Far East.

PFEL filed an application dated December 15, 1954, for permission for its unsubsidized vessels to transport cargo in the domestic trade between Hawaii and the California coast as part of a transpacific voyage, and to transport cargo between Hawaii and ports on Route 29 as part of a transpacific voyage. Under the date of March 1, 1955, PFEL amended its application so as to request permission for its unsubsidized vessels to transport cargo in the domestic trade between Hawaii, on the one hand, and ports in California, Oregon, and Washington, on the other hand, as part of a transpacific voyage, and to transport cargo between Hawaii and ports in Guam as part of a transpacific voyage. The Board referred for hearing (Docket No. S–55) only so much of the application as sought written permission under section 805 (a) of the Act to carry cargoes between ports in Hawaii and ports in California, Oregon, and Washington on unsubsidized transpacific voyages with cargo vessels.[3]

The two proceedings were consolidated. Pursuant to notice published in the Federal Register, hearing was held before an examiner from October 17 through November 14, 1955, at San Francisco; from November 14 through December 8, 1955, at Honolulu; and from January 24 through February 1, 1956, at Washington, D. C. The record consists of 7,561 pages of testimony and 176 exhibits.

Matson Navigation Company ("Matson"), Pacific Transport Lines, Inc. ("PTL"), States Steamship Company ("States"), and Isthmian Steamship Company ("Isthmian") intervened. PFEL intervened in No. S–52 and APL intervened in No. S–55. Isthmian was not represented at the hearing and filed no brief. No briefs were filed by PTL or States. PTL says that it "is familiar with the arguments of Matson in opposition to Section 805 (a) permission contained in the opening brief of Matson, and both adopts as its own and endorses such arguments of Matson." States, now an applicant for subsidy, advises that, "if the Federal Maritime Board were to grant PFEL permission under Section 805 (a) to serve Hawaii, States will itself apply for similar permission to call its transpacific vessels at Hawaii in the domestic trade between Hawaii and ports on the Pacific coast."

Subsequent to the hearing, on June 18, 1956, APL withdrew its applications and has taken no further part in the proceeding.

Briefs were filed, the examiner issued a recommended decision, exceptions were filed, and we heard oral argument.

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[3] Where the term "application" is hereinafter used in referring to PFEL's application, it will be understood to mean only that part of the application that was referred for hearing.

The examiner found and concluded that the granting of PEEL's application will not result in unfair competition to any person, firm, or corporation operating exclusively in the coastwise or intercoastal service, or be prejudicial to the objects and policy of the Act, and recommended that PFEL's application be granted. We do not agree with the ultimate conclusions and recommendations of the examiner. Exceptions and recommended findings not discussed in this report nor reflected in our findings or conclusions have been found not related to material issues or not supported by evidence.

PFEL operates a subsidized service on Route 29 under an operating-differential subsidy agreement with the Board. In addition, it operates without subsidy and on a regular schedule a Pacific/Guam service, and also, a transpacific refrigerated-vessel service.

PFEL's unsubsidized Pacific coast/Guam service has been operated for about nine years. The service is maintained on a twice-monthly frequency. One of the sailings is made with a vessel that loads outbound in the Pacific Northwest and then proceeds to Los Angeles and San Francisco to load; on the other sailing, the vessel loads only at California ports. The vessels carry general cargo to Guam and bulk cargo to Japan, normally returning to the Pacific coast in ballast. On one of the two sailings calls are made at Honolulu to load cargo for Wake and Guam. The service does not presently carry cargo between the Pacific coast and Hawaii. Transpacific bulk cargo carried by the Guam vessels is not competitive with the bulk cargoes carried by PFEL's subsidized vessels because it is over and above the requirements of the latter for bulk. Moreover, the quantity of bulk cargoes carried by United States-flag berth operators on Route 29 is insignificant in comparison with past and present available bulk cargo. If the application is granted, PFEL will turn the vessels at Guam and will not employ them to carry bulk cargo beyond Guam. It will charter vessels, to the extent approved by the Maritime Administration, to lift bulk cargoes for destinations beyond Guam.

