# FEDERAL MARITIME BOARD

No. S–56

## STATES STEAMSHIP COMPANY—APPLICATION FOR OPERATING-DIFFERENTIAL SUBSIDY IN THE U. S. PACIFIC COAST/FAR EAST SERVICE

*Submitted January 27, 1957. Decided May 10, 1957*

States Steamship Company is operating an existing service between the Pacific coast and the Far East, to the extent of a minimum of 24 and a maximum of 30 sailings annually, within the meaning of section 605 (c) of the Merchant Marine Act, 1936.

The effect of the granting of an operating-differential subsidy contract to States Steamship Company for the service described in paragraph 1, above, would not be to give undue advantage or be unduly prejudicial, as between citizens of the United States, in the operation of vessels in competitive services, routes, or lines.

States Steamship Company is not operating an existing service between the Pacific Northwest and the Far East, to the extent of a minimum of 10 and a maximum of 16 sailings yearly, within the meaning of section 605 (c) of the Merchant Marine Act, 1936.

The present service between the Pacific Northwest and the Far East by vessels of United States registry is inadequate, within the meaning of section 605 (c) of the Merchant Marine Act, 1936, and in the accomplishment of the purposes and policies of the Act, additional vessels should be operated thereon.

Section 605 (c) of the Merchant Marine Act, 1936, does not interpose a bar to the granting of an operating-differential subsidy contract to States Steamship Company for the operation of cargo vessels on the services described in paragraphs 1 and 3, above.

*James L. Adams*, *Tom Killefer*, and *Gordon L. Poole* for applicant.

*Tom Killefer* and *James L. Adams* for Pacific Transport Lines, Inc., *Warner W. Gardner* and *Lawrence W. Hartman* for American President Lines, Ltd., and American Mail Line Ltd., *George F. Galland* and *Robert N. Kharasch* for States Marine Lines, *Odell Kominers* and *J. Alton Boyer* for Pacific Far East Line, Inc., and Coastwise Line, *Thomas J. White* for The Commission of Public Docks of the

City of Portland, Oregon, *Ira L. Ewers* for Alaska Steamship Company, and *Thomas F. Lynch* and *Wendell W. Lang* for Isthmian Steamship Company, interveners.

*Edward Aptaker* 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

The purpose of this proceeding is to determine whether section 605 (c) of the Merchant Marine Act, 1936,[1] 46 U. S. C. 1175 (the Act), interposes a bar to the granting of an operating-differential subsidy pursuant to section 601 of the Act to States Steamship Company (States) on both its Pacific coast/Far East and Pacific Northwest/Far East services.

Pacific Transport Lines, Inc. (PTL), wholly owned by States, intervened in support of States. American President Lines, Ltd. (APL), its subsidiary American Mail Line Ltd. (AML), Pacific Far East Line, Inc. (PFEL), States Marine Lines (SML), and Isthmian Steamship Company (Isthmian), a subsidiary of SML, all engaged in the transpacific trade and all subsidized save Isthmian and SML, intervened in opposition to the applicant. Both SML and Isthmian [2] have subsidy applications pending. The Commission of Public Docks of the City of Portland, Oregon (Portland Docks), intervened to request the Board to require States to furnish direct sailings from Columbia River ports if subsidy is granted. Alaska Steamship Company (Alaska Steam) and Coastwise Line (Coastwise), operating between the United States Pacific coast, Canada, and

[1] 605 (c): "No contract shall be made under this title with respect to a vessel to be operated on a service, route, or line served by citizens of the United States which would be in addition to the existing service, or services, unless the Board shall determine after proper hearing of all parties that the service already provided by vessels of United States registry in such service, route, or line is inadequate, and that in the accomplishment of the purposes and policy of this Act additional vessels should be operated thereon; and no contract shall be made with respect to a vessel operated or to be operated in a service, route, or line served by two or more citizens of the United States with vessels of United States registry, if the Board shall determine the effect of such a contract would be to give undue advantage or be unduly prejudicial, as between citizens of the United States, in the operation of vessels in competitive services, routes, or lines, unless following public hearing, due notice of which shall be given to each line serving the route, the Board shall find that it is necessary to enter into such contract in order to provide adequate service by vessels of United States registry. The Board, 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."

[2] Isthmian's application was filed subsequent to the hearing in this case.

Alaska, intervened to protect their interests inasmuch as States original application concerning the privilege of serving Canada and Alaska was so vague that it could be construed so as to permit trading between United States and/or Alaskan ports and Canadian ports. Upon States' amendment of its application removing that ambiguity and unequivocally requesting permission to serve Canada and Alaska only for the purpose of loading and discharging cargo to and from the Far East, Alaska Steam withdrew from the case. Coastwise was not satisfied and requests the Board, in the event subsidy is awarded, specifically to prohibit States from trading between U. S. Pacific and Alaskan ports and Pacific Canada without a prior hearing under section 605 (c). Public Counsel also appeared as a party.

Hearings were held before the examiner, who issued a recommended decision. APL, AML, PFEL, SML, Coastwise, and Public Counsel filed exceptions to the recommended decision, States replied to the exceptions, and oral argument was held.

Subsidy is sought for eight vessels, two more than applicant now operates in these services. The operation of eight vessels would permit 13 round voyages to northern oriental ports and 13 to southern oriental ports, both in the Pacific coast service, and 12 round voyages to northern oriental ports in the Pacific Northwest service, 26 round voyages in the Pacific coast and 12 in the Pacific Northwest service, or a combined total of 38 round voyages.

Applicant seeks subsidy on a combined minimum of 34 and a combined maximum of 46 sailings yearly, or a minimum of 24 and a maximum of 30 in the Pacific coast/Far East service and a minimum of 10 and a maximum of 16 in the Pacific Northwest/Far East service together with the privilege of calling at Alaska and Pacific Canadian ports to load and discharge cargo to and from the Far East in both services.

Under the provisions of section 605 (c), since applicant claims to be an existing operator in both services, we must determine whether States operates an "existing" service, within the meaning of that section, in either or both of its services; if the record dictates an affirmative finding of "existing" service we then must determine whether the award of subsidy would unduly advantage applicant or unduly prejudice interveners in the respective trades, and if an award would be unduly advantageous or unduly prejudicial, we may conclude that this section poses no bar to such an award only after finding that subsidy is necessary in order to provide adequate service on such routes by vessels of United States registry. If, on this record, it is concluded that States is not an "existing" operator on either or both

services, section 605 (c) will not pose a bar to an award of subsidy on such route or routes if the service already provided by other United States-flag vessels is inadequate to carry a substantial portion of the foreign commerce of the United States, and in the furtherance of the purposes and policy of the Act additional vessels should be operated thereon.

The examiner concluded and recommended that the Board find applicant to be operating an existing service, within the meaning of section 605 (c), between the Pacific coast and the Far East and between the Pacific Northwest and the Far East, that the award of subsidy to applicant would not result in undue advantage to States or undue prejudice to interveners, and that section 605 (c) posed no bar to the award of subsidy to applicant for the operation of cargo vessels on the routes and services involved.

As to States' Pacific coast/Far East service, the examiner found that it was inaugurated in 1951 and that States has averaged 21 sailings per year from 1951 through 1954 [3] thereon—sailings regularly advertised and on which commercial cargo had been carried, supporting the conclusion that such service was "existing" within the meaning of section 605 (c).

In concluding that States is an "existing" operator as to its Pacific Northwest/Far East service, the examiner relied heavily upon its historical or traditional association with that area. He considered States' commercial sailings from this area during 1951–1954 together with its entire previous operation. At any rate, for the 1951–1954 period [4] he found that applicant averaged 9 sailings per year.

APL–AML, in combined exceptions, contend that (1) States does not have an "existing" service from the Northwest and only a partially "existing" service in the Pacific coast/Far East trade, (2) both APL and AML would be unduly prejudiced by an award of subsidy to States, and (3) a determination of the issue of adequacy must be made, and this record establishes that United States-flag service in both trades is adequate. SML claims that the record does not support a finding of "existing" service in the Northwest trade, and that since the examiner made no findings whatever on the issue of adequacy, the case should be remanded for findings thereon, and that the issue of undue prejudice as to SML must await a determination of SML's own subsidy application now pending.

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[3] 1951–15; 1952–18; 1953–25; 1954–26, sailings per year, including a yearly average of 4 which called at a Northwest port outbound.

[4] 1951–15; 1952–10; 1953–3; 1954–1. In 1953 States had no direct commercial sailings in this service, and in 1954 it had but 1.

Coastwise's exceptions relate to so much of States' amended application as pertains to its proposed calls at Pacific Canada and Alaska. Although it admits that by the granting of the application as presently worded its position would not be jeopardized, it desires that the Board, in its report or in the resulting operating-differential subsidy contract—in the event subsidy is awarded—preclude States from trading between United States Pacific ports and/or Alaska and Canada without a prior hearing under section 605 (c). PFEL contends that (1) to award subsidy to States permitting applicant's vessels to call at both Northwest and California ports, without granting the same privilege to PFEL, would result in undue advantage to States and undue prejudice to PFEL, (2) the failure to make any findings on the issue of adequacy was error, and (3) it was deprived of its right to a hearing.

Public Counsel's position is that (1) States is an existing operator in the Pacific coast/Far East service, (2) the award of subsidy to States for such service would not result in undue advantage or undue prejudice, and (3) States is not as existing operator in its Northwest/Far East service, and since no findings were made by the examiner as to the adequacy or inadequacy of United States-flag vessels in this trade, the Board should either remand to the examiner for such findings or itself make such findings.

In its reply to the exceptions, applicant urges that we adopt the findings and recommendations of the examiner.

## Discussion and Conclusions

We note at the outset that applicant's Pacific coast/Far East service, described as "Pacific Northwest ports and thence California ports to the Far East, returning to the Pacific Northwest", does not conform to a trade route determined to be essential by the Maritime Administrator under section 211 of the Act. It is well settled, however, that section-605 (c) proceedings need not be delayed until the Administrator has made the necessary essential trade route determinations under the Act. *Grace Line Inc.—Subsidy, Route 4*, 3 F. M. B. 731 (1952).

The record establishes that applicant has, in its Pacific coast/Far East service, originated its sailings in the Northwest for several years. Too, the great majority of foreign-flag lines which serve the Northwest operate in this fashion. On the basis of this record, therefore, we expressly recommend that the Maritime Administrator give consideration to amending the descriptions of Trade Routes Nos. 29 and 30 (respectively, Route 29 and Route 30), pursuant to section

211 of the Act, so that the service provided by United States-flag vessels may be in keeping with the service provided by foreign-flag vessels. We do not intend, however, that this recommendation be construed so as to deny the ports of California or the Northwest the direct and exclusive service which they now enjoy and which they require. We have in mind, rather, revisions of the trade routes which would balance the requirements of the traditional California and Northwest shippers.

The transpacific foreign commerce of the United States is overwhelmingly export trade, and it is on this basis that applicant's operations and the needs of the trades shall be judged.

Applicant's proposed services shall be considered separately, and we first turn to the Pacific coast/Far East service. In this regard we are in full agreement with the examiner: States is an existing operator within the meaning of section 605 (c), and an award of subsidy to States covering this service would be neither unduly advantageous to States nor unduly prejudicial to citizens of the United States operating American-flag vessels in competition with States.

Applicant's transpacific commercial liner operations between 1951 and 1954, excluding the sailings from the Northwest direct to the Far East, are as follows:

| Year | Total sailings | Calling at California only | Total | Calling at California and Northwest | |
|---|---|---|---|---|---|
| | | | | California last port | Northwest last port |
| 1954 | 26 | 0 | 26 | 19 | 7 |
| 1953 | 25 | 0 | 25 | 22 | 3 |
| 1952 | 20 | 2 | 18 | 13 | 5 |
| 1951 | 23 | 8 | 15 | 14 | 1 |
| 4 yr. total | 94 | 10 | 84 | 68 | 16 |
| 4 yr. average | 23.5 | 2.5 | 21 | 17 | 4 |
| Range | 20–26 | 0–8 | 15–26 | 13–22 | 1–7 |

Although it is apparent that States does not have existing service in this trade to the extent of the 24 to 30 annual sailings sought, its average of 23.5, is so close to the number of sailings proposed that we do not regard the service in that respect as one in addition to the existing service, especially in view of appicant's 25 and 26 sailings in 1953 and 1954 respectively. *American President Lines, Ltd.—Subsidy, Route 17*, 4 F. M. B.—M. A. 488 (1954).

Next considered are the contentions of undue advantage and undue prejudice with reference to the Pacific coast/Far East service. It is well settled that the burden of proving undue advantage and undue prejudice rests upon the party claiming it (*Lykes Bros. S. S. Co., Inc.—Increased Sailings, Route 22*, 4 F. M. B. 455 (1954); *Grace*

*Line Inc.—Subsidy, Route 4, supra*), and a subsidized operator has a greater burden of proving undue prejudice under this section than a nonsubsidized operator. *Pac. Transp. Lines, Inc.—Subsidy, Route 29*, 4 F. M. B. 7 (1952).

SML, APL, AML, and PFEL all claim undue prejudice. Of these, only SML is presently unsubsidized, and it has a subsidy application pending.

PFEL contends that it would be unduly prejudiced by an award of subsidy to States solely because the dual-range loading privilege sought by States—loading first in the Northwest then topping off in California before sailing outbound—is not enjoyed by PFEL. But in arguing this position PFEL merely argued its contentions—it offered no evidence in support of its claim, and in view of its burden of conclusively proving its contention, the argument must be disregarded.

The undue prejudice which AML claims would result from an award of subsidy to States also relates to States' dual-range loading. In essence, AML contends that States would be able to secure quick-loading bottom cargoes in the Northwest and then top off in California, while AML is required to shift from berth to berth in the Northwest before sailing directly to the Far East. Whatever prejudice AML might suffer is offset by its ability to offer the shippers of such easy, quick-loading cargoes a direct service to the Far East, which States will not be able to do if subsidy is awarded, at least in this service, and it is only in connection with this service that we are considering undue prejudice as to AML.

APL's claim of undue prejudice rests upon the assertion that additional subsidization on Route 29 would in itself be injurious to other carriers on the route. APL, however, certainly has not sustained the burden of proving that it would be unduly prejudiced by an award of subsidy to States. Indeed, its claim of prejudice relates to the subsidization of States coupled with the subsidization of SML.

SML's claim is that *if* States is subsidized and SML is not, SML would be unduly prejudiced, and in support of its claim relies on our pronouncement in *Pac. Transp. Lines, Inc.—Subsidy, Route 29, supra*, page 18, where both PTL and PFEL were applying for subsidy for their existing services on Route 29:

> We conclude, on the basis of the present record, that the granting of subsidies to both PTL and PFEL to the extent of their operations on the route at the time the applications were filed would not unduly prejudice either operator. We leave open the question of undue prejudice which might result as between applicants if one of them should fail to qualify for a subsidy * * *.

Obviously, in that case the Board intended to avoid the issue until it became determinative. Since both applicants subsequently were awarded subsidy, the issue was never ripe for decision. This is confirmed by the Board's report on petition for reconsideration, 4 F. M. B. 136 (1952). In any event, to prevail in this issue, SML must prove that the award of subsidy to States would result in undue prejudice to SML or undue advantage to States. There is nothing in this record to substantiate SML's claim.

Regarding this proposed service, APL maintains that States is not an existing operator as to the 24 to 30 annual sailings sought because of the number and regularity of sailings, the traffic handled, and the failure of States to call at "regular" ports and secondary ports on each voyage. However, it is sufficient if applicant's service is reasonably in general accord with the proposed subsidized service. The word "service" in section 605 (c) is used, of course, broadly to cover the entire scope of operations. It embraces "much more than vessels; it includes the scope, regularity, and probable permanency of the operations, the route covered, the traffic handled, the support given by the shipping public, and other factors which concern the bona fide character of the operation." *Pac. Transp. Lines, Inc.—Subsidy, Route 29, supra.* None of these elements alone is determinative—nor would a deficiency in any one necessarily be fatal to a finding of existing service. Moreover, States' proposed service is in general accord with its existing operation. Such has been held sufficient to establish existing service within the meaning of this section. *Bloomfield S. S. Co.—Subsidy, Route 15 B*, 3 U. S. M. C. 299 (1946).

We find and conclude, therefore, that States is an existing operator within the meaning of section 605 (c) as to its Pacific coast/Far East service, and that the award of subsidy to States will not unduly advantage States or unduly prejudice any of the interveners.

With reference to applicant's Northwest/Far East service, however, we cannot agree with the examiner that States has an existing service. Sailings commenced subsequent to the date of filing the subsidy application cannot be considered in determining existing service. See *Pac. Transp. Lines, Inc.—Subsidy, Route 29, supra*, and *Lykes Bros. S. S. Co.—Increased Sailings, Route 22, supra.* Although States has been associated with the transpacific trade from the Northwest for many years, since 1952 its service from this area has been negligible. For example, in 1951 it had 14 commercial sailings direct from the Northwest, five in 1952, none in 1953, and but one in 1954, constituting an average of five per year during the 1951–1954

period.[5] Within the meaning of section 605 (c), five sailings annually cannot support a finding of an existing service of 10 to 16 sailings annually.

In order for applicant to prevail, then, it must be determined that United States-flag service in this trade is inadequate and that in the accomplishment of the purposes and policy of the Act additional vessels must be operated thereon.

As the following table indicates, liner carryings in this trade include an unusually high ratio of bulk-type cargoes:

LINER CARRYINGS ON ROUTE 30

[In thousands of long tons]

| | Total | General | Bulk | Percentage of bulk |
|---|---|---|---|---|
| 1951 | 366 | 263 | 102 | 27.8 |
| 1952 | 366 | 207 | 159 | 43.4 |
| 1953 | 454 | 130 | 324 | 71.3 |
| 1954 | 511 | 161 | 350 | 68.4 |
| 1955 | 641 | 281 | 360 | 56.1 |

The foregoing table reveals that (1) while commercial carryings have increased approximately 7 percent sinces 1951, bulk commodities moving via liners have increased 252 percent during the same period, (2) since 1953, bulk commodities have accounted for well over half of the total commercial liner carryings, and (3) liners are carrying an ever-increasing amount of bulk-type commodities.

The following table indicates that during the 1951–1955 period nonliner carryings have increased from 851,243 tons to 1,400,300 tons, and have accounted for at least 70 percent of the total commercial movement. It further shows that United States-flag vessels carry a very small percentage of the tramp movement.

NONLINER COMMERCIAL CARGO OUTBOUND ON ROUTE 30, BY TYPE OF SERVICE AND FLAG

| Year | Total tons | Percent of all commercial | U. S. flag tons | U. S. flag percent |
|---|---|---|---|---|
| 1951 | 851,243 | 70 | 211,952 | 25 |
| 1952 | 1,456,596 | 80 | 72,039 | 5 |
| 1953 | 1,065,557 | 70 | 9,900 | 1 |
| 1954 | 1,323,910 | 72 | 290,562 | 22 |
| 1955 | 1,400,300 | 70 | 154,158 | 12 |

[5] Although the examiner found applicant to have an annual average of nine sailings in this trade, we note that four of those sailings were also relied upon to support a finding of existing service in the Pacific coast/Far East service; one sailing may not be construed to be a sailing in more than one service for the purpose of measuring existing service. Moreover, the average of four sailings originated in California and called at the Northwest en route to the Far East.

To further demonstrate the importance of bulk-type commodities in this trade, the following table compares liner general, liner bulk cargoes, and tramp movements:

TOTAL COMMERCIAL CARRYINGS ON ROUTE 30

[In thousands of long tons]

| | Total | Liner general | Bulk | Nonliner | Total general | Total bulk | Percent of bulk cargoes |
|---|---|---|---|---|---|---|---|
| 1951 | 366 | 263 | 102 | 851 | 263 | 953 | 78 |
| 1952 | 366 | 207 | 157 | 1,456 | 207 | 1,615 | 88 |
| 1953 | 454 | 130 | 324 | 1,065 | 130 | 1,389 | 91 |
| 1954 | 511 | 161 | 350 | 1,324 | 161 | 1,674 | 91 |
| 1955 | 641 | 281 | 360 | 1,400 | 281 | 1,760 | 86 |

Obviously, the water-borne export foreign commerce of the United States, from the Pacific Northwest, is a bulk-type commodity trade.

In view of United States-flag vessels having captured large amounts of liner cargoes in recent years,[6] we must determine whether general cargoes will continue to move at their present high level and whether liners can reasonably expect to attract increasing amounts of bulk-type commodities.

As to the movement of general cargo in this trade, the record clearly supports a finding of a moderate and steady increase in the foreseeable future.

In view of the preponderance of bulk-type commodities in the Northwest, an inaccurate measurement would result if, in determining adequacy of service in this trade, we considered past and future liner carryings of general cargo exclusively. Our conclusion would be equally erroneous if we considered all commercial carryings from this area, including the entire bulk movement, in measuring adequacy. Bulk-type commodities, however, must be considered to the extent that they may reasonably be expected to be carried by liners. *Bloomfield S. S. Co.—Subsidy, Routes 13 (1) and 21 (5)*, 4 F. M. B. 305 (1953). Thus we must examine nonliner cargoes in the light of their probable conversion to liner cargoes, and in ascertaining this we recognize the yardstick set forth in the above case, at page 318: "The most valuable guide to measure adequacy of service in the future is necessarily adequacy of service in the past, modified to such extent as may appear justified by the best available judgment as to what the future may have in store." It is with this in mind that we

[6] During the period 1951–1955, including the carryings made by States, United States-flag vessels carried 76, 51, 53, 59, and 62 percent of total liner traffic annually. Excluding the cargoes carried by States, United States-flag vessels carried 59, 43, 45, 54, and 33 percent of the total liner traffic annually during the same period.

interpret this record. The foregoing tables portray two uncontrovertible facts: commercial carryings by liners are increasing and bulk cargoes are carried more and more by liners.

Between 1951 and 1955, commercial carryings in this trade increased approximately 15 percent annually, and although we do not believe that this record supports a finding that total liner commercial carryings will increase at the same rate, we note that the record is convincing as to the continued growth of liner movements out of the Northwest. Uncontradicted testimony on this point is to the effect that a steady, moderate increase in exports should continue, and that an increase of 55,000 tons per year—the average annual increase during the 1951–1955 period, and less than ten percent of the 1955 figure—would result in over 900,000 tons of commercial cargo moving outbound via liners by 1960, or only slightly less than one and one-half times the commercial outbound movement in 1955. On the basis of this record, we believe that 900,000 tons of commercial liner cargo may reasonably be expected to be offered in this trade by 1960. In view of the rapid and steady increase of available bulk-commodity offerings in this trade, and the ability of liners to carry large amounts of bulk cargoes, the projected annual increase of 55,000 tons per year is certainly reasonable. We feel that without the addition of applicant's service, American-flag service would be inadequate.

Although the above cargo projections would, within a very few years, clearly support the additional 10 to 16 annual sailings proposed by States, we do not rely entirely on such projections. We feel that the realities and peculiarities of this trade, here and now, warrant a finding of inadequacy. We are cognizant of the comparatively high participation of United States-flag vessels in the present liner carryings,[7] and we realize that if we were to apply a mechanical, mathematical formula of 50 percent participation by United States-flag vessels in the liner trade as being tantamount to the statutory word "substantial," a finding of inadequacy might not be warranted. But it has been firmly settled that the 50-percent test is but a general guide and must not defeat more cogent factors. On this very subject we have previously held that "this goal [of 50 percent] was intended as a general guide with respect to the over-all participation of United States-flag vessels, and that other controlling considerations ought to be specifically invoked when we deal with individual trade routes." *Bloomfield S. S. Co.—Subsidy, Routes 13 (1) and 21 (5)*, 4 F. M. B. 349, 352 (1953). As to the over-all participation of United States-flag vessels in our foreign commerce, we take official notice of the fact

[7] See footnote 6.

that not more than 38 percent of our total liner foreign commerce is carried in American-flag bottoms. In attaining this over-all goal of 50 percent United States-flag participation in some trades may well exceed 50 percent while on other routes, because of the dictates of realities, adequate American-flag participation may be substantially less than 50 percent.

In view of the tremendous—and growing—volume of bulk commodities available in the Northwest, the increasing ability of liners to convert these bulk-type cargoes to liner type, the comparatively small amount of free space on liners, and the meager participation by American-flag vessels in this nonliner cargo movement, we feel that the Northwest/Far East service, without the 10 to 16 annual sailings of the applicant, is not adequately served by vessels of United States registry.

Since we have determined that this trade is not now adequately served, the operation of additional United States-flag vessels is necessarily in furtherance of the purposes and policy of the Act, and whether the granting of the subsidy application would result in undue advantage or undue prejudice is not in issue. *Bloomfield* (2 reports), *supra; American President Lines—Calls, Round-The-World Service*, 4 F. M. B. 681 (1955).

Finally, we consider the request of Coastwise that in this report or in the operating-differential subsidy contract, if one is awarded, we specifically preclude States from trading between United States Pacific ports and/or Alaska and Canada, without a prior hearing under section 605 (c) of the Act. There is nothing in this record to indicate an intention on the part of States ever to undertake such trading, and at any rate, as to future operations, Coastwise has adequate statutory protection.

We thus conclude that section 605 (c) of the Act interposes no bar to the subsidization of either or both of applicant's proposed services. As to the proposed Pacific coast/Far East service, however, even if other sections of the Act do not prevent an award of subsidy to States, subsidization covering the full range of such service will depend upon a determination by the Maritime Administrator that applicant's proposed Pacific coast/Far East service is essential within the meaning of section 211 of the Act. *States Marine Corp.—Subsidy, Tri-Continent Service*, 5 F. M. B. 60 (1956).

Contentions of the parties not discussed herein have been considered and found not related to material issues or supported by the evidence.

# FEDERAL MARITIME BOARD

No. 790

ENCINAL TERMINALS ET AL.

*v.*

PACIFIC WESTBOUND CONFERENCE ET AL.

*Submitted June 11, 1957. Decided June 27, 1957*

Action of Pacific Westbound Conference and the member lines thereof has prevented common carriers from serving complainant ports at the same rates as San Francisco, in violation of section 205 of the Merchant Marine Act, 1936.

*Gerald H. Trautman* and *William Schwarzer* for Encinal Terminals and Howard Terminal, *J. Kerwin Rooney* and *Lloyd S. McDonald* for City of Oakland, acting by and through its Board of Port Commissioners (Port of Oakland), *Gerald H. Trautman* and *William J. Ball* for Parr-Richmond Terminal Company, and *J. Richard Townsend* and *C. W. Phelps* for Stockton Port District, complainants.

*Allan E. Charles*, *Joseph J. Geary*, and *Alan Nichols* for Pacific Westbound Conference and the individual members thereof, respondents.

*John W. Collier* for City of Oakland, *Eugene A. Read* for Oakland Chamber of Commerce, *William Biddick, Jr.*, and *Monroe N. Langdon* for City of Stockton, *J. C. Sommers* for Stockton Chamber of Commerce, *Frank Annibale* for City of Alameda, *Stanley D. Whitney* for Chamber of Commerce of the City of Alameda, *Thomas M. Carlson* and *William J. Ball* for City of Richmond, *Miriam E. Wolf* and *Harold B. Haas* for State of California, through its agency the Board of State Harbor Commissioners for San Francisco Harbor, *Dion R. Holm* and *Richard Saveri* for City and County of San Francisco, and *C. R. Nickerson* for San Francisco Bay Carloading Conference, interveners.

REPORT OF THE BOARD

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

BY THE BOARD:

This proceeding arises out of a complaint filed by Encinal Terminals, Howard Terminal, City of Oakland, Parr-Richmond Terminal Co., and Stockton Port District,[1] directed against Pacific Westbound Conference (the conference) and the individual member lines thereof.[2] The complaint alleges that the conference's Overland Freight Tariff No. 3–Q applies only to certain named terminal ports, including San Francisco, but does not apply to complainant ports; that the conference's Local Freight Tariff No. 1–W, with freight rates higher than those in the Overland Tariff, applies to both the named terminal ports and to complainant ports; that by failing to specify rates from Alameda, Oakland, Richmond, and Stockton in the Overland Tariff, while at the same time extending such rates only to San Francisco and the other terminal ports, that tariff prohibits any member line from accepting overland cargo at the complainant ports;[3] and that such actions of the conference result in violation of sections 14, Fourth, 15, 16, 17, and 36 of the Shipping Act, 1916 (the 1916 Act), section 205 of the Merchant Marine Act, 1936 (the 1936 Act), Pacific Westbound Conference Agreement No. 57 (Agreement 57), and the legal obligations of common carriers.

The Chamber of Commerce of the City of Alameda, City of Alameda, City of Oakland, City of Richmond, City of Stockton, Oakland Chamber of Commerce, and Stockton Chamber of Commerce intervened on behalf of complainants. The City and County of San Francisco, San Francisco Bay Carloading Conference, and the State of California, through its agency the Board of State Harbor Commissioners for San Francisco Harbor, intervened on behalf of respondents.

Hearing was held before an examiner, who issued a recommended decision. Exceptions to the recommended decision were filed by com-

[1] Encinal Terminals operates port facilities in Alameda, California; Howard Terminal operates port facilities in Oakland, California; City of Oakland, through its Board of Port Commissioners, represents the port of Oakland; Parr-Richmond Terminal Company operates port facilities in Richmond, California; and Stockton Port District operates port facilities in Stockton, California. We recognize that complainants represent the ports of Alameda, Oakland, Richmond, and Stockton, and throughout this proceeding we therefore refer to complainants as "complainant ports."

[2] See Appendix.

[3] Under the conference agreement, all member lines are required to abide strictly by conference tariffs, and service by member lines is restricted only to port coverage and rates as set forth in such tariffs.

plainants, respondents, and certain interveners, replies to exceptions were filed, and oral argument was held before the Board.

The examiner concluded and found that the conference action complained of results in undue prejudice to complainant ports and undue preference to San Francisco, in violation of section 16 of the Act, and constitutes undue and unreasonable preference and prejudice between different descriptions of traffic, in violation of section 16. These same actions were found to result in a violation of the "unjust or unreasonable" provisions of section 17 of the 1916 Act, and of Agreement 57. The examiner found no violation of sections 14, Fourth, 15, and 36 of the 1916 Act, section 205 of the 1936 Act, or the "obligations of a common carrier".

Our disposition of the case differs somewhat from the recommended decision of the examiner. Exceptions taken and recommended findings not discussed in this report and not reflected in our findings or conclusions have been found not relevant or unnecessary for disposition of the proceeding, or not supported by the evidence.

## Findings of Fact

The conference maintains two tariffs covering the trade served, Overland Freight Tariff No. 3–R and Local Freight Tariff No. 1–X.

The Overland Tariff applies commodity rates on goods originating in areas generally east of the Rocky Mountains (called "overland cargo" and "overland territory"), and is applicable from San Francisco, Los Angeles, and Long Beach, California, Portland, Oregon, Seattle, Tacoma, and Longview, Washington, and Vancouver, British Columbia, to Yokahama, Kobe, Osaka, Hongkong, Manila, and other ports as shown therein. The west coast ports are designated "Terminal Ports," and rates in the tariff apply to overland cargoes moving through those ports. The tariff does not, and has never, provided these rates from Oakland, Alameda, Richmond, or Stockton.

The Local Tariff applies commodity rates on goods originating in areas generally west of the Rocky Mountains (called "local cargo" and "local territory"), is applicable from the same terminal ports as above, and by Rule 9 is further applicable from the nonterminal ports of Oakland, Alameda, Richmond, and Stockton by direct call or by transshipment at vessel's expense. Thus, the rates in the Local Tariff apply to local cargoes moving through the terminal and nonterminal ports.

The freight rates in the Overland Tariff, applicable only to the terminal ports, are lower than the rates on the same commodities in the Local Tariff. With respect to 45.76 percent of the total volume

of overland cargo that moved in 1955,[4] the overland ocean freight rates averaged $7.20 per ton less than the local rates on the same commodities. Furthermore, under the Overland Tariff the rail and water carriers absorb, generally on a 50–50 basis, the cost of loading, unloading, and/or wharfage charges at terminal ports. No such absorption is made with respect to local cargoes moving under the Local Tariff.

The Overland Tariff does not contain rates applicable to overland cargoes moving through complainant ports, and because of the conference requirement that all member lines abide strictly by the terms of the conference tariffs, if an individual line should accept such cargoes at the complainant ports the higher local rates, without absorption of terminal charges, would have to be assessed.

On at least one occasion cargo which originated in overland territory moved through one of the complainant ports but, because of the provisions of the Overland Tariff, was charged the higher local rates.

Complainants have in the past requested the conference to extend the Overland Tariff so as to permit the member lines at their option to load overland cargo at complainant ports, and a few shippers have made similar requests. At conference meetings certain members voted for adoption of such requests, and some lines voted for adoption for a trial period of one year. The final conference action in each instance, by two-thirds or greater vote, was denial of the requests.

Testimony of individual respondent lines showed varying positions as to application of overland rates to complainant ports. Some were in sympathy with the desires of the complainant ports, and, if their vessels were loading local cargo at such ports they would also load overland cargo if the rates applied, depending on the character of the cargo, the type of stowage required, and upon competitive conditions. Some would welcome the option of accepting certain types of overland cargo at complainant ports at overland rates if they could retain control over the routing and prevent diversion and increased costs.

Complainant ports and terminal operators are located on harbor development and improvement projects authorized by Congress in the San Francisco Bay area. Each provides all the facilities and services required for loading and unloading vessels, and such facilities and services are adequate and suitable for handling all the cargo here involved. In view of our final disposition of this proceeding, we find it unnecessary to make further findings of fact.

[4] This 45.76 percent constituted the ten major overland commodities which moved in 1955.

## Discussion and Conclusions

We find section 205 of the 1936 Act to be directly applicable to the facts developed in this proceeding. That section reads:

> Without limiting the power and authority otherwise vested in the Commission, it shall be unlawful for any common carrier by water, either directly or indirectly, through the medium of an agreement, conference, association, understanding, or otherwise, to prevent or attempt to prevent any other such carrier from serving any port designed for the accommodation of ocean-going vessels located on any improvement project authorized by the Congress or through it by any other agency of the Federal Government, lying within the continental limits of the United States, at the same rates which it charges at the nearest port already regularly served by it.

It is beyond dispute that complainant ports constitute ports "designed for accommodation of ocean-going vessels located on any improvement project authorized by the Congress or through it by any other agency of the Federal Government, lying within the continental limits of the United States," and are entitled to the protection of section 205. San Francisco and complainant ports are closely adjacent in the San Francisco Bay area, and are directly competitive for cargoes moving through the Bay area. San Francisco clearly is "the nearest port already regularly served" under the Overland Tariff, within the meaning of section 205.[5] If concerted action of the conference "prevents or attempts to prevent" any common carrier by water from serving complainant ports "at the same rates which it charges at the nearest port already regularly served by it" (San Francisco), such action is unlawful.

The record fully supports a finding that the existing Overland Tariff, through its application of the lower overland rates solely to the terminal ports, including San Francisco, prohibits any individual member line from serving complainant ports at overland rates. If cargo from overland territory should move through complainant ports the existing tariffs would require the application of the higher local rate. In the past, some lines favored extension of overland rates to complainant ports, but conference action prevented any such extension. The testimony showed that certain lines would extend some degree of service to complainant ports, but were prevented by the terms of the Overland Tariff. As the Overland Tariff now is worded, individual lines are prevented in the future from extending *any* service to complainant ports at the overland rates. The conclu-

[5] We need not in this proceeding, and do not, consider the effect of section 205 in a situation where the ports considered might be more widely separated than the particular ports here involved.

sion is inescapable that the Overland Tariff, since its inception, has prevented, and, unless modified, will continue to prevent, any individual member line from serving complainant ports at the overland rates now effective from San Francisco. We think such action is precisely the type of "agreement, conference, association, [and] understanding" which is declared unlawful under section 205.

The only previous decision in which the Board or its predecessors have directly considered the applicability of section 205 was *Sun-Maid Raisin Growers Asso.* v. *Blue Star Line, Ltd.*, 2 U. S. M. C. 31 (1939). In that case the Maritime Commission found no violation of section 205 because the conference agreement therein considered did not *prevent* any carrier from serving any port it desired to serve—it expressly authorized individual carriers to establish rates from other ports not designated as terminal ports, subject to the condition that such rates would not be lower than those in effect from terminal ports.

The *Sun-Maid* decision in no way conflicts with our findings herein. If the conference tariff here involved contained any provision which would allow a member line to extend overland rates to complainant ports, we could find no violation of section 205. A provision similar to that approved in the *Sun-Maid* case would be in conformity with our findings herein. It is the lack of any such provision which leads to our conclusion in this proceeding.

Section 205 does not authorize us to require an individual carrier to extend any service to particular ports, and our limited conclusions herein do not place such a requirement on any carrier. Section 205 and our conclusions herein are directed only to conference action which *prevents* an individual common carrier from extending service to complainant ports at the same rates applicable from San Francisco.[6]

In view of the clear and unambiguous language of section 205 and the undisputed facts developed herein, the arguments advanced by the conference lines and their supporting interveners, that section 205 does not apply to the facts in this proceeding, are not convincing.

In view of our disposition of this proceeding under section 205, we find it unnecessary to consider whether respondents' action resulted in undue prejudice or preference between localities or between different descriptions of traffic, in violation of section 16 of the 1916 Act, or were unjustly discriminatory or unjust or unreasonable, in violation of section 17. We further find it unnecessary to consider

[6] We need not in this proceeding, and do not, consider the conditions under which an individual carrier in its discretion may elect to serve complainant ports.

the allegations of violations of sections 14, Fourth, 15, and 36 of the 1916 Act, or the obligations of a common carrier.

We find and conclude that the action of the conference and its member lines has prevented common carriers from serving complainant ports at the same rates as San Francisco, in violation of section 205 of the 1936 Act. Respondents will be expected to modify the Overland Tariff so as to permit member lines, within their individual discretion, to serve complainant ports at the same rates applicable from San Francisco.

An appropriate order will be entered.

## APPENDIX

### CONFERENCE MEMBERS

AMERICAN MAIL LINE LTD.
AMERICAN PRESIDENT LINES, LTD.
DAIDO KAIUN KAISHA, LTD. (Daido Line)
DE LA RAMA LINES—
- The De La Rama Steamship Co., Inc.
- The Swedish East Asia Co., Ltd.
- The Ocean Steamship Co., Ltd.
- The China Mutual Steam Navigation Co., Ltd.
- Nederlandsche Stoomvaart Maatschappij "Ocean" N. V.

ISTHMIAN STEAMSHIP COMPANY
JAVA PACIFIC & HOEGH LINES—
- N. V. Stoomvaart Maatschappij "Nederland"
- Koninklijke Rotterdamsche Lloyd, N. V.
- Skibsaktieselskapet Arizona
- Skibsaktieselskapet Astrea
- Skibsaktieselskapet Aruba
- Skibsaktieselskapet Noruega
- Skibsaktieselskapet Abaco
- A/S Atlantica

KLAVENESS LINE—
- Skibsaktieselskapet Sangstad
- Skibsaktieselskapet Solstad
- Skibsaktieselskapet Siljestad
- Dampskibsaktieselskabet International
- Skibsaktieselskapet Mandeville
- Skibsaktieselskapet Goodwill

KNUTSEN LINE—
- Dampskibsaktieselskapet Jeanette Skinner
- Skibsaktieselskapet Pacific
- Skibsaktieselskapet Marie Bakke
- Dampskibsaktieselskapet Golden Gate
- Dampskibsaktieselskapet Lisbeth
- Skibsaktieselskapet Ogeka

NIPPON YUSEN KAISHA (N. Y. K. LINE)
PACIFIC FAR EAST LINE, INC.
PACIFIC ORIENT EXPRESS LINE—
- Skipsaktieselskapet Nordheim
- Skipsaktieselskapet Vito
- Skipsaktieselskapet Kirkoy
- Skipsaktieselskapet Skagerak (Ditlev-Simonsen Lines)
- Transatlantic Steamship Company, Ltd., of Gothenburg

PACIFIC TRANSPORT LINES, INC.
STATES MARINE CORPORATION
STATES MARINE CORPORATION OF DELAWARE
STATES STEAMSHIP CO.
WATERMAN STEAMSHIP CORPORATION

## Associate Members

DAMPSKIBSSELSKABET AF 1912, AKTIESELSKAB AKTIESELSKABET DAMPSKIBSSELSKABET SVENDBORG
(A. P. Moller, Maersk Line)
BANK LINE, LTD.
COMPAGNIE DE TRANSPORTS OCEANIQUES
ELLERMAN & BUCKNALL ASSOCIATED LINES
(American & Manchurian Line)
FERNVILLE FAR EAST LINES—
Fearnley & Eger and A. F. Klaveness & Co., A/S
Skibsaktieselskapet Varild
Skibsaktieselskapet Marina
Aktieselskabet Glittre
Dampskibsinteressentskabet Garonne
Skibsaktieselskapet Sangstad
Skibsaktieselskapet Solstad
Skibsaktieselskapet Siljestad
Dampskibsaktieselskabet International
Skibsaktieselskapet Mandeville
Skibsaktieselskapet Goodwill
IVARAN LINE—
Aktieselskapet Ivarans Rederi
Skibsaktieselskapet Igade
A/S Lise
(Ivaran Lines—Far East Service)
KAWASAKI KISEN KAISHA, LTD.
KOKUSAI LINE—
Iino Kaiun Kaisha, Ltd.
Mitsubishi Kaiun Kaisha, Ltd.
MITSUI STEAMSHIP CO., LTD.
OSAKA SHOSEN KAISHA, LTD.
PRINCE LINE, LTD.
SHINNIHON STEAMSHIP CO., LTD.
WILHELMSENS DAMPSKIBSAKTIESELSKAB
A/S Den Norske Afrika—Og Australielinie
A/S Tonsberg
A/S Tankfart I A/S Tankfart IV
A/S Tankfart V A/S Tankfart VI
YAMASHITA KISEN KAISHA

At a Session of the FEDERAL MARITIME BOARD, held at its office in Washington, D. C., on the 27th day of June A. D. 1957

No. 790

ENCINAL TERMINALS ET AL.

*v.*

PACIFIC WESTBOUND CONFERENCE ET AL.

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

*It is ordered*, That respondents Pacific Westbound Conference and the member lines thereof be, and they are hereby, notified and required to abstain from action herein found to be in violation of section 205 of the Merchant Marine Act, 1936; and

*It is further ordered*, That respondents be, and they are hereby, required, within 15 days from the date of service of this order, to modify their Overland Tariff in a manner consistent herewith.

BY THE BOARD.

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

# DEPARTMENT OF COMMERCE

# MARITIME ADMINISTRATION

No. S-61

## AMERICAN PRESIDENT LINES, LTD., AND LYKES BROS. STEAMSHIP CO., INC.—AGREEMENT NO. 8061—APPORTIONMENT OF RUBBER SHIPMENTS ORIGINATING IN THAILAND

*Submitted June 27, 1957. Decided July 5, 1957*

Temporary approval previously granted American President Lines, Ltd., and Lykes Bros. Steamship Co., Inc., to participate in Agreement 8061 to be withdrawn 60 days from date hereof. If agreement modified so as to provide that United States-flag lines carry at least 34.5 percent of cargoes covered thereby, approval to participate in the pool will be granted.

*Vern Countryman* for American President Lines, Ltd.
*Odell Kominers* for Lykes Bros. Steamship Co., Inc.
*Edward Schmeltzer* as Public Counsel.

### REPORT OF THE ACTING ADMINISTRATOR

American President Lines, Ltd. (APL), and Lykes Bros. Steamship Co., Inc. (Lykes), both holders of operating-differential subsidy agreements with the Federal Maritime Board, are parties to Agreement No. 8061, duly approved by the Board on February 29, 1956. This agreement provides for the apportionment of rubber shipments from Thailand (Siam) to the United States among members of the Siam/New York Conference.[1] Under the terms of the agreement, the United States-flag lines—APL, Lykes, and Isthmian Steamship Company (Isthmian) are allocated 17, 5, and 12.5 percent, respectively, of such shipments, or a total of 34.5 percent.

As subsidized operators, APL and Lykes may participate in the

[1] Members of the Siam/New York Conference include three American lines—APL, Lykes, and Isthmian—and nine foreign-flag lines. Isthmian is not presently subsidized.

pool only with the consent of the Administrator,[2] and in granting or withholding such approval consideration will be given as to whether such agreements contravene, or may reasonably be expected to operate so as to contravene, the purposes, policy, or provisions of the Merchant Marine Act, 1936 (the Act). On February 29, 1956, APL and Lykes were authorized to participate temporarily in the pool pending a final determination by the Administrator, after hearing, as to whether such participation would contravene, or might operate so as to contravene, the purposes, policy, or provisions of the Act.

Hearing was held on March 20, 1957, and on May 28, 1957, the examiner served his recommended decision in which he concluded that the participation in the pooling agreement by APL and/or Lykes would not contravene the purposes, policy, or provisions of the Act.

Public Counsel excepted to the examiner's decision on the ground that unless the agreement were modified so as to guarantee at least 34.5 percent of the rubber to the three American-flag carriers, collectively, approval of participation in the pool might well operate so as to contravene the purposes or policy of the Act. Replies to exceptions were not filed.

The record is clear that Lykes' relatively infrequent sailings in this trade, together with the comparatively small volume of rubber moving from Siam to the Gulf, may prevent Lykes from attaining its full portion of the cargo under the agreement. For example, in 1956 Lykes carried less than one-half its authorized share, or only 2.38 percent of the cargo, with the result that the amount carried by American-flag lines was 1.63 percent less than the pool quota of 34.5 percent. Thus, in order to insure the carriage of 34.5 percent of rubber in American bottoms—which the agreement authorizes—when Lykes is unable to carry its full share, that portion not carried by Lykes must be allocated to either Isthmian or APL.

An agreement which places a ceiling on the amount of cargo that can be lifted by United States-flag lines without guaranteeing them a minimum is not commensurate with the purposes, policy, and provisions of the Act. Therefore, the temporary approval granted to APL and Lykes on February 29, 1956, will be withdrawn 60 days from the date hereof. If within such time, however, the agreement is amended so as to provide that American-flag vessels will carry not less than 34.5 percent of the cargo covered by the agreement, APL and Lykes shall be authorized, under Article II–18 (c) of Operating Differential Subsidy Agreements FMB—12 and MCc–62431, respectively, to participate in Agreement No. 8061.

[2] Article II–18 (c) of the respective operating-differential subsidy agreements.

No. S–61

AMERICAN PRESIDENT LINES, LTD., AND LYKES BROS. STEAMSHIP CO., INC.—AGREEMENT NO. 8061—APPORTIONMENT OF RUBBER SHIPMENTS ORIGINATING IN SIAM

MODIFICATION OF REPORT OF THE ACTING ADMINISTRATOR

In the report herein of July 5, 1957, it was stated that unless the parties amended Agreement No. 8061 so that the American-flag vessels would carry not less than 34.5 percent of the cargo covered by the agreement, the temporary approval granted to American President Lines, Ltd. (APL), and Lykes Bros. Steamship Co., Inc. (Lykes), on February 29, 1956, would be withdrawn 60 days from the date of the report.