PFEL'S transpacific refrigerated-vessel service is operated with fully refrigerated ships bareboat chartered from the Government. These vessels are employed for the carriage of military reefer cargo under military contract and military direction. PFEL has carried on these vessels refrigerated military cargo from United States Pacific coast ports to Hawaii at the specific instruction and direction of the military. The average lift has been from 900 tons to 1,000 tons per month, moving as a single lot.

If the application is granted, PFEL will maintain a service between the Pacific coast, Hawaii, and Guam on a ten-day frequency, em-

ploying six liner vessels. It is presently planned that these vessels will be three AP–3's now owned by PFEL and three C–3's bareboat chartered by PFEL. The itinerary initially contemplated is service outbound from the Pacific Northwest (alternating between Puget Sound and the Columbia River, i. e., Seattle, Tacoma, Portland, Longview, and Astoria), Los Angeles, and the San Francisco Bay area (including Stockton, an east-bay terminal, and a San Francisco terminal) to Honolulu, thence Wake, thence Guam, turning at Guam, and loading homebound at Guam and Hawaii for the Pacific coast. Service will be afforded for dry and reefer cargo and for bulk liquids. PFEL expects to make space available for about 2,500 tons of cargo on each sailing from the Pacific coast to Hawaii and for about 4,000 to 5,000 tons per sailing from Hawaii to the Pacific coast. It will offer direct service to Honolulu and will serve the other Hawaii ports by transshipment, or by direct call if sufficient cargo offers. Service will be provided at Matson's then current rates. To the extent special equipment or fittings may be necessary to carry refrigerated cargo, sugar, bulk liquids, or any other cargo, PFEL is prepared and intends to furnish such special equipment and fittings.

APL carries cargo between Los Angeles and San Francisco and Honolulu on its combination passenger-cargo vessels *President Cleveland* and *President Wilson*. It does not solicit cargo for this trade. Its Hawaiian carryings in recent years have averaged at best a few hundred tons per voyage and have been limited to so-called express and refrigerated cargo.

PTL operates a subsidized fortnightly service on Route 29 under an operating-differential subsidy agreement with the Board. It has authority under section 805 (a) to call at Hawaii on not more than 13 sailings annually in each direction. PTL serves Hawaii on its subsidized voyages, with statutory abatement of subsidy. Outbound carryings are principally from San Francisco proper. Service was discontinued from Stockton and from east-bay terminals in San Francisco Bay, and little cargo is being obtained from the Los Angeles area. Direct service for commercial cargo is provided to Honolulu only, with transshipment to other Hawaiian ports. Eastbound service from Hawaii has not been furnished for the past years. No reefer service is offered to or from Hawaii. PTL characterizes Hawaii as playing "a minor role" in its total carryings. Under the permission granted to PTL to call at Hawaii, it must at all times give priority to its transpacific cargo requirements, and, since 1953, except for an occasional bad month, it has had very little outbound free space in its transpacific vessels.

Matson operates four services between mainland ports of the United States and Hawaii, as follow: Pacific Northwest/Hawaii freight service, California/Hawaii freight service, a passenger service, and Atlantic-Gulf/Hawaii joint freight service. Each of these services is confined to domestic ports, except that since 1932 the Pacific Northwest/Hawaii freight service has included calls at British Columbia ports to load and discharge cargo.

Matson's service between the Pacific Northwest and Hawaii is maintained with two C–3's and two Liberty-type vessels. The C–3's sail at frequencies of 14 and 21 days from Portland, Seattle, Tacoma, and British Columbia, carrying dry, liquid, and refrigerated cargo. While they are operated as general-cargo vessels, they lift quantities of lumber and military cargo. They return, carrying dry and liquid cargo, at intervals of 14 and 21 days to Seattle and Tacoma, with a time provision in the schedule to permit calling at San Francisco Bay if required. They also provide eastbound service to British Columbia. The Liberty-type vessels are used in a lumber service. One of these vessels, or lumber carriers as they are called, is available once in every 30 days, alternately serving Puget Sound and Columbia River-Coos Bay. The lumber carriers may lift items of general cargo or military cargo in addition to lumber. They return with cargo from Hawaii to Portland. Schedule time provides sufficient flexibility to call at San Francisco Bay if required, and also at Vancouver, Washington.

Service between San Francisco Bay ports and Los Angeles and Hawaii is provided by Matson with eight C–3's, which operate on a 28-day turnaround. From San Francisco-Alameda, Matson makes a sailing every Wednesday, and from Los Angeles, every Friday. From Hawaii to San Francisco-Oakland-Alameda, a sailing is made every Thursday, and to Los Angeles, every Monday. The Los Angeles vessel also brings cargo to San Francisco Bay. Dry, liquid, and refrigerated cargo is lifted westbound and eastbound. The schedule is so arranged that eastbound ships into San Francisco, upon completion of discharge, give weekly service to the military and are available to lift outbound general cargo from San Francisco before proceeding to Los Angeles.

From Stockton, Matson schedules a sailing for Hawaii once every 21 days; inward sailings are on about the same schedule.

Matson has engaged in coastwise trade with Hawaii for 73 years. It has invested over $30,000,000 of its own funds in freight vessels, which have been fitted to serve the Hawaiian trade, and over $5,000,000 in shore facilities and equipment to handle the cargo in

the Hawaiian trade. It has also assumed substantial financial obligations with respect to shore facilities and equipment required to care for and handle Hawaiian cargo. In addition, Matson has a continuous research program investigating new and improved methods and facilities for handling, caring for, and transporting cargo in the Hawaiian trade.

No carrier other than those mentioned above provides service between the United States Pacific coast and Hawaii or in any leg or segment of that trade.

There have been occasions when cargo offered to Matson has not been accommodated on a particular vessel and has had to await the next sailing. Utilization outbound has ranged from about 80% in 1950 to about 90% in the first six months of 1955. In each year there has been substantial unused underdeck, deck, and reefer space, and there have been times when the cargo vessels were withdrawn due to insufficient cargo. While certain shippers have requested more frequent service and more cargo space at particular times, the record shows that most shippers are satisfied with the Matson service.

Longview, Washington, has not been served by Matson for general cargo, though service is provided to lumber docks. One shipper indicated a movement of 150 to 250 tons of paper a year to Hawaii, and 10 to 15 tons would be available for a particular call.

No service had been given by Matson to Astoria, Washington, until the time of the hearing. The record indicates a movement of 500 tons of flour per month from Astoria to Hawaii, and during the hearing trial service to Astoria was instituted. The port of Stockton had asked for fortnightly frequency, and Matson has instituted service on a 21 day frequency. Certain Stockton shippers feel this service does not fully meet their needs.

In 1954 Matson carried 1,048,505 short tons of cargo outbound from the Pacific coast to Hawaii, PTL carried 17,297 long tons, and APL carried 1,862 long tons. In the same year, Matson carried 1,184,086 short tons of cargo inbound from Hawaii to the Pacific coast, PTL carried 2,770 long tons, and APL carried 343 long tons.

Of the cargo moving from Hawaii to the Pacific coast, approximately 95 percent consists of sugar, molasses, and pineapple. All of this is carried by Matson.

Through interlocking corporate relationships Matson is associated with the major producers and shippers of sugar, molasses, and pineapple in the Hawaiian Islands, and these same business interests handle much of Matson's terminal and stevedoring work and agency work in both Hawaii and the United States. Certain of these affili-

ated interests are large importers of lumber and fertilizer from the Pacific coast.

Matson owns and acts as agent for the Oceanic Steamship Company ("Oceanic"), which operates substantial service on Trade Route No. 27 [4] under an operating-differential subsidy agreement with the Board. Matson and Oceanic have identical officers, directors, management, and freight traffic staffs in the United States (except for a freight traffic manager, his assistant, and a stenographer employed solely by Oceanic in its San Francisco office), and have common offices, agents, and terminals. Matson's overhead not specifically allocable to Oceanic is prorated between Oceanic and Matson in keeping with Maritime Administration's formula.