Counsel for APL has requested that the effective date of the withdrawal of the temporary approval be delayed due to the physical difficulties involved in amending Agreement No. 8061 and filing it with the Federal Maritime Board for approval, all within the time specified in the report. Counsel for Lykes join in this request.

Upon consideration of the foregoing, the time for withdrawal of the temporary approval referred to in the last paragraph of the report is hereby changed from 60 to 90 days.

# FEDERAL MARITIME BOARD

No. 744

TERMINAL RATE STRUCTURE—PACIFIC NORTHWEST PORTS

*Submitted August 6, 1957. Decided August 13, 1957*

Handling and service charges incurred between point of rest and ship's hook must be assessed by terminal operator against party receiving benefit therefrom but may be billed to and collected from the vessel in the first instance.

*Robert W. Graham* for Northwest Marine Terminal Association and members thereof.

*Allen C. Dawson* as Public Counsel.

REPORT OF THE BOARD ON PETITION FOR REARGUMENT IN PART

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

BY THE BOARD:

The report and order of the Board herein were served on June 29, 1956 (5 F. M. B. 53). Respondents, Northwest Marine Terminals Association and its members, filed a petition for reconsideration and reargument of that report and order. By order of June 21, 1957, that part of the petition which requested clarification of certain language in the report was granted and the remainder of the petition was denied. Oral argument was held on August 6, 1957. Public Counsel appeared in support of petitioner's position, and no party appeared in opposition.

The clarification which petitioners request relates to the assessment of handling and service charges under the Freas Formula. Our report requires that such charges be assessed against the party for whom, under the contract of affreightment, they have been incurred. Thus, where the contract of affreightment involves a tackle-to-tackle rate, handling and service charges incurred between point of rest and

ship's hook outbound and between ship's hook and point of rest inbound are incurred for the benefit of the shipper or consignee, and in view of the language in the report, such charges must be assessed against the shipper or consignee. Petitioners argue that since they are not parties to the contract of affreightment they are unable in any given case to determine the party ultimately liable for such assessments, and suggest that our report be clarified so as to allow the terminal operators, in every case, to collect the handling and service charges from the carrier who, in proper instances, will collect therefor from the shipper or consignee.

Although we feel that the rule as stated in the earlier report would allow the petitioners to so operate, in the interests of clarity the report is hereby amended so that in every case the terminal operator may bill and collect from the vessel, and in instances where the charges are incurred for the benefit of the cargo the carrier shall bill and collect such charges from the shipper or consignee.

# FEDERAL MARITIME BOARD

DOCKET NO. 765 (SUB. NO. 1)

IN THE MATTER OF THE NOTICE OF PROPOSED RULE MAKING —BUSINESS PRACTICES OF FREIGHT FORWARDERS [46 CFR PART 244]

*Submitted June 25, 1957. Decided August 13, 1957*

The Board has jurisdiction to issue rules regarding business practices of freight forwarders. Petition to dismiss rule-making proceeding denied.

*J. Richard Townsend* for Pacific Coast Ocean Freight Forwarders Conference, 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 and Brokers Association, Inc., *Benjamin M. Altschuler* for Customs Brokers and Forwarders Association of America, Inc., and *Robert Eikel* for Texas Ocean Freight Forwarders Association, petitioners.

*Robert E. Mitchell*, *Edward Aptaker*, *Richard J. Gage*, and *Edward Schmeltzer* as Public Counsel.

REPORT OF THE BOARD ON PETITION TO DISMISS

BEN H. GUILL, *Vice Chairman*, and THOS. E. STAKEM, JR., *Member*.

BY THE BOARD:

Notice was published in the Federal Register of March 19, 1957, of the institution of a proposed rule-making proceeding, under sections 15, 16, 17, and 21 of the Shipping Act, 1916 (the 1916 Act), section 204 of the Merchant Marine Act, 1936 (the 1936 Act), section 19 of the Merchant Marine Act, 1920 (the 1920 Act), and section 4 of the Administrative Procedure Act (APA). The proposed rules are to modify the Board's General Order 72 (15 F. R. 3152, 18 F. R. 8807), which relates to the business and practices of freight forwarders, to further clarify definitions therein, and to eliminate

certain practices which may be unjust or unreasonable or otherwise in violation of the 1916 Act.

Petitions were filed to dismiss the proceeding on the ground that the Board lacks jurisdiction to adopt the proposed rules. The petitions are based primarily on the grounds: (1) that the Board has no rule-making authority under the provisions of the 1916 Act; (2) that section 204 of the 1936 Act confers no authority on the Board to issue rules under the 1916 Act; (3) that even if the Board has rule-making authority under the 1916 Act, it has no such authority with respect to brokers and the payment of brokerage; and (4) that even if the Board has rule-making authority under the 1916 Act with respect to brokers and the payment of brokerage, such authority cannot be exercised without a finding of a violation of that Act. Replies to the petitions were filed by Public Counsel, and oral argument was held.

Section 2 (c) of APA defines a "rule" as "the whole or any part of any agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy * * *." Action of the Board which implements, interprets, or prescribes law or policy for the future, whether such action is of general or particular applicability, is "rule making" under the APA.

While the 1916 Act contains no express language granting general rule-making power to the Board, such substantive authority has been conferred by section 204 of the 1936 Act. *Carrier-Imposed Time Limits For Freight Adjustments*, 4 F. M. B. 29, 32 (1952).[1]

Section 204 (a) of the 1936 Act transferred to the Maritime Commission (the Board's predecessor) "all the functions, powers, and

[1] In view of our finding that section 204 gives the Board general rule-making power with respect to the regulatory provisions of the 1916 Act, it is unnecessary here to determine whether the 1916 Act itself, despite the lack of express statutory language, necessarily includes the power to make rules in a proper proceeding. In view, however, of the language of the Supreme Court in *California* v. *United States*, 320 U. S. 577 (1944), we think such rule-making power is implicit in the regulatory powers vested in the Board. The court therein stated at page 582:

"Having found violations of §§ 16 and 17, the Commission was charged by law with the duty of devising appropriate means for their correction. * * * Explicit formulation of duties owed by a business subject to legal regulation is desirable if indeed not necessary. Only thus can it avoid the hazards of uncertainty whether its attempted compliance with an undefined requirement of law is in fact compliance. Neither industry nor the community which it serves is benefited by the explosion of intermittent lawsuits for determining the relative rights of conflicting interests. What more natural for the Commission, having found disobedience of the law against discriminatory and unreasonable practices, than to define the outer bounds of practices that would not be unreasonable nor discriminatory."

As the administrative agency charged under the 1916 Act with the regulation of the shipping industry, we think the Board has the power, where practices in conflict with regulatory provisions of the 1916 Act are found, to issue rules prohibiting such practices.

duties vested in the former United States Shipping Board by the Shipping Act, 1916 * * *," and provides:

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

Under section 204 (b) the Board now has authority to adopt rules and regulations to carry out the powers, duties, and functions vested in it under the provisions of the 1916 Act. To the extent, therefore, that the 1916 Act vests powers and duties in the Board to regulate the activities of freight forwarders, the Board has authority to promulgate rules and regulations with respect to the business practices of forwarders.

Although the Board has held that brokers are not "other persons subject to this Act" within the meaning of section 1 of the 1916 Act (*In re Gulf Brokerage And Forwarding Agreements*, 1 U. S. S. B. B. 533 (1936)), the Board and the courts have clearly held that forwarders are "other persons" within the meaning of section 1, and are thereby subject to applicable regulatory provisions of the 1916 Act. *New York Freight Forwarder Investigation*, 3 U. S. M. C. 157 (1949); *U. S.* v. *American Union Transport*, 327 U. S. 437 (1946). The rules proposed herein will regulate "business practices of freight forwarders," including the collection of brokerage fees by freight forwarders and the payment of brokerage fees by common carriers by water. The proposed rules require the registration of forwarders and not brokers; they will regulate brokerage practices of forwarders and carriers, both of which are subject to the regulatory provisions of the 1916 Act. We therefore see no merit in the arguments advanced by petitioners that the Board lacks jurisdiction to issue the proposed rules because the regulatory provisions of the 1916 Act do not apply to brokers or to brokerage payments.

In addition to the general rule-making power vested in the Board by section 204 of the 1936 Act, section 17 of the 1916 Act, by express language, grants authority to the Board to promulgate the particular rules herein proposed. The applicable portion of that section states:

> 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.

The activities of forwarders, including the collection of brokerage payments, are intimately connected with the "receiving, handling, storing, or delivering of property," within the meaning of section 17.

The direct applicability of section 17 to the activities of freight forwarders was noted by the Supreme Court in *U. S.* v. *American Union Transport*, *supra*, at p. 449:

> The purpose of § 17, in relevant part, is to provide for the establishment, observance and enforcement of just and reasonable regulations and practices relating to or in connection with the receiving, handling, storing or delivering of property. By the nature of their business, independent forwarders are intimately connected with these various activities. Here again, unless the Commission has jurisdiction over them, it may not be able effectively to carry out the policy of the Act.

The Board and its predecessors many times have promulgated rules which implement, interpret, or prescribe law or policy for the future (*Intercoastal Rate Investigation*, 1 U. S. S. B. 108 (1926); *Associated Jobbers & Mfrs.* v. *Am.-Hawaiian S. S. Co. et al.*, 1 U. S. S. B. 198 (1931); *Storage of Import Property*, 1 U. S. M. C. 676 (1937)), and have directed such rules expressly to the practices of freight forwarders. *New York Freight Forwarder Investigation*, *supra.*

We find that the Board, by virtue of section 204 of the 1936 Act, has general rule-making authority, under applicable regulatory provisions of the 1916 Act, to issue the rules proposed herein. We find further that the power vested in the Board under section 17 of the 1916 Act, to determine, prescribe, and order enforced just and reasonable regulations or practices "relating to or connected with the receiving, handling, storing, or delivering of property", expressly grants power to the Board to promulgate such rules.

Much of petitioners' argument is directed to the issue of whether practices which are prohibited under the proposed rules are violative of substantive provisions of the 1916 Act, and to the extent to which the Board must make findings of violations of that Act as a prerequisite to issuance of rules. We think such arguments are premature.

At this stage of the proceeding the rules are only "proposed"—they are not in any way final or binding on any party. They have been proposed on the basis of experience developed in numerous prior formal proceedings involving brokerage and forwarding practices, and upon a preliminary investigation in connection with Docket No. 765, *Investigation of Practices, Operations, Actions, and Agreements of Ocean Freight Forwarders and Related Matters*, instituted by order of the Board dated October 6, 1954, and now pending. In the present proceeding the Board has done no more than notify all interested parties that certain business practices of forwarders may be in conflict with stated provisions of the 1916 Act, and has proposed

rules to correct such practices. Written views and suggestions from interested parties have been solicited and are due on or before August 30, 1957. What findings may be made ultimately and the form of the rules which may be issued finally, are not known. At this time it is pure conjecture on the part of petitioners to assume that proper findings will not be made or that proper procedures leading to such findings will not be followed. Arguments directed to the merits of the proposed rules, or conjecture as to the procedural steps which will be followed in adopting the rules, are not germane to the question of the Board's jurisdiction to issue such rules.

In conclusion, we find that the Board has jurisdiction to issue rules regarding business practices of forwarders. The petitions to dismiss the proceeding are denied.

# FEDERAL MARITIME BOARD

No. 785

D. J. ROACH, INC.

*v.*

ALBANY PORT DISTRICT, ALBANY PORT DISTRICT COMMISSION, AND CARGILL, INCORPORATED

*Submitted September 10, 1957. Decided October 18, 1957*

No violation of Shipping Act, 1916, found. Complaint dismissed.

*Robert Furness* for complainant.

*R. Granville Curry*, *Frederick M. Dolan*, and *Daniel H. Prior, Jr.*, for Albany Port District and Albany Port District Commission, and *Weston B. Grimes* for Cargill, Incorporated, respondents.

*Robert E. Mitchell*, *Edward Aptaker*, and *Robert J. 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:

This case arises from a complaint filed under section 22[1] of the Shipping Act, 1916 (the Act), by D. J. Roach, Inc., a stevedore, against the Albany Port District, the Albany Port District Commission (State respondents), and Cargill, Incorporated (Cargill), alleging that respondents, as persons subject to the provisions of the Act, have entered into an agreement which provides for an exclusive, preferential working agreement controlling, regulating, preventing,

[1] This section authorizes the filing, by *any* person, of a complaint alleging a violation of the Act, and, if proved, permits recovery of reparation for any injury resulting therefrom. Whether complainant is within the class of persons for whose protection the Act was designed is immaterial. "There is no reason for giving the statutory remedy [section 22] a procedural narrowness that would preclude the Board from utilizing the complaint of a third party * * * to correct violations of the act." *Isthmian S. S. Co. v. United States*, 53 F. (2d) 251 (S. D. N. Y. 1931).

or destroying competition, thereby subjecting complainant to (1) undue prejudice in violation of section 16, First, of the Act, and (2) unjust and unreasonable regulations relating to receiving, handling, or storing of property, in violation of section 17 of the Act. Since the alleged agreement was effectuated prior to its approval by the Board, complainant alleges a violation of section 15 of the Act.

The gravamen of the complaint is that since the State respondents, as owners and operators of terminal facilities in Albany, and Cargill, as operator of a terminal facility used in the grain trade in Albany, agreed that only one stevedore would be employed in the loading of grain ships there, and that the services of complainant in connection therewith would be terminated, (1) the parties unduly preferred complainant's competitor and unduly prejudiced complainant, and (2) the regulations providing for the employment of but a single stevedore constitute unjust regulations relating to the receiving, handling, and storing of property.

The examiner concluded that the conduct of respondents was not violative of the Act, and recommended that the complaint be dismissed.

Only complainant (who did not file a brief) took exceptions to the examiner's recommended decision. Although Cargill did not file exceptions, upon oral argument it contended that it was solely responsible to the Secretary of Agriculture under the provisions of the United States Warehouse Act, 7 U. S. C. 241, as a licensee thereunder, and not subject to the jurisdiction of this Board.

We agree with the examiner's conclusion that the complaint should be dismissed. As to the issue of jurisdiction over Cargill, we agree that the Warehouse Act, which relates to the storage of grain as opposed to its movement, in no way limits the jurisdiction conferred upon this Board by the Shipping Act, 1916. Thus, whether Cargill is subject to our jurisdiction depends upon whether its activities are such as to bring it within the definition of an "other person" contained in section 1 of the Act.[2] It has long been held that a person engaging in terminal activities is such an "other person." *State of California* v. *United States*, 46 F. Supp. 474 (N. D. Cal. 1942), affd. 320 U. S. 577 (1944). This record establishes that Cargill leases and operates—together with its grain elevator—loading galleries, chutes, and other paraphernalia which, since they constitute the only means by which grain vessels operating as common carriers by water in our interstate and foreign commerce are loaded at Albany, must be classified as

[2] In *Baltimore & O. R. Co.* v. *United States,* 201 F. 2d 795 (3d Cir. 1953), a railroad subject to the jurisdiction of the Interstate Commerce Commission was held to be subject to the jurisdiction of the Board as to terminal facilities furnished in connection with common carriers by water.

terminal facilities. As operator thereof, Cargill is a terminal operator and is subject to the provisions of the Act and to the jurisdiction of this Board.

This record reflects a situation in which Cargill held itself out to perform, and through contracts with vessels agreed to perform, stevedoring services, and merely subcontracted certain of its stevedoring operations to other stevedoring contractors who, in turn, performed the work for Cargill and not for the vessel or the cargo. We are unable to find, therefore, that the refusal to employ complainant was a violation of section 16, First, of the Act. Likewise, on this record, we are unable to find that the employment of one stevedoring subcontractor to the exclusion of complainant constitutes an unreasonable regulation or practice in connection with the receiving, handling, or storing of property, under section 17 of the Act.

It is also clear that the joint decision of respondents to terminate complainant's services in connection with grain stevedoring did not constitute an agreement "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; alloting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement" (section 15 of the Act). There has been no showing that such decision of the respondents in any way affects transportation rates or fares, competition between shippers, carriers, or others afforded protection by the Act, allotment of ports, limitations on the volume of passengers or freight, or the transportation by water of persons or goods.

We note that the lease agreement between the State respondents and Cargill may be one within the purview of section 15 of the Act, and if so, its effectuation by the parties prior to approval by the Board would be violative of that section. This matter was not presented to us for adjudication, however. Regarding this lease agreement, we will take such further action, under the Act, as may be appropriate in light of all the surrounding circumstances.

An order dismissing the complaint will be issued.

CORRECTED ORDER

At a Session of the FEDERAL MARITIME BOARD, held at its office in Washington, D. C., on the 31st day of October A. D. 1957

No. 785

D. J. ROACH, INC.

*v.*

ALBANY PORT DISTRICT, ALBANY PORT DISTRICT COMMISSION, AND CARGILL, INCORPORATED

This proceeding being at issue on 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 made, and the Board, on October 18, 1957, having made and entered of record a report stating its decision and conclusions thereon, which report is hereby referred to and made a part hereof:

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

BY THE BOARD.

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

# FEDERAL MARITIME BOARD

No. 788

ASSOCIATED-BANNING COMPANY ET AL.

*v.*

MATSON NAVIGATION COMPANY ET AL.

No. 796

HOWARD TERMINAL

*v.*

MATSON NAVIGATION COMPANY ET AL.

No. 798

IN THE MATTER OF AGREEMENT NO. 8095 BETWEEN THE CITY OF OAKLAND AND ENCINAL TERMINALS, AND AGREEMENT NO. 8095–A BETWEEN ENCINAL TERMINALS AND MATCINAL CORPORATION

*Submitted August 13, 1957. Decided October 31, 1957*

Agreement No. 8063 not a true copy nor a true and complete memorandum of the agreement between Matson Navigation Company and Encinal Terminals, as required by section 15 of the Shipping Act, 1916, and approval granted on April 6, 1956, withdrawn.

Matson Navigation Company and Encinal Terminals have violated section 15 of the Shipping Act, 1916, in carrying out an agreement prior to approval by the Board.

Agreement No. 8095–1 not shown to be unlawful or detrimental to the commerce of the United States, and is approved.

Encinal Terminals and the Port of Oakland have violated section 15 of the Shipping Act, 1916, in carrying out Agreement No. 8095 prior to Board approval.

Agreement No. 8095–A–1, to which Matcinal Corporation is a party, is not approved pursuant to section 15 of the Shipping Act, 1916.

*Odell Kominers* and *J. Alton Boyer* for Associated-Banning Company et al.

*Allan P. Matthew*, *Gerald H. Trautman*, *Frederic A. Sawyer*, and *William W. Schwarzer* for Howard Terminal.

*J. Kerwin Rooney* and *Lloyd S. MacDonald* for Board of Port Commissioners of the City of Oakland, California.

*Alvin J. Rockwell* and *John M. Naff, Jr.*, for Matson Navigation Company and Matson Terminals, Inc.

*Eugene D. Bennett* and *Donald G. McNeil* for Encinal Terminals.

*Gilbert C. Wheat*, *Harry L. Haehl, Jr.*, and *Tom Killefer* for Matcinal Corporation.

*Robert E. Mitchell*, *Edward Aptaker*, and *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:

On January 9, 1956, Matson Navgiation Company (Matson) and Encinal Terminals (Encinal), two persons subject to the Shipping Act, 1916 (the Act), formally entered into an agreement (Agreement No. 8063) to form a corporation to be known as Matcinal Corporation (Matcinal), which, according to recitation in the preamble to the agreement, would engage in the business of furnishing wharfage, stevedoring, dock, warehouse, and/or other terminal facilities in connection with a common carrier by water. The agreement provided that the vessels of Matson's subsidized subsidiary, Oceanic Steamship Company (Oceanic), would be serviced at cost by Matcinal in accordance with section 803 of the Merchant Marine Act, 1936, and that the agreement would be of no force or effect if not approved by the Board. It was filed with the Board for approval on January 12, 1956.

Protests were filed against the agreement, and the Associated-Banning group [1] filed a complaint alleging that (1) Agreement No. 8063 is neither a true and complete copy nor a true and complete memorandum of the entire agreement between the parties; (2) in violation of section 15 of the Act, Matson and Encinal have carried out, in whole or in part, their agreement; and (3) the activities of Matson and Encinal result in violation of sections 14, 15, 16, 17, and 20 of the Act.

[1] Associated-Banning Company, a stevedore and carloader and unloader, and 10 other companies engaged in stevedoring and terminal activities in the San Francisco Bay area: California Stevedore and Ballast Co., Jones Stevedoring Company, Marine Terminals Corporation, Mutual Stevedoring Company, Mutual Terminals, Incorporated, Pacific Ports Service Company, the San Francisco Stevedoring Co., Schirmer Stevedoring Co., Ltd., Seaboard Stevedoring Corporation, West Coast Terminals Co. of California.

On April 6, 1956, the Board denied the protests, approved Agreement No. 8063, and dismissed the complaint of the Associated-Banning group, save the allegations that the parties were operating under an agreement which had not been filed with and approved by the Board. This complaint is the subject matter of No. 788, in which the respondents are Matson, Matson Terminals, Inc. (Matson Terminals), Encinal, and Matcinal. Howard Terminal (Howard), a terminal operator and stevedore of bulk cargoes in the east Bay area, intervened in No. 788, and its position is allied with that of the Associated-Banning group.

On February 29, 1956, prior to the time the Board approved Agreement No. 8063, the Port of Oakland (the Port) filed with the Board, pursuant to section 15 of the Act, Agreement No. 8095 between Encinal and the Port under the terms of which Encinal, as a licensee, would operate the 9th Avenue pier, owned and formerly operated by the Port, for a one-year period beginning February 1, 1956. This agreement provided, *inter alia*, for the fixing of rates to be charged by Encinal and an apportioning between the parties of certain earnings accruing from the operation of the facility. During the period when Encinal and the Port were negotiating the pier license, Encinal advised the Port of its desire to make a transfer of the license to a subsidiary or affiliate during the period covered by the license, and provision was made in the agreement to cover this eventuality, subject to the prior written approval of the Port.

On April 26, 1956, 20 days after the Board approved Agreement No. 8063, Agreement No. 8095–A, to which Encinal and Matcinal are parties, was filed with the Board for approval. In essence, this agreement provides that Encinal, as licensee of the 9th Avenue pier in Oakland, would sublicense Matcinal as the terminal operator.

Howard filed a complaint alleging that (1) Agreement No. 8063 is not the entire agreement between the parties, (2) Agreement No. 8095–A, by which Matcinal will succeed to the benefits of the license agreement between Encinal and the Port, is in reality a supplement to Agreement No. 8063, (3) under Agreement No. 8095–A, California Packing Company (Calpak) would receive a deferred rebate [2] and would be accorded undue advantage over other shippers, in violation of sections 14 and 16 of the Act, and the servicing at cost of Oceanic's vessels by Matcinal would result in a violation of section 16 of the

[2] Encinal is the wholly owned subsidiary of Alaska Packers Association, which in turn is owned 92.6 percent by Calpak. More fully, the allegation is that profits derived from Matcinal's handling of Calpak's shipments will be repaid to the owners of Calpak in the form of dividends, resulting in a deferred rebate, in violation of section 16, and that Calpak shipments will be accorded unreasonable preferences over other shippers, in violation of section 14.

Act,[3] (4) information concerning shipper's confidential information may be passed on to Encinal and Matson, in violation of section 20 of the Act, and (5) the agreements tend to monopolize the terminal operating business in the Bay area, in violation of the antitrust statutes.[4] This complaint was assigned No. 796.

Protests were filed urging the Board not to approve Agreements Nos. 8095 and 8095–A. Howard protested against Agreement No. 8095–A, asking that the Board enter into an investigation of it, and incorporated in its protest the allegations of its complaint in No. 796. Howard did not protest the approval of Agreement No. 8095. The Associated-Banning group filed protests opposing both agreements. On July 30, 1956, the Board dismissed all of the allegations contained in the complaint in No. 796, save those to the effect that the parties to the agreement were operating pursuant to an agreement not filed under section 15. On August 2, 1956, acting on the protests against Agreements Nos. 8095 and 8095–A,[5] the Board ordered an investigation, assigned No. 798, into these agreements, deferred their approval or disapproval pending the investigation, and ordered the investigation consolidated with Nos. 788 and 796 for hearing.

The scope of these proceedings is therefore limited to whether Matson and Encinal have operated pursuant to an agreement not filed with and approved by the Board, in violation of section 15, and a general investigation into the merits of Agreements Nos. 8095 and 8095–A to determine whether they should be approved; there is also the issue of whether the parties have effectuated either or both of the agreements in violation of section 15. Necessarily falling within the scope of the complaints in Nos. 788 and 796 is whether Agreement No. 8063 is a true and complete copy or a true and complete memorandum of the entire agreement between the parties.

In addition to the foregoing, concerning which there can be no dispute, the record establishes certain other facts which are germane to the issues presented here.

Early in 1955, Encinal, then solely engaged in the terminal business in the east Bay area, contemplated the possibility of expanding its operations to include stevedoring of general cargo. Encinal's president discussed with a representative of Matson the possibility of obtaining Matson's east Bay stevedoring business. Matson Terminals was then performing terminal work and stevedoring in San

[3] Under section 803 of the Merchant Marine Act, 1936, Matcinal could service Oceanic's vessels (Oceanic being a subsidized operator) only with the Maritime Administrator's permission, and then on condition that the services are rendered at cost.

[4] The Sherman Antitrust Act, 15 U. S. C. 1, and the Clayton Antitrust Act, 15 U. S. C. 12.

[5] Agreements Nos. 8095–1 and 8095–A–1, extending the life of Agreements Nos. 8095 and 8095–A, have been filed for approval.

Francisco, almost entirely for Matson's vessels, and also performed general stevedoring in connection with Matson's vessels at Encinal's Alameda terminal. It was hoped, however, to expand "Matson Terminals in the competitive stevedoring and terminal field." In the furtherance of this aim, Matson Terminals, in July 1955, acquired the terminal work of Waterman Steamship Corporation (Waterman) at San Francisco, and in the following September, Waterman's stevedoring at both San Francisco and east Bay terminals was taken over by Matson Terminals.

Although there is conflict both as to the identity of the party who first proposed the joint venture now known as Matcinal, and the approximate date of this proposal, it is clear that Encinal and Matson, as early as the summer of 1955, discussed the formation of a corporation which would perform both terminal and stevedoring. Certainly, the executive vice president of Matson and the president of Encinal discussed this venture at length in October and November of 1955.

At the time Agreement No. 8063 was filed, the general manager of Matcinal had already been given to understand that the 9th Avenue terminal was to be licensed to Encinal by the Port, and that after necessary approval it would be turned over to Matcinal for operation. He was so advised by either the president of Encinal (who is also the president of Matcinal) or the vice president of Matson Terminals (who is also a vice president and director of Matcinal). The record is clear that Matson's executive vice president also understood, at least in early January, that Matcinal would have the 9th Avenue pier made available to it.

It was further anticipated that Lunckenbach Steamship Company (Luckenbach), a carrier of substantial cargoes in the eastbound intercoastal trade, could be persuaded to use the 9th Avenue facility exclusively in the east Bay area. Encinal's president, in a discussion with a representative of Luckenbach, sought both the terminal and stevedoring work of Luckenbach at the 9th Avenue pier on behalf of a new corporation to be formed by Matson and Encinal.

During the November discussions between Encinal and Matson, the stevedoring of Waterman's vessels in the east Bay was considered. Encinal and Matson thought that Waterman might be receptive to having this work performed by Matcinal rather than by Matson Terminals. In exchange for this, it was anticipated by Matson that Encinal would contribute additional business to Matcinal. Although the Waterman business has not materialized for Matcinal, there are indications that Waterman would not object to the arrangement after "the air has cleared."

Encinal, which in recent years contemplated expanding its operations to include stevedoring of general cargo, deferred this activity to Matcinal and even to Matson Terminals. The vice president of Matson Terminals and a director of Matcinal stated that if he were offered stevedoring work at Encinal he would refer it to Matcinal.

The examiner issued a recommended decision in which he found and concluded that (1) Agreement No. 8063 is not a true and complete copy of the agreement between Matson and Encinal, (2) Agreement No. 8063 should be disapproved, (3) the parties to Agreement No. 8063 violated section 15 of the Act in that (a) they carried out Agreement No. 8063, in whole or in part, prior to approval of that agreement, and (b) they have been operating pursuant to an agreement not filed with and approved by the Board, (4) Encinal and the Port violated section 15 in carrying out Agreement No. 8095 prior to its approval by the Board, (5) Agreements Nos. 8095 and 8095–A (and their time extensions) should be approved, (6) sections 14, 16, 17, and 20 of the Act had not been violated by respondents,[6] and (7) Howard (a complainant and an intervener) and the Port violated section 15 in carrying out Agreement No. 8085[7] prior to Board approval.

## Discussion and Conclusions

In Nos. 788 and 796 we are presented with the issue of whether Matson and Encinal did carry out in whole or in part, directly or indirectly, an agreement prior to its approval by the Board, and concomitantly, whether Agreement No. 8063 is a true and complete copy or true and complete memorandum of the agreement, including understandings and other arrangements, between the parties.

In approving Agreement No. 8063, the Board sanctioned an agreement under which Matson and Encinal were to form a corporation known as Matcinal, which agreement is little more than evidence of a general intention of the parties to enter the stevedoring, terminal, and carloading and unloading business as partners acting through the new corporate entity. As heretofore noted, however, Matson and Encinal, by January 9, 1956, had agreed to substantially more than that which was filed with the Board for approval on January 12, 1956. Notably, they had agreed that Matcinal would operate the 9th Avenue pier in Oakland as the sublicensee of Encinal, that Encinal would endeavor to secure the Luckenbach terminal and stevedoring

[6] These allegations in the complaint were dismissed by the Board prior to the hearings. They are not now before the Board and no further reference will be made to them.

[7] This agreement was forwarded to the Board for approval on February 29, 1956. It was approved on June 8, 1956, and the record discloses that the parties have been operating pursuant to this agreement since February 1, 1956.

work for Matcinal at the 9th Avenue facility, that the stevedoring of Matson vessels at Encinal's Alameda terminal would be performed by Matcinal rather than by Matson Terminals, and that Matson would endeavor to transfer the east Bay stevedoring of Waterman's vessels from Matson Terminals to Matcinal. These are integral parts of the over-all plan between the parties, and their failure to include them in the agreement for which they sought approval rendered that agreement incomplete. Likewise, the tacit understanding that Encinal and Matson Terminals would abandon their plans for expanding their independent operations in the terminal and stevedoring fields, was an integral part of the over-all agreement between the parties at the time Agreement No. 8063 was filed.

The creation of a new corporation which is to engage in business activities similar to those of the two parties creating the new corporate entity does not carry with it the understanding that (1) the creators will transfer to the new corporation part or all of their business being carried on by them in their individual capacities, or (2) in their separate capacities they will seek business for the new entity rather than for their existing and continuing separate enterprises. Such understandings or agreements above referred to, and existing at the time Agreement No. 8063 was filed with the Board for approval, do not necessarily flow from the filed agreement, as contended by respondents. Nor are they inferrable from a reading, no matter how liberal, of the filed agreement. Further, they go right to the heart of the practices enumerated in section 15 of the Act: they provide for the "pooling or apportioning earnings * * * [and] traffic," provide for "controlling, regulating, preventing, or destroying competition," and establish a "cooperative working arrangement." The conclusion is inescapable that Agreement No. 8063, when filed for approval, did not reflect the true and complete agreement between the parties. Hence, we will withdraw our approval of the agreement, and it now stands as nonapproved.

We do not mean to imply that parties must adopt and file for approval at one and the same time an agreement which encompasses all possible areas of activity within the purview of section 15 of the Act. That section itself speaks of "modifications" and "cancellations" of agreements. Obviously there must be room for subsequent expansion and retraction. We do mean, however, that when parties file an agreement for approval they must include all understandings and arrangements of the character covered by section 15 which exist between them at the time. And agreements, understandings, and arrangements falling within the purview of section 15, subsequently entered into by the parties, must also be filed for separate approval.

Since it is evident that Agreement No. 8063 was only a *part* of the understanding between the parties at the time it was submitted to the Board for approval, any carrying out of the true agreement, in whole or in part, constituted a violation of section 15. In furtherance of their actual agreement, it is manifest from this record that Matson and Encinal partially carried out their agreement. For example, Matson approached Waterman relative to the transfer of that carrier's stevedoring work in the east Bay to the joint venture. This constitutes partial effectuation of the agreement. Similarly, in attempting to secure the Luckenbach terminal and stevedoring business for Matcinal at the 9th Avenue pier, the true agreement of Matson and Encinal was in part carried out. It is our conclusion, therefore, that Matson and Encinal have carried out an agreement not filed with and approved by the Board, in violation of section 15.

Since the true and complete agreement, understanding, or arrangement between the parties has not been filed with the Board for approval pursuant to section 15 and title 46 Code of Federal Regulations, section 222.11 *et seq.*, under which interested parties would be properly notified, it is unnecessary for us to decide whether the "true and complete" agreement would merit our approval. Indeed, we cannot say with any degree of certainty that this record reflects the entire agreement which exists between the parties.

No. 798 raises the question whether Agreements Nos. 8095 and 8095–A should be approved pursuant to section 15. Agreement No. 8095 will be considered first. As heretofore noted, it is the license agreement between Encinal and the Port under the terms of which the 9th Avenue pier in Oakland, owned and previously operated by the Port, would be operated by Encinal as lincensee for a period of one year beginning February 1, 1956. This obviously is an agreement between "other persons" subject to the Act, within the meaning of section 1. It contains provisions which allow for "the fixing or regulating of transportation rates or fares" and the "apportioning of earnings," resulting from the operation of the pier. Clearly, such an agreement falls within the meaning of section 15. *Practices, Etc., of San Francisco Bay Area Terminals*, 2 U. S. M. C. 588 (1941), affirmed sub nom *California* v. *United States*, 320 U. S. 577 (1941). Moreover, the record clearly establishes that the parties have been operating pursuant to their agreement since February 1, 1956. Therefore, since the agreement has not been formally approved by the Board, the examiner correctly concluded that in this respect the parties thereto have violated section 15.

The pier license under consideration is not unlike others which we have approved, and the operation of the 9th Avenue pier by Encinal

is not opposed by competing stevedores. We note that it provides that the licensee, with the prior written approval of the licensor, may assign its rights under the license to a subsidiary. Any such assignment is also subject to our prior approval under section 15. We will take no action with respect to Agreement No. 8095 since, by its own terms, it has expired. We shall, however, approve Agreement No. 8095–1.

Since we have withdrawn our approval of Agreement No. 8063, Agreement No. 8095–A–1,[8] to which Matcinal is a party, will not be approved.

During the course of these proceedings it became apparent that Agreement No. 8085, to which the Port and Howard are parties, had been effectuated by them prior to approval by the Board. This agreement, effective February 1, 1956, was filed with the Board for approval on February 29, 1956, and was approved on June 8, 1956. In view of the evidence that Howard commenced terminal operations at the pier, pursuant to the terms of the agreement, months prior to the agreement's approval, the parties apparently have violated section 15. This issue was not presented to us for adjudication. Regarding this agreement, however, we shall take such further action, under the Act, as may be appropriate in light of all the surrounding circumstances.

An order consistent herewith will be issued.

[8] Agreement No. 8095–A too has expired by its terms, and no action will be taken in connection with it.

ORDER

At a Session of the FEDERAL MARITIME BOARD, held at its office in Washington, D. C., on the 31st day of October A. D., 1957

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No. 788

ASSOCIATED-BANNING COMPANY ET AL.

*v.*

MATSON NAVIGATION COMPANY ET AL.

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No. 796

HOWARD TERMINAL

*v.*

MATSON NAVIGATION COMPANY ET AL.

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No. 798

IN THE MATTER OF AGREEMENT NO. 8095 BETWEEN THE CITY OF OAKLAND AND ENCINAL TERMINALS, AND AGREEMENT NO. 8095-A BETWEEN ENCINAL TERMINALS AND MATCINAL CORPORATION

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Nos. 788 and 796 being at issue upon complaints and answers on file, and No. 798 having been instituted by the Board upon its own motion, and the proceedings having been consolidated and duly heard, and full investigation of the matters and things involved having been had, and the Board on the date hereof having made and entered a report stating its decision and conclusions thereon, which report is hereby referred to and made a part hereof:

*It is ordered*, That approval of Agreement No. 8063, granted on April 6, 1956, be, and it is hereby, withdrawn; and

*It is further ordered*, That Matson Navigation Company and Encinal Terminals be, and they are hereby, notified and required

hereafter to abstain from concerted action herein found to be in violation of section 15 of the Shipping Act, 1916; and

*It is further ordered*, That Agreement No. 8095–1 be, and it is hereby, approved; and

*It is further ordered*, That Agreement No. 8095–A–1 is hereby not approved; 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. M–82

AMERICAN PRESIDENT LINES, LTD., ET AL.—ANNUAL REVIEW OF BAREBOAT CHARTERS OF GOVERNMENT-OWNED, WAR-BUILT, DRY-CARGO VESSELS

*Submitted December 9, 1957. Decided December 9, 1957*

Board finds and certifies to the Secretary of Commerce that conditions do not now exist justifying the continuance of the charters of the nine vessels herein under consideration.

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

*L. W. Hartman* for American Mail Line Ltd.

*Marvin J. Coles* for American Tramp Shipowners Association, Inc.

*Richard W. Kurrus* for Navigator Steamship Corp. and Tramp Freighter Corp.

*Robert E. Mitchell*, *Edward Aptaker*, and *Robert J. 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:

By notice of tentative findings published in the Federal Register on November 30, 1957 (22 F. R. 9628), the Board announced that, pursuant to section 5 (e) (1) of the Merchant Ship Sales Act of 1946, as amended, the bareboat charters of the following Government-owned, war-built, dry-cargo vessels have been reviewed as of November 29, 1957:

| *Vessel* | *Charterer* |
|---|---|
| *Council Bluffs Victory* | American President Lines, Ltd. |
| *Hope Victory* | American President Lines, Ltd. |
| *Baylor Victory* | Central Gulf SS. Corp. |
| *Lahaina Victory* | American Mail Line Ltd. |
| *Pine Bluff Victory* | Pacific Atlantic SS. Co. |
| *Casimir Pulaski* | American Coal Shipping, Inc. |
| *Joseph C. Cannon* | Blidberg Rothschild Co., Inc. |
| *Greece Victory* | Isbrandtsen Co., Inc. |
| *Navajo Victory* | Isbrandtsen Co., Inc. |

The notice made tentative findings that conditions do not exist justifying the continuance of the charters for additional twelve-month periods. Interested parties were granted an opportunity to file objections to such findings and request a hearing.

Pursuant to notice published in the Federal Register on December 7, 1957 (22 F. R. 9844), hearing was held before the Board on December 9, 1957. No protests were made to the tentative findings. Isbrandtsen appeared, however, with respect to its charters of the *Greece Victory* and the *Navajo Victory*, and introduced testimony to the effect that although these ships went under charter to Isbrandtsen on December 13, 1956, and January 8, 1957, respectively, they are chartered to the Indian Government under one year consecutive voyage charters for grain from the Pacific coast to India, which commenced on March 6 and March 22, 1957, respectively. It was the position of Isbrandtsen that it should be permitted to retain these two vessels in order to complete its contractual commitments to India.

On cross-examination Isbrandtsen's witness admitted that there are now privately owned American-flag vessels available for use in this service at below the N. S. A. rate. He also admitted that Isbrandtsen has at least one privately owned vessel laid up on the east coast because of unavailability of cargoes at or near the N. S. A. rate.

American Tramp Shipowners Association, Inc., Navigator Steamship Corp., and Tramp Freighter Corp. intervened but presented no evidence.

On the basis of the record before us we find nothing which warrants our modifying the tentative findings made on November 29, 1957, with respect to these vessels.

We therefore find and hereby certify to the Secretary of Commerce [1] that conditions do not now exist justifying the continuance beyond their present expiration dates of the charters of the nine vessels which are the subject of this proceeding.

[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. 808

## PACIFIC COAST/HAWAII AND ATLANTIC-GULF/HAWAII GENERAL INCREASE IN RATES

*Submitted September 18, 1957. Decided December 9, 1957*

Proposed tariffs of respondents found to be just and reasonable except for rates on canned pineapple and canned pineapple juice from Hawaii to the Pacific coast.

Proposed rates on canned pineapple and canned pineapple juice from Hawaii to the Pacific coast are unjust and unreasonable.

Proposed rates on canned pineapple and canned pineapple juice to be canceled and new rates, reflecting full 13.2 percent increase over old rates, to be substituted therefor.

*Alvin J. Rockwell*, *George D. Rives*, and *Willis R. Deming* for Matson Navigation Company and Isthmian Lines, Inc., *Ronald A. Capone* for United States Lines Company, *Tom Killefer* for Pacific Transport Lines, Inc., *Joseph A. Klausner* and *John Mason* for Hawaiian Steamship Company, Limited, and *Sterling F. Stoudenmire, Jr.*, for Waterman Steamship Corporation, respondents.

*Preston Low* for Low Bros. Lumber Co., Ltd., *Harold M. Goodman* for Honolulu Supply Co., Ltd., and *John P. Coghlan* for Pineapple Growers Association of Hawaii, interveners.

*Robert E. Mitchell*, *Edward Aptaker*, *Edward Schmeltzer*, and *Robert C. Bamford* as Public Counsel.

### REPORT OF THE BOARD

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

BY THE BOARD:

In December 1956 and January 1957, respondents, common carriers by water in the Pacific/Hawaii and the Atlantic-Gulf/Hawaii trades, published general commodity rate increases to become effective in

January and February 1957. Pursuant to section 18[1] of the Shipping Act, 1916, as amended (the 1916 Act), and section 3[2] of the Intercoastal Shipping Act, 1933, as amended (the 1933 Act), the Board ordered an investigation into the lawfulness of the proposed rates, charges, regulations, and practices, and suspended the effectuation of the proposed rates until May 26, 1957.[3] With special permission granted by the Board, respondents agreed to further withhold operation under the proposed rates until July 15, 1957. During the period that the proposed rates were suspended, the Board authorized respondents to operate under tariffs which permitted an interim rate increase of approximately 72 percent of the increases contemplated by the proposed rates. Since July 15, 1957, however, the proposed rates have been in effect.

Matson Navigation Company (Matson) and Hawaiian Steamship Company, Ltd. (Hawaiian Steam), operate exclusively in the Hawaiian domestic trade. The following respondents serve Hawaii as part of their foreign-trade service: United States Lines Company (U. S. Lines), Isthmian Lines, Inc. (Isthmian), Pacific Transport Lines, Inc (PTL), Waterman Steamship Corporation (Waterman), Oceanic Steamship Company (Oceanic),[4] Lykes Bros. Steamship Co., Inc. (Lykes), American President Lines, Ltd. (APL), and States Marine Corporation of Delaware (SML). Respondent Young Brothers, Ltd. (Young), is an interisland carrier. Oceanic, Lykes, APL, and Young did not participate in the proceeding.

Interveners who appeared in opposition to the proposed rates were Low Bros. Lumber Company (Low Bros.) and Honolulu Supply Co., Ltd. (Honolulu Supply). Pineapple Growers Association of Hawaii, which did not participate in the hearing, was permitted to intervene after the issuance of the examiner's initial decision and filed exceptions and orally argued its position before the Board.

Hawaiian Steam,[5] a comparatively new carrier operating between California and Hawaii, carries a small amount of cargo; its primary service is devoted to passengers. Matson maintains its Pacific coast/Hawaii service with 15 vessels, and operates five vessels in the Atlantic-Gulf/Hawaii trade as part of a joint service with Isthmian.

Matson is the dominant carrier in these trades and, as such, has long been recognized as the rate maker. *Matson Navigation Company—*

[1] See Appendix.

[2] See Appendix.

[3] Under section 3 of the 1933 Act, as amended, the Board could not suspend the proposed rates more than four months.

[4] Oceanic, a subsidized operator, is a wholly owned subsidiary of Matson.

[5] Although its one vessel can carry 4,000 tons per sailing, it has averaged only 1,000 tons.

*Rate Structure*, 3 U. S. M. C. 82 (1948). The proposed tariffs of the other respondents follow the Matson tariffs very closely.

The last general rate increase in the Hawaiian trades was effective March 1, 1955, reflecting increased costs incurred through December 31, 1954. Between January 1, 1955, and December 1, 1956, Matson's expenses in the Pacific coast/Hawaii service and in the Atlantic-Gulf/Hawaii service have increased substantially. Increases in the Pacific coast/Hawai service include:

| | *Percent* |
|---|---|
| Wages and allied costs | 10.98 |
| Other vessel costs | 12.68 |
| Fuel oil | 36.2 |
| Administrative and general | 29.0 |

The rates under the proposed tariff contemplate an increase of 6.5 percent to cover all increased costs except cargo handling, and an additional 6 percent to cover that item. By rounding off the dollar amounts the total increase becomes 13.2 percent. Generally, all cargo rates are to be increased by 13.2 percent except bulk commodities which do not require cargo handling, and they will be increased approximately 6.5 percent generally. Refrigerated cargo will be increased 15 percent, and a few commodities will either be increased by varying percentages or will suffer no increase for reasons which respondents argue are justified. The proposed rates in the Pacific coast/Hawaii trade were increased to offset the experienced increased costs, and the Atlantic-Gulf/Hawaii rates were increased so as to preserve the existing rate balance between the two services. The Pacific coast service is by far the larger of the two and was used by respondents to measure the rates.

Since Matson is the dominant carrier in these trades, and as such is the rate maker, we believe that an examination of Matson's operations will result in a correct determination of the issues presented here.

In contending that the proposed rates are fair and reasonable, Matson urges we find that (a) its rate base or property necessarily devoted to its common carrier freight operations is $42,370,000, (b) a fair return on this investment would be between 7½ percent and 10 percent, (c) a decline will be experienced in revenue tonnage in these trades, and the application of the proposed rates to the projected tonnage will result in a return of from 7½ percent to 10 percent, and (d) the different rate treatment of some commodities in the proposed tariffs is justified.

Public Counsel argues that (a) Matson's rate base should be $35,950,000, (b) a fair return on this investment would be between 7½ percent and 9 percent, (c) that rather than decline, revenue tonnage

should increase 4 percent in 1957 and 1958, and (d) the favorable rate treatment of tin plate and canned pineapple contemplated under the proposed rates, as compared with other commodities, is not justified.

Intervener Low Bros. maintains that Matson's rate base should be the original cost, depreciated, of its fixed property, plus working capital, and with intervener Honolulu Supply, maintains that the low rate on canned pineapple to the Pacific coast is a clear preference in favor of Matson's own interests.[6]

In determining the reasonableness of the proposed rates, the Board will consider (a) the value of the property necessarily devoted to the enterprise, (b) the rate of return which would be just and reasonable, and (c) the anticipated revenue tonnage in order to ascertain whether the return would approximate the fair return. In addition to the foregoing, since the proposed rates are not to be uniformly applied to all commodities, an inquiry into those commodities receiving different rate treatment must be made.

The record discloses that the depreciated original cost of Matson's vessels used in both services is $15,411,000. The depreciated original cost of Matson's other property devoted to these trades is $1,014,000, and its working capital, determined in the manner the Board and Maritime Administration require of subsidized operators,[7] is $5,405,000. These latter two amounts were not challenged by either Public Counsel or by the opposing interveners.

As to vessel replacement or reproduction cost, an expert witness on behalf of Matson testified that (a) the depreciated reproduction cost of the present fleet[8] would be $56,490,000, (b) the purchase of the same type and age of vessels as now used by Matson, together with improvements necessary for adaptation to Matson's use, would cost $57,386,000,[9] (c) the depreciated replacement cost of modern-type vessels would be $94,050,000, and (d) the depreciated replacement cost of high-speed vessels on a ton-mile or bale-mile basis would be $90,792,000. The Office of Ship Construction and Repair of Maritime Administration found these estimates to be reasonable.

In addition to replacement and reproduction costs, in the opinion of another expert witness produced by Matson, the fair market value of Matson's fleet in January 1957 was approximately $32,166,000, but that by March 1957 the value declined to about $30,557,700, a

[6] 15.7 percent of Hawaiian Pineapple Company, the largest single producer in Hawaii, is owned by Castle and Cook Ltd., which also owns 8.01 percent of Matson.

[7] General Order No. 71, 46 C. F. R. 291 *et seq.*

[8] Matson's fleet is comprised of 15 C-3's, 3 Victory-type, and 2 Liberty-type vessels.

[9] As the basis of his estimate, the witness asserted the purchase of 20 vessels in one block would necessitate the payment of the world market price of the vessels.

decline of 5 percent. The record contains no countervailing testimony as to the fair market value of the fleet.

With regard to a fair rate of return, Matson urges a return of from 7½ percent to 10 percent on its proposed rate base of $42,370,000, whereas Public Counsel advocates a return of between 7½ percent and 9 percent on the base which he proposes—$35,950,000.

The principal evidence pertaining to a fair rate of return on investment was supplied by testimony of and exhibits prepared by an investment analyst. This evidence covers analyses of public utilities exclusive of transportation enterprises, industrial organizations, and steamship companies other than Matson. This witness concluded, with respect to a comparison of Matson and utility companies, that the utilities would be more attractive from an investment standpoint because they have excellent growth prospects which Matson, because there is no real prospect for any material growth in the Hawaiian economy, does not have. The record indicated that in the last quarter of 1956, (a) 12 gas pipeline companies earned an average of 16.5 percent on their "common equity" and 7.3 percent on their "total capital," [10] (b) 36 gas distribution companies earned 13.7 percent on "common equity" and 7.4 percent on "total capital," and (c) 116 electric companies earned 11.5 percent on "common equity" and 6.2 percent on "total capital."

The witness is of the opinion that investment risks in the industrial field are generally less than those in the shipping industry, and reasons that investment capital will flow to investments involving greater risks and low growth potential only if the rate of return is sufficiently high. Selected industrials earned during calendar year 1956 an average of 15.5 percent on "invested capital." [11] Selected subsidized steamship lines in 1956 earned an average of 14.5 percent on "net property" [12] plus working capital. Based upon a depreciated cost basis (including working capital) of $21,830,000, the witness concluded that a fair rate of return to Matson would be between 15 percent and 20 percent, or a return of $3,274,500 to $4,366,000.

This dollar return on the rate base Matson advocates—$42,370,000—would amount to between 7½ percent and 10 percent while the same dollar return applied to the $35,950,000 rate base urged by Public Counsel would be between 9 percent and 12 percent.

Matson asserts that traffic in both services will decline in 1957. It expects the combined services to carry 3,614,800 revenue tons in 1957,

[10] Common equity is that portion of the investment held free of debt. Total capital represents the aggregate amount invested in the business: common equity plus property acquired with borrowed funds.

[11] Depreciated fixed assets plus working capital, i. e. book value plus working capital.

[12] Original cost depreciated.

a decline of 282,000 tons. It anticipates 400,300 tons in the Atlantic-Gulf service, a decline of almost 102,000 tons, and 3,214,500 tons in the Pacific coast trade, a decline of 180,000 tons. Public Counsel asserts that 1957 and 1958 carryings should increase at least 4 percent over 1956.

It is clear from the record that Matson has steadily increased its total revenue tons in these trades from 1952 through 1956 from 2,691,611 to 3,896,829 tons, with the exception of 1954, when there was a slight dip in the cargo offerings. These increases amount to more than 5 percent per year. Matson forecasts its carryings a year in advance and they are amended quarterly. The estimate is based upon conferences with shippers and consignees, economic reports, and past performances.

Matson's estimated carryings for 1957 anticipate a decline of about 24,000 tons from the Atlantic and Gulf outbound. Actual carryings during the first quarter of 1957 confirm this estimate. Matson's estimate of carryings for the other services include the following:

*Atlantic-Gulf inbound*

Canned pineapple—135,000 tons—down 57,000 tons from 1956
Raw sugar—103,000 tons—down 39,000 tons from 1956

*Pacific coast outbound*

General—458,000 tons—down 19,861 tons from 1956
Autos—110,000 tons—down 22,602 tons from 1956
Bulk crude oil—down 6,535 tons from 1956
Fuel oil—270,000—down 15,911 tons from 1956
Appliances—22,000—down 6,257 tons from 1956
Tin plate—35,000—up 33 tons over 1956

*Pacific coast inbound*

Canned pineapple—200,000 tons—down 11,800 tons from 1956
Raw sugar—750,000 tons—down 8,000 tons from 1956
Reefer cargo—14,000 tons—down 1,069 tons from 1956

The estimate for the outbound carryings from the Atlantic and Gulf are quite accurate. Inbound in this trade, Matson carried only 2,600 tons less than it had forecast during the first quarter of 1957. Heavy rains in Hawaii, however, delayed the harvesting of sugar and that commodity did not begin to move until late in February 1957. Had the sugar been carried as was anticipated, Matson's projection would have been short by about 20,000 tons. The sugar quota for 1957 is approximately the same as it was in 1956, and it is fair to assume that the sugar not moved in the first quarter will be carried throughout the balance of the year. The first quarter actual carryings outbound in

the Pacific coast/Hawaii service exceeded Matson's projection by about 12 percent—497,152 revenue tons were carried as opposed to Matson's estimate of only 443,214 revenue tons. Except for Matson's own projection, there is no evidence of record that the cargo offerings to and from Hawaii will be less than in 1956. The movement to the Atlantic and Gulf areas and from the Pacific coast during the first quarter of 1957 indicates that Matson's projection of anticipated carryings was unduly pessimistic.

As noted heretofore, some commodities are to receive a rate treatment different from others under the proposed tariffs. Canned pineapple destined to the Pacific coast will not be increased the entire 13.2 percent. In fact, Matson plans to increase the rate on this item only 6.9 percent. It is claimed that Hawaiian pineapple must compete with California domestic fruit, particularly peaches. It is contended that to increase the rate on pineapple might result in the diminution of this important cargo. It is noted, however, that the full increase of 13.2 percent (rather than an increase of only 6.9 percent) on canned pineapple would amount to an increase in revenue to the carrier of $1 per ton whereas the increase to the consumer would be only about 1/10 of one cent per can. It is hard to realize how such a minimal increase would adversely affect the marketing of canned pineapple. Assuming the Pacific coast/Hawaii carryings remained the same in 1957 as in 1956, the levying of the full 13.2 percent would result in an increase in income to Matson of about $212,000.

On westbound refrigerated cargo, due to the increased handling costs, Matson plans to raise the rate 15 percent. Eastbound refrigerated cargo would receive a lesser increase. The fact that there is far less demand for eastbound reefer space, together with the fact that an increase in the rate might cause the loss of the cargo altogether, justifies the different treatment. The rate on raw sugar to the Pacific coast would be increased only 6.5 percent. There is evidence of this commodity competing with local beet sugar, and the record is clear that the costs of handling sugar have actually decreased. Autos and strapped lumber are not to receive the full increase, and Matson maintains that this is because they are easily and speedily loaded and do not absorb the full increase of 6 percent for cargo handling. Too, the movement of strapped lumber is comparatively new and Matson is hoping to convert lumber shippers to the method of shipping strapped lumber. Tin plate is not to be increased over the former rates. The record is clear that an unregulated tramp carrier is carrying full shiploads of tin plate to Hawaii, and an increase in the rates might cause further losses of this cargo.

On the basis of the record presented here, the examiner in his initial decision found and concluded that (1) the fair value of Matson's property devoted to its freighter operation is $43,000,000,[13] (2) a fair rate of return would be between 7½ percent and 10 percent after taxes, (3) Matson's Hawaiian carryings would increase approximately 2 percent in 1957 over 1956, and (4) of the commodities given special rate treatment under the proposed rates, only the rate on canned pineapple to the Pacific coast was not justified. Using a base of $43,000,000 and applying the proposed rates to the 1956 carryings of Matson, he found that the return would be about 7 percent after taxes. Applying the proposed rates to the 1956 carryings, as increased by 2 percent, he found the return to be about 8 percent after taxes.

Exceptions were filed by Public Counsel, Honolulu Supply, Low Bros., and Pineapple Growers Association. Pineapple Growers Association exceptions relate solely to the examiner's finding that the increase of only 6.5 percent on canned pineapple to the Pacific coast was not justified. Public Counsel excepted to the findings that the rate base should be $43,000,000, that a fair return would be between 7½ percent and 10 percent, that the anticipated traffic level would be only 2 percent above 1956 carryings, and that the rate on tin plate was justified.

## Discussion and Conclusions

Section 3 of the 1933 Act, pursuant to which this proceeding was initiated, places upon the respondents the burden of proving that the proposed tariffs are just and reasonable. If the tariffs are shown to be unjust or unreasonable, pursuant to section 18 of the 1916 Act, the Board may "order enforced a just and reasonable maximum rate, fare, or charge, or a just and reasonable classification, tariff, regulation, or practice."

Matson is entitled to a "fair return on the reasonable value of the property at the time that it is being used for the public." *San Diego Land Company* v. *National City*, 174 U. S. 739 (1899). It is manifest from this record that cargo offerings in these trades have increased steadily between 1952 and 1956, save 1954. It is further evident that the population of Hawaii is increasing and that the saturation points in these trades have not yet been reached. Although Matson claims that it will experience an 8 percent decline in revenue tonnage in 1957, this contention is rebutted by the actual cargo movement in these trades

[13] The examiner also determined a rate base for Isthmian. However, since we feel that an examination of Matson's tariffs, closely followed by the other respondents, will determine the issues here, no reference will be made to the findings and conclusions regarding Isthmian.

during the first quarter of 1957. The examiner found that the revenue tonnage should increase about two percent. A two percent increase in revenue tons would provide Matson with 3,974,766 tons in 1957 as compared to 3,896,829 tons in 1956. We recognize, of course, that the question of anticipated tonnage involves conjecture, but upon consideration of all the evidence of record on this point, it is our conclusion that Matson should experience an increase in revenue tonnage in 1957 of about two percent. Thus, if Matson's proposed tariffs, as applied to reasonably anticipated carryings of 3,974,766 tons, produce a fair return upon the fair value of its property devoted to the enterprise, it cannot be said that the proposed tariffs are not "just and reasonable."

Our next inquiries relate to the rate base (the fair value of the property devoted to the business) and a fair rate of return. In ascertaining the "reasonable value" of the carrier's property devoted to these services, we are not bound by any artificial rules or formulæ. *The Minnesota Rate Cases*, 230 U. S. 352 (1913).

There is no dispute concerning the values assigned "working capital" ($5,405,000) and "property other than vessels" ($1,014,000), and since they appear to be fair and reasonable, we adopt the examiner's conclusions as to these two items.

In arriving at the reasonable value of the property—the rate base—we are chiefly concerned with the fair value of Matson's vessels. The record demonstrates that the book value of the vessels is but $15,411,000, that the market value of the fleet, at the time the proposed rates were filed, was $32,166,000, and that the depreciated reproduction or replacement cost, depending upon the particular form of replacement undertaken, ranges from $56,490,000 to $94,050,000. Including "working capital" and "other property," various bases have been advanced: original cost depreciated—$21,830,000; market value "adjusted to eliminate any short run effect on the market"—$35,950,000; and an average of original cost depreciated and reproduction cost depreciated—$42,370,000. The examiner found that the fair value of Matson's property was $43,000,000—approximately the average of original cost depreciated and reproduction cost depreciated. In addition to the foregoing values, it appears that the fair market value of Matson's fleet at the time the tariffs were filed, together with "other property" and "working capital", is $38,585,000.

An examination of the rates of return on the proposed rate bases under the proposed tariffs, based upon a two percent increase in revenue tonnage, is in order. It is apparent from the record that the added cost of handling cargo, without reference to vessel operating expenses and administrative and overhead costs, is approximately $7.36 per

ton. Taking into consideration the increased revenues and the costs of handling this two-percent estimated increase in cargo, (1) on a base of $21,830,000, Matson would realize a return of 14.91 percent; (2) on a base of $35,950,000—advocated by Public Counsel—the return would be 9.05 percent; (3) on a base of $38,585,000 the return would be 8.43 percent; (4) on a base of $43,000,000 the return would be 7.57 percent; and (5) on a base of $62,909,000[14] the return would be 5.17 percent. If the increased revenue produced by charging the full 13.2 percent increase in the tariff on canned pineapple moving to the Pacific coast is included, the returns would be 15.39 percent, 9.34 percent, 8.71 percent, 7.8 percent, and 5.41 percent, respectively.

If the book value of Matson's property is used as a rate base, the proposed tariffs may well be said to yield an unreasonably high return. Matson's vessels were purchased at a time when their cost was considerably lower than they are at the present time. If the fleet were liquidated it would have twice the amount of its book value available for other investment. Therefore, book value, as the measure of the fair value of the property devoted to these trades, is entirely unrealistic.

At the other extreme, if $62,909,000 is used as a rate base, the proposed tariffs would yield what would appear to be an unreasonably low return. As Public Counsel points out, "the fault with this standard is that it assumes for ratemaking purposes that the carrier *presently* has reproduced its capital assets." Depreciated reproduction cost alone does not provide an appropriate base for our purposes here.

Two of the remaining three proposed "fair values" are concerned with "fair market value." The record indicates that at the time the proposed tariffs were filed the fair market value of Matson's fleet was $38,585,000. Public Counsel's proposal of $35,950,000 is basically the fair market value adjusted to eliminate what he contends is a short term peak in vessel values. The other proposed "fair value," $43,000,000, is the average of book value and the depreciated reproduction cost as determined by the examiner. Under the proposed tariffs, the return on these proposals amounts to 8.43 percent, 9.05 percent, and 7.57 percent, respectively. Including the increased revenue from canned pineapple (if charged the full rate), the profit amounts to 8.71 percent, 9.34 percent, and 7.8 percent, respectively. Public Counsel, in excepting to the examiner's finding that a fair return for Matson would be between 7½ percent and 10 percent of $43,000,000, urges us to fix the rate of return at a particular point between 7½ percent and 9 percent of $35,950,000. Matson is entitled to a return on its in-

[14] The bases set forth in this sentence include, in addition to vessel values, the value of other property and working capital.

vestment equal to that generally being made at the same time and in the same general area on investments in other businesses having similar risks. Its return should be sufficient to assure confidence in the financial integrity of the company so as to maintain its credit and to attract capital. *Bluefield Co.* v. *Public Serv. Comm.*, 262 U. S. 679 (1923) : *Power Comm'n* v. *Hope Gas Co.*, 320 U. S. 591 (1944).

In view of all the evidence of record we find that, including the revenue realized from charging the full increase of 13.2 percent on canned pineapple products from Hawaii to the Pacific coast, *infra*, the tariffs proposed by Matson would produce net profits which are within the zone of reasonableness as applied to any of the "fair values" discussed above. We further note that the increased rates are closely correlated to actual cost increases experienced by Matson since its last general rate increase. Hence, we conclude that the proposed tariffs, with the exception of the rates on canned pineapple, are just and reasonable. It is therefore unnecessary for us to determine with exactitude the "fair value" of Matson's property to establish a rate base here.

The proposed increase on canned pineapple to the Pacific coast is only 6.9 percent as opposed to an increase of 13.2 percent on other commodities requiring the same services. The movement of canned pineapple is substantial. An increase of 2 percent over the 1956 movement amounts to about 216,000 tons, and as the difference between 6.9 percent and 13.2 percent amounts to about $1.00 per ton to the carrier, it would produce about $216,000 of additional revenue. Notably, the increase in transportation cost would result in a retail increase of less than $\frac{1}{10}$ of one cent per can. In light of this, there is no competitive reason for favoring canned pineapple with a lower rate, and since the cost of moving canned pineapple to the Pacific coast increased to the same extent as other commodities which bear the full 13.2 percent rate increase, the lower rate on canned pineapple would constitute an "unjust or unreasonable" rate. Matson has not sustained its burden of proving that the lower rate on this commodity is "just and reasonable."

We agree with the examiner that Matson has sustained its burden in proving that the lower rate on tin plate is reasonable. This commodity does make a substantial contribution to vessel operating and overhead expenses, and the ever-present threat of a tramp operator (which succeeded in carrying subsantial amounts in full cargo lots in 1955, 1956, and 1957) competing for this cargo, unless met ratewise by Matson, would result in a loss of this contribution. In the absence of exceptions to the examiner's findings as to the rate treatment of other commodities (automobiles, canned tuna, fuel oil, fertilizers,

sugar, strapped lumber, sea vans, molasses, and refrigerated cargo), we adopt as our own his findings with reference thereto.

We have measured the reasonableness of all respondents' tariffs in these trades by those of Matson, and we find that Matson's proposed tariff, except as to canned pineapple, is reasonable. Since Matson is the rate maker in these trades, and since the remaining respondents' tariffs closely follow those of Matson, we find, as to them, that their tariffs are lawful.

Exceptions taken and findings not discussed herein and not reflected in our findings or conclusions have been found not relevant or unnecessary for disposition of the proceeding, or not supported by the evidence.

In summary, we conclude that the proposed tariffs, with the exception of the rates on canned pineapple products to the Pacific coast, are just and reasonable. The rates of the canned pineapple products moving to the Pacific coast shall be canceled and replaced with new rates which reflect the entire 13.2 percent rate increase which other commodities are charged.

An order consonant herewith will be issued.

## Appendix

### Section 18 of the 1916 Act.

That every common carrier by water in interstate commerce shall establish, observe, and enforce just and reasonable rates, fares, charges, classifications, and tariffs, and just and reasonable regulations and practices relating thereto and to the issuance, form, and substance of tickets, receipts, and bills of lading, the manner and method of presenting, marking, packing, and delivering property for transportation, the carrying of personal, sample, and excess baggage, the facilities for transportation, and all other matters relating to or connected with the receiving, handling, transporting, storing, or delivering of property.

Every such carrier shall file with the board and keep open to public inspection, in the form and manner and within the time prescribed by the board, the maximum rates, fares, and charges for or in connection with transportation between points on its own route; and if a through route has been established, the maximum rates, fares, and charges for or in connection with transportation between points on its own route and points on the route of any other carrier by water.

No such carrier shall demand, charge, or collect a greater compensation for such transportation than the rates, fares, and charges filed in compliance with this section, except with the approval of the board and after ten days' public notice in the form and manner prescribed by the board, stating the increase proposed to be made; but the board for good cause shown may waive such notice.

Whenever the board finds that any rate, fare, charge, classification, tariff, regulation, or practice, demanded, charged, collected or observed by such carriers is unjust or unreasonable, it may determine, prescribe, and order enforced a just and reasonable maximum rate, fare, or charge, or a just and reasonable classification, tariff, regulation, or practice.

### Section 3 of the 1933 Act.

Whenever there shall be filed with the board any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the board shall have, and

it is hereby given, authority, either upon complaint or upon its own initiative without complaint, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice: *Provided, however*, That there shall be no suspension of a tariff schedule or service which extends to additional ports, actual service at rates of said carrier for similar service already in effect at the nearest port of call to said additional port.

Pending such hearing and the decision thereon the board, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than four months beyond the time when it would otherwise go into effect; and after full hearing whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the board may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period. At any hearing under this paragraph the burden of proof to show that the rate, fare, charge, classification, regulation, or practice is just and reasonable shall be upon the carrier or carriers. The board shall give preference to the hearing and decision of such questions and decide the same as speedily as possible.

AMENDED ORDER

At a Session of the FEDERAL MARITIME BOARD, held at its office in Washington, D. C., on the 17th day of December A. D. 1957

No. 808

PACIFIC COAST/HAWAII AND ATLANTIC-GULF/HAWAII GENERAL INCREASE IN RATES

This proceeding having been instituted by the Board on its own motion, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Board, on December 9, 1957, having made and entered of record a report stating its conclusions and decision thereon, which report is hereby referred to and made a part hereof:

*It is ordered*, That Matson Navigation Company cancel the rate in its tariff on canned pineapple from Hawaii to the Pacific coast and substitute therefor, within 10 days from December 9, 1957 (the date of the orginial order herein), a tariff rate reflecting an increase of 13.2 percent over the rate in effect on December 1, 1956; and

*It is further ordered*, That Pacific Transport Lines, Inc. (now States Steamship Co.), cancel the rate in its tariff on canned pineapple from Hawaii to the Pacific coast and substitute therefor, within 10 days from the date of this amended order, a tariff rate reflecting an increase of 13.2 percent over the rate in effect on December 1, 1956; and

*It is further ordered*, That Hawaiian Steamship Co., Ltd. (now Hawaiian Textron, Inc.), cancel the rate in its tariff on canned pineapple from Hawaii to the Pacific coast and substitute therefor, within 10 days from the date of this amended order, a tariff rate reflecting an increase of 7.85 percent over the rate in effect on March 1, 1957; and

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

BY THE BOARD.

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

# FEDERAL MARITIME BOARD
# MARITIME ADMINISTRATION

No. S-63

AMERICAN PRESIDENT LINES, LTD.—APPLICATION FOR INCREASED SAILINGS IN THE ATLANTIC/STRAITS SERVICE, TRADE ROUTE NO. 17

*Submitted September 27, 1957. Decided December 13, 1957*

American President Lines, Ltd., is not operating an existing service with respect to the 12 additional sailings per year over Service No. 1 of Trade Route No. 17 for which subsidy is applied.

The existing service over Service No. 1 of Trade Route No. 17 by vessels of United States registry is inadequate, within the meaning of section 605 (c) of the Merchant Marine Act of 1936, and in the accomplishment of the purposes and policy of the Act, additional vessels should be operated thereon.

Section 605 (c) of the Merchant Marine Act of 1936 is not a bar to the granting of the subsidy herein requested.

Grant of the authority for intercoastal service herein requested would not result in unfair competition to any person, firm, or corporation operating exclusively in the coastwise or intercoastal service, within the meaning of section 805 (a) of the Merchant Marine Act of 1936, and would not be prejudicial to the objects and policy of the Act.

*Warner W. Gardner* and *Vern Countryman* for applicant.

*Tom Killefer*, *James L. Adams*, and *Gordon L. Poole* for States Steamship Co. and Pacific Transport Lines, Inc., *George F. Galland*, *Robert N. Kharasch*, and *G. Nathan Calkins, Jr.*, for Isthmian Lines, Inc., *Odell Kominers* and *G. Alton Boyer* for Luckenbach Steamship Co., Inc., *Alvin J. Rockwell* and *Willis R. Deming* for Matson Orient Line, Inc., *John J. O'Connor* and *Richard W. Kurrus* for Isbrandtsen Co., Inc., interveners.

*Robert E. Mitchell*, *Edward Aptaker*, and *Richard J. Gage* 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 an application filed by American President Lines, Ltd. (APL), to increase from a minimum of 12 and

a maximum of 16 subsidized sailings per year to a minimum of 24 and a maximum of 28 subsidized sailings per year in its Atlantic/Straits service, which is Service No. 1 of Trade Route No. 17 (Service No. 1 or the route).[1] By order published in the Federal Register on May 26, 1956 (21 F. R. 3634), a public hearing was ordered under sections 605 (c) and 805 (a) of the Merchant Marine Act, 1936 (the Act). The following companies intervened: States Steamship Co. (States), Pacific Transport Lines, Inc. (PTL), Isthmian Lines, Inc. (Isthmian), Pacific Far East Line, Inc. (PFEL), Isbrandtsen Company, Inc. (Isbrandtsen), Luckenbach Steamship Co., Inc. (Luckenbach), and Matson Orient Line, Inc. (Matson Orient). PFEL withdrew from the proceeding, and Isbrandtsen, Luckenbach, and Matson Orient took no active part in the hearing and did not file briefs or exceptions.

It is apparent from the record, and conceded from the outset by APL, that the additional subsidized sailings herein requested would be in addition to its existing service. Evidence presented with respect to section 605 (c) of the Act was limited to the issues of (1) adequacy of United States-flag service, and (2) whether, in the accomplishment of the purposes and policy of the Act, additional vessels should be operated on the service, route, or line.

In his recommended decision the examiner found that United States-flag service on Service No. 1 is inadequate, within the meaning of section 605 (c) of the Act, and that in the accomplishment of the purposes and policy of the Act additional vessels of United States registry should be operated thereon. He concluded that section 605 (c) does not interpose a bar to an award of subsidy for the additional sailings requested.

Exceptions to the recommended decision have been filed and we have heard oral argument thereon. Exceptions and recommended findings not discussed in this report nor reflected in our findings or conclusions have been given consideration and found not related to material issues or not supported by evidence.

States/PTL filed numerous specific exceptions to findings in the recommended decision, and excepted to the ultimate findings and conclusions that United States-flag participation on Service No. 1 is inadequate; that in the accomplishment of the purposes and policy of the Act additional vessels of United States registry should be operated thereon; and that section 605 (c) interposes no bar to the

[1] Service No. 1 of Trade Route No. 17 is described: "U. S. Atlantic (via Panama Canal) and California to Indonesia-Malaya and return, including Far East Ports—Hong Kong and south en route."

award of subsidy for the additional sailings. The basic arguments advanced in support of the exceptions are:

1. No finding of inadequacy of United States-flag service can be made where, as here:

(a) The Board and its predecessor, the Maritime Commission, had determined in two prior decisions,[2] in 1947 and 1951, that United States-flag participation on the Atlantic/Straits service was adequate;

(b) Since 1951, traffic with the primary areas of Service No. 1 (Indonesia-Malaya) has declined; and

(c) The record fails to prove any change since 1951 which would warrant the Board in reversing its prior findings of adequacy of United States-flag service.

2. No subsidy should be allowed for additional sailings where, as here, APL has failed to prove an increase in traffic or traffic potential with the primary areas of the service (Indonesia-Malaya), but in fact relies on increases in traffic with the off-route areas (Philippines, Hong Kong, Indochina, and Thailand.[3]

Isthmian contends that a specific finding should have been made showing the level of Isthmian's service during the years of record, and that there should be an express finding as to whether the grant of subsidy to APL for these additional sailings would preclude the grant of subsidy to Isthmian in its pending subsidy application (Docket No. S-72).

We find the evidentiary facts to be as follows:

Since January 1, 1955, APL has been operating its subsidized Atlantic/Straits service with a basic scheduling of five vessels.[4] Its subsidy contract provides for a minimum of 12 and a maximum of 16 sailings a year, and the service substantially conforms to Service No. 1 as determined to be essential by the Maritime Administrator under section 211 of the Act. In May of 1956, APL was granted temporary authority to operate three additional vessels without subsidy on this service. APL's application herein considered is for subsidy for these additional sailings. At the time of hearing the

[2] *U. S. Lines Co.—Subsidy, Routes 12 Etc.*, 3 U. S. M. C. 325 (1947); *Amer. Pres. Lines, Ltd.—Charter of War-Built Vessels*, 3 F. M. B. 646 (1951).

[3] Trade Route No. 17 includes the Philippines, Hong Kong, Indochina, and Thailand within its trade route description. These areas are also served as parts of Trade Route No. 29 (California–Far East) and Trade Route No. 12 (Atlantic–Far East). States/PTL has for this reason referred to these areas as "off-route" with respect to Trade Route No. 17. These areas are part of Service No. 1 and are recognized as such in this proceeding. For the sake of clarity, however, in considering States/PTL contentions, we refer to these areas throughout this report as "Trade Route No. 12 points" and/or "Trade Route No. 29 points."

[4] Throughout this report "Service No. 1" or "the Atlantic/Straits Service" will refer to Service No. 1 of Trade Route No. 17, and "APL Atlantic/Straits vessels" will refer to the APL vessels operated on such service.

service was operated with three C–3 and five AP–3 vessels, but it was intended in the near future to change this ratio to four of each type.

Present sailings by APL on the Atlantic/Straits service are twice monthly, with a turnaround time of 121 days. Two alternating itineraries are followed:

(1) Atlantic (Boston, Baltimore, New York, Hampton Roads), San Francisco, Guam, Manila, Soerabaja, Djakarta, Singapore, Port Swettenham, Belawan, Penang, Singapore, Manila, Hong Kong, Los Angeles, Atlantic; and

(2) Atlantic, San Francisco, Manila, Soerabaja, Djakarta, Bangkok, Saigon, Singapore, Port Swettenham, Penang, Singapore, Manila, Los Angeles, Atlantic.[5]

The differences between these itineraries are that No. (2) omits service to Guam, Belawan, and Hong Kong, and adds service to Bangkok and Saigon. It should be noted, therefore, that the above ports are presently served on only half the APL voyages. It should be noted further that APL's Atlantic/Straits vessels serve only San Francisco in California outbound, and only Los Angeles in California inbound. Only half the sailings outbound call Manila direct, and only half the inbound sailings are from Manila direct.

The Atlantic/Straits service goes more than half-way around the world via Panama Canal before returning to the Atlantic. It is the longest essential foreign trade route under the American flag. Despite the fact that the distance from Singapore to New York is approximately 2,400 miles shorter via Suez than via Panama, for the period July 1955 through June 1956 only two other lines provide shorter transit time from Singapore to New York than the Atlantic/Straits vessels, which averaged 42.5 days. In the last half of 1956 this transit time averaged only 39.8 days. The service through Panama has been competitive with the shorter service through Suez. While an exact segregation of sailings by flag over this route is impossible on the record, it is clear that foreign-flag vessels provide many more sailings over-all than do United States-flag vessels.

The only nonliner cargoes of any consequence moving over this route are from the Philippines to the Atlantic, amounting to only 17 percent of the total dry cargo on that segment in the period 1952–1955. Since the end of the heavy military movements to Indochina in 1954, defense cargoes on this route are insignificant, except from California to the Philippines, amounting to 28 percent of the total dry cargo on

[5] The ports in Malaya (Singapore, Port Swettenham, Penang) and in Indonesia (Djakarta, Soerabaja, Belawan) are the purely Trade Route No. 17 points. The ports in the Philippines (Manila), Hong Kong, Indochina (Saigon), and Thailand (Bangkok) are points which are on Trade Route No. 17 and also on Trade Routes Nos. 12 and 29.

that segment. As did the examiner, our examination of cargo movements on this route will be limited to liner commercial cargoes only, and, unless indicated to the contrary, all cargo statistics refer to liner commercial cargoes only.

The predominant movement of cargo on the Atlantic/Straits service is inbound. From 1952 through 1955 the total movement was 12,749,227 tons: 9,164,557 tons, or 72 percent, inbound, and 3,584,670, or 28 percent, outbound.[6] During this same period the APL Atlantic/Straits vessels carried a total of 480,470 tons on this service: 291,864 tons, or 61 percent, inbound, and 188,606 tons, or 39 percent, outbound. Movements over this route are predominantly Atlantic coast cargoes. For the period 1952 through 1955, of the total volume carried, 73 percent were Atlantic coast cargoes and 27 percent were California cargoes. During this same period, of the volume carried by APL Atlantic/Straits vessels, 72 percent were Atlantic coast cargoes and 28 percent were California cargoes.

The principal commodities carried outbound by all liners on the Atlantic/Straits service during 1955 were as follows:

| | *Tons* |
|---|---|
| Iron and steel products | 126,552 |
| Petroleum and products | 75,143 |
| Dairy products | 58,683 |
| Paper and products | 54,646 |
| Industrial chemicals | 47,330 |

Principal commodities carried inbound by all liners on the Atlantic/Straits service during 1955 were as follows:

| | *Tons* |
|---|---|
| Sugar | 702,490 |
| Rubber, crude and allied gums | 542,075 |
| Manganese | 363,563 |
| Copra | 276,213 |
| Vegetable oils and fats, inedible | 68,693 |
| Logs and lumber | 51,708 |
| Nuts and preparations | 44,985 |

Except for bulk commodities and the large inbound sugar movement which APL has carried in relatively small quantities, it appears that the APL Atlantic/Straits vessels have carried a representative cross-section of the cargoes moving in the trade. Rubber is the predominant commodity inbound to both coasts on these vessels, and from Indonesia and Malaya constitutes nearly 90 percent of the cargoes carried.

It is the policy of APL to first assign the Indonesia-Malaya area whatever space it needs for homebound bookings aboard the

[6] Traffic figures throughout this report are in long tons unless otherwise indicated.

Atlantic/Straits vessels. Other areas are then permitted to book the balance of space. An APL witness knew of only one instance when the Indonesia-Malaya office failed to obtain all the space it could book.

For the purpose of analysis of the cargo movement over the various segments of the service, the record has presented traffic statistics over twelve segments inbound and twelve segments outbound. The outbound segments consist of separate segments from the Atlantic coast and from California to the Philippines, Hong Kong, Indochina, Thailand, Indonesia, and Malaya. The inbound segments consist of separate segments from these same six areas to California and to the Atlantic coast. It should again be pointed out that the segments between California and the Philippines, Hong Kong, Indochina, and Thailand are parts of Trade Route No. 29 as well as parts of Service No. 1 of Trade Route No. 17, and that the segments between the Atlantic coast and the Philippines, Hong Kong, Indochina, and Thailand are parts of Trade Route No. 12 as well as service No. 1 of Trade Route No. 17. The segments between the Atlantic coast and California and Indonesia and Malaya are segments of Trade Route 17 alone.

Table I of the appendix shows the total volume of cargo moving on Service No. 1 as a whole and on the various segments for the years 1952 through 1955, the percent of United States-flag participation, and the percent of the total carried on APL Atlantic/Straits vessels. United States-flag participation in the predominant inbound movement was only 30 percent over the 4-year period; for the outbound movement it was 46 percent. In the combined inbound and outbound movements, United States-flag participation was 35 percent. These percentages have not varied appreciably during the 4-year period. Outbound from California, United States-flag participation exceeded 50 percent on all segments for the period, and inbound the participation exceeded 50 percent from Indochina, Hong Kong, and the Philippines. Outbound from the Atlantic coast, the only segment exceeding 50 percent was to Malaya; inbound, none of the segments had as much as 50 percent participation.

Table II of the appendix shows the cargo movement between the Atlantic coast/California and Indonesia-Malaya, table III shows the movement between the Atlantic coast/California and areas on Trade Routes Nos. 12 and 29.

With respect to the carryings of the APL Atlantic/Straits vessels alone on this route for the period 1952 through 1955, the following are relevant traffic statistics:

480,470 tons were carried on all segments (343,441 tons Atlantic and 137,029 tons California), of which 291,864 tons moved outbound and

188,606 tons moved inbound. These figures amounted to 4 percent, 5 percent, and 3 percent, respectively, of the total carryings by all liners on the route, and in each category were 11 percent of the United States-flag total on the route Of the Atlantic cargoes, 41 percent were to and from Indonesia-Malaya and 59 percent were to and from Trade Route No. 12 areas. Of the California cargoes, 63 percent were to and from Indonesia-Malaya and 37 percent were to and from Trade Route No. 29 areas. The largest portion moving to and from the areas also served on Trade Routes Nos. 12 and 29 move to and from the Philippines.

Cargoes carried by APL Atlantic/Straits vessels inbound and outbound between the Atlantic coast/California and Indonesia-Malaya are shown in table IV of the appendix; those inbound and outbound between the Atlantic coast/California and Trade Routes 12 and 29 areas are shown in table V; those inbound and outbound between California and Indonesia-Malaya are shown in table VI; and those inbound and outbound between California and Trade Route 29 areas are shown in table VII.

Of all cargoes carried between California and Indonesia-Malaya by United States-flag vessels during the period 1952 through 1955, the APL Atlantic/Straits vessels handled 30 percent. Average loadings by APL Atlantic/Straits vessels in Indonesia-Malaya for California and the Atlantic coast have steadily increased, as shown below:

| *Year* | *Average tons* |
|---|---|
| 1949 | 1,375 |
| 1950 | 2,187 |
| 1951 | 3,048 |
| 1952 | 4,040 |
| 1953 | 3,365 |
| 1954 | 3,291 |
| 1955 | 4,244 |

The four APL Atlantic/Straits vessels returning to the United States after twice-monthly service was instituted in May 1956 averaged 4,637 tons of cargo loaded in Indonesia-Malaya.

Free space available on the APL Atlantic/Straits vessels at last United States port of departure outbound and first United States port of arrival inbound was as follows between 1953 and 1956:

| *Outbound* | *(Percent)* | *Inbound* | *(Percent)* |
|---|---|---|---|
| 1953 | 1 | 1953 | 19 |
| 1954 | 1 | 1954 | 13 |
| 1955 | 4 | 1955 | 4 |
| 1956 | 1 | 1956 | 7 |

The carryings of APL Atlantic/Straits vessels between California and Trade Route 29 areas have been small in relation to their total carryings over the whole Atlantic/Straits service, averaging 10 percent for the years 1952 through 1955. In relation to all cargo movements and all United States-flag cargo movements over these Trade Route 29 segments, the carryings by APL Atlantic/Straits vessels have been of little significance, averaging only 1.7 percent and 3 percent, respectively, between 1952 and 1955.

Average carryings by the APL Atlantic/Straits vessels between California and the Trade Route No. 29 areas, while fluctuating from year to year, have been small in recent years. Since 1950, these vessels have averaged less than 500 tons per vessel outbound from California to the Philippines and Hong Kong; less than 200 tons outbound from California to Indochina and Hong Kong; less than 300 tons inbound from the Philippines and Hong Kong to California; and less than 150 tons inbound from Indochina and Thailand. Assuming that the additional APL sailings over this route will secure cargo in approximately the same proportion as past sailings, it appears that the impact of these sailings on States and PTL will be extremely small, amounting to less than 50 tons per voyage for States and less than 40 tons per voyage for PTL.

APL now has authority to carry intercoastal cargoes eastbound from Los Angeles to New York and Boston on its Atlantic/Straits vessels. In 1954, these vessels carried nine percent of the cargo moving to Boston and New York and made 12 percent of the sailings; in 1955, they carried 11 percent of the cargo and furnished 19 percent of the sailings. Westbound, the vessels are limited to the carrying of refrigerated cargo, a service not furnished by any other carrier. The refrigerated movement, while small, is of importance to certain shippers.

APL seeks only to have its existing intercoastal privileges extended to cover the additional sailings. No objection was made to such privileges.

## Discussion and Conclusions

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

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

or more citizens of the United States with vessels of United States registry, if the Board shall determine the effect of such a contract would be to give undue advantage or be unduly prejudicial, as between citizens of the United States, in the operation of vessels in competitive services, routes, or lines, unless following public hearing, due notice of which shall be given to each line serving the route, the Board shall find that it is necessary to enter into such contract in order to provide adequate service by vessels of United States registry.

It is apparent from the record, and APL has conceded from the outset, that the additional subsidized sailings requested would be in addition to the existing service. The issues to be determined under section 605 (c) are, therefore, (1) whether United States-flag participation on Service No. 1 is adequate, and (2) whether, in the accomplishment of the purposes and policy of the Act, additional vessels should be operated thereon. When considering such a service under section 605 (c) it is well settled that we do not weigh whether the award of subsidy would give undue advantage or be unduly prejudicial as between citizens of the United States operating competitive services. *Bloomfield S. S. Co.—Subsidy, Routes 13 (1) and 21 (5)*, 4 F. M. B. 305 (1953).

In *American President Lines, Ltd.—Subsidy, Route 17*, 4 F. M. B.—M. A. 488, 491 (1954), the Board made it clear that Trade Route No. 17 was declared essential

* * * largely because of the strategic and economic importance to the United States of the natural resources—tin, rubber, oils, fibers, etc.—in which the Indonesia-Malaya area is so rich. Freight service "C–2" [now service No. 1] on Trade Route No. 17 was established by the Maritime Commission to provide an alternative to the Atlantic/Indonesia-Malaya Suez route, which is the traditional route traveled by steamship lines plying the trade.

In recognition of the fact that Indonesia-Malaya cargoes alone could not maintain the Atlantic/Straits service, Service No. 1 includes in its description "Far East ports—Hong Kong and south enroute." This includes the Philippines, Hong Kong, Indochina, and Thailand. Furthermore, Services 3 and 4 of the route also include Far East ports as well as Indonesia-Malaya. The Board has made it clear, however, that the prime area to be served on the route is Indonesia-Malaya and that the route is not intended to serve primarily the Philippines, Hong Kong, Indochina, and Thailand, which areas are also parts of Trade Route No. 29 and Trade Route No. 12.

States/PTL rely on prior decisions, by the Board's predecessor in 1947 in *U. S. Lines Co.—Subsidy, Routes 12, Etc.*, 3 U. S. M. C. 325 (Docket No. S–7), and by the Board itself in 1951 in *Am. Pres. Lines, Ltd.—Charter of War-Built Vessels*, 3 F. M. B. 646 (Docket No. M–20), for their contention that United States-flag service is adequate

on Service No. 1 It is true that in Docket No. S–7 the Maritime Commission found that convincing evidence had not been presented showing that United States-flag participation on Trade Route No. 17 was inadequate. United States-flag participation at that time was 61 percent outbound and 57 percent inbound. Docket No. M–20 involved the chartering of a Government-owned dry-cargo vessel under section 5 (e) of the Merchant Ship Sales Act of 1946, as amended (50 U. S. C. App. 1738 (e)), and the discussion of adequacy therein was directed to adequacy of existing service to carry the cargoes available; it was not concerned with adequacy of *United States-flag participation* on the service *vis a vis foreign-flag participation*, which is the issue under section 605 (c). We agree with the examiner that our determination as to adequacy of United States-flag participation under section 605 (c) must be based upon present and probable future conditions, and cannot by unduly concerned with conditions in the past.

We do not think the record supports the contentions of States/PTL that traffic with the primary areas of the Atlantic/Straits service (Indonesia-Malaya) has declined, and that the additional sailings are needed for service primarily to the so-called "off-route" areas (the Philippines, Hong Kong, Indochina, and Thailand, which are areas also served on Trade Routes Nos. 12 and 29).

Indonesia-Malaya traffic has fluctuated from year to year, but if recognition be given to Government stockpiling of rubber in the years 1951 to 1953, it will be seen from table II that trade between this area and the Atlantic coast and California cannot be said to have declined appreciably. For example, total imports and exports in 1950 amounted to 717,000 tons, but in 1954 and 1955, after stockpiling tapered off, the total was 738,000 tons and 760,000 tons, respectively. It is further apparent that the APL Atlantic/Straits vessels have been steadily increasing their average loadings per voyage inbound from Indonesia-Malaya (see table on p. 365, *infra*). Table IV shows that the volume of cargoes carried by the APL Atlantic/Straits vessels between Indonesia-Malaya and the Atlantic coast and California have increased, and table V, while showing some increase in carryings by these vessels between the Trade Routes 12 and 29 areas and the California and Atlantic coast since 1951, does not, over-all, indicate an undue reliance on these areas. The four vessels returning to the United States after twice-monthly service was initiated in May of 1956 averaged 4,637 tons of cargo loaded in Indonesia-Malaya, which is higher than for any previous year of record.

We think the record supports the finding of the examiner that APL, in the operation of its Atlantic/Straits service, has been faithful in recent years to the admonition of the Board to concentrate on the

primary areas of Indonesia-Malaya. APL has not been able, however, to fill the vessels with cargo to or from these areas alone, and has continued to rely to some extent on other Trade Route 17 ports which are also served by ships operating on Trade Routes Nos. 12 and 29.

With respect to the California service alone, table VI shows that the APL Atlantic/Straits vessels have carried increased amounts of cargo (total inbound and outbound) between California and the primary areas of Indonesia-Malaya. Table VII shows a substantial dropping off in total cargoes between California and Trade Route 29 areas after 1950, and some increase each year since 1951. As previously seen, the California/Trade Route No. 29 carryings of the APL Atlantic Straits vessels have been small in recent years, averaging only 10 percent of their total carryings in the years 1952 through 1955; only 3 percent of all United States-flag cargoes moving over these segments for the same period; and only 1.7 percent of total cargoes moving over these segments for the same period. As also previously seen, since 1950 these vessels have averaged less than 500 tons per vessel outbound from California to the Philippines and Hong Kong; less than 200 tons outbound from California to Indochina and Thailand; less than 300 tons inbound from the Philippines and Hong Kong to California; and less than 150 tons inbound from Indochina and Thailand. Finally, as previously noted, it appears that the operation of the additional subsidized sailings requested would result in only slight loss of cargoes to States and PTL, amounting to less than 50 tons per voyage for States and less than 40 tons per voyage for PTL.

The record does not support the contention that APL, by this application, is seeking to invade Trade Route No. 29. The Philippines, Hong Kong, Indochina, and Thailand, as noted earlier, are within the essential trade route description of Service No. 1 of Trade Route No. 17 as well as Trade Route No. 29. In our determination of adequacy of United States-flag service over Service No. 1 we therefore consider these segments as integral parts of such service.

As shown in table I, United States-flag participation in the predominant inbound cargo movement over Service No. 1 was only 30 percent for the years 1952 through 1955; outbound, the participation was 46 percent; and inbound and outbound, 35 percent.

Outbound for the years 1952–1955, United States-flag participation exceeded 50 percent on the following legs of the route: California/Philippines, California/Hong Kong, California/Indochina, California/Thailand, California/Indonesia, California/Malaya, and Atlantic/Malaya. Of the three legs on which there was the heaviest

movement—Atlantic/Philippines, California/Philippines, and Atlantic/Indonesia—the participation exceeded 50 percent from California to the Philippines only. Inbound, the participation exceeded 50 percent on the Indochina/California, Hong Kong/California, and Philippines/California legs only. On the two legs which are, historically, the real justification for the route—Indonesia/Atlantic and Malaya/Atlantic—the participation was 27 percent and 40 percent, respectively.

In view of the recognition by the Board and its predecessors that service to and from the Philippines, Hong Kong, Indochina, and Thailand is required to sustain the Atlantic/Straits service, we think it proper in determining adequacy of United States-flag service to consider service over the complete outbound and inbound legs of the route and over the route as a whole, rather than segment by segment individually. As stated in *American President Lines—Calls, Round-the-World Service*, 4 F. M. B. 681, 693 (1955):

> * * * we consider that adequacy of service should be weighed here on the basis of separate inbound and outbound services. As revealed by tables I and II, the export traffic in this service far exceeds the import traffic. In such circumstances this Board in the past has examined inbound and outbound traffic separately * * *.
>
> We consider, however, that inefficiency of operations which may here result from overly refined examination of adequacy or inadequacy of United States-flag services is inconsistent with the purposes and policy of the Act and militates in this case against consideration of adequacy of service on the basis of four segments.