Matson contends that PFEL's application, as amended in the course of the hearing, is outside the scope of the hearing authorized by the Board and that no permission can be granted thereon. Actually, the application was not amended at the hearing. PFEL asks permission to carry cargo between ports in Hawaii and ports in California, Oregon, and Washington on unsubsidized voyages with cargo vessels, just as it did before the hearing. The point made by Matson is that PFEL now seeks permission to carry cargo between the Pacific coast and Hawaii on vessels which would not proceed beyond Guam, whereas, before the hearing, it requested permission to perform the transportation between the Pacific coast and Hawaii as part of a service that would include calls in the Far East. This difference is insufficient to warrant a finding that the operation now proposed is outside the scope of the authorized hearing.

PFEL contends that Matson has no standing to oppose its application. It claims that, since Matson is the parent corporation and managing agent of Oceanic, a subsidized operator, these two carriers are required to have written permission under section 805 (a) for operation between the mainland of the United States and Hawaii; that it does not appear that any such permission has been granted except under the grandfather clause of section 805 (a); that grandfather rights cannot predicate a grant of authority greater in any material particular than the prior operations upon which they are based; that Matson's present service is substantially different from its 1935 service, both over-all and in its component parts, and that, therefore, Matson does not have grandfather authority for its present operation.

Referring to Matson's Pacific Northwest/Hawaii freight service, which includes calls at British Columbia ports, PFEL asserts that,

[4] U. S. Pacific/Australasia.

quite apart from the question of whether this service is so much a part of the entire service between the Pacific coast and Hawaii as to make the whole operation one not exclusively in domestic trade, there can be no argument but that the Pacific Northwest service (i. e., the two C–3's plus the two lumber vessels) is not entitled to the protection of section 805 (a). Matson states that, although very important to the Hawaiian economy, the volume of cargo carried between British Columbia ports and Hawaii comprises only a small percentage of the domestic cargo carried on Matson vessels, and urges that this foreign-trade cargo carried at the insistence of receivers and shippers of cargo in Hawaii, in a service that is primarily a domestic service, should not deter the Board from affording to Matson and its Pacific Northwest freight service the protection afforded by section 805 (a).

Matson contends that the proposed competition of PFEL would be unfair. It claims that PFEL's domestic Hawaiian cargo service would deprive it of cargo to which it is fundamentally entitled, which it has the capacity to carry, and which it needs. In claiming to be fundamentally entitled to carry Hawaii's cargo, Matson says: "We use the expression 'fundamentally entitled', of course, in the context of this proceeding. The question of who is fundamentally entitled to cargo naturally does not arise where there is free competition with none of the contestants supported by the Government. On the other hand, the question of fundamental entitlement arises sharply where, as here, there is a domestic operator which is entitled to the protection of section 805 (a) from a subsidized operator." Matson maintains that it is fundamentally entitled to carry Hawaii's cargo by reason of its 73 years in the Hawaiian trade and its investment in shore facilities and in its fleet. It urges that PFEL would overtonnage the trade, blanket Matson sailings, provide irregular or unrestricted service, concentrate on the most favorable cargoes, use chartered vessels, and compete unfairly with Matson through the use of its subsidized vessels. It also maintains that the benefits that PFEL receives in foreign trade in the form of construction-differential subsidy, operating-differential subsidy, benefits from deposits in statutory reserve funds, and cargo-preference aid, and would receive from the expected carriage of domestic cargo on an added-cost basis, would have an unfair impact on Matson.

Asserting that, if PFEL's application is granted, Matson will still be the primary carrier in the trade and the carrier on which the trade must rely for basic service year after year, Matson also contends that competition which deprives such a domestic carrier of cargo which it needs, which it has the capacity to carry, and to which it is funda-

mentally entitled is not only unfair competition but is also prejudicial to the objects and policy of the Act. It claims that that which results in unfair competition to Matson is prejudicial to the objects and policy of the Act even if Matson itself were not in a position to invoke the statutory defense of unfair competition. Therefore, it urges the same grounds in support of its contention that PFEL's competition would be prejudicial to the objects and policy of the Act as it advances in connection with its contention that such competition would be unfair. In addition, it maintains that PFEL would neglect its primary trades, that PFEL's chartered vessels would not provide certainty of future service commensurate with the damage to Matson, that PFEL's application must be considered in relation to PFEL's present and potential operations, and that Matson's vessels are essential to national defense.

PFEL contends that the grant of its application will be neither unfairly competitive to Matson nor prejudicial to the objects and policy of the Act, and that, in any event, the Hawaiian Islands need and will benefit from the competition to be furnished by PFEL.

Public Counsel maintains that the proposed service of PFEL will be consistent with the objects and policy of the Act and will not result in unfair competition to Matson.

Matson bases its contention that PFEL would deprive it of Hawaiian cargo that it needs on the adverse effect that PFEL's participation in the Pacific coast-Hawaii traffic would have on Matson's vessel-replacement program. It urges that it made a profit of only 38 cents per revenue ton after taxes and before declaration of dividends on the movement of 13,474,497 revenue tons from 1950 through 1954; that PFEL expects to carry 2,500 tons per voyage on 36 voyages per year from the Pacific coast to Hawaii and 4,000 tons from Hawaii to the Pacific coast; that, converted to revenue tons, PFEL would deprive Matson of 10 percent of the cargo that would otherwise be carried by Matson, and that, from 1950 to 1954, the diversion from Matson of 10 percent of the domestic cargo moving on an average round voyage of a freight vessel between the Pacific coast and Hawaii would have deprived Matson of 31 percent of voyage gross profit and 60 percent of voyage net profit for such round voyage.

## Discussion and Conclusions

Matson has requested that the withdrawal of APL's application in No. S–52 be held to operate with prejudice. We agree with the examiner that this request should be denied. If the APL application

is renewed, the question of whether it should be entertained can be raised at the time of its renewal.

Matson is the only intervener operating "exclusively in the coastwise or intercoastal service" within the meaning of section 805 (a). In its service between California and Hawaii it clearly operates "exclusively" in the domestic service. With respect to its Pacific Northwest/Hawaii service, Matson includes calls at British Columbia. We agree with the examiner that the British Columbia calls preclude a finding that Matson is operating "exclusively" in the coastwise or intercoastal service on its Northwest/Hawaii service. An operator engaged exclusively in the coastwise or intercoastal trade is one furnishing a service that does not include foreign ports. *American President Lines, Ltd.—Subsidy, Route 17*, 4 F. M. B.—M. A. 488, 501 (1954).

PFEL contends that Matson and its subsidiary carrier Oceanic do not have proper grandfather rights and permission under section 805 (a) for Matson's domestic Hawaiian service, and, therefore, Matson has no standing to claim the protection of section 805 (a) in opposing the PFEL application. The status of Oceanic's permission with respect to Matson's domestic services is irrelevant to the question of whether Matson is operating "exclusively" in the domestic coastwise or intercoastal trade. Here the facts of record show Matson to be such an operator with respect to its California/Hawaii service. To that extent Matson is clearly entitled to the protection of section 805 (a) and has standing to oppose the PFEL application.

The burden of proving the statutory requirements of section 805 (a) are upon the applicant, and the domestic operator has only the burden of rebutting the *prima facie* proof required by section 805 (a). *American President Lines, Ltd.—Subsidy, Route 17*, 4 F. M. B.—M. A. 555, 556 (1955). The Board and its predecessors have indicated a special concern for the protection of coastwise and intercoastal operators (*Am. Pres. Lines, Ltd.—Unsubsidized Operation, Route 17*, 3 F. M. B.—M. A. 457, 470 (1951); *American President Lines, Ltd.—Subsidy, Route 17*, 4 F. M. B.—M. A. 488, 504 (1954); *American President Lines, Ltd.—Sec. 805 (a) Application*, 4 F. M. B.—M. A. 436, 440 (1954), and have further indicated that doubts should be resolved in favor of the intercoastal operator (*Am. Pres. Lines, Ltd.—Unsubsidized Operation, Route 17, supra*, at page 470; *American President Lines, Ltd.—Sec. 805 (a) Application, supra*, at page 440).