It is apparent from table I that United States-flag participation inbound, outbound, and over-all is substantially below the general goal of 50 percent, and that at no time in the period 1952 through 1955 did such participation reach or exceed 50 percent. Census data for the first nine months of 1956 show the United States-flag participation as 44 percent outbound, 30 percent inbound, and 33 percent over-all.

An economic analysis made by APL's director of research indicates a probable increase of about three percent per year in liner commercial cargo over the route as a whole, and a continued growth of trade with the Indonesia-Malaya area at a rate slightly less than the area as a whole.

Upon consideration of the entire record, we find that United States-flag participation on Service No. 1 is inadequate.

We further find from the record that additional vessels under United States registry should be operated on the service for the accomplishment of the purposes and policy of the Act. In *Bloomfield S. S. Co.—Subsidy, Routes 13 (1) and 21 (5), supra*, page 324, the Board said:

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

More recently, in *States Steamship Co.—Subsidy, Pacific Coast/Far East*, 5 F. M. B. 304 (1957), the Board said at page 315:

Since we have determined that this trade is not now adequately served, the operation of additional United States-flag vessels is necessarily in furtherance of the purposes and policy of the Act, and whether the granting of the subsidy application would result in undue advantage or undue prejudice is not in issue.

As noted, APL requests permission under section 805 (a) of the Act to provide intercoastal service with respect to the additional twelve sailings, to the extent it presently has authority for intercoastal sailings with its existing subsidized Atlantic/Straits service. Since no parties opposed the grant of such permission, we find that favorable action on the request will not result in unfair competition to any person, firm, or corporation operating exclusively in the coastwise or intercoastal service, and will not be prejudicial to the objects and policy of the Act.

We find and conclude:

1. That American President Lines, Ltd., is not an existing operator on Service No. 1 to the extent of the additional sailings here requested, within the meaning of section 605 (c) of the Act;

2. That United States-flag service on Service No. 1 is inadequate, within the meaning of section 605 (c) of the Act, and that in the accomplishment of the purposes and policy of the Act additional vessels of United States registry should be operated thereon;

3. That section 605 (c) of the Act is not a bar to the granting of the subsidy herein requested; and

4. That intercoastal service by the additional vessels herein considered, limited eastbound to carriage of general cargo from Los Angeles to New York and Boston, and limited westbound to the carrying of refrigerated cargo only, would not result in unfair competition to any person, firm, or corporation operating exclusively in the coastwise or intercoastal service, within the meaning of section 805 (a) of the Act, and would not be prejudicial to the objects and policy of the Act.

## APPENDIX

### TABLE I

| | 1952 | | | 1953 | | |
|---|---|---|---|---|---|---|
| | Tons | Percent U. S. | Percent A/S | Tons | Percent U. S. | Percent A/S |
| **Outbound** | | | | | | |
| Atlantic/Philippines | 245,299 | 27 | 6 | 284,204 | 33 | 6 |
| California/Philippines | 190,009 | 56 | 2 | 226,080 | 59 | 2 |
| Atlantic/Hong Kong* | 21,126 | 30 | 12 | 31,065 | 35 | 7 |
| California/Hong Kong* | 49,723 | 45 | 2 | 55,385 | 62 | 2 |
| Atlantic/Indochina | 23,374 | 34 | (**) | 29,020 | 43 | ---------- |
| California/Indochina | 19,710 | 56 | 8 | 25,336 | 64 | 6 |
| Atlantic/Thailand | 45,166 | 45 | 1 | 46,091 | 50 | 4 |
| California/Thailand | 34,521 | 67 | 1 | 23,154 | 74 | 5 |
| Atlantic/Indonesia | 131,453 | 38 | 6 | 91,267 | 42 | 8 |
| California/Indonesia | 31,179 | 61 | 13 | 18,519 | 60 | 7 |
| Atlantic/Malaya | 49,543 | 47 | 6 | 30,284 | 47 | 7 |
| California/Malaya | 56,013 | 67 | 6 | 36,261 | 62 | 8 |
| Total outbound | 897,116 | 44 | 5 | 896,666 | 48 | 5 |
| **Inbound** | | | | | | |
| Indonesia/California | 8,754 | 41 | 34 | 21,837 | 39 | 32 |
| Indonesia/Atlantic | 223,948 | 32 | 4 | 227,834 | 30 | 4 |
| Malaya/California | 64,818 | 64 | 15 | 47,422 | 36 | 14 |
| Malaya/Atlantic | 367,059 | 44 | 5 | 335,292 | 42 | 4 |
| Thailand/California | 2,089 | 1 | ---------- | 1,968 | 12 | 2 |
| Thailand/Atlantic | 59,917 | 19 | 10 | 41,591 | 16 | 2 |
| Indochina/California | 957 | 90 | 9 | 615 | 41 | 24 |
| Indochina/Atlantic | 12,893 | 51 | 7 | 23,519 | 45 | 16 |
| Hong Kong/California | 11,571 | 73 | ---------- | 10,405 | 77 | 1 |
| Hong Kong/Atlantic | 9,238 | 18 | ---------- | 6,115 | 23 | ---------- |
| Philippines/California | 346,503 | 43 | ---------- | 390,586 | 53 | 1 |
| Philippines/Atlantic | 1,014,874 | 29 | 2 | 1,252,694 | 20 | 2 |
| Total inbound | 2,122,621 | 35 | 3 | 2,359,878 | 30 | 3 |
| Total outbound/inbound | 3,019,737 | 38 | 4 | 3,256,544 | 35 | 3 |

*The Atlantic/Straits vessels do not serve Hong Kong outbound at the present time.
**Less than one percent.

5 F. M. B.—M. A.

TABLE I—Continued

| | 1954 | | | 1955 | | |
|---|---|---|---|---|---|---|
| | Tons | Percent U. S. | Percent A/S | Tons | Percent U. S. | Percent A/S |
| Outbound | | | | | | |
| Atlantic/Philippines | 250,195 | 30 | 7 | 277,018 | 25 | 7 |
| California/Philippines | 211,610 | 60 | 2 | 245,094 | 59 | 3 |
| Atlantic/Hong Kong* | 48,911 | 38 | 8 | 47,907 | 51 | 3 |
| California/Hong Kong* | 77,790 | 72 | 3 | 62,571 | 66 | ---------- |
| Atlantic/Indochina | 25,328 | 64 | ---------- | 22,101 | 42 | ---------- |
| California/Indochina | 28,045 | 57 | ---------- | 8,907 | 63 | 4 |
| Atlantic/Thailand | 31,019 | 51 | 8 | 37,464 | 44 | 7 |
| California/Thailand | 13,300 | 78 | 18 | 23,232 | 63 | 9 |
| Atlantic/Indonesia | 93,659 | 45 | 5 | 100,363 | 33 | 11 |
| California/Indonesia | 16,257 | 48 | 7 | 19,870 | 58 | 16 |
| Atlantic/Malaya | 30,103 | 63 | 18 | 41,122 | 50 | 6 |
| California/Malaya | 36,381 | 58 | 11 | 42,641 | 59 | 4 |
| Total outbound | 862,598 | 49 | 5 | 928,290 | 45 | 6 |
| Inbound | | | | | | |
| Indonesia/California | 20,866 | 37 | 30 | 21,853 | 40 | 29 |
| Indonesia/Atlantic | 171,782 | 25 | 4 | 118,873 | 15 | 3 |
| Malaya/California | 52,811 | 44 | 18 | 58,125 | 46 | 28 |
| Malaya/Atlantic | 316,895 | 36 | 4 | 357,054 | 37 | 6 |
| Thailand/California | 3,664 | 26 | 20 | 7,023 | 20 | 20 |
| Thailand/Atlantic | 45,551 | 11 | 6 | 73,876 | 12 | 3 |
| Indochina/California | 1,974 | 55 | 35 | 2,682 | 75 | 74 |
| Indochina/Atlantic | 32,631 | 34 | 13 | 30,192 | 49 | 24 |
| Hong Kong/California | 10,756 | 83 | 2 | 13,607 | 84 | 4 |
| Hong Kong/Atlantic | 7,604 | 37 | 5 | 9,579 | 50 | 12 |
| Philippines/California | 390,938 | 59 | 1 | 409,098 | 72 | 1 |
| Philippines/Atlantic | 1,276,300 | 13 | 2 | 1,248,324 | 14 | 2 |
| Total inbound | 2,331,772 | 26 | 3 | 2,350,286 | 30 | 4 |
| Total outbound/inbound | 3,194,370 | 32 | 4 | 3,278,576 | 34 | 4 |

*The Atlantic/Straits vessels do not serve Hong Kong outbound at the present time.

TABLE I—Continued

| | Total | | |
|---|---|---|---|
| | Tons | Percent U. S. | Percent A/S |
| **Outbound** | | | |
| Atlantic/Philippines | 1,056,716 | 29 | 7 |
| California/Philippines | 872,793 | 59 | 2 |
| Atlantic/Hong Kong* | 149,009 | 40 | 7 |
| California/Hong Kong* | 245,469 | 63 | 2 |
| Atlantic/Indochina | 99,823 | 46 | ---- |
| California/Indochina | 81,998 | 60 | 4 |
| Atlantic/Thailand | 159,740 | 47 | 5 |
| California/Thailand | 94,207 | 69 | 6 |
| Atlantic/Indonesia | 416,742 | 39 | 7 |
| California/Indonesia | 85,825 | 58 | 11 |
| Atlantic/Malaya | 151,052 | 51 | 9 |
| California/Malaya | 171,296 | 62 | 7 |
| Total outbound | 3,584,670 | 46 | 5 |
| **Inbound** | | | |
| Indonesia/California | 73,310 | 39 | 31 |
| Indonesia/Atlantic | 742,437 | 27 | 4 |
| Malaya/California | 223,176 | 48 | 19 |
| Malaya/Atlantic | 1,376,300 | 40 | 5 |
| Thailand/California | 14,744 | 18 | 15 |
| Thailand/Atlantic | 220,935 | 15 | 5 |
| Indochina/California | 6,228 | 67 | 47 |
| Indochina/Atlantic | 99,235 | 43 | 16 |
| Hong Kong/California | 46,339 | 79 | 2 |
| Hong Kong/Atlantic | 32,536 | 33 | 5 |
| Philippines/California | 1,537,125 | 57 | ---- |
| Philippines/Atlantic | 4,792,192 | 18 | 2 |
| Total inbound | 9,164,577 | 30 | 3 |
| Total outbound/inbound | 12,749,227 | 35 | 4 |

*The Atlantic/Straits vessels do not serve Hong Kong outbound at the present time.

TABLE II.—Total tons of cargo between Atlantic-California and Indonesia-Malaya

| | In | Out | Total | | In | Out | Total |
|---|---|---|---|---|---|---|---|
| 1948 | 514,260 | 279,985 | 794,245 | 1952 | 664,579 | 268,188 | 932,767 |
| 1949 | 440,750 | 302,742 | 743,492 | 1953 | 632,385 | 176,331 | 808,716 |
| 1950 | 573,034 | 143,519 | 716,553 | 1954 | 562,354 | 176,400 | 738,754 |
| 1951 | 635,515 | 288,087 | 923,602 | 1955 | 555,905 | 203,006 | 758,911 |

TABLE III.—Total tons of cargo between Atlantic-California and T/R 12 and T/R 29 areas

| | In | Out | Total | | In | Out | Total |
|---|---|---|---|---|---|---|---|
| 1948 | 1,061,074 | 871,223 | 1,932,297 | 1952 | 1,458,042 | 628,928 | 2,086,970 |
| 1949 | 1,300,126 | 1,034,773 | 2,334,899 | 1953 | 1,727,493 | 720,335 | 2,447,828 |
| 1950 | 1,197,395 | 674,292 | 1,871,687 | 1954 | 1,769,418 | 686,198 | 2,455,616 |
| 1951 | 1,205,158 | 696,768 | 1,901,926 | 1955 | 1,794,381 | 724,294 | 2,518,675 |

TABLE IV.—Tons of cargo carried by APL Atlantic/Straits vessels between Atlantic-California and Indonesia-Malaya

| | In | Out | Total | | In | Out | Total |
|---|---|---|---|---|---|---|---|
| 1948 | 5,660 | 2,262 | 7,922 | 1952 | 40,401 | 18,894 | 59,295 |
| 1949 | 19,246 | 32,418 | 51,664 | 1953 | 37,016 | 13,705 | 50,721 |
| 1950 | 28,431 | 19,138 | 47,569 | 1954 | 36,206 | 15,079 | 51,285 |
| 1951 | 33,527 | 24,046 | 57,573 | 1955 | 46,679 | 18,244 | 64,923 |

TABLE V.—Tons of cargo carried by APL Atlantic/Straits vessels between Atlantic-California and T/R 12 and T/R 29 areas

| | In | Out | Total | | In | Out | Total |
|---|---|---|---|---|---|---|---|
| 1948 | 14,585 | 13,208 | 27,793 | 1952 | 29,522 | 25,468 | 54,990 |
| 1949 | 63,146 | 52,782 | 115,928 | 1953 | 31,383 | 30,910 | 62,293 |
| 1950 | 63,022 | 35,819 | 98,841 | 1954 | 33,585 | 31,825 | 65,410 |
| 1951 | 37,730 | 16,628 | 54,358 | 1955 | 37,108 | 34,508 | 71,616 |

TABLE VI.—Tons of cargo carried by APL Atlantic/Straits vessels between California and Indonesia-Malaya

| | In | Out | Total | | In | Out | Total |
|---|---|---|---|---|---|---|---|
| 1948 | 2,765 | 1,094 | 3,859 | 1952 | 13,014 | 7,584 | 20,598 |
| 1949 | 11,383 | 5,717 | 17,100 | 1953 | 13,492 | 4,217 | 17,709 |
| 1950 | 16,798 | 4,464 | 21,262 | 1954 | 15,873 | 5,102 | 20,975 |
| 1951 | 16,477 | 5,020 | 21,497 | 1955 | 22,950 | 4,766 | 27,716 |

TABLE VII.—Tons of cargo carried by APL Atlantic/Straits vessels between California and Trade Route 29 areas

| | In | Out | Total | | In | Out | Total |
|---|---|---|---|---|---|---|---|
| 1948 | 4,272 | 7,304 | 11,576 | 1952 | 1,751 | 6,743 | 8,494 |
| 1949 | 19,432 | 17,008 | 36,440 | 1953 | 3,879 | 8,485 | 12,364 |
| 1950 | 9,429 | 15,487 | 24,916 | 1954 | 3,697 | 8,513 | 12,210 |
| 1951 | 3,925 | 5,048 | 8,973 | 1955 | 6,802 | 10,224 | 17,026 |

# FEDERAL MARITIME BOARD

No. M–81

BOSTON SHIPPING CORP.—APPLICATION TO BAREBOAT CHARTER TWO N3–M–A1 TYPE VESSELS

*Submitted January 17, 1958. Decided January 20, 1958*

Board finds and certifies to the Secretary of Commerce that the use of N3–M–A1 type vessels in workover service on offshore oil and gas wells in the Gulf of Mexico is a service 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.

*Jerome Powell* for applicant.

*Lee Holley* for American Tramp Shipowners Association, Inc., *Alan F. Wohlstetter* for Alaska Freight Lines, Inc., and Moran Towing and Transportation Company, and *John Mason* for W. R. Chamberlin & Company, interveners.

*Robert E. Mitchell*, *Edward Aptaker*, *Robert C. Bamford*, and *Robert Hood* as Public Counsel.

REPORT OF THE BOARD

CLARENCE G. MORSE, *Chairman*, and 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 U. S. C. App. 1738 (e)) (the Act), upon the application of Boston Shipping Corp., as amended, to bareboat charter for an indefinite period two N3–M–A1 type vessels, the *Asa Lothrop* and the *Glen Gerald Griswold*. In the event the charters are awarded, it is proposed that the vessels will be converted and used in servicing offshore oil and gas wells in the Gulf of Mexico.

American Tramp Shipowners Association, Inc., Alaska Freight Lines, Inc., Moran Towing and Transportation Company, and W. R. Chamberlin & Company (Chamberlin) opposed the application. All interveners except Chamberlin withdrew from the proceeding when the request for authority to carry commercial cargo between the Pacific coast and the Gulf prior to the conversion of the vessel for the workover service was withdrawn.

Proposed legislation has been introduced in the 85th Congress (S. 2241 and S. J. Res. 101) to authorize the sale of the subject vessels by the Secretary of Commerce. Chamberlin's opposition to the charter rests chiefly on the ground that it is interested in the purchase of the *Asa Lothrop*, and fears that the conversion of the vessel by applicant will prejudice its ability to bid on the vessel on equal terms with applicant.

Applicant desires to charter only the *Asa Lothrop* in the beginning, and to delay acceptance of the *Glen Gerald Griswold* for a period up to 6 months in order to commence and test the proposed service, which is a new venture. It presently operates two Liberty-type vessels under charter from the Government, both engaged as dry-bulk carriers in the world-wide tramp trades. The vessels to be chartered will not be used in such service, being intended for use in servicing offshore oil and gas wells in the Gulf of Mexico. This service consists of renovating and repairing existing wells to increase production and to reduce the costs to the oil or gas producer. The term workover covers a number of different types of services, such as repair of cracked well casings, drilling to additional depth, or penetrating a casing to recover oil bearing sands passed over during the initial drilling. A workover rig includes a derrick together with its draw-works, cat-works, and rotary, a power supply, and materials necessary to perform the particular workover service required, such as drilling mud and cement, pipe, pumps, and valves. Some of this equipment is heavy and a heavy-duty crane is necessary in order to lift the equipment to and from the offshore well platform. The *Asa Lothrop* is equipped with a whirly crane mounted on rails along the outside boards and straddling the three hatches, with sufficient capacity to perform the lifts expected to be required; for this reason the vessel is the one first desired by applicant.

More than 2,000 offshore wells are in production in the Gulf of Mexico, and more are being drilled. It is estimated that the average producing well, during its economic life, will require from three to five workovers. About $1.5 billion have been expended by the producers on offshore exploration and development, but because of exceptionally high costs, a profit has not been realized. Because of

high costs and the necessity to realize some return on their investments, the producers are becoming more cost conscious, particularly with regard to workovers. No single vessel is equipped to perform a complete workover service, and it is the purpose of applicant and its affiliates, with the use of the vessels here sought, to meet the requirement.

In order to secure workover service, an oil producer must contract separately for a workover rig and the crew to operate it, for barges and towboats to transport it to the offshore well platform, perhaps for a crane barge to lift the heavy equipment from the transporting barges to the platform if the latter barges are not equipped to perform the lifts, and for other vessels providing housing and mess facilities for the workover crew while at the well platform. These separate operations require extremely close coordination, and are in the aggregate so expensive that the producers now hesitate to procure workover service on individual wells, even though out of production because of the need for such service, until a sufficient number of wells are simultaneously in need of service to justify the expense. Applicant is confident that with the chartered vessels workover service can be performed at substantially reduced costs, thus assisting the producers in recouping their investments and aiding in the production of oil and gas from offshore wells.

Applicant proposes to subcharter the vessels on a bareboat basis to Offshore Well Servicing Corporation (Offshore), a corporation newly organized by it and officials of Spade Drilling Company (Spade) of Borger, Texas. The latter presently performs workover service on land-based wells. The decision to subcharter to Offshore is prompted principally by applicant's lack of experience in the oil industry; the prime use of the vessels will be the furnishing of workover service. Such experience will be supplied by the officials of Spade, with applicant being responsible for the provision of vessel crews and vessel operation.

It is proposed to reactivate the *Asa Lothrop* and make her ready for sea on the west coast, sail her in ballast to Houston, Texas, and there deactivate her for about 60 days for conversion to a workover ship. The conversion will not, in applicant's opinion, affect the basic structure of the vessel, and will consist of the removal of some bulkheads in the afterhouse above the main deck for additional crew and oil workers' bunkroom quarters; the addition of a helicopter deck on the stern, a ramp forward on the forecastle, and a raised platform deck; the installation of additional generators, pumps, piping, wiring controls, and storage tanks probably in the No. 3 hold; and the in-

stallation of storage bins for drilling mud and cement and additional storerooms in the other holds. The location of these latter installations will depend to a great extent on the necessity for trimming the vessel in order to provide stability during heavy lifts. In the proposed operations the vessel would carry as many as three workover derricks and related equipment, and 15-man crews for each. The housing and subsistence of these oil-worker crews necessitate the provision of additional bunkroom facilities. When ready for operation the vessels will require vessel crews of about 38 men each, and the reactivation, conversion, and continued maintenance of the vessels will provide work for American repair yards. All reactivation and conversion costs will be borne directly by applicant or Offshore, and are estimated at about $200,000.

The president of Spade, also the president and principal stockholder of Offshore, has had extensive experience in the furnishing of workover service on land-based wells, and his recognition of the problems of oil and gas producers in securing workover service for offshore wells, and his desire to attempt a solution, are the principal motivations for the instant application. He has made surveys of the equipment, materials, and vessels necessary for the provision of offshore workover service, and has endeavored to purchase or charter privately owned vessels for such service in all areas of the United States. Although some smaller vessels have been offered, studies have disclosed that they would not have the requisite stability during heavy-lift operations. No vessels other than those of the type here sought are adequate, and vessels of that type are not available from private sources. Because of recent accidents involving barge-supported workover operations, and the inability of nonself-propelled barges to seek shelter during inclement weather without the aid of towing vessels which may not be immediately available, the oil producers are becoming more safety conscious. The offshore oil and gas industry requires the services of a self-contained, self-propelled, workover facility.

Applicant requests that if the charter is authorized, the *Asa Lothrop* be placed on off-hire status during the period of conversion mentioned above, although the term of the charter may continue to run. As the vessels will not be in competition with either coastwise or foreign trade vessels for the carriage of commercial cargo as such, applicant is willing that the charter include a prohibition against the transportation of cargo other than that necessary for the furnishing of workover service to offshore wells. Property to be transported will be either owned or leased by Offshore, or will be the property of the

particular producer whose wells are being serviced, and charges to the producer will be on a stated daily or other basis for complete well workover service, including incidental transportation.

The examiner found and concluded that "the applicant has failed to show that the proposed service for which the vessels are sought to be chartered is required in the public interest." Exceptions were filed by applicant, Chamberlin, and Public Counsel. Chamberlin also filed a motion to strike a certain portion of applicant's exceptions.

## Discussion and Conclusions

The examiner concluded that the proposed charters were not shown to be required in the public interest. Applicant contends that the exminer erred in reaching this conclusion, and argues that the record supports affirmative findings on the statutory issues. Although agreeing with the ultimate result reached by the examiner, Chamberlin and Public Counsel contend that the "service" for which the charters are sought is not a "service" within the meaning of that word as used in the Act, and argue that since it is not, the charter may not be awarded, findings on the issues of public interest, adequacy of service, and availability of vessels notwithstanding.

The record patently demonstrates the nonavailability of suitable privately owned American-flag vessels for the use here contemplated, on any conditions or at any rates. The critical issues therefore are "public interest" and the meaning of the word "service" as used in the Act.

The term "public interest" is not defined in the Act. The wording of section 5 (e) explicitly authorizes the Board to determine whether a proposed service is one in the public interest. We have never before been called upon to decide whether a use similar to the one here proposed would be in the public interest. In this case, however, the public interest both to the American merchant marine and to our economy in general is readily apparent: substantial conversion work will be performed in American shipyards, employment will be provided for American seamen, and our offshore oil and gas resources will be more efficiently exploited. Moreover, it appears that the proposed charters would greatly reduce the dangers to workover crews during storms on the present nonself-propelled barges. In *Grace Line Inc.—Charter of War-Built Vessels*, 3 F. M. B. 703 (1951), the applicant proposed to carry iron or steel pipe between California and Venezuela ports for use in increasing the production of the Maracaibo Lake district oil fields, and the Board held that the purpose of the proposed service was not shown to be in the public interest.

We feel that the advantages to both the American merchant marine and to the American economy in general, sufficiently distinguish the instant application from the *Grace* case so as to warrant different conclusions on the issue of public interest. Accordingly, we find the proposed use of the vessels to be in the public interest.

We are also of the opinion that the proposed use of the vessels constitutes a "service" within the meaning of that term as used in the Act. That term is not defined in the statute and we have not had previous occasion to construe it. We do not agree with Chamberlin and Public Counsel that "service" must be interpreted so narrowly that only a charter application proposing to furnish an ordinary commercial shipping service may be approved. The prime purpose in amending the Act was to eliminate, and to prevent in the future, competition between privately owned American-flag ships and Government-owned tonnage. The legislative history establishes this as the prime purpose of section 5 (e). There is no danger of privately owned American-flag vessels meeting competition from Government-owned tonnage in the instant case. If the use for which a vessel is sought is required in the public interest, a charter may be granted if the other two statutory standards are met, and if, as here, it tends to further the development and maintenance of the American merchant marine. We therefore recommended that the charter be approved by the Secretary of Commerce.[1]

In excepting to the examiner's initial decision, applicant alluded to an alleged legal opinion of the General Counsel of the Maritime Administration, which is not a part of this record. Chamberlin thereupon filed a motion to strike this portion of applicant's exceptions. The motion to strike is hereby granted.

## Findings, Certification, and Recommendations

On this record, 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 now 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.

[1] By Department Order No. 117 (amended), 18 F. R. 5518, 5519, the Secretary of Commerce has delegated his authority under the Merchant Ship Sales Act of 1946, as amended, to the Maritime Administrator. References herein to the Secretary of Commerce are also directed to the Maritime Administrator.

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 to any such charter, and to protect privately owned American-flag vessels against competition from chartered vessels:

1) That charterer not employ any vessel chartered hereunder in the carrying of cargoes between United States Pacific coast ports and ports in the Gulf of Mexico;
2) That any vessel chartered hereunder be limited to the service requested in the application; and
3) That in the event any vessel chartered hereunder is sold pursuant to legislation authorizing such sale, the charterer agrees to restore such vessel at its own expense to the same condition as when it was delivered to the charterer.

# FEDERAL MARITIME BOARD

## No. S-71

UNITED STATES LINES COMPANY—APPLICATION FOR INCREASED SUBSIDIZED SAILINGS ON TRADE ROUTE NO. 12—FAR EAST SERVICE

*Submitted February 20, 1958. Decided March 10, 1958*

United States Lines Company is not operating an existing service with respect to the 12 additional sailings per year over Trade Route No. 12 for which subsidy is applied.

The present service on Trade Route No. 12 by vessels of United States registry is inadequate, within the meaning of section 605 (c) of the Merchant Marine Act, 1936, as amended, and in the accomplishment of the purposes and policy of the Act, additional vessels of United States registry should be operated thereon.

Section 605 (c) of the Merchant Marine Act, 1936, as amended, does not interpose a bar to the granting of an operating-differential subsidy contract to United States Lines Company for the operation of the additional sailings herein requested on Trade Route No. 12.

*Ronald A. Capone*, *Robert E. Kline, Jr.*, and *Donald D. Geary* for United States Lines Company.

*Alvin J. Rockwell* and *Willis R. Deming* for Matson Orient Line, Inc., *Warner W. Gardner* for American President Lines, Ltd., *Elkan Turk, Sr.*, *Irving Zion*, *George F. Galland*, and *Robert N. Kharasch*, for Isthmian Lines, Inc., *Sterling F. Stoudenmire, Jr.*, for Waterman Steamship Corporation, interveners.

*Robert E. Mitchell*, *Edward Aptaker*, 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:

On December 3, 1956, United States Lines Company (U. S. Lines), which currently operates a subsidized service on Trade Route No. 12

(the route),[1] filed an application for an increase in subsidized sailings thereon from a maximum of 24 to a maximum of 36 sailings per year.

By order of the presiding examiner, hearing was consolidated with the hearing in Docket No. S–68, which is the application of Matson Orient Line, Inc. (Matson Orient), for an operating-differential subsidy for a minimum of 18 and a maximum of 25 sailings per year on the same trade route.

On January 9, 1958, the examiner served his recommended decision. By order of February 20, 1958, severing Docket No. S–71 from Docket No. S–68, No. S–71 was submitted for final Board action. This report is therefore limited to No. S–71 and to the issues with respect thereto.

Matson Orient, American President Lines, Ltd. (APL), Isthmian Lines, Inc. (Isthmian), and Waterman Steamship Corporation (Waterman) intervened in No. S–71. States Marine Lines withdrew as an intervener prior to hearing, and only United States Lines, Matson Orient, APL, and Public Counsel filed briefs.

With respect to the United States Lines application in No. S–71, the examiner found and concluded (1) that applicant is not operating an existing service to the extent of the increased sailings herein sought, within the meaning of section 605 (c) of the Merchant Marine Act of 1936, as amended (46 U. S. C. 1175 (c)) (the Act); (2) that the present service on the route by vessels of United States registry is inadequate, within the meaning of section 605 (c), and that in the accomplishment of the purposes and policy of the Act additional vessels of United States-flag registry should be operated thereon; and (3) that section 605 (c) is no bar to the granting of an operating-differential subsidy to United States Lines.

Contentions and arguments of the parties not discussed herein have been considered and found not related to material issues or not supported by the evidence.

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

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

[1] Trade Route No. 12 is described as follows:

"Between U. S. Atlantic ports (Maine-Atlantic Coast Florida to but not including Key West) and ports in the Far East (Japan, Formosa, the Philippines and continent of Asia from Union of Soviet Socialist Republics to Siam, inclusive)."

the Board shall determine the effect of such a contract would be to give undue advantage or be unduly prejudicial, as between citizens of the United States, in the operation of vessels in competitive services, routes, or lines, unless following public hearing, due notice of which shall be given to each line serving the route, the Board shall find that it is necessary to enter into such contract in order to provide adequate service by vessels of United States registry.

Inasmuch as the application involves a service which would be in addition to existing services, the only issues for determination are (1) whether the service already provided by vessels of United States registry is inadequate, and (2) whether, in the accomplishment of the purposes and policy of the Act, additional vessels should be operated thereon. *American President Lines, Ltd.* v. *Federal Maritime Board*, 112 F. Supp. 346 (D. D. C. 1953). Under the circumstances, therefore, no consideration need be given to the question of undue advantage or prejudice.

## EXISTING SERVICE

Seven United States-flag carriers operate vessels in ten services which serve some or all of the areas encompassed by the route. United States Lines is the only such line which provides service exclusively on the route; the other six serve the route as part of other services.

*Outbound.* The principal commodities moving outbound on the route are coal, lignite, steel products, fertilizers, tobacco, chemicals, corn, and automotive conveyances. Japan, Korea, and the Philippines are the largest receivers of liner commercial cargo. Coal and lignite, which move for the most part from Hampton Roads and Baltimore, constituted approximately 75 percent of the total outbound traffic between 1952 and 1955; substantially more than half of it was handled by nonliners in 1954 and 1955, but liners will carry it under certain conditions, and it should be considered in the over-all appraisement of the outbound traffic. *American President Lines—Calls, Round-the-World Service*, 4 F. M. B. 681 (1955).

Table I shows the volume of liner commercial cargo moving outbound on the route for the years 1952–56, the percentage thereof handled by United States-flag vessels, and the percentage of the total liner sailings by United States-flag vessels.

TABLE I

| | Long tons | Percentage United States participation | Percentage United States sailings |
|---|---|---|---|
| 1952 | 961,000 | 19 | (a) |
| 1953 | 1,672,000 | 12 | (a) |
| 1954 | 1,626,000 | 11 | 35 |
| 1955 | 1,722,000 | 16 | 35 |
| 1956 | 1,982,000 | 22 | 36 |
| Total | (b) 7,963,000 | 16 | (a) |

a Not available from record.
b In addition, defense cargo, handled almost entirely by United States-flag vessels, totaled 87,000 tons to 125,000 tons a year for the period.

*Inbound.* The principal commodities flowing inbound on the route are sugar, chrome, manganese, rubber, vegetable oils, lumber and shingles, copra, nuts and preparations, manufactured cotton, and clay products. Japan and the Philippines are the heaviest shippers.

Table II shows the volume of inbound liner commercial cargo on the route for the years 1952–56, the percentage thereof handled by United States-flag vessels, and the percentage of the total liner sailings by United States-flag vessels.

TABLE II

| | Long tons | Percentage United States participation | Percentage United States sailings |
|---|---|---|---|
| 1952 | 1,295,000 | 30 | (a) |
| 1953 | 1,547,000 | 20 | (a) |
| 1954 | 1,598,000 | 14 | 27 |
| 1955 | 1,740,000 | 16 | 29 |
| 1956 | 1,035,000 | 20 | 32 |
| Total | 8,115,000 | 19 | (a) |

a Not available from record.

*Outbound and inbound.* Table III shows the total outbound and inbound liner commercial cargo on the route for the years in question, the percentage thereof handled by the United States-flag vessels, and the percentage of the total liner sailings by United States-flag vessels.

TABLE III

| | Long tons | Percentage United States participation | Percentage United States sailings |
|---|---|---|---|
| 1952 | 2,256,000 | 25 | (a) |
| 1953 | 3,219,000 | 16 | (a) |
| 1954 | 3,224,000 | 12 | 31 |
| 1955 | 3,462,000 | 16 | 32 |
| 1956 | 3,017,000 | 21 | 34 |
| Total | 15,178,000 | 18 | (a) |

[a] Not available from record.

## DISCUSSION AND CONCLUSIONS

Trade Route No. 12 enjoys a rather balanced trade insofar as liner service is concerned. That being so, it is quite in order to survey the over-all traffic pattern in order to determine whether the route is adequately served by United States-flag vessels. Outbound, 1956 was the only year between 1952 and 1956 in which United States-flag participation exceeded 20 percent of the traffic, and the average for the period was only 16 percent a year. Inbound, in the same period, 1952 was the only year in which participation exceeded 20 percent, and the average was 19 percent a year. Outbound and inbound the high for the period was 25 percent in 1952 and the average was 18 percent a year. For 1954–56, the only years of record, United States-flag sailings did not exceed 36 percent of the total liner sailings in either direction.

Two out of the 10 United States-flag services which serve this route had more than 10 percent free space outbound in 1955, two had between five and 10 percent, and the others had less than five percent. Only United States Lines had more than five percent free space outbound in 1956; its sailings had been increased, however, by the use of Mariner vessels. Inbound, five of the 10 services in 1955 and three in 1956 averaged 37 percent or more free space. The free space inbound of United States Lines was 18 percent in 1955 but only eight percent in 1956; utilization in 1957 (up to the time of hearing) remained about the same as in 1956.

The general trend of traffic on the route has been upward for the past few years. One witness for Matson Orient was of the opinion that there would be an increase in the volume, and although he was unable to specify the magnitude, he believed it would be as great as in the most recent years. Another witness for Matson Orient stated that talks with shippers and consignees convinced him that liner traffic

will increase in 1957 and that total volume will remain the same or increase.

A generally concurring stand was taken by the witness for United States Lines, his opinion being predicated upon cargo statistics, reports from the company's foreign offices and agents, and the continued growth (population and economic) of the United States as well as the other countries on the route. He concluded that the results for 1957 should be at least as good as for 1956, in spite of a temporary decline in exports beginning in July 1957 as the result of Japan's adverse balance of payments.

Upon this record we conclude that the volume of trade on the route in the near future will remain at least equal to the level of trade in the past few years.

Under any reasonable standard that might be applied, it is found that United States-flag service on the route is inadequate.

Having determined that the route is not adequately served by United States-flag vessels, and upon consideration of the record as a whole, we make the further finding that, in the accomplishment of the purposes and policy of the Act, additional vessels of United States registry should be operated thereon.

We find and conclude:

1. That United States Lines Company is not an existing operator on the route to the extent of the additional sailings herein requested, within the meaning of section 605 (c) of the Act;

2. That United States-flag service on the route is inadequate, within the meaning of section 605 (c) of the Act, and that in the accomplishment of the purposes and policy of the Act additional vessels of United States registry should be operated thereon; and

3. That section 605 (c) of the Act is not a bar to the granting of the subsidy requested.

# FEDERAL MARITIME BOARD

## No. 787

## IN THE MATTER OF SAMUEL KAYE, FAMOUS FREIGHT FORWARDING COMPANY, SAN-SU TRADING COMPANY, AND FAIRCHILD INTERNATIONAL CORPORATION

*Submitted October 30, 1957. Decided April 21, 1958*

Respondent Samuel Kaye found to have exclusive ownership and control of freight forwarder respondent Famous Freight Forwarding Company and shipper respondents San-Su Trading Company and Fairchild International Corporation.

Respondent Samuel Kaye, doing business as Famous Freight Forwarding Company in the capacity of freight forwarder, and respondents Samuel Kaye, San-Su Trading Company, and Fairchild International Corporation, in the capacity of shippers, found to have collected ocean freight brokerage under circumstances resulting in violation of the first paragraph of section 16 of the Shipping Act, 1916, as amended.

Respondent Samuel Kaye, doing business as Famous Freight Forwarding Company in the capacity of freight forwarder, found to have collected ocean freight brokerage under circumstances resulting in violation of section 16 Second of the Shipping Act, 1916, as amended, and General Order 72. Freight Forwarder Registration No. 989, issued to Samuel Kaye doing business as Famous Freight Forwarding Company, canceled.

Respondent Samuel Kaye, doing business as Famous Freight Forwarding Company in the capacity of freight forwarder, and respondents Samuel Kaye and San-Su Trading Company, in the capacity of shippers, by means of false classification on shipments of stoves, ovens, and refrigerators, violated the first paragraph of section 16 of the Shipping Act, 1916, as amended.

Respondent Samuel Kaye, doing business as Famous Freight Forwarding Company in the capacity of freight forwarder, by means of false classification of stoves, ovens, and refrigerators, violated section 16 Second of the Shipping Act, 1916, as amended.

Respondent Fairchild International Corporation not shown to have misclassified shipments in violation of section 16 of the Shipping Act, 1916, as amended.

*Robert Furness* for respondents.

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

*Robert E. Mitchell*, *Edward Aptaker*, and *Robert J. 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:

This is an investigation on the Board's own motion, notice of which was published in the Federal Register on March 8, 1956 (21 F. R. 1496). The purpose of the investigation was to determine whether respondent Samuel Kaye (Kaye), doing business as Famous Freight Forwarding Company (Famous) and registered as an ocean freight forwarder pursuant to the Board's General Order 72 (46 C. F. R. 244.1 *et seq.*), owns or controls respondents San-Su Trading Company (San-Su) and Fairchild International Corporation (Fairchild), exporters and shippers by vessel in foreign commerce, within the meaning of section 244.13 of General Order 72, and whether Kaye, d/b/a Famous,[1] on shipments on San-Su and Fairchild, has collected ocean freight brokerage from Royal Netherlands Steamship Company (Royal Netherlands), Grace Line Inc. (Grace), and United Fruit Company (United Fruit) during the period April 1954 through November 1955, under circumstances which result in a violation of General Order 72 and section 16 of the Shipping Act, 1916, as amended (46 U. S. C. 815) (the Act).

The investigation also was to determine whether Kaye, Famous, San-Su, and/or Fairchild knowingly and willfully, directly or indirectly, by means of false classification or by any other unjust or unfair device or means, obtained or attempted to obtain transportation by water of stoves and ovens and electric refrigerators at less than the rates or charges which otherwise would be applicable, during the period July 1955 through October 1955 and/or at other times prior thereto, in violation of section 16 of the Act.

New York Foreign Freight Forwarders and Brokers Association, Inc. (New York Forwarders), intervened.

Hearing was held before an examiner, exceptions to the examiner's recommended decision were filed by respondents, replies to exceptions were filed by Public Counsel and intervener, and oral argument was held before the Board.

The examiner found and concluded that forwarder Kaye, d/b/a Famous, was in fact the seller and shipper of shipments made in the names of San-Su and Fairchild and had beneficial interests therein, and that Kaye's collection of ocean freight brokerage on such shipments during the period April 1954 through November 1955 was in

[1] Throughout this report the abbreviation "d/b/a" is used in place of "doing business as."

violation of section 16 of the Act and of General Order 72. He recommended that Freight Forwarder Registration No. 989, issued to Kaye, d/b/a Famous, be canceled.

The examiner further found and concluded that shipper respondent San-Su, knowingly and willfully, falsely classified shipments of stoves, ovens, and refrigerators and thereby obtained transportation by water for property at less than the rates or charges which would otherwise be applicable, in violation of section 16 of the Act.

The examiner recommended referral to the Department of Justice for appropriate action.

Except to the extent modified herein, we agree generally with the findings and conclusions of the examiner. Exceptions taken and recommended findings not discussed in this report and not reflected in our findings have been found not relevant or unnecessary for disposition of the proceeding or not supported by the evidence.

As to the collection of ocean freight brokerage by Kaye, d/b/a Famous, on shipments of San-Su and Fairchild, the relevant facts are as follows:

Kaye, as secretary of Fairchild and Wulf, Inc., a company engaged in exporting general commodities in foreign trade, acquired sole stock ownership of that company some time in 1946, changed the name to Fairchild International Corporation, and has operated in New York City in the exporting business since that time. San-Su, an individual proprietorship, was formed by Kaye as a trade name for the purpose of conducting an export business. On March 31, 1949, Kaye established Famous, an individual proprietorship, for the purpose of carrying on the business of forwarding. He specialized in serving customers in Puerto Rico, Venezuela, Colombia, and various countries in Central America, and operated San-Su and Fairchild in order to realize profits from selling and exporting merchandise.

Pursuant to the provisions of General Order 72, effective June 1, 1950, Famous applied on July 31, 1950, for registration as a freight forwarder, naming Kaye as the individual owner. In the application Kaye answered "no" to the following questions:

6. Is registrant a subsidiary or affiliate of any other business?

7. Does registrant control or is he engaged, directly or indirectly, in any business other than forwarding?

At the time he gave these answers Kaye was the sole owner of Fairchild and San-Su. Kaye admitted in this proceeding that the foregoing answers were false at the time they were made.

The Board's certificate of registration No. 989 was issued to Famous

on August 7, 1950. On July 12, 1951, the Chief of the Board's Regulation Office wrote to Kaye as owner of Famous, stating:

> Since you as an individual are operating the Famous Freight Forwarding Co., you are the actual registrant and should be so shown on the application form and on the certificate of registration. On this basis your reply to question 1 of the Form MC-21 should read as follows—"Samuel Kaye, d/b/a Famous Freight Forwarding Co."

A copy of General Order 72 and additional application forms were forwarded for completion and return to the Board, and it was requested that the certificate of registration be returned for cancellation, whereupon a revised certificate would be issued. In reply, a new application dated August 1, 1951, was filed, showing registrant as "Samuel Kaye, d/b/a Famous Freight Forwarding Co." and repeating the original negative answers as to affiliations, control, and other activities.

The letter transmitting the new application and the registration certificate being on the stationery of and signed "Fairchild International Corp., Samuel Kaye, Pres.", the Regulation Office requested explanation of the negative answers on the application, together with information as to the business in which Fairchild was engaged. In subsequent correspondence Kaye stated that Fairchild was a buying office for foreign accounts and that Famous handled the forwarding of those shipments; that Famous was not then engaged in activities connected with any other shipper; that Famous was in no sense an employee of Fairchild and the two organizations were absolutely distinct; and that Kaye was the president, treasurer, and sole stockholder of Fairchild.

The Regulation Office, by letter dated October 31, 1951, informed Kaye that:

> * * * in your case the following portion of rule 244.13 of General Order 72 is applicable:
> "Registration shall not entitle a forwarder to collect ocean brokerage from a common carrier by water in cases where payment thereof would constitute a rebate—i. e., * * * where the forwarder directly or indirectly controls or is controlled by the shipper * * *."

This letter further informed Kaye that:

> * * * your company cannot legally collect brokerage on shipments handled by Fairchild, since you, the forwarder, have control of Fairchild, the shipper. There is no reason, however, why you cannot continue to handle shipments for Fairchild provided you do not accept ocean brokerage on their shipments. Please advise this office as to whether, under the circumstances, you intend to continue handling the shipments of Fairchild.

Kaye responded by letter of November 29, 1951, saying that "* * * Famous Freight Forwarding Co. will handle the shipments of Fairchild International Corp., but of course, will not collect brokerage."

In March 1954, Famous filed with Atlantic and Gulf/West Coast Central America and Mexico Conference and five other conferences a form entitled "Statement of F. M. B. Registered Forwarder to Following Conferences [named] in Application for Freight Commission." In that application Kaye was named as 100 percent owner of Famous, which was described as being in the "general forwarding business." Kaye, who signed the application, answered "No" to the following questions:

Are you engaged in activity other than solely forwarding?

Do you have any financial interest in, or do you control or in any way influence the activities of firms other than your own?

Does any other firm have a financial interest in, control, or in any way influence, the activities of your firm?

If your company is in any way affiliated, associated or connected with any exporter, importer, ocean carrier, other forwarder or agent therefor or other organization carrying on activity related to your own or transportation in general, explain in detail.

Are any of your owners, partners, officers or employees also owners, partners, officers or employees of any other firm?

Does your company or any of its officers, partners, owners or employees have any interest, direct or otherwise, in the purchase and sale of merchandise?

In response to the following questions:

Are all of your owners, partners, officers and employees devoting their full activity to your firm? Do any of your owners, partners, officers, or employees derive any part of their compensation from sources other than your firm?

Kaye answered, "Full activity devoted to the firm."

Kaye admitted in this proceeding that the foregoing answers were false at the time they were made.

Directly preceding Kaye's signature on the conference application form was printed the following representation:

(b) Our acceptance of freight commissions is and will be strictly in accordance with the provisions of Section 16 of the Shipping Act, 1916, as amended.

(c) All revenues accruing to us from freight commissions paid to us under those rules will be retained by us and no portion thereof will be paid directly or indirectly in any manner whatsoever to any shipper or consignee or to any employee or representative thereof or to any other person not lawfully entitled to receive the same.

Despite Kaye's assurance to the Board on November 29, 1951, that Famous "will not collect brokerage" in connection with Fairchild shipments, it is apparent that Famous did collect ocean freight brokerage on shipments made by both Fairchild and San-Su after November 29, 1951. During the period from April 1954 through November 1955, the record shows such collections in the amounts of $38.99 from Grace, $73.74 from United Fruit, and $890.74 from Royal Netherlands.

On the reverse side of the Grace canceled brokerage checks, imme-

diately above the endorsement of Famous, appears the following language:

> In compliance with section 16 of the Shipping Act, 1916, as amended, payment of freight brokerage by the Grace Line in the amount shown and the acceptance thereof by the undersigned endorser are on the strict understanding that no part of the freight brokerage shall revert to the shipper or consignee, and the endorser hereby confirms that he is entitled to receive this brokerage and that his business is in no sense subsidiary to that of the shipper or consignee.

The reverse side of the canceled United Fruit brokerage checks contain substantially similar language.

The Chief Investigator of the Board's Security Office discussed with Kaye in New York in August 1955 the collection of brokerage by Famous. Kaye displayed a number of brokerage checks from steamship companies which he was accumulating for the purpose of returning at one time instead of returning each check separately with an individual letter. This was not done at the time since Kaye left New York a few days after this visit for foreign countries in connection with his exporting interests.