Matson has been engaged exclusively in the Pacific coast/Hawaii service for over 73 years, has invested substantial sums in shoreside facilities and equipment, and has built up and maintained a fleet

of vessels especially equipped to handle cargoes moving in the Hawaiian trade. This service has been developed and maintained by private investment without benefit of operating or construction subsidy. Although Matson's subsidiary Oceanic is a subsidized carrier, the record shows that Matson is primarily a domestic unsubsidized operator. There is nothing in the record which indicates that Matson's domestic Hawaiian service has been supported by Oceanic subsidy. In contrast, PFEL is primarily a subsidized operator in the foreign commerce of the United States, and even if granted permission to provide its requested service to Hawaii, its operations would continue to be primarily in offshore services.

Matson's Hawaiian operations have been operated at only a modest profit, an average of only 38 cents per revenue ton after taxes and before dividends, for the period 1950 through 1954. PFEL expects to carry approximately 2,500 tons per voyage from the Pacific coast to Hawaii, and 4,000 to 5,000 tons per voyage from Hawaii to the Pacific coast, on 36 voyages per year. It is apparent from the record that PFEL would be in a position to concentrate primarily on high value commodities, and would, in effect, "skim the cream" in this trade. PFEL would, in addition, provide direct service to Honolulu only, and service to Hawaii outports would be provided by transshipment, or by direct call only if sufficient cargoes offer. In contrast, Matson, the primary and historic carrier in this trade, must continue to provide the necessary and more costly direct service to the Hawaii outports, regardless of the volume of cargoes carried. We therefore feel that although the PFEL competition may divert less than 10 percent of the tonnage in this trade, the diversion of Matson revenues may be substantially greater. Such diversion of cargoes which otherwise have been moving by Matson would sharply reduce the voyage net profits of Matson's sailings in this trade. Matson's vessel-replacement program for Pacific coast freighters will require an investment of at least 100 million dollars. Even at present voyage profit levels the replacement of vessels for Matson is a serious problem. It would be aggravated by approval of the PFEL application.

The examiner found that the years 1952 and 1954 should be excluded from a calculation of average voyage net profit because of strike and labor situations which unduly reduced voyage profits. Even excluding those low-profit years we feeel that a diversion of nearly 10 percent of the cargo moving between the Pacific coast and Hawaii would jeopardize Matson's vessel-replacement program.

The record shows that while certain shippers have indicated that particular cargoes have sometimes been refused for a particular sail-

ing, and that certain shippers desire more service to Stockton and broader port coverage, the record as a whole supports a finding that the great majority of shippers have been adequately served by Matson. Though particular sailings have been full and cargoes have on limited occasions been held for a later sailing, there has been available excess free space on most Matson sailings, and vessels have at times been withdrawn from this service for lack of cargoes. The record supports a finding that Matson has had sufficient capacity to serve the trade adequately, and will continue to provide sufficient capacity to meet the needs of this trade in the foreseeable future. The record fails to show the need for service in excess of that presently provided by Matson and other existing operators.

Prior decisions of the Board and Administrator have stated the principle that a subsidized operator should not be permitted to deprive regular domestic carriers of cargoes which they need, have the capacity to carry, and to which they are fundamentally entitled. *Amer. Pres. Lines, Ltd.—Unsubsidized Operation, Route 17, supra; American President Lines, Ltd.—Sec. 805 (a) Permission, supra; American President Lines, Ltd.—Subsidy, Route 17, supra.*

In *Unsubsidized Operation, supra*, at page 470, the Board and Administrator stated:

> The great importance to our merchant marine of its domestic fleet, and the serious difficulties that have attended the reestablishment of domestic shipping in the period since World War II, 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.

In *Subsidy, Route 17, supra*, at page 504, the Board and Administrator further indicated that,

> * * * in our judgement those operators who provide exclusively intercoastal services are entitled, as against primarily offshore operators such as APL, to whatever intercoastal cargoes they can carry.

In view of the foregoing analysis, and in conformity with the principles previously announced by the Board and Administrator, we feel that Matson, an exclusively domestic operator in the California/Hawaii trade, needs the available cargo in this trade, has the capacity to carry such cargoes and, as opposed to PFEL, primarily a subsidized offshore operator, is fundamentally entitled to such cargoes. Furthermore, the diversion of the volume of cargo which PFEL would carry would seriously jeopardize Matson's vessel-replacement program, and would impede the proper development and continuation of Matson's California/Hawaii service. We should be particularly careful to protect the existing operator in an offshore

territorial trade such as the Pacific coast/Hawaii trade considered herein. The Hawaiian economy is vitally dependent on ocean transportation to and from the Pacific coast. We conclude that to permit PFEL to carry cargoes in the California/Hawaii trade would result in unfair competition to Matson in its California/Hawaii service, an exclusively domestic service, and would be prejudicial to the objects and policy of the Act.

The PFEL application is for an integrated service which would serve both the Northwest and the California ports and Hawaii on the same vessels. The primary service would appear to be between California and Hawaii. In view of our findings that such service would result in unfair competition to an operator engaged "exclusively in the coastwise or intercoastal service," and would be prejudicial to the objects and policy of the Act, we are unable to grant the permission requested by PFEL. We have not been presented herein with an application for service solely between the Northwest and Hawaii, in which service Matson is not an exclusive domestic operator entitled to the protection of section 805 (a), and our conclusions are not directed to such an application.

Matson is the predominant carrier in the Pacific coast/Hawaii trade, and we recognize that such a carrier should not be protected from free competition. Denial of PFEL's application does not protect Matson from such competition. Any *unsubsidized* United States-flag carrier may at any time, and without restriction or permission from this Board, enter into competition with Matson in this trade.

On the full record herein, we find and conclude that the granting of permission to PFEL to provide the requested service between Pacific coast ports and Hawaii would result in unfair competition to a carrier operating exclusively in the coastwise or intercoastal service, and would be prejudicial to the objects and policy of the Act. We therefore deny such application.

Vice Chairman Guill, dissenting:

I do not concur in the result reached by the majority. In my view, the record and arguments support the findings and conclusions of the examiner.

The primary issues presented in this proceeding, such as (a) does Matson in fact have sufficient capacity to meet the needs of the trade, (b) is there a need for additional service, (c) would additional competition from PFEL be unfair to Matson, and (d) would the amount of cargoes diverted from Matson by PFEL be a real burden on Matson's domestic operations or prejudice Matson's vessel-replacement

program, are primarily issues of fact which must be determined from an analysis of conflicting testimony and evidence.

Extensive hearings were held before an experienced examiner of the Board, covering 45 days of testimony in San Francisco, Honolulu, and Washington. The record consists of over 7,500 pages of transcript, 176 exhibits totalling 1900 pages, and includes the testimony of over 70 witnesses. The examiner, who actually observed the witnesses and heard the conflicting testimony of numerous shipper, consignee, and company witnesses, made findings and reached conclusions (a) that Matson's services do not fully meet the needs of shippers in the trade, (b) that certain ports have been given insufficient service, (c) that through its business affiliations in Hawaii Matson would have an advantage over PFEL in obtaining cargoes, (d) that for all practical purposes Matson's service in the first six months of 1955 operated at maximum utilization, (e) that in view of the deficiencies in Matson's service "it can hardly be said that PFEL's service would be superfluous", (f) that in view of indicated future growth in the Pacific coast/Hawaii trade, the competition of PFEL would not appear to be a burden on Matson's domestic operations and would not prejudice Matson's vessel-replacement program, and (g) that PFEL's competition would not be unfair to Matson or prejudicial to the objects and policy of the Act.