Thereafter, in November 1955, the vice-chairman of the Associated Latin American Freight Conference talked with Kaye with respect to the propriety of the collection of brokerage from one of the conference lines on certain shipments made in the names of Fairchild and San-Su, the conferences believing that there was some connection between Famous and these shippers. Asked about the connection, and whether in his opinion he was entitled to collect brokerage on shipments made in the names of the two companies, Kaye explained that he was not interested in collecting brokerage. By his letter of November 15, 1955, to the vice-chairman of the conferences, he stated:

> Confirming our conversation of today, we wish to advise you that we are only operating as Freight Forwarders for our own organization, and that we are not interested in collecting brokerage from the steamship companies who act as the carriers for our shipments

The conference chairman replied on November 17, 1955, that Kaye's reference to "our own organization" was understood to mean Fairchild and San-Su, and that the member carriers were being so advised in order that there might be no misunderstanding as to future payments of brokerage. Furthermore,

> * * * we are obliged to request that you advise us with respect to brokerage collected from our member lines by Famous Freight Forwarding Company on shipments made in the name of Fairchild and San-Su since it would appear that such brokerage has been received in violation of the terms of the Shipping Act of 1916, as amended, and the regulations of the Federal Maritime Board.

By letter of the same date the chairman notified individual members of the conference that Famous was being removed from the conferences' list of approved forwarders inasmuch as Famous had stated it was acting as forwarder only for its own organization, i. e., Fairchild International and San-Su, and was not collecting brokerage on shipments by those companies. Each line was requested to review its records from April 5, 1954, to November 17, 1955, and to furnish the conference office the details of all brokerage paid to Famous on shipments made in the name of either Fairchild or San-Su.

Representatives of the Board's Security Office again called upon Kaye on December 7 and 8, 1955, to inquire into the brokerage situation with respect to shipments of Fairchild and San-Su, and also to inquire concerning certain allegations of possible misdescription of merchandise. Kaye showed the investigators a group of brokerage checks that had not been deposited, including some that had been shown to investigators in August 1955. On December 9, 1955, Famous returned 21 checks in the aggregate amount of $124.06 to the four issuing carriers "inasmuch as we have given up our Registration Number."

As of January 18, 1956, Famous had not replied to the conference's request of November 17, 1955, for advice as to the amount of brokerage collected on shipments of Fairchild and San-Su, and on that date Kaye was informed by the vice-chairman that the member carriers had been asked to report direct on that subject. Kaye replied on January 24, 1956, that he was returning brokerage received from the steamship companies in accordance with arrangements made with the Federal Maritime Board. Subsequently, on March 6, 1956, the conference chairman wrote Kaye that only partial repayment of the brokerage apparently collected in violation of law had been made to that date, and requested that the following amounts due the member lines be returned immediately:

| | |
|---|---|
| Alcoa Steamship Company, Inc | $26.97 |
| Grace Line Inc | 38.99 |
| Royal Netherlands Steamship Co | 809.93 |
| Transportadora Grancolombiana, Ltda | 152.67 |
| United Fruit Company | 69.59 |
| Total | $1,098.15 |

Famous repaid Royal Netherlands on March 13, 1956 (after issuance of the Board's order instituting this investigation), and made full payment of the other accounts during that month. As indicated above, these were refunds of brokerage collected during the period April 1954 to November 17, 1955. Other brokerage payments were received by Famous on Shipments of San-Su and Fairchild from 1951

to April 1954, and when questioned at the hearing as to whether such payments had been returned, Kaye testified, "No sir. Nobody asked me to return it."

As to the misclassification of stoves, ovens, and refrigerators by Kaye, d/b/a Famous, San-Su, and Fairchild, the relevant facts are as follows:

In August 1955, San-Su made two shipments to Venezuelan ports via Royal Netherlands on which Famous acted as freight forwarder. The bills of lading described the cargoes as specified quantities of "Cartons—Bdls. Containing Pans, Enameled, Iron or Steelware (Item #218)." This description referred to "Item 218" in Freight Tariff No. 6 of United States Atlantic and Gulf—Venezuela and Netherlands Antilles Conference, which was effective at the time of movement. Kaye, d/b/a Famous, was a subscriber to this tariff, received copies of all supplements to and corrections thereof, and had long experience shipping under it.

Prior to July 28, 1954, Item 218 in Tariff No. 6 had provided commodity rates to the various ports on:

Enameled Iron or Steelware, viz.:

Basins, Hand, Wash (not Lavatories)
Bowls
Canisters
Casseroles
Chambers, Sanitary
Commodes, Sanitary
Cups, Drinking
Cuspidors
Dishes
Funnels
Hospital or Toilet
Irrigators
Kettles
Pails
Pans
Pots, Coffee
Shovels, Stoves
Strainers, Sink
Tableware, N. O. S.
Trays, Serving
Utensils, Cooking or Kitchen, not Electrical, N. O. S.

Effective July 28, 1954, however, before the shipments herein considered, Item 218 had been amended by Rate Advice No. 29 as follows:

Enameled Iron or Steelware, viz:

Shovels, Stove (to correct printer's error) No change in rates
Utensils, Cooking or Kitchen, not Electrical, N. O. S. (Cancel Rates)

Freight charges on the shipment destined to Puerto Cabello were assessed at the Item 218 rate of $20 per 40 cubic feet; on the other, destined Maracaibo, the tariff rate of $22 was charged. San-Su's commercial invoices covering these shipments were among the documents Kaye turned over to the Board's investigators; these described the articles as "cocines" (translated as "stoves") and "Docenas Hornos" ("dozens of ovens"). The articles were described by Kaye

as low-priced, enameled, nonelectric cooking stoves, a kerosene type used outdoors as well as in the home, and which, in his opinion, were not oil stoves. The ovens were small, enameled portable ones that can be lifted on and off the top of a stove.

At the time of these shipments Tariff No. 6 contained Item 1,000, which published the following ratings on stoves and ovens:

| | Class |
|---|---|
| *Stoves, viz.:* | |
| Alcohol | 3 |
| Coal, Gas, Gasoline, Oil or Wood Burning | 6 |
| Electric | 3 |
| *Ovens, viz.:* | |
| Not electric | 6 |
| N. O. S. | 3 |

Had these shipments moved as "Stoves—Coal, Gas, Gasoline, Oil or Wood Burning," and "Ovens—Not Electric," the 6th-class rate rather than the Item 218 rate would have been charged. Under these circumstances the shipment to Puerto Cabello would have been billed at $26 per 40 cubic feet rather than at $20 per 40 cubic feet as actually assessed, and the shipment to Maracaibo would have been billed at $28 per 40 cubic feet rather than at $22 per 40 cubic feet as actually assessed.

In October 1955, San-Su made four shipments of refrigerators to Venezuelan ports via Royal Netherlands, on which Famous acted as freight forwarder. The refrigerators were all electrical, manufactured by General Electric, and described in the commercial invoices as "Refrigeradoras."

Item 1,000 of Tariff No. 6 contains the following classification ratings on refrigerators:

| | Class |
|---|---|
| *Refrigerators, viz.:* | |
| Cabinets with or without units installed, including units and parts for same if shipped in separate packages | 4 |
| Commercial "Walk-In" type, viz.: | |
| With units | 4 |
| Without units | 8 |
| Not mechanical, for use only with ice | 6 |
| Units and parts not installed in cabinets | 3 |

A shipment to La Guaira, described in the bill of lading as "6 Cs Refrigerators Non-mechanical," was charged the 6th-class rate of $26 per 40 cubic feet. Had this shipment been described as "Refrigerators, viz.: Cabinets with or without units installed, including units and parts for same if shipped in separate packages," the 4th-class rate of $34 would have been charged. A shipment to Puerto Cabello, described as "10 Cs Refrigerators Non-mechanical," was charged the

6th-class rate of $26; the 4th-class rate was $34. A shipment to Guanta was described in the bill of lading as consisting of "3 cases Refrigerators Non-mechanical and 2 Cases Gas Ranges." Ranges were rated 6th class, and the 6th-class rate of $29 was charged on the entire shipment. Had the refrigerators in this shipment been described as "Refrigerators—Cabinets with or without units installed, including units and parts for same if shipped in separate packages," the 4th-class rate of $37 would have been charged. The fourth shipment was of four refrigerators of the same model, to Cuidad Bolivar. The bill of lading description, however, was "2 Cases containing household electric refrigerators and 2 Cases refrigerators non-mechanical." The freight charges on the first two were assessed at the 4th-class rate of $46, while on those described as nonmechanical, the 6th-class rate of $38 was applied.

Kaye admitted these descriptions as "non-mechanical" refrigerators were incorrect, but stated that it was the result purely of a clerical error in billing.

Kaye testified with respect to the shipments of stoves, ovens, and refrigerators that, although he felt the tariff was unclear, he had never attempted to contact the conference in an effort to clarify the provisions he considered to be ambiguous.

## Discussion and Conclusions

We consider first the issue of whether the collection of freight brokerage by Kaye, d/b/a Famous, on shipments of San-Su and Fairchild, was a violation of section 16 of the Act and of General Order 72.

Section 16 of the Act provides in part as follows:

> That it shall be unlawful for any shipper, consignor, consignee, forwarder, broker, or other person, or any officer, agent, or employee thereof, knowingly and willfully, directly or indirectly, by means of false billing, false classification, false weighing, false report of weight, or by any other unjust or unfair device or means to obtain or attempt to obtain transportation by water for property at less than the rates or charges which would otherwise be applicable.
>
> That it shall be unlawful for any common carrier by water, or other person subject to this Act, either alone or in conjunction with any other person, directly or indirectly—
>
> * * *
>
> Second. To allow any person to obtain transportation for property at less than the regular rates or charges then established and enforced on the line of such carrier by means of false billing, false classification, false weighing, false report of weight, or by any other unjust or unfair device or means.
>
> * * *
>
> 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.

It is beyond dispute on this record that Kaye had the exclusive ownership and control of Famous, the freight forwarder, and of San-Su and Fairchild, the shippers. The conclusion is inescapable that Kaye, d/b/a Famous, was in fact the seller and shipper of the shipments made in the names of San-Su and Fairchild.

It is further clear from the evidence that Kaye, d/b/a Famous, collected and received brokerage payments from ocean carriers during the period under investigation (April 1954 through November 1955) on shipments made by Kaye as shipper under the names San-Su and Fairchild.

The record is replete with evidence that Kaye's collection of brokerage on shipments of San-Su and Fairchild, which companies he fully owned and controlled, was willful and knowing. On two occasions he filed false statements with the Board on applications for issuance of a forwarder registration number, an obvious attempt to hide from the Board his true business as an exporter and shipper. He gave false answers to questions in the application he signed and filed with the conference, in order to collect brokerage as a forwarder. It was repeatedly brought to the attention of Famous and of Kaye, by the Board, by the conference, and by endorsement on brokerage checks received by Famous, that collection of brokerage under conditions whereby any part of such brokerage reverted to the shipper or consignee, would be in violation of section 16 of the Act and General Order 72, yet Kaye continued to receive and accept such brokerage. Even after he wrote the Board in 1951 that he would no longer collect brokerage in connection with shipments of Fairchild, he continued until at least November 1955 to receive and accept such payments.

The record establishes beyond any reasonable doubt that, as shippers, San-Su and Fairchild, wholly owned and controlled by Kaye, knowingly and willfully, through collection of brokerage payments by Kaye, d/b/a Famous, obtained transportation of their shipments at rates less by the amount of brokerage collected than the rates which otherwise would have been applicable. Collection of brokerage under these precise circumstances has been held to be a violation of section 16 of the Act.

In *New York Freight Forwarder Investigation*, 3 U. S. M. C. 157 (1949), the Maritime Commission said at page 164:

> Brokerage paid to a shipper on his own shipments constitutes a rebate in violation of section 16 of the Shipping Act—and this is true notwithstanding that the shipper may also be a forwarder and may purport to receive the brokerage money in his forwarder capacity. Similarly, a forwarder who has any

beneficial interest in a shipment and accepts brokerage thereon, is equally guilty of accepting a rebate in violation of section 16.

We therefore find and conclude that Kaye, d/b/a Famous, in the capacity of freight forwarder, and Kaye, San-Su and Fairchild, in the capacity of shippers, violated the first paragraph of section 16 of the Act in that they knowingly and willfully, by an unjust or unfair device or means, obtained transportation by water for property at less than the rates or charges which would otherwise be applicable. We further find and conclude that Kaye, d/b/a Famous, in the capacity of freight forwarder, being an "other person subject to this Act,"[2] also violated section 16 Second in that he allowed shippers (San-Su and Fairchild), by an unjust and unfair device or means, to obtain transportation for property at less than the regular rates or charges then established and enforced by an ocean carrier.

We further find and conclude that this collection of brokerage by Kaye, d/b/a Famous, in the capacity of freight forwarder, also violated the Board's General Order 72, as amended, which provides in part:

244.13 *Brokerage.* No forwarder, after the date on which he is required to register, shall accept brokerage from ocean carriers unless and until such forwarder has been assigned a registration number pursuant to these rules. Registration shall not entitle a forwarder to collect brokerage from a common carrier by water in cases where payment thereof would constitute a rebate—i. e., where the forwarder is a shipper or consignee or is the seller or purchaser of the shipment, or has any beneficial interest therein or where the forwarder directly or indirectly controls or is controlled by the shipper or consignee, or by any person having a beneficial interest in the shipment. A forwarder shall not share any part of the brokerage received from a common carrier by water with a shipper or consignee.

In accordance with section 244.5 of General Order 72, as amended, Freight Forwarder Registration No. 989, issued to Famous, will be revoked.

The foregoing findings of violations of section 16 of the Act and of General Order 72 have been virtually conceded by counsel for respondents on page 3 of respondents' exceptions and supporting brief. We expressly reject, however, the contention advanced on that same page that, because the money has been refunded, the brokerage issue is moot. The fact that illegal brokerage collections were finally repaid to the carriers is irrelevant to the determination of whether such collections, when made, were violative of the Act or of Board orders.

We next consider whether Kaye, d/b/a Famous, San-Su, and Fair-

[2] *U. S.* v. *American Union Transport*, 327 U. S. 437 (1946).

child, misclassified stoves, ovens, and refrigerators in violation of section 16 of the Act.

As for the two lots of stoves and ovens which were shipped by San-Su via Royal Netherlands to Puerto Cabello and Maracaibo in August of 1955, it is apparent from the record that Item 1000 specifically includes class rates for stoves and for ovens:

*Stoves*, viz.:

| | Class |
|---|---|
| Alcohol | 3 |
| Coal, Gas, Gasoline, Oil or Wood Burning | 6 |
| Electric | 3 |

*Ovens*, viz.:

| | Class |
|---|---|
| Not electric | 3 |
| N. O. S. | 6 |

Yet Kaye, d/b/a Famous, described San-Su kerosene stoves and portable ovens on the ocean bills of lading as specified quantities of "Cartons—Bdls. Containing Pans, Enameled, Iron or Steelware (Item 218)." They moved under the commodity rates provided in Item 218 of Tariff 6, as amended by Rate Advice No. 29, as follows:

Enameled Iron or Steelware, viz.:

| | |
|---|---|
| Basins, Hand, Wash (not Lavatories) | Irrigators |
| Bowls | Kettles |
| Canisters | Pails |
| Casseroles | Pans |
| Chambers, Sanitary | Pots, Coffee |
| Commodes, Sanitary | Shovels, Stove |
| Cups, Drinking | Strainers, Sink |
| Cuspidors | Tableware, N. O. S. |
| Dishes | Trays, Serving |
| Funnels | Utensils, Cooking or Kitchen, not Electrical, N. O. S. |
| Hospital or Toilet | |

Terms in a tariff should be construed in a manner consistent with general understanding and commercial usage. As stated by the Shipping Board in *Thomas G. Crowe et. al.* v. *Southern S. S. et al.*, 1 U. S. S. B. 145, 147 (1929):

> The terms in question must be construed in the sense in which they are generally understood and accepted commercially. Shippers can not be permitted to avail themselves of a strained and unnatural construction.

To the same effect see *Acme Novelty Co.* v. *American-Hawaiian S. S. Co.*, 2 U. S. M. C. 412 (1940), and *National Cable and Metal Co.* v. *American-Hawaiian S. S. Co.*, 2 U. S. M. C. 470 (1941).

We think a reasonable reading of Tariff No. 6 leads to the conclusion that the appropriate rate on these items would be the 6th-class rate

under Item 1000, *i. e.*, kerosene stoves would clearly come under the category: "Stoves—Coal, Gas, Gasoline, Oil or Wood Burning," and portable ovens would clearly come under the category "Ovens, Not Electric." In view of these specific tariff descriptions, we agree with the examiner that it was an unrealistic and strained interpretation of the tariff to describe these articles as "Pans, Enameled, Iron or Steelware," and to classify them under an item headed "Enameled Iron or Steelware."

It is further apparent from the record that the four shipments of electrical refrigerators made by San-Su via Royal Netherlands to Venezuelan ports in October 1955 clearly should have been classified as "*Refrigerators*, viz.: Cabinets with or without units installed, including units and parts for same if shipped in separate packages." Under this classification they would have been charged the 4th-class rate. It was an incorrect and false classification to describe them as "Refrigerators Non-Mechanical" and to ship them under an item "Commercial, 'Walk-In' type, viz.: Not mechanical, for use only with ice," which moved under the lower 6th-class rate. Kaye admitted that the classification was not correct but insisted that the misdescription was purely clerical error.

We think it fully clear from the record that the misclassification of stoves, ovens, and refrigerators by Kaye, d/b/a Famous, and San-Su was done knowingly and willfully as a device to obtain lower freight rates on the shipments involved. In order to obtain the lower rate on stoves and ovens it was necessary to classify the particular items in completely unrealistic ways in order to avoid the specific and obvious generic terms "stoves" and "ovens", which appear alphabetically in the tariff index. It is further apparent that, to the extent Kaye, Famous, or San-Su may have been in doubt as to the proper description and classification of these stoves or ovens, they failed to take any steps to determine from the conference or any carrier what should be the applicable tariff rate. As stated by the Board in *Misclassification of Tissue Paper as Newsprint Paper*, 4 F. M. B. 483, 486 (1954):

> * * * a persistent failure to inform or even attempt to inform himself by means of normal business resources might mean that a shipper or forwarder was acting knowingly and willfully in violation of the Act. Diligent inquiry must be exercised by shippers and by forwarders in order to measure up to the standards set by the Act. Indifference on the part of such persons is tantamount to outright and active violation.

As for the admitted misclassification of electric refrigerators, we agree with the examiner that Kaye's explanation that these instances reflect mere clerical errors is less than persuasive in the light of his

demonstrated disregard of the truth. See *Rates of General Atlantic S. S. Corp.*, 2 U. S. M. C. 681 (1943).

We find and conclude that Kaye, d/b/a Famous, in the capacity of freight forwarder, and San-Su, in the capacity of shipper, knowingly and willfully, by means of false classification of shipments of stoves, ovens, and refrigerators, obtained transportation for property at less than the rates or charges which would otherwise be applicable, in violation of the first paragraph of section 16 of the Act. We further find and conclude that Kaye, d/b/a Famous, in the capacity of freight forwarder, being an "other person subject to this Act," also violated section 16 Second in that he allowed a shipper (San-Su) to obtain transportation for property at less than the regular rates or charges then established and enforced by the carrier, by means of false classification of stoves, ovens, and refrigerators.

There is no evidence of false classification of shipments by Fairchild, so the proceeding, as it relates solely to this issue, will be discontinued as to that respondent.

This matter will be referred to the Department of Justice for appropriate action.

ORDER

At a Session of the FEDERAL MARITIME BOARD, held at its office in Washington, D. C., on the 21st day of April A. D. 1958

No. 787

IN THE MATTER OF SAMUEL KAYE, FAMOUS FREIGHT FORWARDING COMPANY, SAN-SU TRADING COMPANY, AND FAIRCHILD INTERNATIONAL CORPORATION

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

*It is ordered*, That respondent Samuel Kaye, doing business as Famous Freight Forwarding Company, in the capacity of freight forwarder, and respondents Samuel Kaye, San-Su Trading Company, and Fairchild International Corporation, in the capacity of shippers, be, and they are hereby, notified and required to abstain from collection of ocean freight brokerage and/or from false classification of shipments, under circumstances herein found to be in violation of section 16 of the Shipping Act, 1916, as amended, and in violation of the Board's General Order 72; and

*It is further ordered*, That Freight Forwarder Registration No. 989, issued to respondent Famous Freight Forwarding Company, be, and it is hereby, revoked.

BY THE BOARD.

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

# FEDERAL MARITIME BOARD

No. 794

IN THE MATTER OF LUIS (LOUIS) A. PEREIRA, MOLINA FORWARDING CO., INC., LUIS (LOUIS) A. PEREIRA, D/B/A CRESCENT TRADING COMPANY, AND UNITED STATES OIL CORPORATION

*Submitted October 30, 1957. Decided April 21, 1958*

Respondent Luis (Louis) A. Pereira found to have substantially owned and effectively controlled and dominated forwarder respondent Molina Forwarding Company, Inc., and to have wholly owned and controlled shipper respondents Luis (Louis) A. Pereira, doing business as Crescent Trading Company, and United States Oil Corporation.

Through collection of ocean freight brokerage by Molina Forwarding Company, Inc., on shipments of Crescent Trading Company and United States Oil Corp., Molina Forwarding Company, Inc., in the capacity of freight forwarder, and Luis (Louis) A. Pereira, doing business as Crescent Trading Company, and United States Oil Corporation, in the capacity of shippers, found to have violated the first paragraph of section 16 of the Shipping Act, 1916, as amended.

Through collection of ocean freight brokerage by Molina Forwarding Company, Inc., on shipments of Crescent Trading Company and United States Oil Corporation, Molina Forwarding Company, Inc., in the capacity of freight forwarder, found to have violated section 16 Second of the Shipping Act, 1916, as amended, and General Order 72. Freight Forwarder Registration No. 516, issued to Molina Forwarding Company, Inc., canceled.

*David Hoffman* for respondent Molina Forwarding Company, Inc.

*Herbert Rubin* for respondent Luis (Louis) A. Pereira, doing business as Crescent Trading Company, and United States Oil Corporation.

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

*Robert E. Mitchell*, *Edward Aptaker*, and *Robert J. 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:

This is an investigation on the Board's own motion, notice of which was published in the Federal Register on May 16, 1956 (21 F. R. 3233). The purpose of the investigation was to determine whether respondents Molina Forwarding Company, Inc. (Molina Forwarding), Luis (Louis) A. Pereira (Pereira), Luis (Louis) A. Pereira, doing business as Crescent Trading Company (Crescent), and United States Oil Corporation (U. S. Oil) have violated section 16 of the Shipping Act, 1916, as amended (46 U. S. C. 815) (the Act), and the Board's General Order No. 72 (46 C. F. R. 244.1 *et. seq.*), by the collection and receipt of ocean freight brokerage, during the period January 1955 through August 1955, from Grace Line Inc. (Grace) and Alcoa Steamship Company, Inc. (Alcoa).

New York Foreign Freight Forwarders and Brokers Association, Inc. (New York Forwarders), intervened.

Hearing was held before an examiner, exceptions to the examiner's recommended decision were filed by respondents Luis (Louis) A. Pereira, Luis (Louis) A. Pereira, d/b/a Crescent,[1] and United States Oil, replies to exceptions were filed by intervener and Public Counsel, and oral argument was held before the Board.

The examiner found and concluded:

(1) That Molina Forwarding, owned in substantial part and controlled by Pereira, directly or indirectly shared with Pereira, d/b/a Crescent, and United States Oil, also controlled by Pereira, ocean freight brokerage collected and received from Grace and Alcoa during the period January 1955 through August 1955, in violation of General Order 72, as amended, and that Freight Forwarder Certificate of Registration No. 516, issued to Molina Forwarding, should be revoked in accordance with provisions of section 244.5 (b) of General Order 72;

(2) That Pereira, Molina Forwarding, Pereria, d/b/a Crescent, and United States Oil have knowingly and willfully, directly or indirectly, by unjust or unfair device or means, obtained transportation by water for property at less than the rates or charges which would otherwise be applicable, in violation of section 16 of the Act.

The examiner recommended referral to the Department of Justice for appropriate action.

[1] Throughout this report the abreviation "d/b/a" is used in place of "doing business as."

Except to the extent modified herein, we agree generally with the findings and conclusions of the examiner. Exceptions taken and recommended findings not discussed in this report and not reflected in our findings have been found not relevant or not supported by the evidence.

The relevant facts are as follows:

In August 1946, Pereira organized Crescent, a wholly owned individual proprietorship engaged in the export business in New York City. In December 1948, Molina Forwarding was incorporated under the laws of the State of New York, with a paid-in capital of $4,000, consisting of 200 shares issued to Pereira at $10 per share, and 100 shares issued each to Messrs. Ramon Betancourt and Juan Recondo at $10 per share. One hundred shares also were issued to Rafael J. Molina, who transferred to the new corporation the name, accounts, and assets of his established forwarding business which had been operating under the name of Molina Forwarding Company.

Molina Forwarding began operations under Rafael J. Molina, vice-president and general manager, at 11 Broadway in New York City, and occupied space adjacent to the offices of Crescent. The books of Molina Forwarding were at all times retained in the office of Crescent under the custody and control of Ramon Betancourt.

Molina Forwarding lost money from its inception, and in April 1950 Molina resigned and resumed his individual operations as a freight forwarder, but retained his stockholder interest in Molina Forwarding. At this time the paid-in capital of the corporation was virtually exhausted. A Mr. Granda then was hired by Pereira and Betancourt to be general manager of Molina Forwarding, and, in order to reduce expenses, Molina Forwarding gave up its separate office space and was given space in the office of Crescent. Crescent office personnel since that time have furnished necessary clerical and accounting assistance to Molina Forwarding. Crescent has paid rent and utility charges for the premises used by Molina Forwarding but has not been reimbursed therefor.

On July 7, 1950, Molina Forwarding applied to the Board for a freight forwarder registration number pursuant to General Order 72. The application was signed by Aurelio Granda, general manager, and showed the following management and stock ownership:

| | |
|---|---|
| Louis A. Pereira, president | 39.6 percent |
| R. J. Molina, vice-president | 20 percent |
| R. J. Casablanca, vice-president | .2 percent |
| Ramon Betancourt | 20 percent |
| Pura Franco, sec.-treas | .2 percent |
| J. Recondo | 20 percent |
| Aurelio Granda, general manager | |

This application represented that Molina Forwarding was neither a subsidiary nor an affiliate of any other business, and that it did not control and was not engaged, directly or indirectly, in any business other than forwarding. On the basis of this application, Molina Forwarding was issued Certificate of Registration No. 516.

On July 10, 1951, having learned that R. J. Molina was no longer connected with Molina Forwarding, the Chief of the Board's Regulation Office wrote Molina Forwarding to have the original application of July 7, 1950, corrected. In that letter the Board enclosed a copy of General Order 72 and specifically called attention to Rule 244.3 thereof, which stated:

*Additional Information.*—Registrant shall submit such additional information as the Commission may request from time to time, and shall notify the Commission of any change in facts reported to it under these rules, within ten days after such change occurs.

On August 16, 1951, Molina Forwarding submitted a revised freight forwarder application signed by Pereira as president, indicating the same principal stockholders, but Pereira was the only designated officer. This application again represented that registrant was not a subsidiary or affiliate of any other business, and did not control or was not engaged, directly or indirectly, in any business other than forwarding.

Molina Forwarding continued to lose money and Granda soon resigned as general manager. Pereira then interviewed and hired Messrs. Riolo and Esperagna to manage the corporation. The operation of Molina Forwarding continued to be a losing venture, and Riolo and Esperagna left the company sometime in 1952.

Since the paid-in capital of $4,000 was exhausted under the management of R. J. Molina in 1949, Molina Forwarding has continued to operate only by virtue of loans advanced by Pereira, through Crescent and United States Oil. Without such loans the busines could not have continued. Pereira advanced the funds weekly for the purpose of deferring Molina Forwarding's operating expenses and paying the freight charges on shipments of his companies, Crescent and United States Oil. In the year 1955 such shipments constituted about half the forwarding business handled by Molina Forwarding. Pereira testified that these loans were continued in order to see Molina Forwarding through its financial difficulties and to recoup the moneys advanced. At the time of hearing Molina Forwarding owed Crescent and United States Oil approximately $14,000.

At the time Riolo and Esperagna left the company in 1952, Pereira attempted to buy the stock of the other stockholders in order to liqui-

date the corporation. Recondo would have cooperated in such a sale, giving Pereira a total of 60 percent of the stock, but Betancourt and Molina refused to sell.[2] Pereira admitted that the corporation could have simply ceased to operate without any agreement among the stockholders, or its operations could have been ended at any time by Pereira refusing to lend it money to stay in business.

Failing to buy out the other stockholders, Pereira interviewed and hired James Garcia as general manager of Molina Forwarding in September of 1952, and he has continued to conduct its operations.

In April 1952, United States Oil was incorporated under the laws of the State of New York, for the purpose, among other things, of engaging in the exporting business. All the issued stock is owned by Pereira and has been so owned since the inception of the company.

In addition to appearing as president of Molina Forwarding and being its principal stockholder, Pereira signed checks for that corporation and continued to do so until he informed Garcia sometime in 1955 that he would stop doing so because he did not want his reputation injured by association with a losing business. At the time Garcia was hired in September 1952, Pereira told him he would become the owner of Molina Forwarding if he could make it a profitable operation. In early 1955 Garcia was informed by Pereira that he, Garcia, was president, and was informed sometime later that the board of directors had approved his appointment. There is no evidence of minutes, notice of stockholders' meetings, etc., indicating how or when such action may have been taken. Molina, who continues to be a stockholder, never received any notices or information of any kind regarding the business of the corporation.

Pereira testified that he resigned as president of Molina Forwarding after Esperagna and Riolo took over the management in 1951, but had not prepared or submitted any written resignation. He had simply told Riolo and Esperagna that he did not want to be known as an officer of that corporation. He testified that he had resigned as a director several years before resigning as an officer, but had never formally notified the company of such resignation.

It appears that Molina Forwarding, as forwarding agent, has since 1950 handled the shipments of Crescent, and since 1952 handled the shipments of United States Oil. It is a reasonable conclusion from the record that Molina Forwarding has collected brokerage on these

[2] For the purposes of this report we have assumed Pereira's stock ownership in Molina Forwarding to be 39.6 percent. However, there is testimony from two witnesses which indicates that Pereira may in fact have purchased the stock held by Recondo and Betancourt. In such event Pereira would be the owner of substantially more than 50 percent of the stock of Molina Forwarding.

shipments of Crescent and United States Oil, and the record clearly shows that during the period January through August 1955, Molina Forwarding has collected ocean freight brokerage from Grace on one shipment of Crescent and three shipments of United States Oil, and from Alcoa on four shipments of Crescent.

Rafael Molina testified that when Molina Forwarding was originally being organized he had pointed out to Pereira that there might be a conflict in collecting brokerage on shipments of Crescent. Miss Cayita Pacheco, who had been personal secretary to Pereira from February 1952 to about October 1955, testified that on a number of occasions Pereira had discussed this matter with her and had stated that he knew it was not legal to own and control an exporting company and a forwarding business.

Pereira testified that the foregoing testimony of Molina and Pacheco was not true.

## Discussion and Conclusions

Section 16 of the Act provides in part as follows:

> That it shall be unlawful for any shipper, consignor, consignee, forwarder, broker, or other person or any officer, agent, or employee thereof, knowingly and willfully, directly or indirectly, by means of false billing, false classification, false weighing, false report of weight, or by any other unjust or unfair device or means to obtain or attempt to obtain transportation by water for property at less than the rates or charges which would otherwise be applicable.
>
> That it shall be unlawful for any common carrier by water, or other person subject to this Act, either alone or in conjunction with any other person, directly or indirectly—
>
> * * *
>
> Second. To allow any person to obtain transportation for property at less than the regular rates or charges then established and enforced on the line of such carrier by means of false billing, false classification, false weighing, false report of weight, or by any other unjust or unfair device or means.
>
> * * *
>
> 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.

It is beyond dispute that Pereira owned Crescent as a sole proprietorship from its inception in 1946 until the time of the hearing; that Pereira owned 100 percent of the issued stock of United States Oil from the inception of that company in 1952 until the time of the hearing; and that both of these organizations have engaged in the export business and have made shipments by common carrier by water in the commerce of the United States.

We further think it fully apparent from the record that Pereira has substantially owned and controlled Molina Forwarding since its

inception in 1948. Pereira owned at least 40 percent of the outstanding stock of Molina Forwarding since that time, and the evidence establishes that he has completely dominated the affairs of the company. Though Molina Forwarding is in form a corporation, the conduct of its business affairs belies the corporate structure and indicates that it has in fact been conducted by Pereira more in the nature of a sole proprietorship.

Pereira has hired the personnel of Molina Forwarding. He has provided, through his wholly owned and controlled companies Crescent and United States Oil, office space and utilities without expense. Clerical and accounting services have been supplied by Crescent and United States Oil to Molina Forwarding without charge. Since 1949, Molina Forwarding has continued to function only by virtue of loans advanced by Pereira through Crescent and United States Oil. It is clear from the record that without such loans from Pereira the business could not have continued. Pereira has signed the checks, and possibly the income tax returns of Molina Forwarding. To the extent he no longer signs checks for that corporation, relinquishment of such authority appears to have been merely his own personal decision. His resignation as president and director similarly appears to have been no more than his own unilateral action. The appointment of Garcia as president, and Pereira's promise to give Garcia sole ownership of the company if it became profitable, further indicate Pereira's sole direction and control. To the extent Garcia could conduct the affairs of Molina Forwarding, it is fully apparent from the record that such authority had been bestowed upon him by Pereira. It is further reasonable to conclude from the record that Pereira could have personally and unilaterally modified or rescinded such authority at any time.

There is nothing in the record to show that there were stockholders' or directors' meetings, or that there were any reports or statements supplied to stockholders or directors. Rafael Molina, owner of 20 percent of the stock, took no part in the affairs of the company after leaving as general manager in 1950. Betancourt and Recondo, each owners of 20 percent of the stock, appear to have had little or no continuing part in the affairs of the corporation, and in fact have spent much of their time in Puerto Rico.

It is the contention of Pereira, Pereira d/b/a Crescent, and United States Oil that Molina Forwarding was a corporation operated separately and independently of the respondent shippers, and that the relationship between Molina Forwarding and the Pereira-owned shippers was purely that of a creditor. With this we cannot agree.

Though Pereira had advanced loans to Molina Forwarding and was owed certain moneys by the forwarding company, the record shows that the relationship goes far beyond that of merely debtor and creditor. We fully agree with the finding of the examiner that Molina Forwarding was effectively controlled and completely dominated by Pereira. It is further apparent that Molina Forwarding has in fact functioned virtually as the export traffic department for the Pereira-owned shippers Crescent and United States Oil.

Having found that the forwarding company is effectively controlled and dominated by Pereira the shipper d/b/a Crescent and United States Oil, the crucial issue for determination is whether, through the collection of ocean freight brokerage by Molina Forwarding on shipments of Pereira d/b/a Crescent and United States Oil, these respondents have knowingly and willfully, by an unjust or unfair device or means, obtained or attempted to obtain transportation by water for property at less than the rates or charges which would otherwise be applicable, i. e., have they obtained or attempted to obtain an unlawful rebate.[3]

In our report in Docket No. 787, *In the Matter of Samuel Kaye et al.*, decided this day, we found that collection of brokerage by a forwarder on shipments made by shippers wholly owned and controlled by the same person who owned the forwarding company, constituted unlawful rebates in violation of section 16 of the Act. It was held in that case that, through collection of brokerage under those circumstances, respondents obtained transportation of their shipments at rates less, by the amount of brokerage, than the rates which otherwise would have been applicable.

We think the same reasoning applicable in the instant proceeding. To the extent Pereira substantially owned and effectively controlled Molina Forwarding, collection of brokerage payments by that forwarding company on Pereira's shipments in the names of Crescent and United States Oil inured to the benefit of Pereira the shipper. To the extent of such benefit the shippers have attempted to obtain and have obtained transportation of their shipments at less than the rates which would otherwise be applicable.[4] It is not necessary that there be com-

[3] The record shows that Molina Forwarding has handled shipments of Crescent since 1950 and U. S. Oil since 1952, and it is reasonable to conclude that brokerage was collected on these shipments. Specifically, during the period January 1955 through August 1955, Molina Forwarding collected brokerage from Grace on one shipment of Crescent and three shipments of U. S. Oil, and from Alcoa on four shipments of Crescent. The fact that the actual amount of brokerage which the record expressly proves to have been collected may be small has no bearing on the issue of whether or not such collection is unlawful under the Act or appropriate Board orders.

[4] This benefit inures to the shipper regardless of the fact that the shipper may have loaned money to the forwarder and thus be a creditor of the forwarder.

plete ownership and control of the forwarder by the shipper in order for such collection of brokerage to be an unlawful rebate under section 16. The prohibitions of section 16 expressly apply to "indirect" as well as "direct" rebates, to "attempt to obtain" a rebate as well as to actually "obtaining" a rebate, and to rebates "by any * * * unjust or unfair device or means * * *" Under this language, it has been held that if the forwarder-shipper relationship is sufficient to create in the forwarder a beneficial interest in a shipment, collection of brokerage by the forwarder would be a violation of section 16. As stated by the Maritime Commission in *New York Freight Forwarder Investigation*, 3 U. S. M. C. 157, 164 (1949):

> Brokerage paid to a shipper on his own shipments constitutes a rebate in violation of section 16 of the Shipping Act—and this is true notwithstanding that the shipper may also be a forwarder and may purport to receive the brokerage money in his forwarder capacity. Similarly, *a forwarder who has any beneficial interest in a shipment and accepts brokerage thereon, is equally guilty of accepting a rebate in violation of section 16.* (Emphasis added)

We further think it apparent that the attempt to obtain and the obtaining of a lower freight rate by respondents through collection of brokerage by a substantially owned and controlled forwarder, was done knowingly and willfully and was an unjust or unfair device or means within the meaning of section 16. There is testimony from two witnesses indicating that Pereira knew that it was not legal for Molina Forwarding to collect brokerage on shipments of Crescent and United States Oil. In an application to the Board in 1951 for issuance of a freight forwarder registration number signed by Pereira, a clear statement was made that Molina Forwarding was not affiliated with nor engaged in any other business, although at that time Pereira was both the primary stockholder of the forwarding company and sole owner of Crescent the shipper. Furthermore, Pereira had been furnished a copy of General Order 72, which clearly stated in section 244.13 that it was unlawful for a forwarder to collect brokerage when such forwarder has a beneficial interest in a shipment or where the forwarder directly or indirectly controls or is controlled by the shipper or consignee.

In view of the record and the foregoing analysis, we find and conclude that Molina Forwarding, in the capacity of freight forwarder, and Luis (Louis) A. Pereira, d/b/a Crescent, and United States Oil, in the capacity of shippers, violated the first paragraph of section 16 of the Act—in that, by an unjust and unfair device or means, they knowingly and willfully obtained or attempted to obtain transportation by water for property at less than the rates or charges which would otherwise be applicable. We further find and conclude that

Molina Forwarding, in the capacity of freight forwarder, being an "other person subject to this Act," [5] also violated section 16 Second of the Act in that it allowed shippers (Pereira d/b/a Crescent and United States Oil), by an unjust or unfair device or means, to obtain transportation of property at less than the regular rates or charges then established and enforced by an ocean carrier.

We further find and conclude that this collection of brokerage by Molina Forwarding, in the capacity of freight forwarder, also violated General Order 72, as amended, which provides in part:

244.13 *Brokerage.*—No forwarder, after the date on which he is required to register, shall accept brokerage from ocean carriers unless and until such forwarder has been assigned a registration number pursuant to these rules. Registration shall not entitle a forwarder to collect brokerage from a common carrier by water in cases where payment thereof would constitute a rebate—i. e., where the forwarder is a shipper or consignee or is the seller or purchaser of the shipment, or has any beneficial interest therein or where the forwarder directly or indirectly controls or is controlled by the shipper or consignee, or by any person having a beneficial interest in the shipment. A forwarder shall not share any part of the brokerage received from a common carrier by water with a shipper or consignee.

In accordance with section 244.5 of General Order 72, as amended, Freight Forwarder Registration No. 516, issued to Molina Forwarding, will be revoked.

This matter will be referred to the Department of Justice for appropriate action.

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[5] *U. S. v. American Union Transport,* 327 U. S. 437 (1946).

ORDER

At a session of the FEDERAL MARITIME BOARD, held at its office in Washington, D. C., on the 21st day of April A. D. 1958

No. 794

IN THE MATTER OF LUIS (LOUIS) A. PEREIRA, MOLINA FORWARDING CO., INC., LUIS (LOUIS) A. PEREIRA, D/B/A CRESCENT TRADING COMPANY, AND UNITED STATES OIL CORPORATION

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

*It is ordered*, That respondent Molina Forwarding Company, Inc., in the capacity of freight forwarder, and respondents Luis (Louis) A. Pereira, doing business as Crescent Trading Company, and United States Oil Corporation, in the capacity of shippers, be, and they are hereby, notified and required to abstain from collection of ocean freight brokerage under circumstances herein found to be in violation of section 16 of the Shipping Act, 1916, as amended, and in violation of the Board's General Order 72; and

*It is further ordered*, That Freight Forwarder Registration No. 516, issued to respondent Molina Forwarding Company, Inc., be, and it is hereby, revoked.

BY THE BOARD.

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

# FEDERAL MARITIME BOARD

No. S-68

MATSON ORIENT LINE, INC.—APPLICATION FOR OPERATING-DIFFERENTIAL SUBSIDY ON TRADE ROUTE NO. 12 (U. S. ATLANTIC/FAR EAST)

*Submitted April 9, 1958. Decided May 16, 1958*

Matson Orient Line, Inc., is not operating an existing service between the Atlantic coast of the United States and the Far East (Trade Route No. 12), within the meaning of section 605 (c) of the Merchant Marine Act, 1936, as amended.

The present service on Trade Route No. 12 by vessels of United States registry is inadequate, within the meaning of section 605 (c) of the Merchant Marine Act, 1936, as amended, and in the accomplishment of the purposes and policy of the Act additional vessels of United States registry should be operated thereon.

The present service provided by vessels of United States registry between Hawaii and the Far East is not shown to be inadequate, within the meaning of section 605 (c) of the Merchant Marine Act, 1936, as amended, and additional vessels of United States registry are not required to be operated in such trade in the accomplishment of the purposes and policy of the Act.

Section 605 (c) of the Merchant Marine Act, 1936, as amended, does not interpose a bar to the granting of an operating-differential subsidy contract to Matson Orient Line, Inc., for the operation of cargo vessels on the service described in paragraph 1 above.

Section 605 (c) of the Merchant Marine Act, 1936, as amended, does interpose a bar to the granting of operating-differential subsidy aid to Matson Orient Line, Inc., for the operation of cargo vessels between ports in Hawaii and ports in the Far East.

*Willis R. Deming* and *Alvin J. Rockwell* for Matson Orient Line, Inc.

*Ronald A. Capone*, *Robert E. Kline, Jr.*, and *Donald D. Geary* for United States Lines Company, *Warner W. Gardner* for American President Lines, Ltd., *George F. Galland* and *Robert N. Kharasch* for Isthmian Lines., Inc., *Sterling F. Stoudenmire, Jr.*, for Waterman Steamship Corporation, and *Odell Kominers* and *J. Alton Boyer* for Pacific Far East Line, Inc., interveners.

*Robert E. Mitchell*, *Edward Aptaker*, and *Edward Schmeltzer* as Public Counsel.

REPORT OF THE BOARD

CLARENCE G. MORSE, *Chairman*, THOS. E. STAKEM, JR., *Member*

BY THE BOARD:

This is a proceeding under section 605 (c) of the Merchant Marine Act, 1936, as amended,[1] 46 U. S. C. 1175 (c) (the Act), to determine whether the provisions of that section interpose a bar to the granting of an operating-differential subsidy contract under section 601 of the Act, 46 U. S. C. 1171, to Matson Orient Line, Inc. (Matson Orient), on its proposed Trade Route No. 12 service, with the privilige of calling at Hawaii to load and discharge cargo in the foreign commerce of the United States.

Matson Orient presently does not own or operate any vessels. Its application, filed on July 13, 1956, contemplates a subsidized service of 18 to 24 sailings per year with C–3 type vessels or other types mutually agreed upon by the Board and Matson Orient, on Trade Route No. 12 (the route)—between United States Atlantic ports (Maine—Atlantic coast Florida to but not including Key West) and ports in the Far East (Japan, Formosa, the Philippines, and the continent of Asia from the Union of Soviet Socialist Republics to Siam, inclusive)—as well as the privilege of carrying cargo between Hawaii and the Far East.

Hearing on the application was consolidated with the hearing on the application of intervener United States Lines Company (United States Lines) for increased subsidized sailings on the route, filed on December 3, 1956 (Docket No. S–71).

Other interveners are American President Lines, Ltd. (APL), Isthmian Lines, Inc. (Isthmian), Waterman Steamship Corporation (Waterman), and Pacific Far East Lines, Inc. (PFEL). States Marine Corporation and States Marine Corporation of Delaware, which originally intervened, were granted leave to withdraw their intervention prior to the commencement of the hearing.

Briefs and proposed findings were filed by Matson Orient, U. S. Lines, APL, and Public Counsel. Upon amendment of its application prior to hearing, whereby Matson Orient deleted its request for written permission to serve Hawaii in the domestic trade under section 805(a) of the Act, 46 U. S. C. 1223(a), PFEL advised that it would not participate in or be represented at the hearing.

[1] Section 605 (c) is found in the appendix.

In his recommended decision based on the consolidated record, the examiner concluded that section 605(c) of the Act did not interpose a bar to the granting of subsidy to either applicant. Shortly thereafter the Board granted United States Lines' motion for severance of the two proceedings, and on March 11, 1958, its report was served in Docket No. S–71. That report reflected essentially the findings and conclusions of the examiner with respect to United States Lines. Here we adopt, generally, that recommended decision insofar as it relates to the application of Matson Orient.

Since this application contemplates a new operation, the only issues presented are (1) whether the service already provided by United States-flag vessels on Trade Route No. 12 is inadequate; (2) whether, in the accomplishment of the purposes and policy of the Act, additional vessels of United States registry should be operated on Trade Route No. 12; and (3) whether, since the application requested the privilege of calling at Hawaii for the purpose of loading and discharging cargo in the foreign commerce of the United States, section 605(c) of the Act interposes a bar to the award of subsidy for such service. The question of whether undue advantage or undue prejudice would result from the granting of subsidy aid to applicant is not in issue. *American President Lines, Ltd.* v. *Federal Maritime Board*, 112 F. Supp. 346 (D. D. C. 1953).

Specifically, the examiner found that the existing service provided by United States-flag vessels on Trade Route No. 12 was inadequate, and that in the accomplishment of the purposes and policy of the Act additional vessels of United States registry should be operated thereon, and he concluded that section 605(c) raised no bar to the award of subsidy to Matson Orient on the route. As to the privilege of calls at Hawaii to load and discharge cargo in the foreign commerce of the United States, the examiner found that the trade is adequately served by United States-flag vessels, and he concluded that section 605(c) of the Act does interpose a bar to the granting of subsidy aid to Matson Orient for such service.

Exceptions to the recommended decision were filed by Matson Orient, PFEL,[2] Isthmian,[3] United States Lines, and Public Counsel,

[2] PFEL's exceptions relate solely to the examiner's finding that PFEL "* * * withdrew [its] intervention prior to the hearing," when, in fact, in view of Matson Orient's amendment of its application deleting the request for section 805 (a) written permission for calling at Hawaii in the domestic trade, PFEL advised the examiner that PFEL "* * * does not presently intend to participate in the impending hearings * * * or to be represented at those hearings." These exceptions are not germane to the issues and no further reference to them will be made.

[3] Isthmian did not file proposed findings of fact or a brief with the examiner, and did not argue orally its position before the Board.

replies to exceptions were filed by Public Counsel, Matson Orient, and United States Lines, and oral argument was heard by the Board.

Matson Orient, while generally supporting the recommended decision, excepted to the finding that there has been no showing of inadequacy of United States-flag service as to Hawaii, and to the conclusion that section 605 (c) of the Act interposes a bar to the award of subsidy aid to Matson Orient for its proposed Hawaii service. Matson Orient contends that since Hawaii is an "off-route" point, it is not necessary, in order to grant the privilege, to find that the service already provided is inadequate, and in any event, service by vessels of United States registry between Hawaii and the Far East is, in fact, inadequate.

United States Lines excepted to the examiner's conclusion that section 605 (c) of the Act does not interpose a bar to the award of subsidy to Matson Orient, and to his findings that (1) the grant of Matson Orient's application would further the purposes and policy of the Act, and (2) "it is immaterial that a particular applicant is not operating a service at the time it files its application, that it fails to give the number and type of vessels to be operated in the service or how they are to be obtained, and that no definite time is given when its service will commence."

Isthmian asserts that it does not oppose the award of subsidy aid to applicant provided that such an award does not preclude a similar award to Isthmian on its westbound round-the-world service. In excepting to the recommended decision it complains that the examiner failed to include a finding as to whether the grant of subsidy in this case would preclude a grant of subsidy to Isthmian on its pending application, and further failed to find that if the award of subsidy to Matson Orient would preclude a similar award to Isthmian, then Isthmian's application is entitled to simultaneous consideration with the application of Matson Orient.

Public Counsel contends that the examiner erred in (1) failing to determine the amount of additional United States-flag service that is required to achieve adequacy within the meaning of the Act, (2) finding that the refusal of applicant to specify the number and type of vessels it proposes to employ, and the date on which it will be ready, willing, and able to commence operations, are immaterial in a section 605 (c) proceeding, and (3) concluding that section 605 (c) does not interpose a bar to the award of subsidy to Matson Orient.

DISCUSSION AND CONCLUSIONS

What we said with reference to adequacy of United States-flag service in Docket No. S–71 [4] is equally appropriate here since each application is grounded upon the same record. The record illustrates that outbound on the route liner commercial cargo has steadily increased from 961,000 long tons in 1952 to 1,982,000 long tons in 1956, while United States-flag vessels accounted for an average of only 16 percent of this movement, and United States-flag vessels accounted for more than 20 percent (22 percent) in 1956 only. Inbound, liner commercial cargo has steadily increased from 1,295,000 long tons in 1952 to 1,935,000 long tons in 1956. The average United States-flag vessel participation in this inbound movement was only 19 percent. Combined outbound and inbound, United States-flag vessel carryings averaged 18 percent during the 1952–1956 period, with a high of 25 percent in 1952. United States-flag vessel utilization has been high. Outbound in 1955 only two of the 10 United States-flag services had more than 10 percent free space, two had between five and 10 percent, and the remainder had less than five percent; in 1956, only United States Lines' vessels had more than five percent free space, notwithstanding the fact that in this year United States Lines introduced its Mariner vessels—with their increased cargo capacity—to the trade. Inbound, free space, while more substantial, was not heavy. In 1956, United States Lines averaged about eight percent free space inbound, and its experience since then up to the time of hearing remained about the same.

On the whole, the record demonstrates that cargo offerings on the route will remain at least equal, in the foreseeable future, to the level of the offerings in the recent past, when, as noted above, 1,982,000 long tons of liner commercial cargo were carried outbound, of which about 428,000 long tons, or 22 percent, moved by United States-flag vessels, and inbound,1,935,000 long tons of liner commercial cargo were moved, of which 387,000 long tons, or 20 percent, was carried by United States-flag vessels. Combined inbound and outbound in 1956, United States-flag vessels carried 21 percent, or about 815,000 long tons, of the total 3,917,000 tons.

The term adequacy in section 605 (c) of the Act refers to the "service *already provided* by vessels of United States registry in such service" (emphasis added). There has been a relatively low participation of

[4] *United States Lines Co.—Increased Sailings, Route 12*, 5 F. M. B. 379.

United States-flag vessels in this trade and a high ratio of United States-flag vessel utilization, particularly outbound. We conclude, therefore, as we did in No. S–71, that the service already provided by United States-flag vessels on the route is inadequate.

When and if a subsidy contract is awarded as a result of our decision in No. S–71, United States Lines vessels will have additional carrying capacity. The record indicates that increased *capacity* of United States Lines, through additional sailings with Mariner vessels and the substitution of Mariners for its previously utilized C–2 type vessels, amounts to some 261,400 long tons over its 1956 actual carryings of 154,000 long tons. Assuming that United States Lines does carry this much additional cargo, United States-flag participation would be 689,400 tons, and based upon 1956 actual carryings, would amount to 34.7 percent participation outbound, 32.9 percent inbound, and 33.9 percent both outbound and inbound. Adding to this the capacity of Matson Orient's proposed service—252,000 tons—United States-flag participation would be 941,400 tons, and based upon 1956 actual carryings, would amount to 45.9 percent participation outbound, 47 percent inbound, and 46.7 percent both outbound and inbound.

Public Counsel contend that the level of adequacy in this trade should be set at 40 percent in view of the formidable competition from Japanese-flag vessels. We note that Japanese vessels have been strongly entrenched in the transpacific trade on Trade Routes Nos. 29 and 30, yet United States-flag participation in each of those trades now exceeds 60 percent. We further note that in 1956, after United States Lines introduced its Mariners to the trade, its outbound free space remained low. Upon this record, and the recent history of United States-flag liner services to the Far East, we are of the opinion that to limit adequacy to 40 percent of the total liner movement at the 1956 traffic level would be unwarranted.

Assuming contracts are awarded to both United States Lines and Matson Orient, United States flag vessels would carry a combined total of only 46.7 percent of the inbound and outbound liner movement on the route if they go out with capacity loads and if cargo offerings do not exceed those of 1956. We feel that the foregoing is well within the grasp of United States-flag vessels on this service, and we conclude that additional vessels should be operated on the route in furtherance of the purposes and policy of the Act.

Unless the specific exceptions to which we now turn demand a contrary conclusion, section 605 (c) of the Act does not interpose a bar to the granting of subsidy aid to Matson Orient for a proposed service on the route.

Public Counsel points out that there are other pending subsidy applications which relate, in part at least, to Trade Route No. 12, that these pending applications, if granted, could accommodate about 103,000 long tons of additional cargo for United States-flag vessels. This capacity, when added to the present existing carryings, plus the capacity provided by the additional sailings of United States Lines and the proposed service of Matson Orient, would amount to approximately 1,044,000 long tons outbound, 1,011,000 long tons inbound, and a combined capacity of 2,055,000 long tons, or 52.7, 51.2, and 52.4 percent, respectively, assuming, again, that vessels carry capacity loads and that cargo offerings do not increase over 1956. It is the position of Public Counsel that all of these applications cannot be granted because they are not required in order to achieve adequacy, and therefore (1) we must determine the number of additional sailings which are necessary to achieve adequacy, and (2) since one or more applicants may be barred from receiving subsidy on the route because the trade will be adequately served, we must determine which of the pending applications is best suited to accomplish the purposes and policy of the Act.

We have determined that the service already provided by United States-flag vessels in this service is inadequate. Further, we are of the opinion that the participation in the liner movement on the route, as proposed by both United States Lines and Matson Orient, is well within the grasp of United States-flag vessels. The Act does not require a finding that the extent of existing inadequacy be determined. In any event, we have noted that the granting of all pending applications pertaining to this service would amount to about 52 percent United States-flag vessel participation, assuming that there is no increase in the liner cargo offerings in the future. An additional five percent of the movement is not so great that we can say here that it cannot or will not be achieved. We note, too, that in one of the pending applications [5] there has been no section-605 (c) hearing and that in two [6] the recommended decision has not been issued. We cannot say, upon this record, that 52 percent of the movement would constitute a "substantial portion of the water-borne export and import foreign commerce of the United States." Suffice it to say that a favorable section-605 (c) determination does not in itself result in the award of subsidy, that pending applications may be amended or withdrawn, and that the record in later section-605 (c) hearings may indicate that cargo offerings have changed materially.

[5] Waterman Steamship Corp., Docket No. S–73.

[6] Isthmian Round the World, Westbound, Docket No. S–72, and APL Round the World, Westbound, Docket No. S–74.

Since we have rejected the notion that the level of adequacy in this trade should be set at 40 percent of the 1956 movement, and since we are unprepared to say in light of the above that one or more of the other pending applicants shall be barred by reason of section 605 (c) of the Act, the second contention of Public Counsel, *supra*, is not presented for decision. We do not agree, however, nor has it ever been held by our predecessors, that the purposes-and-policy clause of the section was intended to determine which of several applications is best suited to achieve adequacy on a given trade route. We believe that the foregoing disposes of the contention advanced by Isthmian.

It is argued also that Matson Orient's application is so vague that the Board cannot determine that the proposed service would enhance the purposes and policy of the Act. Applicant produced (1) data showing the type of vessels it proposes to operate—C–3 or other types agreed upon with the Board; (2) voyage pro forma data based upon the operation of C–3 type vessels; (3) nature and amounts of cargo to be loaded and dischargd at each port; (4) sailing time; (5) annual voyages per vessel; and other information. We believe that the examiner correctly ruled that evidence relating to the vessel types to be employed, the exact route, the source of the vessels, the ability and willingness to acquire new vessels, design features to be incorporated in the new vessels, the exact time the new service would be inaugurated, and the like, are immaterial and irrelevant. Although considerably more detailed information is needed by the Board for its deliberations under other sections of the Act, we believe that the data of record produced by Matson Orient is sufficient for us to make the determinations required under section 605 (c).

A further argument of Public Counsel is that Matson Orient's failure to disclose the time when it intends to inaugurate a specific service might well lead to the circumvention of the safeguards of section 605 (c), if the section is found not to bar the award of a subsidy contract. Public Counsel fears that a favorable finding for applicant may be interpreted as a license to seek subsidy at some far later time when, in applicant's opinion, the service would be profitable, and at that time additional service may not be required, with the result that other persons in the trade might be deprived of the protection afforded by section 605 (c). The section provides that "no contract shall be made under this title with respect to a vessel to be operated on a service * * * unless * * * the service already provided by vessels of United States registry in such service is inadequate * * *". A favorable section-605 (c) determination does not allow an applicant to pick and choose when he will commence operations

under a contract. Assuming that other sections of the Act do not preclude the award of subsidy to Matson Orient, we will insist that applicant take all action necessary for the prompt determination of its application, and unless a subsidy contract, if offered, is executed and operations have commenced within a reasonable time, we shall review our determinations here in light of conditions as they then exist.

Applicant has requested the privilege of calling at Hawaii for the purpose of loading and discharging cargo in the foreign commerce of the United States. Upon this record, we find that section 605 (c) of the Act does interpose a bar to the award of subsidy for such service. It is clear that United States-flag liners are faced with virtually no foreign competition in this service, and it cannot be said, upon this record, that the service is inadequately served. Applicant urges upon us the view that since Hawaii is a privilege, or off-route point, inadequacy as to this segment of the service need not be found.

To adopt the foregoing argument we would be precluded from granting a subsidy for anything less than the service proposed by applicant, no matter how unsuitable for subsidy any leg or segment of the proposed service might appear. To subsidize an obviously adequately served off-route point simply because the remainder of the proposed route is inadequately served would militate against the very purpose of the subsidy program.

Contentions and arguments of parties not discussed herein have been considered and found not to be related to material issues or not to be supported by the evidence.

We find and conclude:

1. That Matson Orient is not operating an existing service on Trade Route No. 12;

2. That the service already provided by vessels of United States registry on Trade Route No. 12 is inadequate within the meaning of section 605 (c) of the Act, and that, in the accomplishment of the purposes and policy of the Act, additional vessels of United States registry should be operated thereon;

3. That the service already provided by vessels of United States registry between Hawaii and the Far East is not shown to be inadequate, and additional vessels of United States registry are not required to be operated between Hawaii and the Far East;

4. That section 605 (c) does not interpose a bar to the award of subsidy to Matson Orient for its proposed service on Trade Route No. 12; and

5. That section 605 (c) does interpose a bar to the award of subsidy to Matson Orient for its proposed service between Hawaii and the Far East.

APPENDIX

Section 605 (c) No contract shall be made under this title with respect to a vessel to be operated on a service, route, or line served by citizens of the United States which would be in addition to the existing service, or services, unless the Commission shall determine after proper hearing of all parties that the service already provided by vessels of United States registry in such service, route, or line is inadequate, and that in the accomplishment of the purposes and policy of this Act additional vessels should be operated thereon; and no contract shall be made with respect to a vessel operated or to be operated in a service, route, or line served by two or more citizens of the United States with vessels of United States registry, if the Commission shall determine the effect of such a contract would be to give undue advantage or be unduly prejudicial, as between citizens of the United States, in the operation of vessels in competitive services, routes, or lines, unless following public hearing, due notice of which shall be given to each line serving the route, the Commission shall find that it is necessary to enter into such contract in order to provide adequate service by vessels of United States registry. The Commission, in determining for the purposes of this section whether services are competitive, shall take into consideration the type, size, and speed of the vessels employed, whether passenger or cargo, or combination passenger and cargo, vessels, the ports or ranges between which they run, the character of cargo carried, and such other facts as it may deem proper.

# FEDERAL MARITIME BOARD

## No. M–77

PRUDENTIAL STEAMSHIP CORPORATION ET AL.—APPLICATIONS TO BAREBOAT CHARTER DRY-CARGO VESSELS

*Submitted May 16, 1957. Decided May 16, 1957*

The Board should find and so certify to the Secretary of Commerce that the applications of Arrow Steamship Company, Boston Shipping Corporation, West Coast Steamship Company, Mathiasen Steamship Corporation, Pope & Talbot, Inc., and Mississippi Shipping Company, Inc., to bareboat charter Government-owned, dry-cargo vessels should be denied.

*Garrett Fuller* for West Coast Steamship Company.

*Ira L. Ewers*, *Robert H. Duff* and *William B. Ewers* for Mathiasen Steamship Corporation.

*Robert S. Hope* and *J. Alton Boyer* for Pope & Talbot, Inc.

*Donald Macleay* for Mississippi Shipping Company, Inc.

*Marvin Coles* for American Tramp Shipowners Association.

*Russell T. Weil* and *Ronald A. Capone* for United States Lines.

*Francis T. Greene* for Prudential Steamship Corporation.

*Arthur F. Tarantino* for New England Industries Inc., World Carriers Inc., American Merchant Marine Steamship Corporation and Pegor Steamship Corporation.

*John Reagan* for General Services Administration.

*Allen C. Dawson* as Public Counsel.

INITIAL DECISION OF C. B. GRAY, EXAMINER, ON FURTHER HEARING [1]

Subsequent to the receipt of exceptions to the initial decision herein and of a motion to reopen, the Federal Maritime Board by order of April 1, 1957, on its own motion reopened this proceeding for the purpose of taking further evidence with respect to whether the services for which the vessels are proposed to be chartered are not adequately

[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).

served, and with respect to the availability of privately owned American-flag vessels for charter on reasonable conditions and at reasonable rates for use in such services. Further hearing was held on April 11 and 12, pursuant to notice published in the Federal Register of April 5, 1957.

By order of April 9, the application of Isthmian Lines, Inc., was severed from the other applications in Docket No. M–77, was designated as No. M–77 (Sub. No. 1), and was decided April 22, 1957.

Paroh Steamship Corporation, Coastwise Line and Polarus Steamship Company, had withdrawn their applications prior to the further hearing, and that of Prudential Steamship Corporation was withdrawn at the opening of that hearing. As Arrow Steamship Company and Boston Shipping Corporation had not excepted to the recommendation that their applications should not be granted, this proceeding is limited to the applications of:

West Coast Steamship Company for 5 Liberty ships
Mathiasen Steamship Corporation for 3 Libertys
Pope & Talbot, Inc., for 3 Victorys or Libertys
Mississippi Shipping Company, Inc., for 3 Victorys or Libertys

Mathiasen Steamship Corporation presented no additional evidence, its application standing as submitted originally and West Coast Steamship Company offered no further evidence. New England Industries Inc., World Carriers, Inc., American Merchant Marine Steamship Corporation and Pegor Steamship Corporation intervened but presented no evidence.

## Pope & Talbot, Inc.

Pope & Talbot, Inc., have under charter until the end of this year seven Government-owned vessels, three of which are employed in the movement of Yugo-Slavian grain on consecutive voyages, three on Turkish grain and one on General Services Administration (GSA) coal. Following the original hearing herein, the Maritime Administration informed applicant that five of the seven vessels would be withdrawn from charter and subsequently assigned to the Military Sea Transport Service (MSTS) under general agency. None had been withdrawn at the time of further hearing, but one of the vessels was under suspension notice. Because of the heavy expense incurred in absorbing certain breakout costs and installing grain fittings in the vessels now under bareboat charter, applicant objects to the withdrawal of the five ships before those costs can be amortized. Applicant expresses willingness to time-charter these ships to MSTS if it be permitted to do so. Pope & Talbot does not seek to have three

additional ships broken out of lay-up. It is intended that upon completion of their present employment, three of the vessels chartered under Dockets M–69 (Sub. No. 2) and (Sub. No. 3) shall be transferred to charter under this proceeding, Docket No. M–77, and in turn chartered to MSTS on time charter.

Applicant owns six vessels, one of which is on time charter to MSTS and another on a single voyage with GSA coal. These two vessels will be free in May 1957, on the Pacific Coast, but as they will be required to cover applicant's intercoastal berth service, permission to charter them to MSTS will not be sought. Pope & Talbot seek to charter the Government-owned vessels to MSTS at the rates set by the Maritime Administration as fair and reasonable but its own vessels would not be offered except at higher rates. The Government-owned ships have been offered at NSA rates but MSTS has neither accepted them nor made any counter offer. The General Manager of applicant's steamship division knows that privately owned vessels are available for charter at rates lower than those of the NSA, but he has made no offer for any of them. Offers to applicant of Liberty ships at $70,000 per month have been rejected as too expensive for the only service to which they can be put, namely, intercoastal eastbound movement of lumber.

### Mississippi Shipping Company, Inc.

Mississippi Shipping Company is prohibited by its subsidy contract from carrying full-cargo lots southbound in its berth service. Liberty ships are not suitable for its normal cargo operations southbound, and if the requested vessels are obtained, the company would be doing a bulk full-cargo lot operation southbound rather than its normal berth service. Prior to the original hearing, the company had made no offers on Liberty ships, relying on the testimony in earlier cases as to the price of Libertys. Since that hearing it has made no offers for either Victory or Liberty ships.

The current Brazilian program of 250,000 tons of wheat has been contracted for through July 1957, and in the opinion of applicant's vice-president, the movement will be timely completed. Thus far, 108,500 tons have been fixed on foreign ships and 96,500 tons on American ships, and in the witness' opinion the 50/50 requirement of Public Law 480 will be met if there be one more American fixture. It is conceded that if privately owned tramp ships are offered for these grain cargoes at or below NSA rates, they should have the business in preference to Government-owned ships.

All of the previously described programs of the Department of Agriculture are moving satisfactorily and the Department expects to have completed the movement of 6.5 million tons by June 30, 1957. The Department anticipates completion of the Brazilian program by the end of June 1957, which except for a few spot parcels, has been and will be essentially a tramp movement. The contemplated withdrawal by the Maritime Administration of 15 of the vessels now on the Department's programs for delivery to the MSTS for service from June 15 to October 15, 1957, will not slow down the movement of the cargoes scheduled to move in fiscal year 1958. Even though the number of ships available be so diminished, the Department will still have more vessels than it had during the corresponding period in fiscal year 1957, since there was no substantial number of Government-owned bareboat ships available until February 1, 1957. Thus, while in fiscal year 1957, the Department had use of the vessels for less than half of the fiscal year the vessels will be available under their charters for the full fiscal year 1958. Within the recent past, private operators have offered the Department a number of vessels and some fixtures have been made within the last few weeks at less than NSA rates. It is the Department's conclusion that at this time there is no need for breaking out additional Government-owned vessels.

A summary statement of the Maritime Administration's bareboat chartering program shows that as of April 10, 1957, 211 vessels had been authorized for charter, 140 of which were allocated to operators and 136 had been delivered. Of the latter, 114 were currently on hire as compared with 66 on hire at the time of the original hearing. Of the total number of vessels on hire, 26 were in berth services and 88 were in the transportation of bulk commodities or cargoes of the type susceptible of carriage by American tramp carriers. Eighteen of the allocated vessels were in reactivating status, 10 of which were expected to be in service during April and the others in approximately four or five weeks. Four of the vessels have not been withdrawn, although assigned.

In the opinion of the Administration's Office of Ship Operations, the ships currently allocated are sufficient to meet the known requirements for Government-sponsored cargoes. With respect to coal, the market rates have reached such a level, approximately $10 per ton, that it is improbable that an American operator taking vessels on bareboat charters under the present terms and conditions could operate solely in the coal trade. As coal is not a Government sponsored cargo, the Maritime Administration has issued no rate advice for the movement from Hampton Roads to Antwerp-Rotterdam. In Docket No.

M–67, decided June 28, 1956, however, the Board considered $11.60 to be a reasonable rate for this service, and since then that rate has been increased to $11.75 because of the increased price of fuel. Indicative of a lack of interest in the transportaion of coal is the fact that while in Docket No. M–72, 50 ships were authorized for coal, only 19 have been allocated, and the applicants are not asking for additional ships under that docket. Customarily, 15 ships are turned over to the MSTS each year for general agency operation in the summer Arctic program; except for unforeseen or spot situations, the MSTS therefore has an adequate number of ships available to it or under charter.

### American Tramp Shipowners Association

The American Tramp Shipowners Association shows that rates on commercial cargoes in the world market had fallen below the American break-even point so that at the time of further hearing the American tramp was limited to cargoes moving under the 50/50 requirement of Public Law 480; to domestic voyages; to service for the MSTS, and to charters to liner companies. During February 1957, American ships could find business at NSA rates, but subsequently lower rates had to be offered to secure Government-sponsored cargoes. Allocation of the Government-owned ships to bareboat charterers is also adding to the difficulties of the operators of privately owned ships in obtaining business.

Early in March 1957, the Maritime Administration informed the Association that consideration was being given to the withdrawal from bareboat charterers of about 15 Victory ships employed in Government cargo programs, for the MSTS summer Arctic program during the period May through August 1957. The Association was asked to advise as to the availability of United States-flag privately owned ships to meet the requirements of the Government programs during that period. After canvassing its membership, the Association advised the Maritime Administration on April 2 that five Victorys and 12 Liberty ships would be available for the carriage of cargoes at or below NSA rates and later two more Libertys were reported. Seven of the ships would be available in May, five at United States Atlantic ports north of Hatteras, and two at the West Coast; seven would be available in June, two at USNH, one at a Gulf port and four on the West Coast; in July, one ship would be available at the West Coast, and in August, four ships, two at USNH and two at the West Coast. As the period of requested availability was May-August, some of the

ships in May and June positions would become available for second voyages.

### Discussions and Conclusions

This record now establishes that there is no need for additional ships to transport Government-sponsored cargoes or coal; that the needs of the MSTS are being met and that more American-flag tramp ships are offered for charter at NSA rates or less than are here requested. There is therefore no basis for the requisite findings under Public Law 591 that the services for which the vessels are proposed to be chartered are not adequately served and that privately owned American-flag vessels are not available for charter at reasonable rates for use in such services. Accordingly, the pending applications should be denied.

### Recommendation

The Board should find and so certify to the Secretary of Commerce that the applications of Arrow Steamship Company, Boston Shipping Corporation, West Coast Steamship Company, Mathiasen Steamship Corporation, Pope & Talbot, Inc., and Mississippi Shipping Company, Inc., to bareboat charter Government-owned, dry-cargo vessels should be denied.

ORDER

At a Session of the FEDERAL MARITIME BOARD, held at its office in Washington, D.C., on the 13th day of June A.D. 1958.

No. 807

UNITED STATES ATLANTIC AND GULF-PUERTO RICO CONFERENCE INCREASE IN RATES

This proceeding of investigation was instituted by the Board's orders of January 4, January 8, and September 5, 1957, for the purpose of determining whether certain increased rates filed by respondent carries were unjust or unreasonable under section 18 of the Shipping Act, 1916, as amended (the 1916 Act), and the provisions of the Intercoastal Shipping Act, 1933, as amended (the 1933 Act).

The orders of January 4 and 8, 1957, made the United States Atlantic & Gulf-Puerto Rico Conference, Agent J. W. deBruycker, Bull Insular Line, Inc., Lykes Bros. Steamship Co., Inc., Waterman Steamship Corporation, and Alcoa Steamship Co., Inc., respondents, and were directed to an investigation of the lawfulness of rate increases of 15 percent, or 6 cents per cubic foot, or 12 cents per 100 pounds, whichever produced the greatest increase in revenues. The order of September 5, 1957, added Pan-Atlantic Steamship Corporation as a respondent, and expanded the proceeding to include an investigation into a further rate increase of 12 percent.

The following intervened in opposition to the rate increases, or as their interests might appear: Commonwealth of Puerto Rico, Administration of General Services, Association de Industriales de Puerto Rico (Puerto Rico Manufacturers), Caribe Shoe Corporation, Commonwealth Manufacturers' Association, Paula Shoe Company, Coastal Footwear Corporation, Bata Shoe Company, Association of Sugar Producers of Puerto Rico, Atlantic Industries, Inc., Louisiana State Rice Milling Company, Inc., Rice Millers' Association, and Trailer Marine Transportation, Inc.

Hearing was held from April 16, 1957, through May 3, 1957, on the 15 percent increase. On the additional rate increase of 12 percent, further hearing was held from October 21, 1957, through October 28, 1957, and concluded on November 1, 1957. The initial decision of the

examiner covering both investigations was served on February 3, 1958. Exceptions to the initial decision were filed by the Commonwealth of Puerto Rico, Association of Sugar Producers of Puerto Rico, and Public Counsel, reply thereto was filed by respondents, and oral argument was held before the Board.

The initial decision correctly held that under section 3 of the 1933 Act the burden was upon the carriers to prove the rates just and reasonable. From the record developed the initial decision concluded that:

1. A fair composite rate base for the property devoted to the conference carriers' Puerto Rico service is $60,000,000, and a fair rate of return thereon is 10 percent;

2. An operating ratio not in excess of 90 percent is appropriate and necessary for this service; and

3. The proposed tariffs under consideration are just and reasonable.

The exceptions are primarily directed to the sufficiency of the evidence and proof presented by respondents. They allege that the proof consists of statistical summaries based upon allocations and computations derived from underlying books, records, and accounts; that the examiner refused interveners' repeated requests that respondents be required to produce or make available such underlying accounts, books, and records; and that without such basic underlying data available to test the accuracy of the summaries, allocations, and computations contained in the exhibits, the evidence is not substantial and probative and is insufficient for the Board to reach a valid conclusion as to the lawfulness of the rates under investigation.

As to the contentions of the parties and the ruling of the examiner on the foregoing issue, the initial decision states as follows:

> As required by section 3 of the Intercoastal Shipping Act, 1933 (46 USC section 845), the burden rests upon the carriers to prove that the increased rates are just and reasonable. For this proof, the carriers rely upon their exhibits as received in evidence and the testimony thereon. Principally, the exhibits are summaries of statistical data, allocations and computations, and general information taken by the carriers, they assure, from their original books, records and accounts. Such books, records and accounts were not produced at the hearings or made available to other parties. Before and during the hearings, counsel for the Commonwealth of Puerto Rico (Commonwealth) and counsel for other interveners who participated in the hearings (hereafter counsel for interveners, or interveners), and Public Counsel, repeatedly urged the carriers to produce at the hearings, or make available to them, such books, records, accounts, and work sheets, in order that they may test the accuracy and correctness of the data, allocations, and computations contained in the carriers' said exhibits.
>
> The materials sought were generally as follows:
>
> (a) corporate structure of the carriers and affiliates,

(b) original separate and consolidated corporate balance sheets for the years 1950 through 1956,

(c) corporate documents and schedules relating to intercompany charges and credits,

(d) original separate and consolidated corporate income and expense statements for each carrier and affiliate and supporting data and documents for the years 1950 through 1956,

(e) reconciliation schedules of surplus accounts for each affiliated company for the years 1950 through 1956.

Interveners state that the failure of the carriers to produce the corporate documents from which their exhibits were summarized, allocated and computed makes it:

(a) impossible to verify whether figures from corporate documents had been accurately, or at all, transcribed to work sheets as alleged,

(b) impossible to verify whether the claimed allocation and computation formulae purportedly employed by the carriers were adhered to or properly applied,

(c) impossible accurately to trace the complex flow of payments, credits and charges among the multitude of corporate affiliates,

(d) impossible to verify which of the innumerable corporate affiliates had enjoyed profits from the trade,

(e) impossible to verify whether all such profits or intercorporate transactions had been appropriately computed and credited,

(f) impossible to analyze the true financial status of the various corporations, or their capital surplus, cash and securities or current asset position,

(g) impossible to correct or amend figures, where errors or inappropriate allocation or computation formulae were used, and

(h) impossible to derive other figures offsetting in nature.

Interveners further state that the financial and accounting evidence introduced by the carriers in support of their burden of proof was entirely computed, allocated and derived, that the figures and data offered in support of the rate increases were constructed for purposes of this case, and that, accordingly the revenue and expense and asset figures introduced by the carriers over the objection of other parties are not entitled to determinative weight and cannot be credited. (Citations omitted.)

Public Counsel state that the failure of the carriers to make available the underlying materials requested presents a basic question as to whether any valid conclusion on the increased rates can be reached on the record as it stands.

The carriers' counsel objected to furnishing the materials sought on the grounds, among others, (a) that it would be burdensome, perhaps requiring many days or weeks (b) that some of it is confidential to the carriers, (c) that the corporate accounting material was in such form that the data for the Puerto Rican trade was "inextricably intertwined" with other operations, and (d) that much of the material sought does not exist.

While there is some merit to the position of interveners and Public Counsel on the question of original books, records and accounts, the examiner refused to require the carriers to produce, or make available, at the hearings the materials sought, for the reasons given by their counsel, but principally because of the entwined nature of the Puerto Rican and other operations, and involvment of the carriers' subsidiaries and affiliates who are not parties to the pro-

ceeding. It was made clear however that the burden of proof remained with the respondent carriers.

The carriers' witnesses testified that their exhibits of record as supported by the testimony are true, accurate and correct. Such exhibits, as well as those furnished by other parties, are regarded as having been furnished in good faith. The evidence as a whole is found to be "in accordance with the reliable, probative, and substantial evidence" provisions of section 7(c) of the Administrative Procedure Act, and it is adequate for the determinations made herein. It is on this premise that this report proceeds.

We do not agree with the examiner that the summary evidence presented by respondents, without reasonable access to supporting and underlying books, records, and accounts by which the accuracy and sufficiency of the evidence may be tested, is "reliable, probative, and substantial evidence" as required by section 7(c) of the Administrative Procedure Act. The record is insufficient for the Board to make proper findings as to the lawfulness of the rates under section 18 of the 1916 Act and under the 1933 Act.

Under the 1916 and 1933 Acts the Board has the duty to determine whether the rates here under consideration are just and reasonable. In order to carry out properly this function it is necessary that the Board have before it a record which shows accurately the operating and financial results of the common-carrier operations of the regulated carriers in this particular regulated trade, including a full disclosure of all relevant and material data which will aid the Board in making an accurate determination of the value of carrier assets devoted to such service and properly includable in a rate base upon which to determine a fair return.

The regulated carriers in this proceeding do not operate purely in the Puerto Rican trade; their business organizations and properties are devoted in part to such trade and in part to other nonregulated activities. Furthermore, certain of the carriers, particularly Bull Insular Line, Inc., conduct their water-carrier operations through various subsidiary and affiliated corporations. The financial and operating records of these respondents are maintained in such a manner that numerous and complicated allocations and computations must be made in order to determine with reasonable accuracy the revenues, expenses, and asset values allocable to the Puerto Rican trade.

The allocations and computations made by respondents, and ultimate summaries based thereon, were introduced as evidence at the hearing. The ruling of the examiner that basic and underlying corporate records need not be produced nor made available to the parties, deprived interveners and Public Counsel of the right properly to test the method and accuracy of such allocations and computations.

The resulting record presented to the Board, therefore, does not allow an analysis of underlying data by which the Board can check the validity of the figures, the formulae of allocation used, or the extent to which intercorporate transactions between the carriers and their affiliated companies have been adjusted properly to reflect results in the regulated Puerto Rican service.

The grounds advanced by respondents for refusing to furnish the requested materials are without merit.

Having chosen to operate as common carriers subject to the regulatory provisions of the 1916 Act and the 1933 Act, respondents assume the obligation to present or make available in regulatory proceedings sufficient probative and substantial evidence to enable the Board properly to carry out its investigative and regulatory duties under these Acts. The fact that the carriers have maintained their books and records in a manner which makes it burdensome to furnish material which is relevant and material to the determination of the issues presented in this investigation, and the fact that data with respect to the Puerto Rican trade is "inextricably intertwined" with other operations, are insufficient reasons for refusing to produce or make available such data. Similarly, it is no valid reason to contend that the material is confidential to the carriers. "* * * there can be nothing private or confidential in the operations of a carrier engaged in interstate commerce. *Smith* v. *Interstate Commerce Commission*, 245 U.S. 33." *Puerto Rican Rates*, 2 U.S.M.C. 117, 123 (1939). To hold otherwise would permit the regulated carriers rather than the Board to determine the scope of the investigation and adequacy of the record upon which the Board must rely in making its decision.

We conclude that this proceeding should be remanded to the examiner for further hearing, and, in order that the full record herein shall contain probative and substantial evidence sufficient for the Board to make valid determinations as to the lawfulness of the rates under investigation, respondents should produce at such further hearing, or make available to interveners and Public Counsel, such original and underlying books, records, accounts, and worksheets, including corporate profit and loss statements and balance sheets, as are required to determine the probative value of the evidence, the accuracy of computations and allocations between regulated and nonregulated activities, and the scope and accuracy of intercorporate transactions. Further, there should be full disclosure of data with respect to any sales or transfers of corporate assets which would be relevant and material in determining accurately the fair value of properties and assets devoted to this Puerto Rican service.

In the initial decision the examiner determined the reasonableness of the rate increases on the composite position of the four conference carriers. Certain parties to the proceeding have contended, however, that Bull Insular Line, Inc., as the dominant carrier in the trade, and as the carrier whose business activities are primarily devoted to this service, should be treated as the basic rate-making carrier in the trade. See *General Increase in Hawaiian Rates*, 5 F.M.B. 347 (1957), wherein Matson Navigation Company, the dominant carrier in the Hawaiian trade, was treated as the rate-making carrier. In order that the Board may give proper consideration to this contention, the record developed on further hearing should be sufficient for consideration of the issues either through analysis of all carriers, or through consideration of Bull Insular Line, Inc., as the rate-making carrier.

*It is ordered*, That this proceeding be, and it is hereby, remanded to the examiner for the purpose of receiving further evidence consistent herewith, at a public hearing to be held at a time and place hereafter to be determined by the Chief Examiner; and

*It is further ordered*, That a prehearing conference be scheduled for the purpose of determining the scope of the further hearing and the data and materials to be produced or made available to the parties at said further hearing; and

*It is further ordered*, That the further hearing be conducted in accordance with the Board's Rules of Practice and Procedure, and that an initial decision be issued by the examiner.

By the Board.

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

ORDER

At a Session of the FEDERAL MARITIME BOARD, held at its office in Washington, D.C., on the 23d day of June A.D. 1958.

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No. 788

ASSOCIATED-BANNING COMPANY ET AL.

*v.*

MATSON NAVIGATION COMPANY ET AL.

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No. 796

HOWARD TERMINAL

*v.*

MATSON NAVIGATION COMPANY ET AL.

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No. 798

IN THE MATTER OF AGREEMENT NO. 8095 BETWEEN THE CITY OF OAKLAND AND ENCINAL TERMINALS, AND AGREEMENT NO. 8095-A BETWEEN ENCINAL TERMINALS AND MATCINAL CORPORATION

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On December 2, 1957, three petitions were filed for reconsideration of the Board's report and order of October 31, 1957 (5 F.M.B. 336). Respondents Port of Oakland and Encinal Terminals filed separate petitions in No. 798 with respect to our findings and conclusions as to Agreement No. 8095, and the violation by them of section 15 of the Shipping Act, 1916, as amended (the Act), in connection with the carrying out of that agreement. Respondents Matson Navigation Company, Encinal Terminals, Matson Terminals, Inc., and Matcinal Corporation jointly filed a petition for reconsideration, requesting (1) the re-approval of Agreement No. 8063 and the approval of Agreement No. 8095-A-1, or (2) a clarification or stay of the order. The joint petition alleges (1) the orders framing the issues did not

place the disapproval of Agreement No. 8063 in issue; (2) the facts upon which the approval of Agreement No. 8063 was withdrawn were known to the Board at the time the agreement was approved.

As to the petitions of the Port of Oakland and Encinal Terminals and the replies thereto, we are of the opinion:

1. The petitions raise no issues of fact or law not previously raised, argued, and fully considered by the Board;

2. Each of the two parties to Agreement No. 8095 is an "other person" subject to the provisions of the Act, within the meaning of section 1 thereof (*California* v. *United States*, 320 U.S. 577 (1944));

3. Since the agreement provided for the fixing and regulating of transportation rates or fares and the apportioning of earnings, it is clearly an agreement within the purview of section 15 of the Act;

4. The carrying out, in whole or in part, of this agreement prior to its approval by the Board constituted a violation of section 15 of the Act, which provides in part: "* * * before approval * * * it shall be unlawful to carry out in whole or in part, directly or indirectly, any * * * agreement * * *";

5. The allegation that other persons subject to our jurisdiction are carrying out similar agreements without interference by this Board, even if true, affords petitioners no legal excuse here; and

6. Operations under Agreement No. 8095 were in issue inasmuch as the orders of investigation incorporated by reference all the allegations of the protests to the agreement; further, the petitioners had actual notice of this issue; it was the subject of testimony; it was argued in briefs; it was disputed in exceptions and replies; and it was orally argued before the Board. *City of Dallas* v. *Civil Aeronautics Board*, 221 F. 2d 501 (D.C. Cir. 1954).

As to the joint petition of Matson Navigation Company, Encinal Terminals, Matson Terminals, Inc., and Matcinal Corporation and the replies thereto, we are of the opinion:

1. Agreement No. 8063 was necessarily in issue as the inquiry was directed to the allegation that respondents were operating pursuant to an agreement, not filed with or approved by the Board, of which Agreement No. 8063 was only a part, in violation of section 15 of the Act;

2. In originally approving Agreement No. 8063, only the agreement formally submitted for approval and officially noticed to interested parties in the Federal Register could be approved by the Board;

3. The record clearly establishes that Agreement No. 8063 did not constitute the true and complete agreement, understanding, or arrangement between the parties; the complete agreement has never

been filed with the Board for approval pursuant to section 15 of the Act;

4. The record clearly establishes that respondents have carried out, in part, an agreement not filed with or approved by the Board, in violation of section 15 of the Act; and

5. The joint petition raises no issues of law or fact not previously argued by the parties and considered by the Board.

As to the request that our order be clarified to show that it did not intend to preclude the continuance of stevedoring by Matcinal, we are of the opinion:

1. All respondents are persons subject to the provisions of the Act, within the meaning of section 1 thereof;

2. Neither the Board nor any of its predecessors has ever held that an agreement between persons subject to the Act, relating to stevedoring activities, is not subject to the filing and approval requirements of section 15 the Act. Upon this record we need not determine whether stevedores are "other persons", within the meaning of section 1 of the Act, but we hold that an agreement between persons subject to the Act to establish a stevedoring operation does constitute an agreement within the purview of section 15.

As to the request for a stay of the effectiveness of the order, we are of the opinion that no cogent reasons have been advanced by respondents to justify this relief.

*It is therefore ordered*, That

1. The several petitions for reconsideration be, and they are hereby, denied;

2. The joint petition for clarification be, and it is hereby, denied;

3. The joint petition for a stay of the order of October 31, 1957, be, and it is hereby, denied; and

4. Respondents notify the Board within five (5) days from the date of service hereof whether they have complied with the said order, and if so, the manner in which compliance has been made, pursuant to Rule 1(c) of the Board's Rules of Practice and Procedure (46 C.F.R. 201.3).

By the Board.

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

# FEDERAL MARITIME BOARD

## No. 820

BROKERAGE ON SHIPMENTS OF OCEAN FREIGHT—MAX LEPACK, JACK POLLACK, PHYLLIS POLLACK, LYNNE FORWARDING, INC., UNITED EXPORT CLOTHING CO., INC., BIMOR TEXTILE COMPANY, INC.

*Submitted March 21, 1958. Decided August 11, 1958.*

Respondents Max LePack and Jack Pollack found to have substantially owned and/or effectively controlled and dominated forwarder respondent Lynne Forwarding, Inc., and shipper respondents United Export Clothing Co., Inc., and Bimor Textile Co., Inc.

Through collection of ocean freight brokerage by Lynne Forwarding, Inc., on shipments of United Export Clothing Co., Inc., and Bimor Textile Co., Inc., respondents Lynne Forwarding, Inc., Max LePack, and Jack Pollack, in the capacity of freight forwarders, and respondents United Export Clothing Co., Inc., Bimor Textile Co., Inc., Max LePack, and Jack Pollack, in the capacity of shippers, found to have violated the first paragraph of section 16 of the Shipping Act, 1916, as amended.

Through collection of ocean freight brokerage by Lynne Forwarding, Inc., on shipments of United Export Clothing Co., Inc., and Bimor Textile Co., Inc., respondents Lynne Forwarding, Inc., Max LePack, and Jack Pollack, in the capacity of freight forwarders, found to have violated section 16 Second of the Shipping Act, 1916, as amended, and General Order No. 72. Freight Forwarder Registration No. 1453, issued to Lynne Forwarding, Inc., revoked.

Respondent Phyllis Pollack not shown to have had any knowledge of or to have taken part in any activities found to violate the Shipping Act, 1916, as amended, or General Order 72. Proceeding dismissed as to this respondent.

*Bertram H. Siegeltuch* for Jack Pollack, Phyllis Pollack, and Lynne Forwarding, Inc.

*Robert E. Mitchell, Edward Aptaker*, and *Robert C. Bamford* as Public Counsel.

REPORT OF THE BOARD

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

BY THE BOARD:

Exceptions have been filed by respondents Jack Pollack, Phyllis Pollack, and Lynne Forwarding, Inc., to the recommended decision of the examiner, and reply thereto has been filed by Public Counsel. The following is the recommended decision of the examiner, including his conclusions, with which, as modified by our ultimate conclusions, we agree:

"By order of May 9th, 1957, as amended on August 12, 1957, the Federal Maritime Board instituted a proceeding of investigation to determine whether respondents Lynne Forwarding, Inc., United Export Clothing Co., Inc., Bimor Textile Company, Inc., Max LePack, Jack Pollack, and Phyllis Pollack have violated the Board's General Order 72 (46 CFR 244.1 et seq.) and Section 16 of the Shipping Act, 1916, as amended. A public hearing was held in New York City on October 18th and October 21, 1957.

"*The respondents.* United Export Clothing Co., Inc. (United), engaged in the purchase of second-hand clothing for export, was incorporated in New York in 1946 with an authorized capital stock of 200 shares—100 shares were issued—55 to Max LePack (45 to someone else), who since 1952 has been the sole owner. Since September 1948 LePack, President and Treasurer, and his son-in-law Jack Pollack (neither an officer nor a director) have each had authority, frequently exercised by both to draw on the corporate bank account. Bimor Textile Company, Inc. (Bimor) engaged primarily in the domestic purchase and sale of new remnant fabrics, was incorporated in New York in 1949 with an authorized capital stock of 200 shares, but only 50 shares were actually issued, all to Max LePack who is Secretary and Treasurer. Jack Pollack is President, and both LePack and Pollack have authority to draw on the corporate bank account and encumber the funds. Lynne Forwarding, Inc. (Lynne), a foreign freight forwarder holding F.M.B. Registration No. 1453, issued March 10, 1952, was incorporated in New York in 1952 with an authorized capital stock of 200 shares, only 20 shares were issued, all to Phyllis Pollack (daughter of Max LePack) named Secretary and who is the wife of Jack Pollack, President and Treasurer of the corporation. Two bank resolutions, each bearing the same date, February 8, 1952, were filed giving full authority to Jack Pollack and Max LePack individually to draw on the account and en-

cumber Lynne's funds. One resolution showed Max LePack as President and Treasurer and Jack Pollack as Secretary of Lynne. The other showed Jack Pollack as President and Treasurer and Max LePack as Agent. Although Max LePack is neither an officer or director of Lynne, he signed checks from time to time when Jack Pollack was not in the office.

"Below in tabular fashion are shown the corporate and family relationships.

TABLE I

| *United Export* | *Bimor Textile* | *Lynne Forwarding* |
|---|---|---|
| Pres. and Treas.: Max LePack. | Pres.: Jack Pollack. | Pres. and Treas.: Jack Pollack. |
| Secretary: Selma LePack [1] | Sec. and Treas.: Max LePack. | Secretary: Phyllis Pollack |
| Directors: | Directors: | Directors: |
| Max LePack | Jack Pollack | Jack Pollack |
| Selma LePack | Selma LePack | Phyllis Pollack |
| Benj. S. Kalnick [2] | Phyllis Pollack | David Drutman [3] |
| Stockholder: Max LePack | Stockholder: Max LePack | Stockholder: Phyllis Pollack.[4] |

[1] Wife of Max LePack, not a respondent in this proceeding.
[2] An attorney for the company, not a respondent.
[3] Brother-in-law of Max LePack, not a respondent.
[4] Although named an individual respondent there is insufficient evidence that she knew of or took any part in any activities that violated section 16.