The examiner who hears the testimony and observes the demeanor of witnesses is especially qualified to reach the proper factual conclusions. *Ohio Associated Tel. Co.* v. *National Labor Relations Bd.*, 192 F. 2d 664 (6th Cir. 1951); *United States Steel Co.* v. *National Labor Relations Bd.*, 196 F. 2d 459 (7th Cir. 1952); *Great Western Food Distributors* v. *Brannan*, 201 F. 2d 476 (7th Cir. 1953). This is particularly true in the instant proceeding, which involves one of the most lengthy and exhaustive records ever developed in a Board proceeding. We should overrule the examiner's findings only for real and substantial cause. I find no arguments advanced in exceptions or oral argument which, in my opinion, warrant our reversal of the examiner's findings.

If Matson were solely a domestic unsubsidized operator without any affiliations or connections with a subsidized line, I would be more inclined to resolve any doubts in favor of Matson, and certain aspects of PFEL's competition might be termed "unfair" within the meaning of section 805 (a). Here, however, Matson, through its wholly owned subsidiary Oceanic, has available to it substantially the same subsidy benefits which would be available to PFEL in connection with its proposed unsubsidized Hawaiian operations. Fur-

thermore, Matson Orient Line, another Matson subsidiary, presently has pending an application for subsidized operations. Because of these facts, it is my view that Matson has a greater burden in rebutting PFEL's *prima facie* case than would a carrier who had no such affiliations with a subsidized line. See *Pac. Transp. Lines, Inc.—Subsidy, Route 29*, 4 F. M. B. 7, 17 (1952). I feel that Matson has not sustained its burden.

In my view, the record fails to show that the granting of PFEL's application would jeopardize Matson's vessel-replacement program. Matson's own traffic witness estimated a 10 percent increase for traffic in 1955 over 1954, and we can take official notice of the fact that there is a steady and continuing increase in cargoes moving in this trade. It appears that diversion of cargoes to PFEL as a result of permission herein sought would be more than made up through over-all increases in the trade. In any event, cost of replacing vessels is a fundamental factor in determining a compensatory freight rate. Over a reasonable period of time freight revenues should support a vessel-replacement program, regardless of whether PFEL is permitted to compete to the limited extent herein requested. Furthermore, Matson's witness would not testify that the granting of PFEL's application would in fact prevent consummation of Matson's vessel-replacement program.

By virtue of its long experience in the trade and close affiliations with business interests in Hawaii, Matson has developed a virtual monopoly in carriage of cargoes moving between the Pacific coast and Hawaii. In 1954 it carried approximately 98 percent of westbound cargoes and 99 percent of eastbound cargoes. I fail to see how, under these conditions, PFEL's proposed competition can be termed "unfair." I have serious doubts that Congress, in enacting section 805 (a), intended to protect a domestic operator who had, in fact, a near monopoly in any trade. Rather, I feel it intended to protect normally competitive domestic operators from unfair competition by predominantly offshore subsidized lines.

In summary, I would like to reemphasize that if Matson were in fact unrelated to any subsidized operations I would be more inclined to resolve all doubts in favor of the exclusively domestic operator. Here, however, Matson and PFEL stand on substanitally equal terms insofar as subsidy is concerned, and, in my view, PFEL's competition would not appear to be unfair to Matson or prejudicial to the objects and policy of the Act.

I feel we should adopt the findings and conclusions of the examiner, and grant the permission requested by PFEL.

I am convinced on the record developed herein, as was the examiner, that PFEL's proposed competition would not be unfair to Matson's present operations and would not appear to be prejudicial to the objects and policy of the Act. As to possible future effects of PFEL competition, the Board could, as it has in the past, grant section 805 (a) permission for a limited period of time, and provide for Board review and possible modification or termination of the permission, if found to result in unfair competition or prejudice to the objects and policy of the Act. *Unsubsidized Operation, supra; Pacific Transp. Lines, Inc.—Sec. 805 (a) Application*, 4 F. M. B. 146 (1953).