"Respondent corporations have the same telephone number and have their offices in the same building owned by United and located at 109 Leonard Street, New York City. Lynne, whose activities are handled principally by Jack Pollack, acts as a freight forwarder on foreign shipments of United and Bimor and also handles a small number of shipments for a few other shippers. Jack Pollack also works for United and Bimor and receives a small salary from these companies. Bimor pays rent to United and also pays for the services of United's employees in handling its merchandise. Lynne pays no rent but its principal income arises from handling United's shipments. From 1951 through 1956 Lynne's percentage of total shipments handled for United have ranged from approximately 83% to 94%. An exception was in 1953 when Lynne handled about 64% of United shipments and some 30% of Silva and Company's shipments. In addition, Lynne has handled a relatively few shipments from some 20 other concerns over the same period.

"Max LePack has been in the used clothing business for many years. In 1948 Jack Pollack a young college graduate with limited business experience married LePack's daughter, Phyllis, and was thereafter employed by United. Later in 1949 LePack entered the remnant

textile business by forming Bimor in order to provide a job and additional income for his son-in-law, Jack Pollack. LePack and Pollack organized Lynne in 1952. Pollack stated '* * * I asked him (LePack) if he would have any objection to going into the Lynne Forwarding business, and if he would give me the shipments rather than giving them to other brokers. * * * and then we organized the Lynne Forwarding Company, and we have been operating ever since that time.' (R. 116–117.) LePack was never an officer, as such, of Lynne nor did he himself have any stock interest therein, even though the first Lynne Freight Forwarder Registration filed with the Board on February 13, 1952, showed Max LePack as President of Lynne and sole stock holder. On February 15, 1952, however, the stock was issued to Phyllis Pollack, his daughter, and on the same date the Board's Regulation Office advised Lynne that if there was any tie-up between the companies Lynne might be precluded from collecting brokerage on United's shipments. Thereafter on February 25th, 1952, Lynne filed a new Registration Form showing Phyllis Pollack as sole stockholder and secretary and her husband Jack Pollack as President. Max LePack had been named as 'Agent' to draw on the Lynne bank account.

"The record evidence discloses that brokerage billed and received by Lynne from carriers between April 2, 1952 and December 27, 1956, totalled approximately $9,100.00 of which some $5,800.00 came from United shipments and about $77.00 from shipments of Bimor. The bulk of the remainder (about $2,500.00) of the fees collected resulted from shipments of Silva and Co.

"Additional Facts
Discussion and Conclusions

"Section 16 of the Shipping Act, 1916, as amended, provides, in pertinent part,

> That it shall be unlawful for any shipper, consignor, consignee, forwarder, broker or *other person*, or any officer, agent, or employee thereof, knowingly and wilfully, 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. (Italics supplied.)

"Section 244.13 of General Order 72, as amended, in part reads:

> Registration shall not entitle a forwarder to collect brokerage from a common carrier by water in cases where payment thereof would constitute a rebate—i.e., where the forwarder is a shipper or consignee or is the seller or purchaser of the shipment, *or has any beneficial interest therein or where the forwarder*

*directly or indirectly controls or is controlled by the shipper or consignee, or by any person having a beneficial interest in the shipment.* A forwarder shall not share any part of the brokerage received from a common carrier by water with a shipper or consignee. (Italics supplied.)

"In *New York Freight Forwarder Investigation*, 3 U.S.M.C. 157 (1949), the United States Maritime Commission said, at page 164:

The evidence shows instances of a forwarder who, at the same place but under a different name, transacts business as a shipper, simultaneously collecting brokerage under another name as a forwarder of his own shipments. Brokerage paid to a shipper on his own shipments constitutes a rebate in violation of section 16 of the Shipping Act—and this is true notwithstanding that the shipper may also be a forwarder and may purport to receive the brokerage money in his forwarder capacity. Similarly, a forwarder who has any beneficial interest in a shipment and accepts brokerage thereon, is equally guilty of accepting a rebate in violation of section 16.

"The Board has previously recognized and held unlawful various plans designed to evade the above requirements.[1] A freight forwarder is an 'other person' subject to the statute.[2] The services of a freight forwarder include arranging delivery of cargo to a vessel, preparation of export documents, arranging insurance etc. and they are performed for a shipper, consignor or consignee who pays therefor a freight forwarding fee.[3] There is no direct evidence which shows that any of the fees received by Lynne were, as such, turned over to United, Bimor or any other shipper. However in the present case we are concerned as to whether the collection of brokerage (which usually amounts to 1.25 percent of the freight charges) by Lynne under the present circumstances on shipments by United and Bimor amounted to a rebate or the receipt of transportation at less than the applicable rate, in violation of the statute.

"While the payment of brokerage directly to a shipper or consignee is illegal, other devices such as the formation by a group of shippers of a stock corporation which collected brokerage from carriers and paid dividends out of the funds derived from such brokerage, back to the shippers holding the stock was held to be illegal.[4] Likewise the law may not be evaded by a shipper who forms a dummy corporation and directly or indirectly siphons off forwarding fees for the purpose of providing a job and salary for a relative (son-in-law) as was the present case and where United and Bimor could, in effect, pay an

[1] *Rates, etc., of L. & A. Garcia and Co.*, 2 U.S.M.C. 615 (1941). *American Union Transport Inc. v. River Plate and Brazil Conferences*, Multilith Dec., March 25, 1957. *Agreements of Nicholson Universal S.S. Co.*, 2 U.S.M.C. 414, 423 (1940).

[2] *United States v. American Union Transport*, 327 U.S. 437 (1946).

[3] *Agreements and Practices re Brokerage, etc.*, 3 U.S.M.C. 170–175 (1949).

[4] *Payments to Shippers by Wisconsin and Michigan Steamship Company etc.*, 1 U.S.M.C. 744–749 (1938).

ocean freight which was diminished to the extent of the brokerage payment to Lynne and thus violate Section 16 and the Board's General Order No. 72.

"Whether a particular arrangement violates the statute, whether it amounts to a direct or indirect getting of transportation at less than applicable rates, wilfully and knowingly, is a question of fact. If the corporate form is used to evade a statute then the corporate entity must be disregarded while we look to the substance and reality of the matter.[5] A freight forwarder's registration may be suspended or cancelled if the device employed constitutes a violation of the Board's General Order 72 or the Shipping Act of 1916.

"Extensive control is exercised by Max LePack over both United and Bimor. Lynne has free office space in United's (Max LePack is President and sole owner) building with the same telephone number as United and Bimor. Lynne's books are kept at this office and those of United and Bimor are kept in the same general office area in the same building. The same accountant not only audits the books of all three companies, but prepares their tax returns as well. Jack Pollack received a salary from both Lynne and United and as to Lynne he stated 'Well, I take care of all the duties required as far as filing export declarations, preparing bills of lading, and so forth—everything that is required in the freight forwarding business.' (R. 113.) 'My duties at the Export Clothing (United) was to *compile all the export information, prepare the declarations and the bills of lading.*' (R. 131.) (Emphasis added.) These duties appear to be the primary services of a freight forwarder.[6]

"The evidence is clear that Mr. Pollack commingled the functions of Lynne, United and Bimor. He stated in connection with the preparation of certain documents for the companies that '* * * it would be hard for me to distinguish whether it would be United or Lynne Forwarding at that point * * *' (R. 134.) The respondents cannot distinguish themselves one from the other.

"Not only did Max LePack have authority to draw on the Lynne bank account, but he furnished $1,000 of the original capital of $2,000 of the corporation. Respondents contend that this was merely a loan for which a demand promissory note was given. The note dated February 15, 1952, signed by Jack Pollack has not been paid and no

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[5] *Fletcher, Cyclopedia Corporations.* (Perm. Ed)—Sect. 45, *Green* v. *Equitable Powder Mfg. Co.*, 95 F. Supp. 129–31 (W.D. Ark. 1951).

[6] *Port of New York Freight Forwarder Investigation,* 3 U.S.M.C. 157–159 (1949) (Note 2). *United States* v. *American Union Transport,* 327 U.S. 437–443 (1946). For a further discussion of Foreign Freight Forwarder duties see *Ocean Transportation, McDowell and Gibbs,* pages 146–153 (1954).

payment or any discussion relating thereto has been had since concerning either the payment of principal or interest. LePack's daughter Mrs. Phyllis Pollack owns all of the issued stock. This note and loan appears to be a screen to cover LePack's beneficial interest in Lynne. Management control over Lynne as a result of LePack's designation as 'agent' coupled with his authority to draw checks on the accounts together with his ownership of a substantial interest in Lynne places LePack, a shipper (owner of United and Bimor) in a position of control of Lynne, a forwarder. The use of the same phone, same space, Lynne's payment of no rent to United (owned by LePack) constitute at best a sort of joint venture of Max LePack and Jack Pollack, with control being exercised indirectly by LePack, a person having a beneficial interest in shipments of United and Bimor. As previously shown Lynne's business from United alone rose so that by 1956 it made up about 94% of Lynne's activities. Out of a total number of 612 shipments in 1956 Lynne handled some 579 from United. Over the five-year period involved herein Lynne handled a total of 1,911 shipments for United and Bimor and only 356 shipments from some 20 other shippers.

"Stock ownership of course is not the only method of control for substance and reality should prevail over form and sham.[7] The present set up was accomplished through a family group which actually left control in Max LePack, the founder of the business.[8] Lynne was not an independent forwarder as such but was in effect the export shipping department for United and Bimor controlled by Max LePack. The fact that a small part of Lynne's business of servicing shipments came from others does not change this picture. The end sought and the result accomplished was to eliminate payment of fees to outside freight forwarders and to get the added income of brokerage payments on the United and Bimor shipments. A part of the ocean freight, i.e., the brokerage, has been used to meet the expenses of the export shipping departments of United and Bimor and results in an indirect violation proscribed by Section 16 of the Shipping Act of 1916. A violation results since, as above shown, Max LePack owns and controls not only United and Bimor, but Lynne as well. General Order No. 72 states that brokerage payments constitute rebates whenever the forwarder 'directly or indirectly controls or is controlled by the shipper or consignee.' Direct control also exists between Bimor and Lynne. Mrs. Phyllis Pollack (LePack's daughter) holds title to all of the stock of Lynne. She takes no part

[7] *Ingle Coal Corporation* v. *United States*, 127 Fed. Supp. 578–579 (1955).
[8] *S.O.S. Co.* v. *Bolta Co.*, 117 F. Supp. 59 (1953).

however in Lynne's operations. Her husband Jack Pollack directly runs the business subject to Max LePack's general direction. Jack Pollack (President and Director) runs and controls Bimor. The other directors are his wife (Mrs. Phyllis Pollack) and his mother-in-law. Max LePack is Secretary-Treasurer and sole stockholder. No directors meetings are held. Complete management in Lynne & Bimor is thus left to Jack Pollack and Max LePack since a corporation acts through its officers where no Board of Directors meet. Substance must prevail over form and these individuals are held to be in control. The actual existence of control is the important thing and not the circuitous means adopted to secure it.[9] The collection of brokerage by Lynne from the carriers on shipments made by United and Bimor are forbidden rebates and violate Section 16, Shipping Act, 1916, and F.M.B. General Order 72.

"Respondents state that Jack Pollack, President and Treasurer of Lynne, is also employed by United and Bimor, but that he is not an officer of either of these corporations, nor is Max LePack an officer of Lynne; that the family relationship between Lynne and United was fully disclosed to the Board in a letter of March 5, 1952, from the Company attorney and that if there was no reason in 1952 for refusing to issue a Certificate of Registration to Lynne, that there is certainly no reason at the present time for revoking the registration; that the business of Lynne has so developed as to negative any claim that it is a device for securing rebates for United and that there has been a complete failure to prove that any of the forwarding fees received by Lynne were turned over to United, Bimor or any other shipper. In issuing the Certificate of Registration to Lynne the Board's Regulation Office did not approve respondents arrangement, as such, but on the contrary the Regulation Office pointed out in a letter to Lynne dated February 15, 1952 that if there was any '* * * financial tie-up between the two companies, and Lynne handles the forwarding of United Export Clothing Co., it would appear that the forwarding company (Lynne) would be precluded from collecting brokerage on United Export's shipments.' (Ex. 33.) Later there was an exchange of other letters between Lynne and the Regulation Office inquiring further as to Lynne's status. Specifically, Lynne's attorney on March 5, 1952, wrote:

> Despite family relationship, if United Export Clothing Co. Inc. is a shipper or a consignee, Lynne Forwarding, Inc. will have no beneficial interest in any shipment made by or to United Export Clothing Co., Inc. *and except for the fact that the stockholders and officers of the two concerns are related, there*

[9] *Overfield* v. *Pennroad Corporation*, 42 Fed. Supp. 586, 607 (1941). *Fletcher, Cyclopedia Corporations* (Perm. Ed.), Sec. 2097.

*is not now nor will there be a 'financial tie-up' between the two companies.* (Ex. 35.) (Emphasis added.)

"Thereafter on March 10, 1952, the Board's Regulation Office issued Certificate Registration No. 1453. The issuance of the registration number did not authorize the collection of brokerage in violation of the law. In fact Lynne as above shown expressly denied such a violation when it stated '* * * there is not now nor will there be a "financial tie-up" between the two companies.' This March 5th letter provided additional information as to officers:

| *United* | *Lynne* |
|---|---|
| Pres.-Treas.: Max LePack | Pres.-Treas.: Jack Pollack |
| Secretary: Selma LePack | Secretary: Phyllis Pollack |
| Sole stockholder: Max LePack | Sole stockholder: Phyllis Pollack |

"These mere family relationships would not, of themselves, make collection of brokerage by Lynne on United and Bimor shipments illegal. This letter however did not disclose certain material information which was necessary in order to make the statements made, in the light of the circumstance under which they were made, not misleading. The letter failed to show that the first registration dated February 13, 1952, was contrary to the minutes of the corporation and contained false and misleading statements; the existence or relationship of Bimor, the offices held by Jack Pollack in that company, and the ownership thereof; that Max LePack and Jack Pollack had cross-powers so that each, alone, could draw on the bank accounts of each corporation; that Max LePack was identified in the Lynne bank resolution as 'Agent' of the company; that Max LePack had provided one-half the funds used to capitalize Lynne; that Lynne was to be given free office space and telephone service by United; that Lynne was to perform all of United's and Bimor's foreign forwarding services and make no real effort to do an independent forwarding business.

"The evidence is convincing that Max LePack did not intend in the beginning to create Lynne as an independent freight forwarder, but on the contrary his plan was to create a dummy forwarder in order to indirectly receive brokerage payments from carriers on shipments made by United and Bimor and a few others.

"In the light of respondent's failure to reveal the necessary and pertinent facts, as required, to the Regulation Office, it cannot successfully be contended by the respondents that the issuance of the registration number implied approval of the respondents relationships and their transactions. There never was a full disclosure of the true relationships between the individual and corporate respondents prior to the issuance of the Registration Number.

"CONCLUSION

"For the reasons above shown Lynne Forwarding, Inc., is not an independent corporate entity engaged in freight forwarding solely on its own. In effect Lynne is an instrumentality or specialized traffic department used primarily for the shipping activities of Max LePack's United and Bimor companies and these arrangements violate Section 244.13 of General Order 72 which prohibits the collection of brokerage in cases where a forwarder is the shipper or has a beneficial interest in the shipment, or where the forwarder directly or indirectly controls or is controlled by the shipper or by any person having a beneficial interest in the shipment. The registration of Lynne Forwarding, Inc., should be cancelled.

"There remains for final resolution the question as to whether respondents' actions were done wilfully and knowingly for the purpose of accomplishing the results complained of. The evidence shows and the conclusion is reached that respondents resorted to a device or means whereby the individual (with the exception of one) and corporate respondents obtained transportation by water for property at less than the rates or charges which would otherwise be applicable in such a manner as to constitute a rebate of a portion of the ocean freight to the shipper. The term 'knowingly and willfully' as used in section 16 has been held to mean purposely or obstinately; it means gross carelessness, heedlessness, or a callous disregard of the consequences of one's acts, or a plain indifference to the law's requirements. 'Diligent inquiry must be exercised by shippers and by forwarders in order to measure up to the standards set by the Act. Indifference on the part of such persons is tantamount to outright * * * violation.'[10]

"The evidence discloses and supports the conclusion that respondents had competent counsel to advise them; that Max LePack was a man with wide knowledge and business experience, and had more than 25 years experience in the business of exporting used clothing, and that although Jack Pollack was only 28 years old, he was a college graduate and had been working for more than 3 years with his father-in-law, Max LePack in the exporting business before Lynne was formed. They were aware of or at least should have known what they were doing and their acts are willful within the meaning of the statute. Since Lynne, Bimor and United, the corporate respondents, were either owned or controlled by Max LePack and Jack Pollack, these individuals are also responsible for the violations noted.

"[10] *Misclassification of Tissue Paper as Newsprint Paper,* 4 F.M.B. 483, 486 (1954). *Rates, etc., from United States to Philippine Islands,* 2 U.S.M.C. 535, 542 (1941). See *U.S.* v. *Illinois Cent. R. Co.,* 303 U.S. 239–243 (1938).

"There is no record evidence to show that Mrs. Phyllis Pollack had any knowledge of, or took any part in the aforesaid activities. In consequence, this proceeding should be dismissed as to this respondent.

"The record should be forwarded to the Department of Justice for appropriate action with respect to the remaining respondents."

Respondents' exceptions present no arguments or issues not fully considered by us and the examiner, and are without merit.

We find and conclude that:

1. Respondents Max LePack and Jack Pollack substantially owned and/or controlled and dominated respondents Lynne Forwarding, Inc., United Export Clothing Co., Inc., and Bimor Textile Co., Inc.

2. Respondents Lynne Forwarding, Inc., Max LePack, and Jack Pollack, in the capacity of freight forwarders, and respondents United Export Clothing Co., Inc., Bimor Textile Co., Inc., Max LePack, and Jack Pollack, in the capacity of shippers, violated the first paragraph of section 16 of the Shipping Act, 1916, as amended, in that they knowingly and willfully, by an unjust and unfair device or means, obtained or attempted to obtain transportation by water for property at less than the rates or charges which would otherwise be applicable.

3. Respondents Lynne Forwarding, Inc., Max LePack, and Jack Pollack, in the capacity of freight forwarders, being "other person[s] subject to this Act," violated section 16 Second of the 1916 Act,[1] in that they allowed shippers (United and Bimor), by an unjust or unfair device or means, to obtain transportation of property at less than the regular rates and charges then established and enforced by an ocean carrier.

4. Respondents Lynne Forwarding, Inc., Max LePack, and Jack Pollack, in the capacity of freight forwarders, violated General Order 72 by collection of freight brokerage on shipments of United Export Clothing Co., Inc., and Bimor Textile Co., Inc. Freight Forwarder Registration No. 1453, issued to Lynne Forwarding, Inc., will be revoked.

5. There is no showing that respondent Phyllis Pollack had any knowledge of or took part in any activities herein found to violate

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

* * * * * * *

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

section 16 of the 1916 Act or General Order 72. The proceeding will be dismissed as to this respondent.

This matter will be referred to the Department of Justice for appropriate action.

ORDER

At a Session of the FEDERAL MARITIME BOARD, held at its office in Washington, D.C., on the 11th day of August A.D. 1958

No. 820

BROKERAGE ON SHIPMENTS OF OCEAN FREIGHT—MAX LEPACK, JACK POLLACK, PHYLLIS POLLACK, LYNNE FORWARDING, INC., UNITED EXPORT CLOTHING CO., INC., BIMOR TEXTILE COMPANY, INC.

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

*It is ordered*, That respondents Lynne Forwarding, Inc., United Export Clothing Co., Inc., Bimor Textile Co., Inc., Max LePack, and Jack Pollack be, and they are hereby, notified and required to abstain from activities herein found to be in violation of section 16 of the Shipping Act, 1916, as amended, and in violation of the Board's General Order 72; and

*It is further ordered*, That the foregoing respondents, pursuant to Rule 1(c) of the Board's Rules of Practice and Procedure (46 C.F.R. 201.3), notify the Board within fifteen (15) days from the date of service hereof whether they have complied with this order, and if so, the manner in which compliance has been made; and

*It is further ordered*, That Freight Forwarder Registration No. 1453, issued to Lynne Forwarding, Inc., be, and it is hereby, revoked; and

*It is further ordered*, That this proceeding be, and it is hereby, dismissed as to respondent Phyllis Pollack.

By the Board.

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

# 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 July 12, 1958. Decided August 12, 1958**

Isbrandtsen Company, Inc., is operating an existing service in the eastbound round-the-world service, save the west coast of Italy, Philippine Islands, Los Angeles, and New Haven, to the extent of 24 sailings annually, within the meaning of section 605(c) of the Merchant Marine Act, 1936, as amended.

The effect of granting an operating-differential subsidy contract to Isbrandtsen Company, Inc., for the eastbound round-the-world service, to the extent described in paragraph 1, above, would not be to give undue advantage or be unduly prejudicial as between citizens of the United States in the operation of vessels in competitive services, routes, or lines.

The present service provided by vessels of United States registry on the services, routes, or lines encompassed by the eastbound round-the-world service is inadequate within the meaning of section 605(c) of the Merchant Marine Act, 1936, as amended, and in the accomplishment of the purposes and policy of the Act additional vessels of United States registry should be operated thereon.

Section 605(c) of the Merchant Marine Act, 1936, as amended, does not interpose a bar to the granting of an operating-differential subsidy contract to Isbrandtsen Company, Inc., for its proposed operation of cargo vessels with limited passenger accommodations in the eastbound round-the-world service, except as to the Azores.

*Modified, 5 F.M.B. 483.

**The continuation by Isbrandtsen Company, Inc., of (1) its eastbound intercoastal service from California to Norfolk and Baltimore, and (2) its eastbound service from California to Puerto Rico, when and if subsidy is awarded, found not to constitute unfair competition to any person, firm, or corporation engaged exclusively in the domestic trade, or to be prejudicial to the objects and policy of the Merchant Marine Act, 1936, as amended.**

*John J. O'Connor*, *Richard W. Kurrus*, and *Edward P. Cotter* for Isbrandtsen Company, Inc.

*Robert E. Kline, Jr.*, *Donald D. Geary*, and *Ronald A. Capone* for Farrell Lines Incorporated.

*Carl S. Rowe*, *Frank B. Stone*, and *Eliot H. Lumbard* for American Export Lines, Inc.

*Sterling F. Stoudenmire, Jr.*, for Waterman Steamship Corporation and Pan-Atlantic Steamship Corporation.

*Warner W. Gardner* and *Vern Countryman* for American President Lines, Ltd.

*Alvin J. Rockwell* and *Willis R. Deming* for Matson Orient Line, Inc.

*Odell Kominers*, *Mark P. Schlefer*, and *J. Alton Boyer* for Bull-Insular Line, Inc., A. H. Bull Steamship Co., Marine Transport Lines, Inc., Luckenbach Steamship Company, Inc., Pope & Talbot, Inc., and Weyerhaeuser Steamship Company.

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

*Robert E. Mitchell*, *Edward Aptaker*, 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 is a proceeding under section 605(c) of the Merchant Marine Act, 1936, as amended (the Act), to determine whether the section interposes a bar to the award of an operating-differential subsidy contract to Isbrandtsen Company, Inc. (Isbrandtsen), and under section 805(a) of the Act to determine whether written permission should be granted to Isbrandtsen to continue its domestic coastwise and intercoastal services in the event subsidy is awarded.

The subsidy application, filed on July 20, 1955, seeks (1) subsidy for a range from 24 to 29 sailings fortnightly with dry-cargo vessels and with limited passenger accommodations in a round-the-world eastbound service from U.S. North Atlantic ports north of Hatteras to the Azores, Morocco (Casablanca), Mediterranean Spain (optional

call at Spanish Atlantic port), Mediterranean France, west coast of Italy, Greece, eastern Mediterranean and Suez Canal ports, ports on the Red Sea, West Pakistan, India, Ceylon, Singapore, Straits Settlements-Malaya-Indonesia, Thailand, French Indochina, Philippines, Hong Kong, Formosa, Chinese ports when and if open to traffic, Korea, Japan, and thence return to U.S. North Atlantic ports via California, Panama Canal ports, and Puerto Rico, and (2) written permission under section 805(a) of the Act to continue certain domestic coastwise and intercoastal services (specifically referred to *infra*).

Interveners appearing in opposition to the subsidy application are Farrell Lines Incorporated (Farrell), American Export Lines, Inc. (Export), American President Lines, Ltd., Matson Orient Line, Inc., Pacific Transport Lines, Inc., and States Steamship Company.[1]

Interveners appearing in opposition to the continuance of domestic operations are Bull-Insular Line, Inc., and A. H. Bull Steamship Co. (collectively Bull), Luckenbach Steamship Company, Inc. (Luckenbach), Marine Transport Lines, Inc. (Marine Transport), Pope & Talbot, Inc. (Pope & Talbot), Weyerhaeuser Steamship Company (Weyerhaeuser), Trailer Marine Transportation, Inc. (TMT), Waterman Steamship Corporation (Waterman), and Pan-Atlantic Steamship Corporation (Pan-Atlantic).[2]

Hearings were held before an examiner, who issued a recommended decision and an initial decision. Exceptions and replies thereto were filed, and oral argument before the Board was held on June 12, 1958.

DOCKET No. S–60

The eastbound round-the-world service has been determined an essential foreign trade route by the Maritime Administrator pursuant to section 211 of the Act.[3]

Isbrandtsen, which employs both U.S.-flag and foreign-flag vessels in its world-wide tramping operations, has employed 10 U.S.-flag vessels in its eastbound round-the-world service since its inception in mid-1949,[4] on a regular fortnightly service except for certain delays and interruptions. It offers the only U.S.-flag service which comprehensively serves the entire route. From 1951 through 1954, Isbrandtsen averaged 24 sailings per year, with a range of from 21 to 26. In 1955, 23 sailings were scheduled and through July 20 (application date), 13 had commenced.

[1] Of these interveners only Farrell and Export actively participated in the proceedings.

[2] Weyerhaeuser, Pope & Talbot, Waterman, Pan-Atlantic, and TMT did not actively participate in the hearings.

[3] The section -211 determination is set forth in appendix A.

[4] Foreign-flag vessels have been used to complete voyages on two occasions during emergencies.

The port coverage provided by applicant in its round-the-world service between 1951 and 1955 is set forth in appendix B.

The regular itinerary of Isbrandtsen's round-the-world vessels, on a fortnightly schedule with a 141-day turnaround,[5] has been New York, Genoa,[6] Alexandria, Jedda, Karachi, Bombay, Colombo, Singapore, Manila,[7] Hong Kong, Keelung (on alternate voyages), Kobe, Nagoya, Shimizu, Yokohama, San Francisco, Los Angeles,[8] San Juan (Puerto Rico), Norfolk, Baltimore, Philadelphia, and New York.

At North Atlantic ports Isbrandtsen has called chiefly at New York, Philadelphia, Baltimore, and Norfolk. During the 1951–1955 period there have been a few calls to other Atlantic ports: Wilmington, Delaware, 9; Boston, 3; New Haven,[9] 11. Regular calls have been made at San Francisco. Every voyage calls at Puerto Rico inbound with foreign cargoes, averaging 300–400 tons from Hong Kong and Japan.

Eleven calls were made at the Azores during the 1951–1955 period; they were not advertised and carried only cargo of Military Sea Transportation Service (MSTS). Three voyages called at a Spanish Mediterranean port in 1955, but since shippers to Spain sometimes require discharge at a Spanish Atlantic port, Isbrandtsen seeks authority to serve both areas.

In the Mediterranean area, Isbrandtsen has called chiefly at Casablanca, Genoa, Leghorn, Beirut, and Alexandria. Sporadically, calls have been made at Barcelona, Toulon, Brindisi, Naples, Sfax, Piraeus, Derince, Tripoli, Izmir, Istanbul, Port Said, and Iskenderun.

In southwest Asia, Isbrandtsen principally has served Karachi, Bombay, Colombo, and Singapore. Other ports served include Banda-Shahpur, Damau, and Madras.

The principal ports served in the Far East are Yokohama, Shimizu, Nagoya, Kobe, Keelung, Hong Kong, and Manila. Prior to July 1954, Isbrandtsen carried principally sugar from the Philippines, but then lost this cargo. It has not served the area since that time although it proposes to serve the area with the aid of subsidy.

Little outbound cargoes are carried beyond Singapore, where the loading of inbound cargoes commences.

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[5] If subsidized Isbandtsen proposes to replace its fleet with modern 18-knot vessels which will permit a turnaround time of 119–126 days.

[6] There has been no service to Genoa since early 1955 due to unfavorable port conditions, but Isbandtsen expects to resume calls there in the near future and retains an agent there.

[7] Service from the Philippines was suspended in 1954.

[8] Service to Los Angeles has been suspended, due to local labor difficulties; only one call has been made there since 1954, but Isbandtsen states that it intends to resume service there when practicable.

[9] Service to New Haven has been suspended due to poor port facilities.

Applicant maintains agencies in about 20 cities in the United States and in over 60 foreign ports. Its sailing schedules are published and distributed to agents and to about 18,000 shippers, forwarders, and brokers.

In his recommended decision the examiner found (1) Isbrandtsen is operating an existing service in the eastbound round-the-world service, except as to the Philippines; (2) the award of an operating-differential subsidy contract to Isbrandtsen would not result in undue advantage or undue prejudice; and (3) section 605(c) of the Act does not interpose a bar to the award of subsidy, except as to the Philippines.

Intervener Farrell serves the Azores on its subsidized sailings to South Africa. It does not object to Isbrandtsen carrying MSTS cargoes to the Azores upon the request of MSTS, but otherwise opposes the application in so far as it refers to the Azores. Farrell contends that (1) these islands are not included in the Administrator's Essential Trade Route description of the eastbound round-the-world service since they are not specifically named, and since they are about 1,000 miles west of Gibraltar they cannot be considered as "Atlantic approaches" within the meaning of the Administrator's determination; (2) Isbrandtsen does not maintain an "existing service" to the Azores within the meaning of the Act; and (3) the record shows that the service already provided to the Azores is adequate.

Farrell called at the Azores 10 times in 1953, 8 in 1954, and 11 in 1955. It has advertised its service but has carried only MSTS cargoes to date. Increasing quantities of commercial cargo have been carried to the other Atlantic islands by Farrell, which provides the only reefer service to the Azores.

Intervener Export operates four services which compete with part of the route covered by this application: a Mediterranean freight service [10] on Trade Route 10, an Alexandria express service [11] on Trade Route 10, an India service [12] on Trade Route 18, and a passenger service [13] on Trade Route 10. It is Export's position that (1) Isbrandtsen is not now operating *the* service for which it seeks subsidy, hence it has an application for a service in addition to existing service and its application must stand or fall, initially, upon the issue of adequacy; (2) the service already provided by U.S.-flag vessels is ade-

[10] 88–104 sailings between U.S. North Atlantic ports and ports in the Mediterranean, Black, Aegean, and Adriatic Seas, and Atlantic ports from the northern boundary of Portugal to the southern boundary of French Morocco, with the Azores and Egypt as privileged.

[11] 24–27 sailings with the four Aces: U.S. North Atlantic to French Mediterranean, west coast of Italy, Egypt, Palestine, Israel, Syria, Lebanon, and Greece.

[12] 22–26 sailings between U.S. Atlantic ports and Gulf of Suez, Red Sea, Gulf of Aden, Pakistan, India, Ceylon, and Burma.

[13] 24–30 sailings to Naples, Genoa, and Cannes with the *Independence* and *Constitution*.

quate, hence section 605(c) bars subsidy; (3) the granting of subsidy to Isbrandtsen with respect to the broad port coverage requested in the Mediterranean, Mideast, and India would result in undue prejudice to Export; and (4) the grant of subsidy would not be consistent with the purposes and policy of the Act in that the application contemplates a service akin to a tramp operation.

Public Counsel argue that (1) Isbrandtsen has an existing service with a minimum of 24 and a maximum of 29 sailings: regular calls at San Francisco, Los Angeles, Puerto Rico, New York, Philadelphia, Baltimore, Norfolk, Genoa, Beirut, Alexandria, Jeddah, Karachi, Bombay, Singapore, Hong Kong, Kobe, Nagoya, Shimizu, Yokohama, and Manila; calls on alternate sailings at Colombo and Keelung; occasional calls at New Haven, Cadiz, Leghorn, Naples, Piraeus, Port Said, Port Sudan, Djibouti, Madras, and Iloilo; (2) the award of subsidy would not result in undue advantage or undue prejudice; (3) service to the Azores should be permitted only on an *ad hoc* basis; and (4) it is necessary to enter into a subsidy contract covering the eastbound round-the-world service to provide adequate service by vessels of U.S. registry.

APL, States, and PTL operate somewhat competing services on Trade Routes 29, 30, 12, 17, and westbound round the world. These interveners took no part in the hearings.

## Discussion and Conclusions

*Existing service.* In determining whether Isbrandtsen is operating an "existing service" within the meaning of section 605(c), we must look to the entire scope of the applicant's operation, including vessels and sailings, the route covered, the scope, regularity, and probable permanency of the operations. *Pacific Transport Lines, Inc.—Subsidy, Route 29*, 4 F.M.B. 7 (1952). Isbrandtsen seeks subsidy on 26 annual sailings, with provisions for a minimum of 24 and a maximum of 29. Between 1951 and 1955, Isbrandtsen made the following number of sailings in its eastbound round-the-world service:

| *1951* | *1952* | *1953* | *1954* | *1955* |
|---|---|---|---|---|
| 21 | 25 | 26 | 24 | 23 |

To qualify as an existing operator with reference to the ports covered in its application, Isbrandtsen's service, at the time its application was filed, must have been reasonably in general accord with its proposed subsidized service. *States Steamship Co.—Subsidy, Pacific Coast/Far East*, 5 F.M.B. 304 (1957). It is clear from this record that the domestic ports of San Francisco, New York, Philadel-

phia, Baltimore, and Norfolk, and Puerto Rico have been provided with regular service by Isbrandtsen.

There can be no question concerning the Azores. Isbrandtsen has carried only small parcels of MSTS cargoes to the Azores, and has averaged but two calls per year, in an irregular pattern. This record will not support a finding that applicant has operated an existing service to the Azores.

Service to Genoa was suspended by Isbrandtsen in 1955, and the record indicates that it has not been resumed. Regardless of the wisdom of Isbrandtsen's decision to interrupt service to this port, we feel that the service has been abandoned and applicant does not qualify as an "existing operator" in so far as service to Genoa is concerned. This finding is consistent with our finding in *States Steamship Company, supra;* although traditionally associated with the Northwest transpacific trade, States was not serving that trade at the time its application was filed and we found that it was not an "existing operator" with respect thereto.

We reach the same conclusion with respect to applicant's inbound service from the Philippines. Applicant has not served the Philippines since 1954, and its intention to resume service at some later date cannot alter the fact that at the time of its application it was not providing an "existing service." Nor can the ports of Los Angeles or New Haven be termed as within "existing service."

On this record, we find that Isbrandtsen has an existing service to the extent of 24 annual sailings covering (1) regular calls at San Francisco, Puerto Rico, New York, Philadelphia, Baltimore, Norfolk, Beirut, Alexandria, Jeddah, Karachi, Bombay, Singapore, Hong Kong, Kobe, Nagoya, Shimizu, and Yokohama; (2) irregular calls at Colombo, Keelung, Casablanca, and Djibouti; and (3) occasional calls at Naples, Piraeus, Derince, Tripoli, Port Said, Port Sudan, and Madras.

*Undue advantage and undue prejudice.* It is well settled that the issue of advantage and prejudice arises only in connection with "existing service," and then, if proved, interposes a bar to the award of subsidy for such existing service only in the event that the record dictates a finding that the service already provided by other U.S.-flag vessels is adequate. The burden of proof on this issue rests upon the party claiming it, and a subsidized operator has a greater burden of proof than does a nonsubsidized operator. *Lykes Bros. S.S. Co., Inc.—Increased Sailings, Route 22,* 4 F.M.B. 455 (1954); *Pacific Transport Lines, Inc., supra.* Export's contention that it would be unduly prejudiced by an award of subsidy to Isbrandtsen as to ports

and areas not falling within Isbrandtsen's "existing service" is untenable. As to its claim of undue prejudice resulting from the subsidy of Isbrandtsen for its "existing service," suffice it to say that Export has not proved its claim on this record. Export enjoys a rather broad latitude in port coverage on Trade Routes 10 and 18. The argument that Export will be unduly prejudiced by Isbrandtsen carrying only outbound cargoes while Export must carry both out and inbound, likewise is without merit. Nor would the subsidization of Isbrandtsen foreclose the more lucrative cargoes to Export on Trade Routes 10 and 18: the frequent and comprehensive service offered by Export under its subsidy contracts is sufficient protection to offset any advantage Isbrandtsen would derive from subsidy.

On this record, we find that the award of subsidy to Isbrandtsen covering its "existing service" as hereinabove described would neither advantage Isbrandtsen unduly nor prejudice Export unduly.

*Adequacy.* Whether section 605(c) interposes a bar to the award of subsidy to Isbrandtsen covering service to Genoa and the Philippines as well as to other areas sought in the application, where Isbrandtsen has not provided an "existing service," depends upon whether the "service already provided by vessels of United States registry * * * is inadequate and that in the accomplishment of the purposes and policy of this Act additional vessels should be operated thereon." As in *American President Lines—Calls, Round-the-World Service*, 4 F.M.B. 681 (1955), the outbound and inbound trades will be treated separately since the inbound traffic situation is different from the outbound.

From California and North Atlantic ports to all ports along the route which Isbrandtsen proposes to serve, to and including Malaya—the farthest point eastbound to which outbound cargoes are carried—the record indicates that service already provided by U.S.-flag vessels is inadequate. The following table reflects the participation of both Isbrandtsen and all U.S.-flag lines in the outbound liner commercial movement in these trades:

| | Total tons (thousands) | Isbrandtsen (percent) | U.S.-flag (percent) |
|---|---|---|---|
| 1951 | 1, 874. 8 | 4 | 47 |
| 1952 | 1, 518. 8 | 5 | 49 |
| 1953 | 1, 384. 8 | 7 | 50 |
| 1954 | 1, 392. 9 | 6 | 42 |
| 1955 | 1, 743. 3 | 6 | 44 |

Only in 1953 did U.S.-flag liners capture 50 percent of this movement, that being the year in which Isbrandtsen reached its highest percentage of participation.

As to the outbound liner commercial movement to the west coast of Italy, particularly Genoa, American-flag participation exceeded 50 percent only in 1952 (51 percent). In both 1954 and 1955, in excess of 500,000 tons moved outbound to the west coast of Italy (representing a substantial increase over 1952), and in each of these years U.S.-flag liners carried a total of 28 percent and 29 percent, respectively, including the 3 percent and 1 percent carryings of Isbrandtsen.

Based upon the foregoing figures and the record as a whole, which indicates that the level of outbound liner cargoes will increase substantially in the near future due to the expanding economy of the countries along the route and the continuing aid these areas will receive from the United States Government, we find that the outbound leg of applicant's eastbound round-the-world service is inadequately served.

From and including Malaya, liner commercial cargo offerings have steadily increased since 1951, from a total of 2,160,000 tons in 1951 to 2,977,900 tons in 1955. The increased cargo offerings notwithstanding, U.S.-flag participation has skidded from 46 percent in 1951 to 28 percent in 1954 and to 32 percent in 1955. The participation of Isbrandtsen and all U.S.-flag lines in the inbound liner commercial movement to both California and North Atlantic ports is shown in the following table:

| | Total tons (thousands) | Isbrandtsen (percent) | U.S.-flag (percent) |
|---|---|---|---|
| 1951 | 2, 160. 1 | 4 | 46 |
| 1952 | 2, 430. 3 | 4 | 36 |
| 1953 | 2, 733. 5 | 3 | 30 |
| 1954 | 2, 740. 9 | 3 | 28 |
| 1955 | 2. 977. 9 | 1 | 32 |

The inbound movement to North Atlantic ports is almost three times as great as the movement to California ports, yet U.S.-flag participation to the North Atlantic has been no higher than 41 percent in 1951 and has been as low as 18 percent in 1954. This decline is all the more disturbing when it is realized that, whereas liner commercial cargoes have increased in this segment of the trade almost 50 percent between 1951 and 1955 (from 1,521,400 tons to 2,194,700 tons), American-flag carryings have actually decreased from 620,000 tons in 1951 to 433,600 tons in 1955. As to the Philippines

particularly, it is noted that cargo offerings have increased since 1950, and the record shows that U.S.-flag liner participation in the trade from Manila has declined from 53 percent in 1951 to 28 percent in 1954.

Although there is overtonnaging inbound, caused primarily by Japanese vessels, nevertheless there is evidence of record that the present capacity of U.S.-flag vessels operating in this trade is insufficient to carry a reasonable portion of the inbound liner commercial offerings. We note also that U.S.-flag Mariners have enjoyed considerable success in capturing inbound cargoes.

Overtonnaging notwithstanding, the low percentage of carryings by U.S.-flag vessels inbound, the increasing cargo offerings, particularly to North Atlantic ports, and the ability of fast modern vessels to attract additional cargoes, lead to the finding that U.S.-flag vessels may reasonably be expected to increase their carryings in this trade. We find, therefore, that the inbound trade is inadequately served.

The Azores have not been deemed part of an essential trade route by the Maritime Administrator. On this record there has been no showing of inadequacy of U.S.-flag service to the Azores, and in view of our prior finding that Isbrandtsen does not conduct an "existing service" to the Azores, section 605(c) bars a subsidy contract with respect thereto.

On the basis of this record as a whole, we find that the eastbound round-the-world service, except as to the Azores, is inadequately served by vessels of United States registry, and that in the accomplishment of the purposes and policy of the Act additional vessels should be operated thereon.

Our conclusions herein are not tantamount, of course, to a finding that Isbrandtsen is entitled to a subsidy contract, for such a conclusion can be reached only after the necessary administrative study and action required under section 601 as well as other sections of the Act. As to the issues raised under section 605(c) of the Act we conclude:

1. That Isbrandtsen, on its eastbound round-the-world service, is conducting an existing service of 24 sailings annually, (a) with regular calls at San Francisco, Puerto Rico, New York, Philadelphia, Baltimore, Norfolk, Beirut, Alexandria, Jeddah, Karachi, Bombay, Singapore, Hong Kong, Kobe, Nagoya, Shimizu, and Yokohama, (b) with irregular calls at Colombo, Keelung, Casablanca, and Djibouti, and (c) occasional calls at Piraeus, Derince, Tripoli, Port Said, Port Sudan, and Madras,

2. That award of subsidy to Isbrandtsen for such existing service would not result in undue advantage or undue prejudice as between

citizens of the United States in the operation of vessels in competitive services, routes, or lines;

3. That the service already provided by vessels of United States registry over the services, routes, or lines comprising the eastbound round-the-world service, is inadequate within the meaning of section 605(c) of the Act, and that in the accomplishment of the purposes and policy of the Act additional vessels of United States registry should be operated thereon;

4. That the service already provided by vessels of United States registry to the Azores is not shown to be inadequate, and additional vessels of United States registry are not required to be operated to the Azores;

5. That section 605(c) of the Act does not interpose a bar to the award of a subsidy contract to Isbrandtsen for its proposed eastbound round-the-world service; and

6. That section 605(c) of the Act does interpose a bar to the award of a subsidy contract to Isbrandtsen for its proposed service to the Azores.

DOCKET NO. S-60 (SUB. NO. 1)

Under section 805(a) of the Act, Isbrandtsen, in the event subsidy is awarded, seeks the written permission of the Board to continue certain domestic operations: (1) an eastbound intercoastal service from California ports to Atlantic coast ports; (2) an eastbound service from California ports to ports in Puerto Rico; (3) a service from ports in Puerto Rico to North Atlantic ports (the above three services to be conducted with its eastbound round-the-world vessels); (4) a bulk-trade service carrying lumber and wood pulp from the Pacific Northwest to North Atlantic ports; and (5) a bulk-trade service principally from ports in Texas and ports on the Gulf coast of Florida to North Atlantic ports, and one for "cross-Gulf" trading between Gulf ports in Texas and Florida.

Permission cannot be granted if it is found that the operation of the domestic services would result in unfair competition to any person operating exclusively in the domestic trades, or if the granting of the permission would be prejudicial to the objects and policy of the Act.

After discharging inbound cargoes on the Pacific coast, and after loading outbound foreign cargoes there, Isbrandtsen has had considerable free space available for the movement of domestic cargoes to Puerto Rico and North Atlantic ports, and upon discharge of inbound foreign and domestic cargoes at Puerto Rico, free space has been available for the carriage of domestic cargoes to North Atlantic ports. As an unsubsidized operator, and with the permission of the

Interstate Commerce Commission where required, Isbrandtsen has carried domestic cargoes in these trades.

Isbrandtsen proposes to engage in the Pacific Northwest lumber and/or wood pulp trades with owned or chartered vessels when vessels are available for charter on the Pacific coast and/or when its own vessels return to the Pacific Northwest from the Orient in ballast. In 1954 Isbrandtsen moved a small quantity of lumber from the Northwest with chartered vessels. Since that time, it has not participated in this trade with either owned or chartered vessels.

Applicant has engaged in the bulk-cargo trades between Gulf and Atlantic coast ports since 1950, contracts with Davison Chemical Company and Freeport Sulphur Company constituting about 90 percent of its carryings. The chief commodities moved are sulphur and phosphate rock, but coal, grain, ore, potash, ammonium sulphate, and gypsum also have been moved. The record demonstrates that the sulphur movement is declining. Mexican sulphur has replaced Gulf sulphur to a great extent, and North Atlantic oil refineries are now producing and marketing sulphur. Vessels employed by Isbrandtsen in these trades have carried bauxite from Jamaica to Gulf ports on occasion.

In his recommended decision the examiner found that the granting to Isbrandtsen of written permission under section 805(a) to operate (1) in the California-North Atlantic, (2) California-Puerto Rico, and (3) Puerto Rico-North Atlantic services would not result in unfair competition to any person, firm, or corporation operating exclusively in the domestic service, and would not be prejudicial to the objects and policy of the Act; as to the bulk movement of lumber and/or wood pulp from Pacific Northwest ports to North Atlantic ports, he found that the granting of the permission would result in unfair competition to carriers operating exclusively in the intercoastal service. In his later initial decision, the examiner concluded that the interveners opposing the cross-Gulf and Gulf to North Atlantic bulk operations of Isbrandtsen were not operating exclusively domestic services, hence they lacked the standing to claim unfair competition, and that the record does not indicate that the granting of the permission would be prejudicial to the objects and policy of the Act.

Exceptions and replies were filed and oral argument thereon was held before the Board.

*California to North Atlantic.* Luckenbach, Pope & Talbot, and Weyerhaeuser operate exclusively domestic services in this trade. Only Luckenbach has actively opposed the application, contending

that the grant of permission to Isbrandtsen would result in unfair competition to Luckenbach and would be prejudicial to the objects of the Act. Luckenbach further contends that the provisions of section 605(a) interpose an absolute bar to the carriage by Isbrandtsen of intercoastal cargo on subsidized vessels in its eastbound round-the-world service.

Luckenbach owns 16 vessels, 10 of which are regularly employed intercoastally, and on the North Atlantic coast serves three ports in competition with Isbrandtsen—Philadelphia, New York, and Boston. Although it also charters out vessels for use in foreign trade, it provides an exclusively intercoastal service, and hence is entitled to statutory protection from unfair competition. *American President Lines, Ltd.—Subsidy, Route 17*, 4 F.M.B. 488, 504 (1954). Luckenbach has long been associated with the intercoastal trade, and Isbrandtsen's chief witness characterized its operations as "efficient", and further agreed that Luckenbach adequately serves the ports at which it calls. Although Luckenbach has had comparatively little free space eastbound (most of its sailings averaging less than 5 percent), its intercoastal operation has been operating at a loss—over $1,250,000 in 1955. It does realize profits, however, from its chartering out of six vessels for foreign trading. Of these six, Luckenbach asserts that four would be employed intercoastally if cargo were available.

Isbrandtsen's intercoastal carryings have been small (2% of the total in 1954 and less than 7% in 1955), but nevertheless increasing. As the following table shows, Isbrandtsen's gains have been at ports not served by Luckenbach:

| | New York | Philadelphia | Baltimore | Norfolk | New Haven |
|---|---|---|---|---|---|
| 1954 | 2, 089 | 445 | 1, 012 | 392 | 14, 441 |
| 1955 | 7, 085 | 3, 031 | 23, 530 | 6, 435 | 8, 248 |
| 1956 [1] | 4, 736 | 1, 802 | 17, 013 | 5, 542 | ---------- |

[1] Through September 2, 1956.

Although Luckenbach has had little free space available, it is sufficient to accommodate the relatively small cargoes carried by Isbrandtsen to ports served by Luckenbach. The denial of section 805(a) permission for Isbrandtsen to serve Atlantic coast ports north of Baltimore intercoastally would be consonant with our pronouncement in *American President Lines, Ltd.*, *supra*, at p. 504:

> And in our judgment those operators who provide exclusively intercoastal services are entitled, as against primarily offshore operators such as APL, to whatever intercoastal cargoes they can carry.

On this record it is found that intercoastal service by Isbrandtsen to ports north of Baltimore, in the event subsidy is awarded, would result in unfair competition to Luckenbach, a domestic carrier entitled to protection from unfair competition, and would be prejudicial to the objects and policy of the Act.

The record discloses that no exclusively domestic operator carried general cargo intercoastally eastbound to Norfolk and Baltimore. It cannot be found, therefore, that Isbrandtsen's service to these ports, as a subsidized operator, would result in the unfair competition proscribed by section 805(a). Further, it cannot be found, at this time, that the granting of the permission to serve these two ports would be prejudicial to the objects and policy of the Act. The permission granted, like all grants of section 805(a) permission, save in instances where grandfather rights are concerned, may be withdrawn, however, where changed conditions so warrant.

*California-Puerto Rico.* In the California-Puerto Rico trade, served by all of Isbrandtsen's round-the-world vessels, applicant has carried 36,000 tons or 27 percent of the movement, and 98,000 tons or 56 percent of the movement, in 1954 and 1955, respectively. Waterman operates in this service but has not objected to the grant of written permission to Isbrandtsen. On this record we find that the continuation of this service by Isbrandtsen, as a subsidized operator, would not result in unfair competition to any exclusively domestic operator, and that it would not be prejudicial to the objects and policy of the Act.

*Puerto Rico-North Atlantic.* Bull operates 13 vessels in this trade, six of them in a liner service. Bull has two distinct liner services to Puerto Rico: one from Philadelphia and Baltimore, and the other from New York. Some of the sailings from New York include calls at the Dominican Republic. As Bull's service between Philadelphia and Baltimore and Puerto Rico is separate and distinct from its New York service, and since the former is exclusively domestic, Bull is entitled to protection from unfair competition as to that service. *American President Lines, Ltd., supra; Pacific Far East Lines, Inc.—Sec. 805(a) Calls at Hawaii*, 5 F.M.B.-M.A. 287 (1957). The preponderance of trade between North Atlantic ports and Puerto Rico is outbound, and on Bull's inbound sailings there is generally 60 percent–70 percent free space on each vessel. Isbrandtsen's carryings to the ports served by Bull, in tons, are as follows:

| | Baltimore | Philadelphia | New York |
|---|---|---|---|
| 1954 | 9 | 137 | 98 |
| 1955 | 25 | 42 | 178 |
| 1956 [1] | 151 | 13 | 135 |

[1] Through September 2, 1956.

It is obvious that Isbrandtsen's carryings could easily have been made by Bull and that they constitute a relatively insignificant fraction of Isbrandtsen's total carryings in the round-the-world service. Since Bull is an exclusively domestic operator as to its Philadelphia-Baltimore service to Puerto Rico, and since it has the capacity to accommodate the cargo carried by Isbrandtsen, we conclude that the continued participation in the Puerto Rico to Philadelphia-Baltimore movement by Isbrandtsen, as a subsidized operator, would result in unfair competition to Bull.

As previously noted, on some scheduled sailings from New York, Bull vessels call also at the Dominican Republic. Hence, Bull is not an exclusively domestic operator between New York and Puerto Rico, and Bull's need for Isbrandtsen's cargoes and its ability to handle them are not sufficient to establish unfair competition and to bar the grant of the permission. But if the carriage of such cargoes by Isbrandtsen prove to be prejudicial to the objects and policy of the Act, section 805(a) permission would not be granted. That is the case presented here.

It is clear that the carryings of Isbrandtsen from Puerto Rico to New York have been negligible and that they are not needed by Isbrandtsen to constitute a successful round-the-world service. There is no question but that Bull would and could accommodate the cargoes carried by Isbrandtsen without impairing the requirements of the Puerto Rican shippers. Bull's status in this trade, while not that of an exclusively domestic operator, is clearly that of a primarily domestic one, it being apparent that its calls at the Dominican Republic have been merely incidental to its Puerto Rican service.

In passing the Act, particularly sections 506, 605(a), and 805(a), Congress manifested a real concern for the plight of domestic operators' competition from subsidized operators. In *Am. Pres. Lines, Ltd.—Unsubsidized Operation, Route 17*, 3 F.M.B.-M.A. 457 (1951), the Board stated at p. 470:

> The great importance to our merchant marine of its domestic fleet * * * should prompt us to resolve all doubts against activities of subsidized

companies whose operations might tend to impede the development of domestic transportation by sea.

In light of the record presented here, we are of the view that the continuation of this service by Isbrandtsen, with subsidy, would "tend to impede the development of domestic transportation by sea" in the trade, and the grant of permission would be prejudicial to the objects and policy of the Act. Therefore, written permission for Isbrandtsen to engage in the domestic commerce between Puerto Rico and North Atlantic ports, in the event Isbrandtsen is subsidized, will not be granted.

*Lumber and wood pulp trade.* The proposal to engage in this trade with unsubsidized vessels contemplates a very limited operation at times when it would be most advantageous to Isbrandtsen, i.e., when vessels are available for charter on the west coast or when a vessel is returning from the Orient in ballast. Pope & Talbot carries lumber and Luckenbach carries wood pulp in this trade. There has been no showing, on this record, that the service of exclusively domestic operators in this trade is inadequate. The service proposed by Isbrandtsen would take cargoes which the exclusively intercoastal operators need, have the capacity to carry, and to which they are fundamentally entitled. In short, it would result in unfair competition to carriers operating exclusively in the coastwise or intercoastal service, and would be prejudicial to the objects and policy of the Act. The permission sought in this trade therefore will not be granted.

*Gulf-North Atlantic bulk trades.* Neither Marine Transport nor Bull qualifies, in this trade, as exclusively domestic operators entitled to absolute protection from unfair competition from subsidized companies because both make calls at Carribean ports and there lift cargoes for Gulf ports. Thus, in determining whether the permission requested should be granted depends upon whether the continued operation would be prejudicial to the objects and policy of the Act.

Isbrandtsen has engaged in this trade since 1950 only, whereas interveners, who are primarily engaged in the domestic services, have been in the trade at least forty years. Between April 16, 1954, and November 30, 1955, Isbrandtsen completely neglected this trade. Its principal shippers have been served by interveners also, apparently satisfactorily. The record dictates the finding that the trade could be adequately served by interveners without the contribution of Isbrandtsen, particularly in view of the diminishing sulphur movement. Isbrandtsen's carryings have been quite substantial, and like interveners, its vessels engaged in this trade have lifted cargoes from

the Carribean to the Gulf. In view of the foregoing analysis we feel that the granting of the requested permission would be prejudicial to the objects and policy of the Act.

## Conclusions

The continuation of the following services by Isbrandtsen, in the event subsidy is awarded, is hereby found not to constitute unfair competition to any person, firm, or corporation engaged exclusively in the domestic trades, and is found not to be prejudicial to the objects and policy of the Act:

1. Eastbound from California to Norfolk and Baltimore, in conjunction with the eastbound round-the world service; and

2. Eastbound from California to Puerto Rico in conjunction with the eastbound round-the-world service.

When and if Isbrandtsen commences subsidized operations, in the absence of any later action by the Board, this will serve as written permission under section 805(a) of the Act for Isbrandtsen to continue (1) its eastbound service from California to Norfolk and Baltimore, and (2) its eastbound service from California to Puerto Rico, both in conjunction with the eastbound round-the-world service.

Contentions and arguments of the parties not discussed herein have been considered and have been found not to be related to material issues or supported by the evidence.

## APPENDIX A

### EASTBOUND ROUND-THE-WORLD SERVICE

1. From United States North Atlantic ports to ports in the Mediterranean (including Atlantic approaches), southwest Asia (Suez to Burma, inclusive, and in Africa on the Red Sea and Gulf of Aden), Indonesia-Malaya (including Singapore), and the Far East (Japan, Formosa, the Philippines, and the continent of Asia from Union of Soviet Socialist Republics to Siam, inclusive), returning to California ports and via the Panama Canal to United States North Atlantic ports. Combination ships will call at Havana, Cuba, and freight ships may call at Puerto Rico.

2. United States-flag sailing requirements are approximately three to four sailings monthly, including one sailing monthly with combination ships, all serving the United States and foreign areas specified in paragraph No. 1 hereof; such sailings to complement U.S.-flag liner sailings on Trade Routes Nos. 4, 10, 12, 17, 18, 28, and 29. (20 F.R. 4373, June 22, 1955; 20 F.R. 7707, October 13, 1955.)

APPENDIX B

| Port | 1951 | 1952 | 1953 | 1954 | 1955 |
|---|---|---|---|---|---|
| Casablanca | 0 | 2 | 12 | 8 | 1 |
| Barcelona | 0 | 0 | 0 | 0 | 1 |
| Toulon | 0 | 1 | 0 | 0 | 1 |
| Genoa | 16 | 25 | 26 | 24 | 14 |
| Leghorn | 1 | 3 | 3 | 24 | 0 |
| Brindisi | 0 | 5 | 0 | 0 | 0 |
| Naples | 0 | 1 | 2 | 2 | 1 |
| Sfax | 0 | 1 | 1 | 0 | 0 |
| Piraeus | 0 | 1 | 2 | 1 | 0 |
| Derince | 2 | 1 | 3 | 0 | 0 |
| Tripoli | 1 | 0 | 6 | 4 | 0 |
| Izmir | 0 | 2 | 0 | 0 | 0 |
| Beirut | 0 | 5 | 25 | 24 | 23 |
| Alexandria | 20 | 25 | 26 | 24 | 23 |
| Istanbul | 0 | 1 | 2 | 0 | 0 |
| Port Said | 0 | 0 | 2 | 1 | 0 |
| Iskenderun | 0 | 0 | 2 | 2 | 0 |
| Jeddah | 11 | 24 | 25 | 15 | 16 |
| Massawa | 0 | 1 | 0 | 1 | 1 |
| Port Sudan | 1 | 4 | 4 | 10 | 7 |
| Djibouti | 0 | 2 | 17 | 23 | 3 |
| Aden | 0 | 0 | 1 | 0 | 0 |
| Bandar-Shahpur | 0 | 3 | 0 | 0 | 0 |
| Karachi | 20 | 25 | 26 | 24 | 23 |
| Bombay | 20 | 25 | 26 | 24 | 23 |
| Colombo | 0 | 4 | 22 | 23 | 8 |
| Damau | 0 | 4 | 0 | 0 | 0 |
| Madras | 0 | 0 | 0 | 3 | 3 |
| Singapore | 19 | 20 | 21 | 20 | 22 |
| Djakarta | 3 | 2 | 0 | 0 | 0 |
| Yokohama | 19 | 24 | 25 | 26 | 23 |
| Shimizu | 16 | 24 | 25 | 23 | 17 |
| Nagoya | 19 | 24 | 25 | 22 | 23 |
| Kobe | 19 | 24 | 25 | 26 | 23 |
| Hirohata | 4 | 0 | 0 | 0 | 0 |
| Keelung | 3 | 0 | 11 | 13 | 12 |
| Hong Kong | 2 | 0 | 15 | 23 | 23 |
| Nagasaki | 0 | 0 | 3 | 1 | 0 |
| San Carlos | 1 | 1 | 1 | 0 | 0 |
| Iloilo | 1 | 4 | 5 | 5 | 0 |
| Manila | 5 | 17 | 21 | 13 | 0 |

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. 817

NICKEY BROTHERS, INC., ET AL.

*v.*

ASSOCIATED STEAMSHIP LINES (MANILA CONFERENCE) ET AL.

*Submitted July 24, 1958. Decided October 9, 1958*

Assailed rates on Philippine mahogany logs from the Philippines to Atlantic and Gulf of Mexico ports of the United States found unduly prejudicial to and unjustly discriminatory against such logs and the complainant receivers thereof, and unduly preferential of Philippine mahogany lumber and the shippers and receivers thereof, in violation of sections 16 First and 17 of the Shipping Act, 1916, as amended, to the extent that the rates on logs exceed the rates on bundled lumber.

Certain respondents found to have violated sections 16 First and 17 of the Shipping Act, 1916, as amended, in the carriage of Philippine mahogany logs from the Philippines to Atlantic and Gulf of Mexico ports of the United States.

*Jack Petree*, *Charles P. Cobb*, and *Robert C. Furness* for complainants.

*Elkan Turk, Jr.*, *Herman Goldman*, *J. A. Dennean*, and *Sol D. Bromberg* for respondents.

REPORT OF THE BOARD

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

BY THE BOARD:

The recommended decision of the examiner was served July 9, 1958, but exceptions were not filed thereto. Upon review, our decision is essentially that which the examiner recommended.

By complaint filed March 28, 1957, as amended, Nickey Brothers, Inc. (Nickey), the Nickey Trading Company, Inc., and Geo. D. Emery Company (Emery) allege that the rates maintained on Philippine mahogany logs from ports in the Philippines to United States Atlantic and Gulf of Mexico ports by respondents Associated Steamship Lines (Manila Conference) (the conference), and its member lines listed in appendix A, are detrimental to the commerce of the United States, give undue or unreasonable preference

to complainants' competitors, subject complainants to undue and unreasonable prejudice or disadvantage, and are unjustly discriminatory and prejudicial, in violation of sections 15, 16 First, and 17 of the Shipping Act, 1916, as amended (the Act.) The Board is requested to enter an order directing respondents to cease and desist from the alleged violations, and to establish parity in the rates on Philippine mahogany logs with those on bundled lumber moving between the same ports.

The conference is organized under Agreement No. 5600, as amended, approved by the Board and its predecessors under section 15 of the Act, and is divided into groups, each having rate-making authority over a trade from the Philippines to a range of destination ports. In order to be eligible to act on rate matters in a particular group, a carrier must be a member of the conference and must have had a vessel berthed in the Philippines which loaded cargo to a port within the area covered by that group during the preceding 6 months. The group here involved determines rates to Atlantic and Gulf ports. The complaint names as respondents certain carriers listed below,[1] which are not members of the Atlantic-Gulf group, or are ineligible to act on rate matters concerning that group under the rule stated above. In its answer the conference put in issue the propriety of including these carriers as respondents, and the record contains no evidence that they have participated or will participate in the establishment and maintenance of the rates.

Nickey and Emery operate plants for the manufacture of lumber, lumber products, and veneer at Memphis, Tenn., and Carteret, N.J., respectively; Nickey also manufactures plywood. The principal markets for their products are in the East, Midwest, and South, although Nickey makes some sales on the west coast. The major portion of their products are produced from Philippine mahogany logs. During the 3-months' period ending September 1955, 78.6 percent of logs sawn into lumber and 62.9 percent of logs cut into veneer by Nickey were of Philippine mahogany. Nickey Trading Company, Inc., is a subsidiary of Nickey engaged in the importation and sale of logs and lumber, and practically all of its imports are sold to Nickey. Nickey has spent considerable time, money, and effort to encourage wider acceptance of Philippine mahogany products in the United States market, and in research to provide a wider range of uses for this wood.

[1] American Mail Line Ltd.; The East Asiatic Co., Ltd.; Mitsubishi Kaiun Kaisha, Ltd.; Pacific Far East Line, Inc.; Pacific Orient Express Line; Pacific Transport Lines, Inc.; the joint services of Knutsen Line, Ditlev-Simonsen Lines, Klaveness Line, and Wilhelmsen Lines; Waterman Steamship Corporation; Compagnie de Transports Oceaniques.

Philippine mahogany logs vary in size, the usual run of logs containing 1,000 to 3,000 feet, Brereton scale, and the average log about 2,000 feet Brereton. The Brereton scale is a system of measurement designed to reflect as nearly as possible the total cubic content of logs for shipping purposes in the equivalent of board feet, but does not reflect the lumber yield in board feet. Log measurements are hereinafter expressed in Brereton scale feet. A board foot is a piece of lumber measuring 12 inches by 12 inches by 1 inch. Logs weigh about 2 long tons per 1,000 feet, and lumber weighs about 1.9 long tons per 1,000 board feet, with some slight variations depending upon the particular species of logs or lumber. Dark red Philippine mahogany from the northern part of the Islands is somewhat heavier than the light red originating in the southern part. Logs therefore may vary in weight from 2 to 6 long tons, with occasional logs weighing 8 or 9 long tons; they rarely weigh over 10 long tons. Lumber is shipped either loose or bundled, a bundle consisting of a number of pieces of lumber compactly strapped. Bundles of Philippine mahogany lumber average about 500 pounds in weight. On the average, 9 bundles of lumber are the equivalent of one log. During the first 6 months of 1957 bundled lumber comprised about 62 percent of all Philippine mahogany lumber imported into Atlantic and Gulf ports, and the proportion of bundled lumber to loose lumber imported is increasing. The experience of complainants is that 1,000 feet of logs yield on the average 667 board feet of lumber or 3,780 square feet of ⅛-inch corestock veneer; 6,000 square feet of ⅛-inch core stock veneer are the equivalent of 1,000 board feet of lumber.

The table in appendix B shows the present rates and the post-World War II rates on logs and lumber from the Philippines to Atlantic and Gulf ports. As indicated in the note to the appendix, an additional charge of $1.00 applies on both logs and lumber when originating at noncustom ports, or so-called outports. The rates on bundled lumber also apply on the board-feet equivalent of corestock veneer. Practically all of the lumber, logs, and corestock veneer originate at outports, and rates hereinafter stated will include the outport charge. These outports are not on the regularly scheduled routes of the conference carriers, and the carriers therefore provide or refuse service at the outports as their circumstances dictate. Only one of the conference carriers, Lykes Bros. Steamship Co., Inc. (Lykes), provides regular service on Philippine mahogany logs from the Philippines to the Gulf, and it has carried upwards of 40 percent of all Philippine mahogany logs imported into the United States.

Philippine mahogany logs are valued at $50 to $60 per 1,000 feet,

and Philippine mahogany lumber at $140 to $160 per 1,000 board feet, for comparable grades, f.o.b. the Philippine port of loading. The value of corestock veneer is not shown. To all destinations in the world, logs in 1956 originated from 63 different ports in the Philippines. However, at only 14 ports were logs loaded to the United States; at 11 ports logs were loaded to Atlantic and Gulf ports; and 95 percent of all logs loaded to Atlantic and Gulf ports originated in 6 ports. As for safe anchorage and harbor facilities, there are no significant differences between the principal log and lumber ports in the Philippines loading for destinations in the United States. Logs are loaded from the water and are floated to shipside in log booms, whereas lumber is loaded from piers or lighters. Loss and damage claims on both logs and lumber are negligible.

Loading costs in the Philippines on both logs and lumber are borne by the consignors. Representatives of Lykes testified at the instance of complainants, under subpena, and presented evidence of the experience of that carrier in the Philippine log and lumber trade. On four voyages during the period April–August 1957, logs were loaded at an average rate of 9.2 tons per stevedore gang per hour, lumber at 8 tons, and corestock veneer at 7.2 tons. Since loading costs are borne by the consignors, a more significant comparison is the quantity of logs or lumber loaded per hour of ship's port time, and to the extent that this can be calculated from the exhibits presented, logs were loaded at an average rate of 8,289 feet per hour and lumber at 8,483 board feet per hour. Testimony was adduced by respondents that lumber loads generally more rapidly than logs, particularly when bundled, but the record as a whole indicates that any differences in loading rates as between the two commodities are insignificant.

The record is clear that logs discharge substantially more rapidly than lumber. Logs may be discharged directly into the water or into open cars on the docks, or may be stored in open areas. Lumber must be discharged into sheds, or otherwise provided protection from the elements. Bundles of lumber are sometimes broken during transit, and although the carriers are relieved of claim responsibility for broken bundles by a provision of the conference tariff, broken bundles add to the difficulties and expense of tallying the shipments. In the experience of Lykes, the costs of discharge are $2.53 per long ton and $5.06 per 1,000 feet in the case of logs, and $8.07 per long ton and $15.33 per 1,000 board feet in the case of loose and bundled lumber. Respondents admit that discharge costs are substantially lower for logs than for lumber.

The stowage factor of logs is less favorable than that of either loose or bundled lumber. The record contains conflicting evidence concerning the proper stowage factors to be utilized. In the experience of Lykes, logs stow 225 cubic feet per 1,000 feet; bundled lumber, 198 cubic feet per 1,000 board feet; and loose lumber, 180 cubic feet per 1,000 board feet. On behalf of respondents it was testified that the stowage factor per 1,000 feet or board feet ranges from 200 to 250 cubic feet for logs, from 150 to 170 cubic feet for lumber generally, 160 cubic feet for loose lumber, and 180 cubic feet for bundled lumber. The table below compares the gross revenues per cubic foot at the rates in effect on and after April 1, 1957, from logs and lumber, using the stowage factors shown by Lykes, and stowage factors (urged as proper by the conference) of 250 cubic feet per 1,000 feet of logs and 180 cubic feet per 1,000 board feet of bundled lumber; discharge costs per 1,000 feet or board feet as experienced by Lykes, reduced to corresponding amounts per cubic foot; and the resulting differences.

| | Logs | | Bundled lumber | |
|---|---|---|---|---|
| | (1) | (2) | (1) | (2) |
| | (*Cents*) | (*Cents* | (*Cents*) | (*Cents*) |
| Gross revenue | 30. 22 | 27. 20 | 30. 30 | 33. 33 |
| Discharge costs | 2. 25 | 2. 02 | 7. 74 | 8. 52 |
| Differences | 27. 97 | 25. 18 | 22. 56 | 24. 81 |

Columns 1—using stowage factors of 225 cubic feet per 1,000 feet of logs and 198 cubic feet per 1,000 board feet of bundled lumber.
Columns 2—using stowage factors of 250 cubic feet per 1,000 feet of logs and 180 cubic feet per 1,000 board feet of bundled lumber.

Had the rates on logs been reduced to the level of the rates on bundled lumber, as sought by complainants, the gross revenues and the revenues less discharge costs on logs would have been 26.67 cents and 24.42 cents per cubic foot, respectively, using a stowage factor of 225, and 24 cents and 21.98 cents per cubic foot, respectively, using a stowage factor of 250. In the use of either of these stowage factors, no consideration is given to the fact that logs may be and regularly are stowed on deck in quantities ranging up to 600 tons by Lykes. The conference tariff provides that either logs or lumber may be stowed on deck at ship's option, but lumber is susceptible to damage from drying, checking, and warping if transported on deck, and there is no evidence that lumber is ever carried on deck from the Philippines to Atlantic and Gulf ports. Even using the highest

stowage factor for logs and the lowest stowage factor for bundled lumber presented on the record, and allowing for only a 10 percent reduction [2] in the stowage factor for logs to compensate for the carriage of logs on deck, the revenue per cubic foot from logs after deduction of discharge costs compares favorably with that from bundled lumber at a parity of rates. Allowing for a similar reduction in the stowage factor achieved by Lykes, an experienced carrier in the trade, logs would provide a greater return than lumber at a parity of rates.

On Philippine mahogany lumber and products, complainants are faced with competition from producers in the Philippines, most of whom are also log exporters, as well as from producers in Japan, and with the importers of the manufactured products in the United States. Complainants are at a natural disadvantage in the importation of logs and the manufacture of lumber products as compared with foreign exporters and United States importers of lumber products, in that they must import and pay freight charges on 1,500 feet of logs for every 1,000 board feet of lumber produced. To the extent that logs are rated higher than lumber, this disadvantage is increased. Prior to the increases in rates effected by the conference on April 1, 1957, and the corresponding increase in the spread between log and bundled lumber rates from $5.50 to $8.00, Nickey had been importing an average of 900,000 feet of logs per month, and operations were conducted at little or no profit. With the increase in the rate spread, formerly marginal operations were converted to loss operations, imports of logs were reduced to about 600,000 feet per month in order to limit them to the amounts necessary only to meet contractual commitments, and further decreases in imports are contemplated. Emery as well as other importers of Philippine mahogany logs whose testimony was presented discontinued entirely their importations at the time of the increased rate spread. While these domestic producers are able to command premium prices to some extent for their Philippine mahogany products because of high quality of production and prompt availability of products manufactured to special sizes and specifications, if the spreads between the prices of domestically manufactured products and imported products becomes too great, buyer resistance against the domestic products develops. Voluminous testimony was presented from distributors of Philippine mahogany products manufactured by Nickey that sales of those products were declining substantially because of price disadvantages as compared with imported products.

[2] Lykes cites one shipment of 1,100 tons of logs, 300 tons of which were carried on deck, and this is characterized as typical.

The table below shows the imports of logs, lumber, veneer, and plywood from the Philippines and Japan for the years 1951 through 1956 and the first 7 months of 1957. Those shown from the Philippines are practically 100 percent of Philipine mahogany, as are the lumber imports from Japan for 1954 and subsequently. Veneer and plywood imported from Japan comprise from 75 to 80 percent Philippine mahogany. The table discloses consistent increases in all categories shown, except in the case of Philippine mahogany logs, where decreases have occurred, thus confirming the testimony that the market in the United States for Philippine mahogany products has expanded substantially, but that the relative share of that market enjoyed by domestic producers from imported logs has declined sharply.

*Imports of logs and lumber from Philippines/Japan*

| | Logs [1] | Lumber [2] | | Veneer [3] | | Plywood [3] | |
|---|---|---|---|---|---|---|---|
| | P.I. | P.I. | Japan | P.I. | Japan | P.I. | Japan |
| 1951 | 40,802 | 37,447 | 1,872 | | 733 | 52 | 12,031 |
| 1952 | 20,611 | 44,177 | 1,293 | 317 | 180 | 116 | 16,136 |
| 1953 | 32,501 | 41,137 | 7,814 | 21,015 | 314 | 522 | 96,579 |
| 1954 | 20,314 | 37,329 | 20,468 | 28,516 | 297 | 1,503 | 280,870 |
| 1955 | 33,812 | 45,554 | 37,045 | 49,712 | 232 | 9,742 | 408,001 |
| 1956 | 34,100 | 45,558 | 50,472 | 50,797 | 2,265 | 14,882 | 493,803 |
| 1957 [4] | 19,628 | 20,541 | 20,999 | 39,978 | 5,165 | 16,867 | 384,201 |

[1] In thousands of feet.
[2] In thousands of board feet.
[3] In thousands of square feet.
[4] First 7 months.

As indicated previously, Philippine mahogany logs are loaded from the sea from log booms floated to shipside, and are wet when placed into the ship's holds, whereas lumber is loaded from piers or lighters and is dry when loaded. Logs are therefore incompatible with other cargoes originating in the Orient, and particularly with manufactured products originating in the Philippines and Japan. Because of their weight and inflexibility, logs are sometimes difficult to handle in loading, and if handled improperly may cause damage to deck plates, hatch coamings, stanchions, and ladders in the holds. This latter disability is also somewhat applicable to bundled lumber, which may weigh as much as 3 tons per bundle. Damage due to handling of logs, in the experience of Lykes, is negligible. During the period January 1956 through June 1957, vessels operated by Lykes in the Philippine/Gulf trade incurred total ship repair costs from all causes in the amount of $27,041.00, during which time 32,940 tons of logs were carried. If attributed solely to the carriage of logs, the damage would amount to only 82 cents per ton of logs carried.

Philippine logging and lumbering operations were practically destroyed during World War II, and until the latter part of 1948 the export of lumber was prohibited. Thus, postwar exports up to that time consisted entirely of logs. By 1949, some lumber mills had been sufficiently rehabilitated to permit the manufacture of lumber for export. The initial postwar log and lumber rates reflected, as shown in appendix B, a differential of $1.00 in favor of logs, which was later increased to $2.00. In 1949, the Philippine Lumber Producers Association (Lumber Association), an organization composed principally of lumber maufacturers, requested of the conference reductions of $4.00 in the log rate and of $8.00 in the lumber rate, in order to assist in the re-establishment of Philippine mahogany in the United States market, which had largely been pre-empted during the war by other woods. The request was granted by the conference, thus reversing the differential and making it favorable to lumber by $2.00. In announcing these rate adjustments to shippers, the conference stated that the rate levels had been agreed upon by it and the Lumber Association.

Nickey protested this reversal of the differential, both in writing and by direct representations at the conference offices in the Philippines, but was informed that the rate relations had been established at the request of the Lumber Association, and that requests for any changes should be taken up with the Lumber Association. In the United States market the members of the Lumber Association are competitors of Nickey and other domestic manufacturers of Philippine mahogany products. Freight charges are paid by the consignees in the United States. On March 27, 1951, a rate on bundled lumber was first established, at a level $3.00 less than the loose lumber rate and $5.00 less than the log rate. This level was requested by certain of the Lumber Association members which had installed strapping facilities for the bundling of lumber, on representations that improved stowage factors and reduced discharge costs would result from the shipment of bundled lumber, but primarily to compensate them for the cost of bundling lumber. In 1952 the differentials in favor of loose and bundled lumber were increased to $2.50 and $5.50, respectively, for which no explanation was given on the record. On February 1, 1956, the differential in favor of bundled lumber over loose lumber was increased to $5.00 by effecting an increase in the loose lumber rate, because of representations from the Lumber Association that the cost of bundling lumber had increased substantially, despite the fact that experience had by then disclosed that the stowage factor of bundled lumber was less favorable than that of loose lumber.

There is no probative evidence of record to indicate that discharge costs of bundled lumber are substantially less than those of loose lumber.

On April 1, 1957, the present rates were established, providing for increases of $5.00 each in the loose and bundled lumber rates, and of $7.50 in the log rate, for the purposes, as expressed in the record, of compensating the conference carriers for increased costs of operation and of restoring substantially the prior differential in the rates between logs and loose lumber. There is nothing of record to indicate that the costs of transporting logs have increased more than those of transporting lumber, and appendix B discloses that except for the period between February 1, 1956, and April 1, 1957, the rate differentials unfavorable to logs as compared with loose and bundled lumber have progressively increased since October 11, 1949.

The record leaves no doubt that the great majority of conference carriers are reluctant to carry logs from the Philippines to Atlantic and Gulf ports, because of their incompatibility with other cargoes, because the log loading ports are off the regular routes of the vessels, and because of expressed fears that the carriage of logs will result in excessive damage to ships and ships' loading gear. Their route itineraries generally provide for calls at other ports in the Orient after sailing from the Philippines to the United States, and at such ports cargoes are available at rates providing revenue of 75 cents per cubic foot or more. Maersk Line transports substantial cargoes of lumber from the Philippines to Atlantic coast ports, loading at only one port in the Philippines, but handles no logs, although in other of its services substantial quantities of logs are carried from the Philippines to Japan. The vessels utilized in the Philippines/Japan service are small and slower than the liners sailing in the Philippines/United States service, and the former may carry full cargoes of logs. On the other hand, Lykes sails directly from the Philippines to Gulf ports, and prefers to handle logs over lumber because of its experience of obtaining quicker loading and discharge of logs. Lykes is of the opinion that the rates on logs and bundled lumber should be on a parity. No conference carrier presented evidence concerning its experience or costs in the log and lumber trade from the Philippines to Atlantic and Gulf ports to refute that presented by Lykes.

From the Philippines to the United States, to Hong Kong, and to Japan until the rates were opened in 1952, the rates on Philippine mahogany logs were higher than on lumber. Exports of logs from the Philippines to Japan increased from slightly over 123 million feet in fiscal year 1951 to almost 592 million feet in fiscal year 1956, and

to 641 million feet in 9 or 10 months of fiscal year 1957. In all other trades, all rates instanced of record indicate that logs generally bear rates the same as or lower than lumber. From Gulf ports to the Far East, the Hamburg range, the United Kingdom, and the Mediterranean except Italian base ports, the rates on logs are the same as the rates on lumber. From the Gulf to Italian base ports, the rates on logs are substantially lower than the rates on lumber. From West Africa to Atlantic coast ports the rates on logs and bundled lumber are the same.

Plants for the manufacture of Philippine mahogany products, particularly lumber, lumber products, corestock veneer, and plywood, have been established and expanded in the Philippines and Japan at a substantial rate since World War II, and the record indicates that wage rates in the Philippines and Japan are substantially below those paid in the United States, that Philippine and Japanese products can be imported at landed prices less than complainants' factory prices, and that elimination of the rate differential complained of would not put complainants on a par, pricewise, with their foreign competitors.

## Discussion and Conclusions

Sections 16 and 17 of the Act, so far as pertinent to this proceeding, provide:

> Sec. 16. That it shall be unlawful for any common carrier by water, or other person subject to this Act, either alone or in conjunction with any other person, directly or indirectly—
>
> *First.*—To make or give any undue or 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.
>
> Sec. 17. That no common carrier by water in foreign commerce shall demand, charge, or collect any rate, fare, or charge which is unjustly discriminatory between shippers or ports, or unjustly prejudicial to exporters of the United States as compared with their foreign competitors. Whenever the board finds that any such rate, fare, or charge is demanded, charged, or collected it may alter the same to the extent necessary to correct such unjust discrimination or prejudice and make an order that the carrier shall discontinue demanding, charging, or collecting any such unjustly discriminatory or prejudicial rate, fare, or charge.

The Board stated in *Port of New York Authority* v. *Ab Svenska et al.*, 4 F.M.B. 202, 205 (1953):

> In order to sustain the charge of unjust discrimination, under these provisions of the Shipping Act, complainant must prove (1) that the preferred port, cargo, or shipper is actually competitive with the complainant, (2) that the discrimination complained of is the proximate cause of injury to complainant,

and (3) that such discrimination is undue, unreasonable, or unjust. *Phila. Ocean Traffic Bureau* v. *Export S.S. Corp.*, 1 U.S.S.B.B. 538, 541 (1936); *H. Kramer & Co.* v. *Inland Waterways Corp. et al.*, 1 U.S.M.C. 630, 633 (1937). In the first of these cases the Secretary of Commerce said:

> "It is well settled that the existence of unjust discrimination and undue prejudice and preference is a question of fact which must be clearly demonstrated by substantial proof. As a general rule there must be a definite showing that the difference in rates complained of is undue and unjust in that it actually operates to the real disadvantage of the complainant. In order to do this it is essential to reveal the specific effect of the rates on the flow of the traffic concerned and on the marketing of the commodities involved, and to disclose an existing and effective competitive relation between the prejudiced and preferred shipper, localities, or commodities. Furthermore, a pertinent inquiry is whether the alleged prejudice is the proximate cause of the disadvantage."

The competitive relation between logs imported by complainants from the Philippines and the products manufactured therefrom, on the one hand, and, on the other, the same types of manufactured products inmported from the Philippines, has been clearly established on the record. It is likewise clear, and respondents do not deny, that the rate differential unfavorable to logs operates to the disadvantage of complainants. Respondents assert, however, that granting the relief sought would not aid substantially complainants' competitive position, and they contend that as a matter of law their rates are not to be used as a device for equalizing the competitive position of domestic manufacturers of wood products and their foreign competitors, and that the Board is without authority to enforce such use of their rate structure. A necessary corollary of this principle, however, is that the existence of competitive disadvantages unrelated to transportation circumstances may not be used to cloak the imposition of prejudicial, preferential, or discriminatory rate structures upon competitive commodities or shippers.

As in the case of the Interstate Commerce Commission, the Board has no power to adjust rates for the purpose of retarding or promoting the progress and development of any particular commercial enterprise, and any superiority or commercial advantage which one commodity or shipper may have over another may not be urged as a reason for denying a nonprejudicial adjustment of freight rates. Cf. *Intermediate Rate Asso.* v. *Director General*, 61 I.C.C. 226 (1921); *Indianapolis Chamber of Commerce* v. *C., C., C. & St. L. Ry. Co.*, 60 I.C.C. 67 (1920). The Board is therefore concerned only with the impact of the assailed rate differential, and the lawfulness of that differential must be determined with regard to surrounding

transportation circumstances and conditions. *Atl. Refining Co. v. Ellerman & Bucknall S.S. Co. et al.*, 1 U.S.S.B. 242, 250 (1932).

Ordinarily, rates on manufactured articles exceed rates on material used in their manufacture. *Puerto Rican Rates*, 2 U.S.M.C. 117, 120 (1939). The record here indicates that this principle is generally applicable in the foreign commerce of the United States, at least to the extent that the rates on logs do not exceed those on lumber, except in the instance here involved. In effect, therefore, a rebuttable presumption is created that to the extent that rates on logs exceed those on lumber, the differential is undue and unjust unless there are justifiable transportation circumstances to indicate otherwise. As to value of the commodities, claim experience, and cost of service to the extent shown, the transportation conditions for logs are no less favorable than those for lumber. The only disabilities attributable to logs are their incompatibility with other cargoes originating in the same trade, because of their wet condition when loaded, and the possibility of minor ship damage upon loading due to the weight of the logs. These disabilities have not proven detrimental to Lykes, the only conference carrier presenting detailed evidence.

The evidence concerning the development of the rate structure on Philippine mahogany logs, loose lumber, and bundled lumber tends toward the conclusion that the existing differentials have been constructed with less regard to the comparative transportation conditions than to other circumstances.

On this record, it is found and concluded that respondents' rates on Philippine mahogany logs from the Philippines to Atlantic and Gulf ports of the United States are unduly prejudicial to, and unjustly discriminatory against, such logs and complainant receivers thereof, and unduly preferential of Philippine mahogany lumber and the shippers and receivers thereof, in violation of sections 16 First and 17 of the Act, to the extent that the rates on logs exceed the rates on bundled lumber. We shall require respondents who have carried logs in violation of the Act to cease and desist from such violations.

In view of our findings above, it is unnecessary to inquire into the allegations relating to section 15 of the Act.

As a corollary to our cease-and-desist order, we shall order the conference to establish a parity in rates between mahogany logs and bundled lumber moving from the Philippines to U.S. Atlantic and Gulf of Mexico ports.

As noted above, certain respondents, although members of the conference, either are not engaged in this trade or are not qualified to participate in the establishment of rates by the group engaged

in this trade. These respondents, enumerated in footnote 1, are found not to have violated sections 16 First and 17 of the Act. They are members of the conference, however, and in ordering the conference to establish parity rates for logs and lumber, our order is directed to all members of the conference.

An order consonant with the foregoing will be issued.

APPENDIX A

RESPONDENTS

AMERICAN MAIL LINE LTD.
AMERICAN PIONEER LINE—
United States Lines Company
AMERICAN PRESIDENT LINES, LTD.
AMERICAN & ORIENTAL LINE—
The Bank Line, Ltd.
BARBER-FERN-VILLE LINES
BARBER WILHELMSEN LINE—
Wilhelmsens Dampskibsaktieselskab
A/S Den Norske Afrika-Og Australienlinie
A/S Tornsberg
A/S Tankfart I
A/S Tankfart IV
A/S Tankfart V
A/S Tankfart VI
Skibsaktieselskapet Varild
Skibsaktieselskapet Marina
Aktieselskabet Glittre
Dampskibsinteressentskavet Garonne
Skibsaktieselskapet Sangstad
Skibsaktieselskapet Solstad
Skibsaktieselskapet Siljestad
Dampskibsaktieselskabet International
Skibsaktieselskapet Mandeville
Skibsaktieselskapet Goodwill
COMPAGNIE DE TRANSPORTS OCEANIQUES
DAIDO KAIUN KAISHA, LTD.
DE LA RAMA LINES—
The De la Rama Steamship Co., Inc.
The Swedish East Asia Co., Ltd.
The Ocean Steamship Co., Ltd.
The China Mutual Steam Navigation Company, Ltd.
Nederlandsche Stoomvaart Maatschappij "Ocean" N.V.
EAST ASIATIC CO., LTD.
ELLERMAN & BUCKNALL ASSOCIATED LINES
FERN-VILLE-FAR EAST LINES
HOEGH LINES—
Skibsaktieselskapet Arizona
Skibsaktieselskapet Astrea
Skibsaktieselskapet Aruba
Skibsaktieselskapet Noruega
Skibsaktieselskapet Abaco
A/S Atlantica
IVARAN LINES FAR EAST SERVICE—
Aktieselskapet Ivarans Rederi
Skibsaktieselskapet Igadi
A/S Lise
ISTHMIAN LINES, INC.
JAVA PACIFIC LINES—
Koninklijke Rotterdamsche Lloyd, N.V.
Stoomvaart Maatschappij "Nederland" N.V.
KNUTSEN LINE—
Dampskibsaktieselskapet Jeanette Skinner
Skibsaktieselskapet Pacific
Skibsaktieselskapet Marie Bakke
Dampskibsaktieselskapet Golden Gate
Dampskibsaktieselskapet Lisbeth
Hvalfangstaktieselskapet Suderoy
KAWASAKI KISEN KAISHA, LTD.
KLAVENESS LINE—
Skibsaktieselskapet Sangstad
Skibsaktieselskapet Solstad
Skibsaktieselskapet Siljestad
Dampskibsaktieselskapet International
Skibsaktieselskapet Mandeville
Skibsaktieselskapet Goodwill
IINO KAIUN KAISHA, LTD.
MITSUBISHI KAIUN KAISHA, LTD.
LYKES ORIENT LINE—
Lykes Bros. Steamship Co., Inc.
A. P. MOLLER—MAERSK LINE—
Dampskibsselskabet Af 1912 Aktieselskab

A. P. MOLLER—MAERSK LINE—Continued
Aktieselskabet Dampskibsselskabet Svendborg
MITSUI STEAMSHIP CO., LTD.
NIPPON YUSEN KAISHA
OSAKA SHOSEN KAISHA, LTD.
SHINNIHON STEAMSHIP CO., LTD.
PACIFIC FAR EAST LINE, INC.
PACIFIC ORIENT EXPRESS LINE
DITLEV-SIMONSEN LINES—
Skipsaktieselskapet Nordheim
Skipsaktieselskapet Vito
Skipsaktieselskapet Kirkoy
Skipsaktieselskapet Skagerak
PACIFIC TRANSPORT LINES, INC.
PRINCE LINE—
Prince Line, Ltd.
VICTORIAS MILLING COMPANY, INC.
WATERMAN STEAMSHIP CORPORATION
WILHELMSEN LINES—
Wilhelmsens Dampskipsaktieselskab
A/S Den Norske Afrika-Og Australielinie
A/S Tornsberg
A/S Tankfart I
A/S Tankfart IV
A/S Tankfart V
A/S Tankfart VI
YAMASHITA KISEN KAISHA
PHILIPPINE NATIONAL LINES (NATIONAL DEVELOPMENT COMPANY)

## APPENDIX B

*Rates on logs and lumber from Philippine custom ports to Gulf and Alantic coast ports.*

| Date | Rates | | | Rate differences | | |
|---|---|---|---|---|---|---|
| | Logs [1] | Lumber [2] | | Favor of logs | Favor of lumber | |
| | | Loose | Bundles | | Loose | Bundles |
| August 13, 1946 | $45.50 | $46.50 | ---------- | $1.00 | ---------- | ---------- |
| May 1, 1947 | 46.50 | 47.50 | ---------- | 1.00 | ---------- | ---------- |
| May 25, 1948 | 53.50 | 55.50 | ---------- | 2.00 | ---------- | ---------- |
| October 11, 1949 | 49.50 | 47.50 | ---------- | ---------- | $2.00 | ---------- |
| March 27, 1951 | 49.50 | 47.50 | $44.50 | ---------- | 2.00 | $5.00 |
| April 22, 1951 | 56.50 | 54.50 | 51.50 | ---------- | 2.00 | 5.00 |
| February 1, 1952 | 58.50 | 56.50 | 53.50 | ---------- | 2.00 | 5.00 |
| May 15, 1952 | 56.50 | 54.00 | 51.00 | ---------- | 2.50 | 5.50 |
| June 2, 1953 | 51.50 | 49.00 | 46.00 | ---------- | 2.50 | 5.50 |
| March 28, 1955 | 54.50 | 52.00 | 49.00 | ---------- | 2.50 | 5.50 |
| May 1, 1955 | 56.50 | 54.00 | 51.00 | ---------- | 2.50 | 5.50 |
| February 1, 1956 | 56.50 | 56.00 | 51.00 | ---------- | .50 | 5.50 |
| May 2, 1956 | 59.50 | 59.00 | 54.00 | ---------- | .50 | 5.50 |
| April 1, 1957 | 67.00 | 64.00 | 59.00 | ---------- | 3.00 | 8.00 |

[1] Per 1,000 feet Brereton scale.
[2] Per 1,000 board feet.

*Note:* When from noncustom ports, rates on logs and lumber were $0.50 per 1,000 feet Brereton scale or per 1,000 board feet, respectively, higher than the rates above shown until the latter part of 1950, and since that time have been and are $1.00 higher.

ORDER

At a Session of the FEDERAL MARITIME BOARD, held at its office in Washington, D.C., on the the 9th day of October A.D. 1958

No. 817

NICKEY BROTHERS, INC., ET AL.

*v.*

ASSOCIATED STEAMSHIP LINES (MANILA CONFERENCE) ET AL.

This proceeding 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:*

1. That respondents herein found in violation of sections 16 First and 17 of the Shipping Act, 1916, as amended, be, and they are hereby, notified and required hereafter to abstain from the violations herein found to have been committed by them; and

2. That respondents Associated Steamship Lines (Manila Conference) and the member lines thereof be, and they are hereby, notified and ordered to establish and enforce parity in rates between Philippine mahogany logs and bundled lumber moving between the Philippine Islands and the Gulf and Atlantic ports of the United States; and

3. That respondents be, and they are hereby, required to notify the Board within twenty (20) days from the date of service hereof, whether they have complied herewith, and if so, the manner in which compliance has been made, pursuant to Rule 1(c) of the Board's Rules of Practice and Procedure (46 C.F.R. 201.3).

By the Board.

JAMES L. PIMPER,
*Secretary.*